CASE LAW

RV's, Motel & Tents

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112 Nev. 141
Supreme Court of Nevada.

David Thomas ALWARD, Appellant,
v.
The STATE of Nevada, Respondent.

No. 24994
|
Feb. 29, 1996.

Synopsis
Defendant was convicted in the Third Judicial District Court, Churchill County, Mario G. Recanzone, J., of second-degree murder with use of a deadly weapon. Defendant appealed. The Supreme Court, Shearing, J., held that: (1) defendant had legitimate expectation of privacy in tent where crime occurred; (2) exigent circumstances exception to search warrant requirement applied only as long as emergency existed; (3) admission of illegally seized evidence was not harmless error; (4) defendant was in custody when he made incriminating statement and, thus, *Miranda* warnings should have been given; (5) probable cause existed for warrantless arrest of defendant; and (6) admission of videotape of statements defendant made to mental health counselor was not harmless error.

Reversed and remanded.

Steffen, C.J., filed a dissenting opinion.

****245** ***141** Appeal from an order of the district court denying a motion for a new trial and from a judgment of conviction, pursuant to a jury trial, of one count of second-degree murder with use of a deadly weapon. Third Judicial District Court, Churchill County; Mario G. Recanzone, Judge.

Reversed and remanded.

Attorneys and Law Firms

Rick Lawton and Associates, Fallon; Laura Wightman Fitzsimmons, Las Vegas, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Kevin Pasquale, District Attorney, Arthur E. Mallory, Chief Deputy District Attorney and Linda S. White, Special Deputy District Attorney, Churchill County, for Respondent.

***144** *OPINION*

SHEARING, Justice:

Appellant David Thomas Alward appeals from the district court's denial of his motion for a new trial and from the judgment of conviction. Alward raises numerous contentions on appeal, including whether: (1) the State concealed its theory of the case, (2) the State violated NRS 173.045(2) by listing numerous witnesses, and only calling a few of those witnesses, (3) evidence pertaining to Alward's character was improperly introduced, (4) autopsy photographs numbered twenty and twenty-one were improperly admitted, (5) a compilation of portions of “home videos” was improperly admitted, (6) the prosecutor committed misconduct, (7) the district court erred in failing to instruct the jury on the voluntariness of Alward's post-*Miranda* statements, and (8) juror misconduct occurred. We determine that these claims are without merit.

However, we conclude that certain evidence obtained in violation of Alward's rights under the Fourth and Fifth Amendments of the United States Constitution and Article 1, sections 8 and 18 of the Nevada Constitution was erroneously admitted. Therefore, we reverse the judgment of conviction and remand the case for further proceedings consistent with this opinion.

****246** *FACTS*

On February 25, 1993, at approximately 5:00 p.m., appellant David Thomas Alward (Alward) flagged down a car carrying mineworkers near the Sand Mountain turnoff on Highway 50, east of Fallon. Alward told them that his girlfriend Kristina Marie Baxter (Baxter) had shot and killed herself with a .22 caliber handgun. Other workers arrived shortly thereafter in a truck equipped with a telephone, called for help, and waited with Alward until help arrived.

Sergeant Leonard Bogdanowicz and Nevada Highway Patrol Trooper Brian Jorgensen were the first officers to arrive. The officers asked Alward what happened, and Alward told them that he and his girlfriend Baxter were camping at Sand Mountain, that ***145** they had argued, and that he went

for a walk, heard a shot, and ran back to the tent. Alward repeatedly told Trooper Jorgensen that he did not want to be left alone. Trooper Jorgensen stayed with Alward while Sergeant Bogdanowicz went to look at the campsite.

Trooper Jorgensen asked Alward if he was armed. Alward replied that he was not and offered to submit to a search for weapons. The trooper conducted a pat-down search. Alward then waited in the patrol car with the trooper. While talking with the trooper in the patrol car, Alward stated that he did not know what happened to the gun that Baxter used to kill herself. Unbeknownst to Alward, Trooper Jorgensen tape-recorded their conversation.

Bogdanowicz's inspection of the campsite shortly after arriving at Sand Mountain revealed a tent that was zipped closed and a vehicle parked southwest of the tent. He noticed a bullet hole in the side of the tent with blonde hairs hanging from the hole. Bogdanowicz unzipped the tent and saw Baxter lying on the floor with a .38 caliber double action revolver in her left hand, her middle finger inside the trigger guard but behind the trigger. He stepped into the tent to verify that she had no pulse. The ambulance crew arrived, entered the tent, and checked Baxter for life signs. Photographs were taken of the body, which was then removed. A single bullet wound was present on the body, entering below the chin on the left side of the neck and exiting at the top of the head on the right side.

Upon returning to the patrol car, Sergeant Bogdanowicz, assisted by Trooper Jorgensen, "bagged" Alward's hands[1] in order to later perform an "atomic absorption" test for the presence of residue from firing a gun. Investigator Steuart, who had since arrived, instructed Sergeant Bogdanowicz to transport Alward to the Sheriff's department to be interviewed. The sergeant testified that, en route, Alward "was just talking to me."

Once at the Sheriff's department, Investigator James Wood conducted the "atomic absorption" test.[2] Wood testified later that he did not inform Alward that he did not have to submit to the test. Wood testified that "I asked him if he would work with me on it, and he said yeah." Wood interviewed Alward as he conducted the test. The interview was videotaped by a hidden camera. ***146** Wood prohibited Alward from making a telephone call and from washing his hands before the test was completed.

After approximately forty-five minutes of interrogation, Wood told Alward, "First thing I want you to do, now I don't want you to take this wrong because we're just not too sure what's going on yet, is ... I want to read you your rights, okay?" Wood read Alward the *Miranda*[3] warnings, and then told him, "You can answer questions and stop at any point in time," to which Alward replied, "I don't want to stop. I want to get this over." Another officer, Investigator Greg Nelson, then entered the room. Wood and Nelson continued to question Alward, then left him alone in the interrogation room ****247** for ten minutes. When they returned, Nelson told Alward that a counselor was coming to speak with him. Wood introduced the counselor to Alward, saying, "She's the counselor that I told you about.... I'm going to leave you two alone to talk for a little while." A videotape recorded the interview with the "mental health" counselor through a special mirror in the interrogation room.

After the counselor left, Wood and Nelson reminded Alward that he had been read the *Miranda* warnings and began questioning him again. Over time, Alward altered his account of how Baxter died, eventually telling the investigators that he and Baxter argued in the tent, that he left the tent to shoot at a can to blow off steam, returned, threw the gun down on the sleeping bag, and watched Baxter pick it up and hold it to her head. Alward told the investigators that he tried to wrest the gun away from her, and it went off, killing her. Nelson told Alward that he was not going to be arrested, but that he would be "held" for his own protection. Alward was confined to jail on a "mental health hold" and was arrested pursuant to a warrant in the early morning hours of February 26, 1993. In all, Alward was interrogated at the Sheriff's department for four to five hours.

At approximately 5:30 p.m. on February 25, 1993, Investigators James Steuart and Daryl Horsley arrived to inspect the crime scene. As they approached the tent, Steuart and Horsley observed what appeared to be a single bullet hole in the side of the tent with a strand of hair hanging from it. Horsley collected the hairs hanging from the hole on the outside of the tent, which appeared to match the decedent's hair. From the inside of the tent, Horsley collected the .38 revolver, Baxter's eyeglasses, and her red notebook. These items were in plain view inside the tent. Steuart and Horsley left the site at approximately 11:00 p.m., zipped the tent closed, and called in other officers to guard the area overnight.

Horsley testified later that, on the following morning, February ***147** 26, 1993, there was slight snowfall on the ground. Steuart and Horsley returned to finish "rough diagrams." They also "gathered all of the evidence inside

of the tent, gathered the tent, and then gathered the truck and load[ed] all into evidence." A matchbox containing 9 millimeter and .45 caliber ammunition was discovered in the tent. Further, one pocket or pouch located on the inside of the tent, which is part of the tent, was found to contain one live .38 round and several empty .38 cartridges. Another similar pocket was found to contain another live .38 round. Two backpacks were also found inside the tent. One backpack contained Alward's writings.[4] From the bed of the pickup truck, investigators retrieved a 9 millimeter magazine and empty .38 brass casings.

An information was filed on March 2, 1993, charging Alward with the commission of murder with the use of a .38 caliber revolver. A preliminary hearing was held April 8, 1993, in justice's court, after which Alward was bound over to district court for trial. On July 28, 1993, Alward filed a motion to suppress the following:

> [All] evidence obtained without the benefit of a valid search warrant; all evidence secured after the detention of the defendant without the benefit of an arrest warrant; all evidence in written or recorded form arising out of evidence taken from the person, personal effects, living quarters, lockers, packages, cartons, clothing, vehicle, jail cell, or any other area protected by the right to privacy of the defendant; any [sic] all statements of the defendant.

On August 9, 1993, the district court conducted a hearing on the motion to suppress. At the hearing, Investigator Steuart testified that he was called "to investigate a gunshot wound to the head on a victim." Steuart testified that after investigating the tent, he "told Sergeant Bogdanowicz to take Alward to the Sheriff's office and to call out Investigator Jim Wood to come down and interview ****248** him." Steuart testified that no search warrant was obtained before conducting the search of the tent or the truck. Investigator Wood testified that he received a call asking him to go to the Sheriff's department to conduct an interview concerning a "possible suicide." No testimony indicated that the ***148** February 26th search was conducted pursuant to Alward's consent or for the purpose of making an inventory.

After the hearing on the motion to suppress, the district court determined that the investigation was carried out to determine whether a suicide had taken place and the circumstances surrounding it, that Alward was not placed in custody during the period before *Miranda* rights were given to Alward, and that the interrogation was to determine the proceedings that led up to the suicide. The district court further determined that Alward's "confession" after he was read the *Miranda* warnings was voluntary. Finally, the district court found that at no time was Alward illegally held until he evidenced a desire to commit suicide, but that "had the officers not held him at that time, they would have been accountable.... He was being legally held at that time to prevent him from harming himself." The district court also found that the mental health counselor was called in to determine whether Alward was suicidal and that Alward's rights were not violated in obtaining the counselor. The district court essentially rested its denial of the motion to suppress on its finding that Alward "is the one that instigated the investigation that led to the evidence being reviewed and secured by the law enforcement officials."

After this ruling, the parties discussed the prosecution's filing of a second amended Information which still alleged that Baxter was killed by a deadly weapon, but deleted mention of a .38 caliber revolver. Alward's counsel stated that "I'm not objecting.... it doesn't change our defense, and we are not going to be harmed.... I don't believe it changes the defense in any way or jeopardizes it in any way." The amended information was filed on August 10, 1993.

The trial began on August 10, 1993. At the conclusion of the trial, on August 27, 1993, the jury returned a verdict of guilty of second-degree murder with use of a deadly weapon. The district court sentenced Alward to two consecutive terms of life imprisonment. On September 1, 1993, Alward filed a motion for a new trial alleging judicial, prosecutorial, and juror misconduct. After a hearing, the district court denied the motion.[5] Alward appeals ***149** from the district court's denial of his motion for a new trial, and from the judgment of conviction.

DISCUSSION

Search of the Tent and the Truck

The State argues that Alward had no property or legitimate possessory interest in either the tent or the truck,[6] thus had no ****249** legitimate expectation of privacy in either the tent or truck, and therefore cannot challenge the lawfulness of the search and seizure.[7]

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The Ninth Circuit Court of Appeals has addressed whether the Fourth Amendment[8] protects a person's privacy interests in a tent located on a public campground. In ***150** *United States v. Gooch,* 6 F.3d 673, 676 (9th Cir.1993), the defendant, a camper in a public campground, was reportedly shooting at other campers. The police were summoned, and without seeking an arrest warrant, ordered Gooch out of his tent, patted him down, arrested him, and handcuffed and locked him in a patrol car. *Id.* The officers then ordered Gooch's companion out of the tent and searched the tent for the firearm, finding a loaded handgun under an air mattress. *Id.* The court concluded that Gooch had both a subjective and an objectively reasonable expectation of privacy in the tent, noting that camping in a public campground as opposed to on private land was of no consequence since the Fourth Amendment "protects people, not places." *Id.* at 676–77 (quoting *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)). Further, the court stated that "[t]he fact that the tent may be moved, alone, is not enough to remove the Fourth Amendment protections. As noted above, tents are protected under the Fourth Amendment like a more permanent structure. Also, a tent is more analogous to a (large) movable container than to a vehicle; the Fourth Amendment protects expectations of privacy in movable, closed containers." *Id.* at 677 (citations omitted).

We find the reasoning in *Gooch* persuasive. Alward had a subjective expectation of privacy in the tent and its contents. He manifested this expectation, at the very least, by leaving the tent, tent pouches, backpack and other containers closed. Alward had an objectively reasonable expectation of privacy in the tent and its contents as well. Simply because appellant camped on land managed by the Bureau of Land Management does not diminish his expectation of privacy. In *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978), the Supreme Court interpreted *Katz* to hold that " 'capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.' " Because Alward and Baxter chose to make a tent their temporary residence, as opposed to staying at a hotel, does not diminish Alward's expectation of privacy. Indeed, holding that temporary residence at a hotel ensures Fourth Amendment protections, while temporary residence in a tent does not, would limit the protections of the Fourth Amendment to those who could afford them. *See Stoner v. California,* 376 U.S. 483, 490, 84 S.Ct. 889, 893–94, 11 L.Ed.2d 856 (1964); *Phillips v. State,* 106 Nev. 763, 801 P.2d 1363 (1990). Thus, we conclude that Alward had a reasonable expectation of privacy in the tent such that the warrantless search of the tent violated the Fourth Amendment. Of course, a warrantless search of the tent ***151** would not have violated the Fourth Amendment had an exception to the warrant requirement existed.

The Fourth Amendment to the United States Constitution and Article 1, section 18, of the Nevada Constitution proscribe all unreasonable searches and seizures. The principle is well established that "searches conducted outside the judicial process, without ****250** 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." *Katz,* 389 U.S. at 357, 88 S.Ct. at 514 (footnotes omitted); *Phillips,* 106 Nev. at 765, 801 P.2d at 1365. In all cases outside the exceptions to the warrant requirement, "the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the 'persons, houses, papers, and effects' of citizens." *Thompson v. Louisiana,* 469 U.S. 17, 20, 105 S.Ct. 409, 410–11, 83 L.Ed.2d 246 (1984). We review the lawfulness of a search de novo. *Gooch,* 6 F.3d 673, 676 (9th Cir.1993).

One exception to the warrant requirement is the existence of exigent circumstances, including a medical emergency. *Mincey v. Arizona,* 437 U.S. 385, 392–93, 98 S.Ct. 2408, 2413–14, 57 L.Ed.2d 290 (1978). However, a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio,* 392 U.S. 1, 25–26, 88 S.Ct. 1868, 1882–83, 20 L.Ed.2d 889 (1967). In this case, the investigators may have had probable cause to search the tent—Alward initially related that Baxter had shot herself with a .22, and a .38 was found in Baxter's hand with her finger curiously lodged behind the trigger—but the investigators did not obtain a warrant to search. For such a search to be valid, it must fall within one of the narrow exceptions to the warrant requirement, as discussed in *Katz.* While there is no such thing as a "murder scene exception" to the warrant requirement, the Supreme Court has indicated that police may enter a residence without a warrant when "they reasonably believe that a person within is in need of immediate aid." *Mincey,* 437 U.S. at 392, 98 S.Ct. at 2413. Further, police "may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." *Id.* The police "may also seize any evidence that is in plain view during the course of their legitimate emergency activities." *Id.* at 393, 98 S.Ct.

at 2413. Thus, the scope of this warrantless emergency entry was limited to rendering any possible assistance to Baxter and securing a possible crime scene. Once the emergency dissipated, i.e., once police established that Baxter was dead, they could not search the premises simply because they were lawfully present. *See Bass v. State,* 732 S.W.2d 632 (Tex.Crim.App.1987); ***152** *State v. Tyler,* 598 S.W.2d 798 (Tenn.Crim.App.1980).

There is no dispute that the officers' presence in the tent was initially lawful because Bogdanowicz, Steuart and Horsley were all part of the police response to Alward's call for help. Any items discovered in plain view in the tent, including the .38 revolver and the red notebook, were lawfully seized. Items discovered in plain view in the truck bed, including the 9 millimeter magazine and empty .38 brass casings, were likewise lawfully seized. Therefore, the district court properly denied Alward's pre-trial motion to suppress the .38 revolver, red notebook, 9 millimeter magazine, and empty .38 brass casings. However, other items seized in the search, either that evening or the following day pursuant to the general search of the entire tent and truck, should have been suppressed. Among the items seized from the tent which were not in plain view were Alward's writings, which were located in a backpack, and 9 millimeter bullets, which were located in a matchbox. Failure to obtain a warrant before searching inside closed containers in the tent and the truck necessitates suppression of this evidence, and the district court erred in failing to do so. *See United States v. Villarreal,* 963 F.2d 770, 773 (5th Cir.1992) (individuals can manifest legitimate expectations of privacy in closed, opaque containers that conceal their contents from plain view).

Further, the warrantless search of closed containers inside the tent was not justified by any other exigent circumstance. Only the victim's body remained in the tent—Alward did not return to the tent after the police arrived, and Alward indicated to the police that no one else was camping with them at Sand Mountain. There is no indication in the record that officers could not return to Fallon to obtain a warrant or that they could not obtain a warrant telephonically. In addition, the tent was guarded after the police left the scene for the evening. The police obtained a ****251** warrant for Alward's arrest that night, and there is no reason why they could not have obtained a search warrant at that time, or earlier, as well. While the State argues that the inclement weather created an exigent circumstance, there is no indication that snowfall would destroy evidence, especially since the exhaustive search of the tent was not conducted until the following day anyway. Because no other exigent circumstances or other exception existed to justify the warrantless search, the search violated Alward's Fourth Amendment rights.

Where error of constitutional proportions has been committed, ***153** a conviction of guilty may be allowed to stand if the error is determined to be harmless beyond a reasonable doubt. *Obermeyer v. State,* 97 Nev. 158, 162, 625 P.2d 95, 97 (1981). Here, we cannot say that the admission of items found in closed containers inside the tent was harmless. Bullets obtained from the matchbox led the prosecution to present the theory that Alward killed Baxter using a 9 millimeter weapon and then placed the .38 revolver in her hand. Expert testimony pertaining to the muzzle imprint on Baxter's neck supported this theory. More importantly, in closing argument, the prosecutor read some of Alward's writings that police recovered from inside the backpack, arguing that Alward's actions conformed with the ideas expressed therein.[9] The prosecutor argued that "[t]he evidence in this case ***154** consists of three major sections, the defendant's writings, the scene of the crime, and the physical evidence ... found there." Thus, we conclude that admission of the illegally seized evidence cannot be viewed as harmless error and, therefore, warrants reversal of Alward's conviction.

Pre- and Post–Miranda Statements

Miranda established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. *Miranda,* 384 U.S. at 444–445, 86 S.Ct. at 1612–13. Pursuant to *Miranda,* a suspect may not be subjected to an interrogation in official "custody" unless that person has previously been advised of, and has knowingly and intelligently waived the following: the right to silence, the right to the presence of an attorney, and the right to appointed counsel ****252** if that person is indigent. *Id.* at 444, 86 S.Ct. at 1612. "Custody" means "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983); *accord Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

The district court determined that Alward was not "in custody." We will not disturb the district court's determination of whether the defendant was "in custody" where that determination is supported by substantial

evidence. *Rowbottom v. State,* 105 Nev. 472, 480, 779 P.2d 934, 939 (1989). In the instant case, however, we conclude that there is not substantial evidence to support the district court's determination that Alward was not "in custody."

Since Alward was not formally arrested at the scene, the pertinent inquiry, as with Fourth Amendment claims, "is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151–52, 82 L.Ed.2d 317 (1984). We consider the totality of the circumstances in deciding whether or not Alward was in custody; no single factor is dispositive. *E.g. Beheler,* 463 U.S. at 1125, 103 S.Ct. at 3520. Important considerations include the ***155** following: (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning. *People v. Celaya,* 191 Cal.App.3d 665, 236 Cal.Rptr. 489, 492 (1987).

Admittedly, Alward summoned police to the scene and "kept telling [Trooper Jorgensen] over and over not to leave him." However, shortly thereafter, Alward's hands were "bagged" to preserve incriminating evidence, and Sergeant Bogdanowicz took Alward to the Sheriff's department. Once Alward's hands were "bagged," he was incapable of leaving the area by hitchhiking or by driving, and he was incapable of dialing a telephone to request a ride from another or to call his family. The investigation focused on Alward at the point that police "bagged" his hands, since in so doing they attempted to preserve evidence with which to incriminate him. The bagging of Alward's hands occurred immediately after Bogdanowicz returned from the tent where he saw that the victim had her finger behind the trigger, not in front of it, making it unlikely that a suicide occurred. The interrogation at the Sheriff's department took place in a room used for interviews and equipped with a special mirror. Apart from the mental health counselor visit, only Alward and the investigators were present in the interview room. From this, we hold that a reasonable person in Alward's position would have concluded that he was under arrest. Any interrogation which took place after Alward's hands were bagged and before *Miranda* warnings were administered was therefore "custodial," and *Miranda* safeguards applied. *Oregon v. Elstad,* 470 U.S. 298, 306, 105 S.Ct. 1285, 1291–92, 84 L.Ed.2d 222 (1985). The district court therefore erred in failing to suppress that part of the videotape which contains statements Alward made before the *Miranda* warnings were administered.

Appellant further contends that statements he made after receiving the *Miranda* warnings were the product of coercive interrogation tactics, and therefore, should have been suppressed.

In *Passama v. State,* 103 Nev. 212, 214, 735 P.2d 321, 323 (1987), this court listed several factors which are relevant in determining whether a defendant's statement was voluntary:

> [t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Only the length of detention is a factor here—Alward was questioned for several hours. However, during that time, there is no ***156** indication in the record that any other factors were present which would detract from voluntariness. Alward had been read the *Miranda* warnings and voluntarily waived his rights. The investigators did not employ coercive interrogation techniquessuch ****253** as depriving Alward of food or sleep. Considering the totality of the circumstances, we conclude that Alward made the inculpatory statements voluntarily. Therefore, we hold that the district court properly admitted the statements which Alward made to police after receiving *Miranda* warnings and waiving his Fifth Amendment rights.

Alward further contends that statements he made at the Sheriff's department should have been suppressed because they were taken following an arrest which was unlawful because the police lacked probable cause at the time they "arrested" him, and because his detention violated NRS 171.123. The State casts Alward's detention as limited to the time that police conducted an investigation into suspected criminal conduct.

We have held that a warrantless felony arrest may be made if the arresting officer knows of facts and circumstances sufficient to lead a prudent person to believe that a felony was committed by the arrestee. *Lyons v. State,* 106 Nev. 438, 446, 796 P.2d 210, 215 (1990) (citing *Block v. State,* 95 Nev. 933, 935, 604 P.2d 338, 339 (1979)). We conclude that probable cause existed to justify an arrest since Alward's claim that Baxter committed suicide was inconsistent with the scene in the tent, which Sergeant Bogdanowicz had already investigated at the time Alward's hands were "bagged." Upon unzipping the tent, Sergeant Bogdanowicz noticed that Baxter's finger was behind the trigger, which was inconsistent

with Alward's story of suicide. Therefore, Alward's “arrest” was not unlawful, and Alward's statements were properly not suppressed for this reason.

Finally, Alward contends that the statements he made after officers informed him of their discovery of items not in plain view at the scene should have been suppressed as the “fruit” of a Fourth Amendment violation. “[E]vidence will not be excluded as ‘fruit’ unless the illegality is at least the ‘but for’ cause of the discovery of the evidence. Suppression is not justified unless ‘the challenged evidence is in some sense the product of illegal governmental activity.’ ” *Segura v. United States,* 468 U.S. 796, 815, 104 S.Ct. 3380, 3390–91, 82 L.Ed.2d 599 (1984) (quoting *United States v. Crews,* 445 U.S. 463, 471, 100 S.Ct. 1244, 1249–50, 63 L.Ed.2d 537 (1980)). Alward fails to specify exactly what the investigators referred to when they told Alward that evidence was discovered at the scene which indicated that he was lying when he stated that he ***157** was not inside the tent when the gun was fired. According to our careful review of the record, the investigators never mentioned any illegal “fruit” during the interrogation. Thus, there is no indication in the instant case that the fruits of the illegal search resulted in the production of Alward's incriminating statements. Here, as in *Segura,* the illegal search of the tent did not contribute in any way to Alward making inculpatory statements.

Mental Health Counselor Interview

Alward contends that statements he made to the mental health counselor should have been suppressed since their admission violated state statutes regarding privilege, and violated his Fifth Amendment rights. The State responds that Alward's statements to the mental health counselor were properly admitted because “a reasonable person would not believe that the communication would be confidential or that a patient-therapist relationship was being established.”

There is no evidence in the record that the counselor was a doctor, and statutes pertaining to the doctor-patient privilege are therefore inapplicable. Neither is there any indication in the record that the counselor was a social worker registered under NRS chapter 641B, or a “marriage and family therapist” under NRS 641A.060. Statutes pertaining to social worker-patient privilege and therapist-patient privilege are therefore inapplicable as well.

However, we conclude that the introduction of this evidence was unfair to Alward. Our review of the transcript and the videotape indicates that the communication appeared to be “confidential.” Investigator Wood implied that the conversation with the mental health counselor was a private conversation when he introduced the counselor to Alward, saying, “She's the counselor that I told you about.... I'm going to leave you two alone to talk for a little while.” The ****254** counselor also urged the departing investigator to close the door so that the interview could begin. These statements, accompanied by actually closing the door to the interview room and leaving Alward and the counselor alone in the room, appear to have been designed to make Alward believe that the conversation was going to be confidential. Therefore, we conclude that admission of the videotaped interview with the mental health counselor violated Alward's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. *McKenna v. State,* 98 Nev. 38, 39, 639 P.2d 557, 558 (1982) (fundamental unfairness, amounting to violation of the defendant's right to due process, for district court to permit court-appointed psychiatrist who examined the defendant to testify ***158** as to admissions the defendant made during that examination).

The interview with the mental health counselor does not contain probative new information. However, the videotape of the interview was an important part of the State's case in that it assisted in demonstrating Alward's guilt by showing how he changed his story over time. Therefore, we cannot conclude that this error was harmless beyond a reasonable doubt, *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1966), and we hold that the district court erred in failing to suppress it. Since we conclude that this portion of the videotape was improperly admitted on due process grounds, we do not reach Alward's Fifth Amendment argument.

CONCLUSION

The judgment of conviction is reversed and the case is remanded for further proceedings consistent with this opinion.

YOUNG, SPRINGER and ROSE, JJ., concur.

STEFFEN, Chief Justice, dissenting:

Respectfully, I dissent.

The primary basis for the majority's reversal of Alward's judgment of conviction is based upon the conclusion that the State engaged in an unlawful search and seizure that produced incriminating evidence in violation of the Fourth Amendment. I disagree. Using what I consider to be common sense and compelling logic, the district court denied the defense motion to suppress on the basis that Alward "is the one that instigated the investigation that led to the evidence being reviewed and secured by the law enforcement officers."

Alward is the one who summoned help and directed the officers to the tent where the victim allegedly shot herself. Alward, who was seeking to convince officers that the death was a suicide, made no suggestion to the officers that they were not free to fully examine and investigate the scene of the victim's death. The tent, which belonged to the victim, was being shared by the two young people, and there is no indication that Alward intended to direct investigating officers to the body, and then invoke a constitutional right to restrict any search and investigation of the area to a time after which a search warrant was obtained.

I am unable to discern any aspect of "unreasonableness" to the search undertaken by the officers. Nor do I derive relevant meaning from the fact that the tent and truck housed closed containers. There is no reason to believe from what occurred before or after Alward summoned assistance, that he went about ***159** closing containers so that the investigators he summoned would be foreclosed from gaining entry without a warrant. Indeed, a reasonable mind would conclude that when a person summons officers to what he or she describes as a suicide scene, the surviving witness would want the officers to freely seek evidence confirming the fact of suicide. In this case, it is clear that Alward hoped to convince the officers that the young woman indeed succumbed to her own act of suicide. It is ridiculous to assume that he would expect to appear credible in the face of restricting the officers' freedom of access to anything at the death scene pending the acquisition of a search warrant. This conclusion is especially cogent under circumstances where the victim and Alward were sharing such close and temporary quarters.

****255** I have no difficulty distinguishing *Gooch* from the instant case. Gooch was firing at other campers and did not invite the assistance or presence of police officers in his tent. His expectation of privacy was not eliminated by an invitation of entry and investigation to law enforcement authorities. However, in the instant case, Alward sought assistance from the officers, and intended to convince them of his girlfriend's suicide. At the very least, he impliedly waived all right to an expectancy of privacy and consented to the officers' searching investigation.

Although there was trial error discussed by the majority, I would hold that the error was harmless beyond a reasonable doubt under the circumstances of this case.

For the reasons briefly outlined above, I would affirm the judgment of conviction entered against Alward pursuant to the verdict of the jury. I therefore dissent.

All Citations

112 Nev. 141, 912 P.2d 243, 66 A.L.R.5th 763

Footnotes

1 Sergeant Bogdanowicz testified that he was instructed to "bag" Alward's hands. This entailed placing paper bags over Alward's hands and taping them closed around his wrists.

2 Another officer, Investigator Steuart, testified that the residue obtained from Alward's hands was not tested after all because it did not meet FBI laboratory criteria.

3 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

4 It appears that the backpack was closed. On direct examination, the prosecution asked Investigator Steuart whether he recognized the backpack, then inquired, "Is that one of the items that you looked into further, so to speak?" Steuart responded affirmatively. In addition, evidence was presented at trial indicating that Alward's writings were inside a blue folder located inside the backpack.

5 The district court made the following findings, among others:

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> 4. Defendant's allegations of judicial misconduct are wholly without foundation.
>
> 5. The defendant's allegations of prosecutorial misconduct are predicated on the failure of the State to disclose its "second gun" theory. The evidence of record shows that the theory was developed by the State from the same evidence that had been made available to the defendant.
>
> 6. The State had a duty to disclose evidence but not to interpret it for the defendant.
>
> 7. The defendant suffered no prejudice by the State's failure to disclose its theory. The defendant produced an expert who adduced evidence which was contrary to the State's theory.
>
> 8. The allegations of prosecutorial misconduct are without foundation.
>
> ....
>
> 10. Any discussion of penalty by some jurors was not pervasive or widespread and did not extend to the whole jury. Any such discussion was incidental and did not appear to in any way influence the jury's verdict or second degree murder.
>
> 11. Jurors were examined on their knowledge of handguns on voir dire where many prospective jurors expressed that they owned and knew how to use handguns.
>
> ....
>
> 13. There is no evidence to suggest that the jurors conducted any independent investigation, experiment, or demonstration not previously suggested by the evidence in open court or that jurors, who professed to have knowledge of firearms, forced their views on other jurors or such views differed from or were contrary to the evidence presented at trial[.]

6 In its reply brief, the State paints Alward as "a fugitive, having run away from home, taking 15–year–old Kristina with him. Alward took Kristina's mother's tent, backpacks and other camping equipment with him and vanished in Debra Alward's truck."

7 Alward's lack of ownership of the tent does not preclude standing to challenge the lawfulness of the search. The tent was Alward's and Baxter's home for the duration of their trip. Alward had a legitimate expectation of privacy in the tent. This case is unlike the situation presented to us in *Hicks v. State,* 96 Nev. 82, 605 P.2d 219 (1980), where the defendant unsuccessfully asserted that his presence in another's apartment conferred standing upon him to challenge the lawfulness of the search of that apartment.

8 The Fourth Amendment 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

9 Specifically, in closing argument, the prosecutor stated, "that job [of summing up what has been proven in the trial] is really ... already been done for me. Mr. Alward himself summed up this case ... when he wrote this:

> Beauty roses laughing, smiling; bleeding roses sobbing, sighing; torn apart love is lost, is it not love when it's not? Beauty roses running, flying; bleeding roses falling, dying; life blood crimson on the floor, can you tell me what's in store? Beauty roses free, and fine; bleeding roses, these are mine.
>
> Bleeding roses torn apart, true love pouring from my heart; life blood crimson on the floor, look what you've done, you fucking whore. I've wasted so much time living this lie, listening to you say you deserve one more try.

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> Well, bitch, it's time to go. The time has come for your true colors to show. I still love you and always will, now I will show you that my love is real. My time has come, and yours has passed; my time has come, and yours has passed, and forever my love will last."

Later in his closing argument, the prosecutor recited another of Alward's "poems":

> Now I think to those days of old when the love was good but the days were cold. Hate really hurts, but love burns worse.
>
> Kiss me, kiss me, kiss me, whisper your name. Hold me, hold me, hold me, let me play your game.
>
> I was strong, but you fucked up my mind. Help me understand it, I'm falling behind. Why did you do it, do it to me? Now help me, bitch, help me to see.
>
> Hurt me, hurt me, hurt me, whisper my name. Kill me, kill me, kill me, now play my game.
>
> Everybody tells me how you feel, so now I know that love isn't real. Love is a toy, it's a fucking game that never really works but who's to blame?
>
> Kiss me, kiss me, kiss me, let me whisper your name. Hold me, hold me, hold me, fuck the games.

And another:

> I hate your smile, I hate your laugh, I hate your fucking hair. I hate your lips, I hate your eyes, I hate your god damn stare. I tried to touch you, tried to taste you, tried to hold you near, but I couldn't get past your wall built of pain and fear. Tried so hard to break it down, but all that came down was me. Now you are gone, and so am I, at last I'm fucking free.

And yet another:

> If you feel as to die, look to the sky, spread your wing, forget your things, release your soul and fly. Spring has come and passed you by, summer has been your time to fly. Fall was here and told you the truth, winter is your time to die.

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105 S.Ct. 2066
Supreme Court of the United States

CALIFORNIA, Petitioner
v.
Charles R. CARNEY.

No. 83-859.
|
Argued Oct. 30, 1984.
|
Decided May 13, 1985.

Synopsis

After unsuccessful motions to suppress evidence and to dismiss, defendant pleaded in the Superior Court, San Diego County, William T. Low, J., nolo contendere to charge of possession of marijuana for sale, and he appealed. The California Supreme Court, Mosk, J., 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807, reversed and remanded, and certiorari was granted. The Supreme Court, Chief Justice Burger, held that: (1) warrantless search of mobile motor home did not violate Fourth Amendment, and (2) search was not unreasonable.

Reversed and remanded.

Justice Stevens filed a dissenting opinion in which Justices Brennan and Marshall joined.

****2066 *386** *Syllabus*[*]

A Drug Enforcement Administration (DEA) agent, who had information that respondent's mobile motor home was being used to exchange marihuana for sex, watched respondent approach a youth who accompanied respondent to the motor home, which was parked in a lot in downtown San Diego. The agent and other agents then kept the vehicle under surveillance, and stopped the youth after he left the vehicle. He told them that he had received marihuana in return for allowing respondent sexual contacts. At the agents' request, the youth returned to the motor home and knocked on the door; respondent stepped out. Without a warrant or consent, one agent then entered the motor home and observed marijuana. A subsequent search of the motor home at the police station revealed additional marihuana, and respondent was charged with possession of marihuana for sale. After his motion to suppress the evidence discovered in the motor home was denied, respondent was convicted in California Superior Court on a plea of *nolo contendere.* The California ****2067** Court of Appeal affirmed. The California Supreme Court reversed, holding that the search of the motor home was unreasonable and that the motor vehicle exception to the warrant requirement of the Fourth Amendment did not apply, because expectations of privacy in a motor home are more like those in a dwelling than in an automobile.

Held: The warrantless search of respondent's motor home did not violate the Fourth Amendment. Pp. 2068-2071.

(a) When a vehicle is being used on the highways or is capable of such use and is found stationary in a place not regularly used for residential purposes, the two justifications for the vehicle exception come into play. First, the vehicle is readily mobile, and, second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways. Here, while respondent's vehicle possessed some attributes of a home, it clearly falls within the vehicle exception. To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that the exception be applied depending on the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles such as a motor home would ignore the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic or other illegal activity. Pp. 2068-2071.

***387** (b) The search in question was not unreasonable. It was one that a magistrate could have authorized if presented with the facts. The DEA agents, based on uncontradicted evidence that respondent was distributing a controlled substance from the vehicle, had abundant probable cause to enter and search the vehicle. P. 2071.

34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983), reversed and remanded.

Attorneys and Law Firms

Louis R. Hanoian, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp,* Attorney General, *Steve White,* Chief Assistant Attorney General, and *Michael D. Wellington* and *John W. Carney,* Deputy Attorneys General.

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Thomas F. Homann argued the cause for respondent. With him on the brief was *A. Dale Manicom.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Alan I. Horowitz,* and *Kathleen A. Felton;* and for the State of Minnesota et al. by *Hubert H. Humphrey III,* Attorney General of Minnesota, and *Thomas F. Catania, Jr.,* and *Paul R. Kempainen,* Special Assistant Attorneys General, *Jim Smith,* Attorney General of Florida, *Tany S. Hong,* Attorney General of Hawaii, and *Michael A. Lilly,* First Deputy Attorney General.

Frank O. Bell, Jr., and *George L. Schraer* filed a brief for the California State Public Defender as *amicus curiae* urging affirmance.

Opinion

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether law enforcement agents violated the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile "motor home" located in a public place.

I

On May 31, 1979, Drug Enforcement Agency Agent Robert Williams watched respondent, Charles Carney, approach ***388** a youth in downtown San Diego. The youth accompanied Carney to a Dodge Mini Motor Home parked in a nearby lot. Carney and the youth closed the window shades in the motor home, including one across the front window. Agent Williams had previously received uncorroborated information that the same motor home was used by another person who was exchanging marihuana for sex. Williams, with assistance from other agents, kept the motor home under surveillance for the entire one and one-quarter hours that Carney and the youth remained inside. When the youth left the motor home, the agents followed and stopped him. The youth told the agents that he had received marijuana in return for allowing Carney sexual contacts.

At the agents' request, the youth returned to the motor home and knocked on its door; Carney stepped out. The agents identified themselves as law enforcement officers. Without a warrant or consent, one agent entered the motor home and observed marihuana, plastic bags, and a scale of the kind used in weighing drugs on a table. Agent Williams took Carney into custody and took possession of the motor home. A subsequent search of the motor home at the police station revealed additional marihuana in the cupboards and refrigerator.

Respondent was charged with possession of marihuana for sale. At a preliminary hearing, he moved to suppress the evidence ****2068** discovered in the motor home. The Magistrate denied the motion, upholding the initial search as a justifiable search for other persons, and the subsequent search as a routine inventory search.

Respondent renewed his suppression motion in the Superior Court. The Superior Court also rejected the claim, holding that there was probable cause to arrest respondent, that the search of the motor home was authorized under the automobile exception to the Fourth Amendment's warrant requirement, and that the motor home itself could be seized without a warrant as an instrumentality of the crime. Respondent ***389** then pleaded *nolo contendere* to the charges against him, and was placed on probation for three years.

Respondent appealed from the order placing him on probation. The California Court of Appeal affirmed, reasoning that the vehicle exception applied to respondent's motor home. 117 Cal.App.3d 36, 172 Cal.Rptr. 430 (1981).

The California Supreme Court reversed the conviction. 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983). The Supreme Court did not disagree with the conclusion of the trial court that the agents had probable cause to arrest respondent and to believe that the vehicle contained evidence of a crime; however, the court held that the search was unreasonable because no warrant was obtained, rejecting the State's argument that the vehicle exception to the warrant requirement should apply.[1] That court reached its decision by concluding that the mobility of a vehicle "is no longer the prime justification for the automobile exception; rather, 'the answer lies in the diminished expectation of privacy which surrounds the automobile.' " *Id.,* at 605, 194 Cal.Rptr., at 504, 668 P.2d, at 811. The California Supreme Court held that the expectations of privacy in a motor home are more like those in a dwelling than in an automobile because the primary function of motor homes is not to provide transportation but to "provide the occupant with living quarters." *Id.,* at 606, 194 Cal.Rptr., at 505, 668 P.2d, at 812.

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We granted certiorari, 465 U.S. 1098, 104 S.Ct. 1589, 80 L.Ed.2d 122 (1984). We reverse.

***390** II

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer. There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called "automobile exception" at issue in this case. This exception to the warrant requirement was first set forth by the Court 60 years ago in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests. The Court rested this exception on a long-recognized distinction between stationary structures and vehicles:

> "[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary ****2069** difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be *quickly moved* out of the locality or jurisdiction in which the warrant must be sought." *Id.,* at 153, 45 S.Ct., at 285 (emphasis added).

The capacity to be "quickly moved" was clearly the basis of the holding in *Carroll,* and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. See, *e.g., Cooper v. California,* 386 U.S. 58, 59, 87 S.Ct. 788, 789, 17 L.Ed.2d 730 (1967); *Chambers v. Maroney,* 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970); *Cady v. Dombrowski,* 413 U.S. 433, 442, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973); ***391** *Cardwell v. Lewis,* 417 U.S. 583, 588, 94 S.Ct. 2464, 2468, 41 L.Ed.2d 325 (1974); *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976). In *Chambers,* for example, commenting on the rationale for the vehicle exception, we noted that "the opportunity to search is fleeting since a car is readily movable." 399 U.S., at 51, 90 S.Ct., at 1981. More recently, in *United States v. Ross,* 456 U.S. 798, 806, 102 S.Ct. 2157, 2163, 72 L.Ed.2d 572 (1982), we once again emphasized that "an immediate intrusion is necessary" because of "the nature of an automobile in transit...." The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman, supra,* 428 U.S., at 367, 96 S.Ct., at 3096.

However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. 428 U.S., at 367, 96 S.Ct., at 3096. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Ibid.*

Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. See, *e.g., Cady v. Dombrowski, supra.* In some cases, the configuration of the vehicle contributed to the lower expectations of privacy; for example, we held in *Cardwell v. Lewis, supra,* 417 U.S., at 590, 94 S.Ct., at 2469, that, because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy. But even when enclosed "repository" areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception. We have applied the exception in the context of a locked car trunk, *Cady v. Dombrowski, supra,* a sealed package in a car trunk, *Ross, supra,* a closed compartment under the dashboard, *Chambers* ***392** *v. Maroney, supra,* the interior of a vehicle's upholstery, *Carroll, supra,* or sealed packages inside a covered pickup truck, *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).

These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. *Cady v. Dombrowski, supra,* 413 U.S., at 440-441, 93 S.Ct., at 2527-2528. As we explained in *South Dakota v. Opperman,* an inventory search case:

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"Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are **2070 noted, or if headlights or other safety equipment are not in proper working order." 428 U.S., at 368, 96 S.Ct., at 3096.

The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Historically, "individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." *Ross, supra,* 456 U.S., at 806, n. 8, 102 S.Ct., at 2163, n. 8. In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception *393 come into play.[2] First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

While it is true that respondent's vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll,* respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police. Furthermore, the vehicle was licensed to "operate on public streets; [was] serviced in public places; ... and [was] subject to extensive regulation and inspection." *Rakas v. Illinois,* 439 U.S. 128, 154, n. 2, 99 S.Ct. 421, 436, n. 2, 58 L.Ed.2d 387 (1978) (POWELL, J., concurring). And the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.

Respondent urges us to distinguish his vehicle from other vehicles within the exception because it was *capable of functioning as a home.* In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, *i.e.,* as a "home" or "residence." To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles *394 such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity. In *United States v. Ross,* 456 U.S., at 822, 102 S.Ct., at 2171, we declined to distinguish between "worthy" and "unworthy" containers, noting that "the central purpose of the Fourth Amendment forecloses such a distinction." We decline today to distinguish between "worthy" and "unworthy" vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

Our application of the vehicle exception has never turned on the other uses to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for **2071 transportation.[3] These two requirements for application of the exception ensure that law enforcement officials are not unnecessarily hamstrung in their efforts to detect and prosecute criminal activity, and that the legitimate privacy interests of the public are protected. Applying the vehicle exception in these circumstances allows the essential purposes served by the exception to be fulfilled, while assuring that the exception will acknowledge legitimate privacy interests.

III

The question remains whether, apart from the lack of a warrant, this search was unreasonable. Under the vehicle exception to the warrant requirement, "[o]nly the prior approval of the magistrate is waived; the search otherwise

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[must be such] as the magistrate could authorize." *Ross, supra,* at 823, 102 S.Ct., at 2172.

***395** This search was not unreasonable; it was plainly one that the magistrate could authorize if presented with these facts. The DEA agents had fresh, direct, uncontradicted evidence that the respondent was distributing a controlled substance from the vehicle, apart from evidence of other possible offenses. The agents thus had abundant probable cause to enter and search the vehicle for evidence of a crime notwithstanding its possible use as a dwelling place.

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

It is so ordered.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The character of "the place to be searched"[1] plays an important role in Fourth Amendment analysis. In this case, police officers searched a Dodge/Midas Mini Motor Home. The California Supreme Court correctly characterized this vehicle as a "hybrid" which combines "the mobility attribute of an automobile ... with most of the privacy characteristics of a house."[2]

The hybrid character of the motor home places it at the crossroads between the privacy interests that generally forbid warrantless invasions of the home, *Payton v. New York,* 445 U.S. 573, 585-590, 100 S.Ct. 1371, 1379-1382, 63 L.Ed.2d 639 (1980), and the law enforcement interests that support the exception for warrantless searches of automobiles based on probable cause, *United States v. Ross,* 456 U.S. 798, 806, 820, 102 S.Ct. 2157, 2163, 2170, 72 L.Ed.2d 572 (1982). By choosing to follow the latter route, the Court errs in three respects: it has entered new ***396** territory prematurely, it has accorded priority to an exception rather than to the general rule, and it has abandoned the limits on the exception imposed by prior cases.

I

In recent Terms, the Court has displayed little confidence in state and lower federal court decisions that purport to enforce the Fourth Amendment. Unless an order suppressing evidence is clearly correct, a petition for certiorari is likely to garner the four votes required for a grant of plenary review-as the one in this case did. Much ****2072** of the Court's "burdensome" workload is a product of its own aggressiveness in this area. By promoting the Supreme Court of the United States as the High Magistrate for every warrantless search and seizure, this practice has burdened the argument docket with cases presenting fact-bound errors of minimal significance.[3] It has also encouraged state legal officers to file petitions for certiorari in even the most frivolous search and seizure cases.[4]

The Court's lack of trust in lower judicial authority has resulted in another improvident exercise of discretionary ***397** jurisdiction.[5] In what is at most only a modest extension of our Fourth Amendment precedents, the California Supreme Court held that police officers may not conduct a nonexigent search of a motor home without a warrant supported by probable cause. The State of California filed a petition for certiorari contending that the decision below conflicted with the authority of other jurisdictions.[6] Even a cursory examination of the cases alleged to be in conflict revealed that they did not consider the question presented here.[7]

***398** ****2073** This is not a case "in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, ... a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law." *Michigan v. Long,* 463 U.S. 1032, 1067-1068, 103 S.Ct. 3469, 3490, 77 L.Ed.2d 1201 (1983) (STEVENS, J., dissenting). As an unusually perceptive study of this Court's docket stated with reference to *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), "this ... situation ... rarely presents a compelling reason for Court review in the absence of a fully percolated conflict."[8] The Court's decision to forge ahead ***399** has established a rule for searching motor homes that is to be followed by the entire Nation. If the Court had merely allowed the decision below to stand, it would have only governed searches of those vehicles in a single State. The breadth of this Court's mandate counsels greater patience before we offer our binding judgment on the meaning of the Constitution.

Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles. Despite the age of the automobile exception and

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the countless cases in which it has been applied, we have no prior cases defining the contours of a reasonable search in the context of hybrids such as motor homes, house trailers, houseboats, or yachts. In this case, the Court can barely glimpse the diverse lifestyles associated with recreational vehicles and mobile living quarters.[9] The line or lines separating mobile homes from permanent structures might have been drawn in various ways, with consideration given to whether the home is moving or at rest, whether it rests on land or water, the form of the vehicle's attachment to its location, its potential speed of departure, its size and capacity to serve as a domicile, and its method of locomotion. Rational decisionmaking strongly counsels against divining the uses and abuses of these vehicles in the vacuum of the first case raising the question before us.

Of course, we may not abdicate our responsibility to clarify the law in this field. Some caution, however, is justified when every decision requires us to resolve a vexing "conflict ... between the individual's constitutionally protected interest in privacy and the public interest in effective law **2074 enforcement." *United States v. Ross,* 456 U.S., at 804, 102 S.Ct., at 2161. "The certainty that is supposed to come from speedy resolution *400 may prove illusory if a premature decision raises more questions than it answers."[10] The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. Consideration of this matter by the lower courts in a series of litigated cases would surely have facilitated a reasoned accommodation of the conflicting interests. To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.[11] Deliberation on the question over time winnows out the unnecessary *401 and discordant elements of doctrine and preserves "whatever is pure and sound and fine."[12]

II

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." We have interpreted this language to provide law enforcement officers with a bright-line standard: "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." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted); *Arkansas v. Sanders,* 442 U.S. 753, 758, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979).

In *United States v. Ross,* the Court reaffirmed the primary importance of the general rule condemning warrantless searches, and emphasized that the exception permitting the search of automobiles without a warrant is a narrow one. 456 U.S., at 824-825, 102 S.Ct., at 2172-2173. We expressly endorsed "the general rule," stated in *Carroll v. United States,* 267 U.S. 132, 156, 45 S.Ct. 280, 286, 69 L.Ed. 543 (1925), that " '[i]n cases where the securing of a warrant is reasonably practicable, it must be used.' " 456 U.S., at 807, 102 S.Ct., at 2163. Given this warning and the presumption of regularity that attaches to a warrant,[13] it is hardly unrealistic to **2075 expect experienced law enforcement officers to obtain a search warrant when one can easily be secured.

The ascendancy of the warrant requirement in our system of justice must not be bullied aside by extravagant claims of necessity:

> " 'The warrant requirement ... is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part *402 of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.' [*Coolidge v. New Hampshire,* 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971).]
>
> "... By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' *Johnson v. United States,* 333 U.S. 10, 14 [68 S.Ct. 367, 369, 92 L.Ed. 436] (1948), we minimize the risk of unreasonable assertions of executive authority." *Arkansas v. Sanders,* 442 U.S., at 758-759, 99 S.Ct., at 2590.

If the motor home were parked in the exact middle of the intersection between the general rule and the exception for automobiles, priority should be given to the rule rather than the exception.

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III

The motor home, however, was not parked in the middle of that intersection. Our prior cases teach us that inherent mobility is not a sufficient justification for the fashioning of an exception to the warrant requirement, especially in the face of heightened expectations of privacy in the location searched. Motor homes, by their common use and construction, afford their owners a substantial and legitimate expectation of privacy when they dwell within. When a motor home is parked in a location that is removed from the public highway, I believe that society is prepared to recognize that the expectations of privacy within it are not unlike the expectations one has in a fixed dwelling. As a general rule, such places may only be searched with a warrant based upon probable cause. Warrantless searches of motor homes are only reasonable when the motor home is traveling on the public streets or highways, or when exigent circumstances otherwise require an immediate search without the expenditure of time necessary to obtain a warrant.

***403** As we explained in *Ross,* the automobile exception is the product of a long history:

> "[S]ince its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable." 456 U.S., at 806-807, 102 S.Ct., at 2163 (footnotes omitted).[14]

The automobile exception has been developed to ameliorate the practical problems associated with the search of vehicles that have been stopped on the streets or public highways because there was probable cause to believe they were transporting contraband. Until today, however, the Court has never decided whether the practical justifications that apply to a vehicle that is stopped in transit on a public way apply with the same force to a vehicle parked in a lot near a court house where it could easily be detained while a warrant is ****2076** issued.[15]

***404** In this case, the motor home was parked in an off-the-street lot only a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application.[16] The officers clearly had the element of surprise with them, and with curtains covering the windshield, the motor home offered no indication of any imminent departure. The officers plainly had probable cause to arrest the respondent and search the motor home, and on this record, it is inexplicable why they eschewed the safe harbor of a warrant.[17]

In the absence of any evidence of exigency in the circumstances of this case, the Court relies on the inherent mobility of the motor home to create a conclusive presumption of exigency. This Court, however, has squarely held that mobility of the place to be searched is not a sufficient justification for abandoning the warrant requirement. In *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the Court held that a warrantless search of a footlocker violated the Fourth Amendment even ***405** though there was ample probable cause to believe it contained contraband. The Government had argued that the rationale of the automobile exception applied to movable containers in general, and that the warrant requirement should be limited to searches of homes and other "core" areas of privacy. See *id.,* at 7, 97 S.Ct., at 2481. We categorically rejected the Government's argument, observing that there are greater privacy interests associated with containers than with automobiles,[18] and that there are less practical problems associated with the temporary detention of a container than with the detention of an automobile. See *id.,* at 13, and n. 7, 97 S.Ct., at 2484, and n. 7.

We again endorsed that analysis in *Ross:*

> ****2077** "The Court in *Chadwick* specifically rejected the argument that the warrantless search was 'reasonable' because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that 'a person's expectations of privacy in personal luggage are substantially greater than in an automobile,' [433 U.S., at 13, 97 S.Ct., at 2484], and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.,* at 13, n. 7 [97 S.Ct., at 2484, n. 7]." 456 U.S., at 811, 102 S.Ct., at 2165-2166.

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It is perfectly obvious that the citizen has a much greater expectation of privacy concerning the interior of a mobile home than of a piece of luggage such as a footlocker. If "inherent mobility" does not justify warrantless searches ***406** of containers, it cannot rationally provide a sufficient justification for the search of a person's dwelling place.

Unlike a brick bungalow or a frame Victorian, a motor home seldom serves as a permanent lifetime abode. The motor home in this case, however, was designed to accommodate a breadth of ordinary everyday living. Photographs in the record indicate that its height, length, and beam provided substantial living space inside: stuffed chairs surround a table; cupboards provide room for storage of personal effects; bunk beds provide sleeping space; and a refrigerator provides ample space for food and beverages.[19] Moreover, curtains and large opaque walls inhibit viewing the activities inside from the exterior of the vehicle. The interior configuration of the motor home establishes that the vehicle's size, shape, and mode of construction should have indicated to the officers that it was a vehicle containing mobile living quarters.

The State contends that officers in the field will have an impossible task determining whether or not other vehicles contain mobile living quarters. It is not necessary for the Court to resolve every unanswered question in this area in a single case, but common English usage suggests that we already distinguish between a "motor home" which is "equipped as a self-contained traveling home," a "camper" which is only equipped for "casual travel and camping," and an automobile which is "designed for passenger transportation."[20] Surely the exteriors of these vehicles contain clues about their different functions which could alert officers in the field to the necessity of a warrant.[21]

***407** The California Vehicle Code also refutes the State's argument that the exclusion of "motor homes" from the automobile exception would be impossible to apply in practice. In its definitional section, the Code distinguishes campers and house cars from station wagons, and suggests that they are special categories of the more general terms-motor vehicles and passenger vehicles.[22] A "house car" is "a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached."[23] Alcoholic beverages ****2078** may not be opened or consumed in motor vehicles traveling on the highways, except in the "living quarters of a housecar or camper."[24] The same definitions might not necessarily apply in the context of the Fourth Amendment, but they do indicate that descriptive distinctions are humanly possible. They also reflect the California Legislature's judgment that "house cars" entertain different kinds of activities than the ordinary passenger vehicle.

In my opinion, searches of places that regularly accommodate a wide range of private human activity are fundamentally different from searches of automobiles which primarily serve a public transportation function.[25] Although it may not be a castle, a motor home is usually the functional equivalent of a hotel room, a vacation and retirement home, or a hunting and fishing cabin. These places may be as spartan ***408** as a humble cottage when compared to the most majestic mansion, 456 U.S., at 822, 102 S.Ct., at 2171; *ante,* at 2070, but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court. *Stoner v. California,* 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964); *Payton v. New York,* 445 U.S., at 585, 100 S.Ct., at 1379; *United States v. Karo,* 468 U.S. 705, 714-715, 104 S.Ct. 3296, 3302-3303, 82 L.Ed.2d 530 (1984).[26] In my opinion, a warrantless search of living quarters in a motor home is "presumptively unreasonable absent exigent circumstances." *Ibid.*

I respectfully dissent.

All Citations

471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406, 53 USLW 4521

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 Respondent contends that the state-court decision rests on an adequate and independent state ground, because the opinion refers to the State as well as the Federal Constitutions. Respondent's argument is clearly foreclosed by our opinion in *Michigan v. Long,* 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201 (1983), in which

we held, "when ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." We read the opinion as resting on federal law.

2 With few exceptions, the courts have not hesitated to apply the vehicle exception to vehicles other than automobiles. See, *e.g., United States v. Rollins,* 699 F.2d 530 (CA11) (airplane), cert. denied, 464 U.S. 933, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983).

3 We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

1 The Fourth Amendment 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 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."

2 34 Cal.3d 597, 606, 194 Cal.Rptr. 500, 505, 668 P.2d 807, 812 (1983).

3 *E.g., United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985); *United States v. Sharpe,* 471 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *Oklahoma v. Castleberry,* 471 U.S. 146, 105 S.Ct. 1859, 85 L.Ed.2d 112 (1985). Cf. *Florida v. Rodriguez,* 469 U.S. 1, 12-13, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (STEVENS, J., dissenting, joined by BRENNAN, J.).

4 See, *e.g., State v. Caponi,* 12 Ohio St.3d 302, 466 N.E.2d 551 (1984), cert. denied, 469 U.S. 1209, 105 S.Ct. 1174, 84 L.Ed.2d 324 (1985). The Court's inventiveness in the search and seizure area has also emboldened state legal officers to file petitions for certiorari from state court suppression orders that are explicitly based on independent state grounds. See, *e.g., Jamison v. State,* 455 So.2d 1112 (Fla.App.1984), cert. denied, 469 U.S. 1127, 105 S.Ct. 811, 83 L.Ed.2d 804 (1985); *Ex parte Gannaway,* 448 So.2d 413 (Ala.1984), cert. denied, 469 U.S. 1207, 105 S.Ct. 1168, 84 L.Ed.2d 320 (1985); *State v. Burkholder,* 12 Ohio St.3d 205, 466 N.E.2d 176, cert. denied, 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984); *People v. Corr,* 682 P.2d 20 (Colo.), cert. denied, 469 U.S. 855, 105 S.Ct. 181, 83 L.Ed.2d 115 (1984); *State v. Von Bulow,* 475 A.2d 995 (R.I.), cert. denied, 469 U.S. 875, 105 S.Ct. 233, 83 L.Ed.2d 162 (1984).

5 *Michigan v. Long,* 463 U.S. 1032, 1065, 103 S.Ct. 3469, 3489, 77 L.Ed.2d 1201 (1983) (STEVENS, J., dissenting); *California v. Ramos,* 463 U.S. 992, 1029, 103 S.Ct. 3446, 3468, 77 L.Ed.2d 1171 (1983) (STEVENS, J., dissenting); *Watt v. Western Nuclear, Inc.,* 462 U.S. 36, 72-73, 103 S.Ct. 2218, 2238-2239, 76 L.Ed.2d 400 (1983) (STEVENS, J., dissenting); *Watt v. Alaska,* 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed.2d 80 (1981) (STEVENS, J., concurring). See also Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 182 (1982).

6 Pet. for Cert. 15-17, 21, 24-25. The petition acknowledged that the decision below was consistent with dictum in two recent Ninth Circuit decisions. See *United States v. Wiga,* 662 F.2d 1325, 1329 (1981), cert. denied, 456 U.S. 918, 102 S.Ct. 1775, 72 L.Ed.2d 178 (1982); *United States v. Williams,* 630 F.2d 1322, 1326, cert. denied, 449 U.S. 865, 101 S.Ct. 197, 66 L.Ed.2d 83 (1980).

7 Only one case contained any reference to heightened expectations of privacy in mobile living quarters. *United States v. Cadena,* 588 F.2d 100, 101-102 (CA5 1979) (*per curiam*). Analogizing to automobile cases, the court upheld the warrantless search of an oceangoing ship while in transit. The court observed that the mobility "exception" required probable cause *and* exigency, and that "the increased measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of probable cause for the search and the exigency of the circumstances excusing the failure to secure a warrant." *Id.,* at 102.

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In all of the other cases, defendants challenged warrantless searches for vehicles claiming either no probable cause or the absence of exigency under *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). *United States v. Montgomery,* 620 F.2d 753, 760 (CA10) ("camper"), cert. denied, 449 U.S. 882, 101 S.Ct. 232, 66 L.Ed.2d 106 (1980); *United States v. Clark,* 559 F.2d 420, 423-425 (CA5) ("camper pick-up truck"), cert. denied, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977); *United States v. Lovenguth,* 514 F.2d 96, 97 (CA9 1975) ("pick up with ... camper top"); *United States v. Cusanelli,* 472 F.2d 1204, 1206 (CA6) (*per curiam*) (two camper trucks), cert. denied, 412 U.S. 953, 93 S.Ct. 3003, 37 L.Ed.2d 1006 (1973); *United States v. Miller,* 460 F.2d 582, 585-586 (CA10 1972) ("motor home"); *United States v. Rodgers,* 442 F.2d 902, 904 (CA5 1971) ("camper truck"); *State v. Million,* 120 Ariz. 10, 15-16, 583 P.2d 897, 902-903 (1978) ("motor home"); *State v. Sardo,* 112 Ariz. 509, 513-514, 543 P.2d 1138, 1142 (1975) ("motor home"). Only *Sardo* involved a vehicle that was not in transit, but the motor home in that case was about to depart the premises.

Two State Supreme Courts have upheld the warrantless search of mobile homes in transit, notwithstanding a claim of heightened privacy interests. See *State v. Mower,* 407 A.2d 729, 732 (Me.1979); *State v. Lepley,* 343 N.W.2d 41, 42-43 (Minn.1984). Those cases-which were not cited in the petition for certiorari-are factually distinguishable from the search of the parked motor home here. In any case, some conflict among state courts on novel questions of the kind involved here is desirable as a means of exploring and refining alternative approaches to the problem.

8 Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities (1984) (to be published in 59 N.Y.U.L.Rev. 677, 761 (1984)). The study elaborated:

"[T]he Court should not hear cases in which a state court has invalidated state action on a federal ground should not be heard by the Court in the absence of a conflict or a decision to treat the case as a vehicle for a major pronouncement of federal law. Without further percolation, there is ordinarily little reason to believe that the issue is one of recurring national significance. In general, correction of error, even regarding a matter of constitutional law, is not a sufficient basis for Supreme Court intervention. This last category differs from a federal court's invalidation of state action in that a structural justification for intervention is generally missing, given the absence of vertical federalism difficulties and the built-in assurance that state courts functioning under significant political constraints are not likely to invalidate state action lightly even on federal grounds.... [The Court] should not grant ... merely to correct perceived error." *Id.,* at 738-739 (footnote omitted).

Chief Justice Samuel Roberts, Retired, of the Pennsylvania Supreme Court has expressed similar concerns. Roberts, The Adequate and Independent State Ground: Some Practical Considerations, 17 IJA Rep., No. 2, pp. 1-2 (1985).

9 See generally 45 Trailer Life, No. 1 (1985); *id.,* No. 2; 22 Motor Home, No. 1 (1985); *id.,* No. 2; 1 R V Lifestyle Magazine, No. 3 (1985).

10 Hellman, The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?, 11 Hastings Const.L.Q. 375, 405 (1984).

11 "Although one of the Court's roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears.... Disagreement in the lower courts facilitates percolation-the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, had the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable.

"Our system is already committed in substantial measure to the principle of percolation. This is one justification for the absence of intercircuit stare decisis. Similarly, state and federal courts daily engage in a process of 'dialectical federalism' wherein state courts are not bound by the holdings of lower federal courts in the same geographical area. But more than past practice and the structure of the judicial system supports a policy of awaiting percolation before Supreme Court intervention. A managerial conception of the Court's role embraces lower court percolation as an affirmative value. The views of the lower courts on a particular legal issue provide the Supreme Court with a means

of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law. The occurrence of a conflict acts as a signaling device to help the Court identify important issues. Moreover, the principle of percolation encourages the lower courts to act as responsible agents in the process of development of national law." Estreicher & Sexton, *supra* n. 8, at 716, 719 (footnotes omitted).

12 B. Cardozo, The Nature of the Judicial Process 179 (1921).

13 *United States v. Leon,* 468 U.S. 897, 913-914, 104 S.Ct. 3405, 3415-3416, 82 L.Ed.2d 677 (1984); *Illinois v. Gates,* 462 U.S. 213, 236-237, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983).

14 "As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history." 456 U.S., at 820, 102 S.Ct., at 2170.

15 In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2045, 99 L.Ed.2d 564 (1971), a plurality refused to apply the automobile exception to an automobile that was seized while parked in the driveway of the suspect's house, towed to a secure police compound, and later searched:

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States* -no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant.' [267 U.S., at 153, 45 S.Ct., at 285,] and the 'automobile exception' despite its label, is simply irrelevant." *Id.,* at 461-462, 91 S.Ct., at 2036 (opinion of Stewart, J., joined by Douglas, BRENNAN, and MARSHALL, JJ.).

In *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), a different plurality approved the seizure of an automobile from a public parking lot, and a later examination of its exterior. *Id.,* at 592-594, 94 S.Ct., at 2470-2471 (opinion of BLACKMUN, J.). Here, of course, we are concerned with the reasonableness of the search, not the seizure. Even if the diminished expectations of privacy associated with an automobile justify the warrantless search of a parked automobile notwithstanding the diminished exigency, the heightened expectations of privacy in the interior of a motor home require a different result.

16 See Suppression Hearing Tr. 7; Tr. of Oral Arg. 27. In addition, a telephonic warrant was only 20 cents and the nearest phone booth away. See Cal.Penal Code Ann. §§ 1526(b), 1528(b) (West 1982); *People v. Morrongiello,* 145 Cal.App.3d 1, 9, 193 Cal.Rptr. 105, 109 (1983).

17 This willingness to search first and later seek justification has properly been characterized as "a decision roughly comparable in prudence to determining whether an electrical wire is charged by grasping it." *United States v. Mitchell,* 538 F.2d 1230, 1233 (CA5 1976) (en banc), cert. denied, 430 U.S. 945, 97 S.Ct. 1578, 51 L.Ed.2d 792 (1977).

18 "The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." 433 U.S., at 13, 97 S.Ct., at 2484.

19 Record, Ex. Nos. 102, 103.

20 Webster's Ninth New Collegiate Dictionary 118, 199, 775 (1983).

21 In refusing to extend the California Supreme Court's decision in *Carney* beyond its context, the California Court of Appeals have had no difficulty in distinguishing the motor home involved there from a Ford van, *People v. Chestnut,* 151 Cal.App.3d 721, 726-727, 198 Cal.Rptr. 8, 11 (1983), and a cab-high camper shell on the back of a pickup truck, *People v. Gordon,*

156 Cal.App.3d 74, 82, 202 Cal.Rptr. 566, 570 (1984). There is no reason to believe that trained officers could not make similar distinctions between different vehicles, especially when state vehicle laws already require them to do so.

22 Cal.Veh. Code Ann. §§ 243, 362, 415, 465, 585 (West 1971 and Supp.1985).

23 § 362 (West 1971).

24 §§ 23221, 23223, 23225, 23226, 23229 (West Supp.1985).

25 Cf. *Cardwell v. Lewis,* 417 U.S., at 590, 94 S.Ct., at 2469 (opinion of BLACKMUN, J.):

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation, and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."

26 "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *United States v. Karo,* 468 U.S., at 714-715, 104 S.Ct., at 3303.

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920 F.3d 584
United States Court of Appeals, Ninth Circuit.

Robert MARTIN; Lawrence Lee Smith; Robert Anderson; Janet F. Bell; Pamela S. Hawkes; and Basil E. Humphrey, Plaintiffs-Appellants,
v.
CITY OF BOISE, Defendant-Appellee.

No. 15-35845
|
Argued and Submitted July 13, 2017 Portland, Oregon
|
Filed April 1, 2019

Synopsis
Background: Homeless persons brought § 1983 action challenging city's public camping ordinance on Eighth Amendment grounds. The United States District Court for the District of Idaho, Ronald E. Bush, United States Magistrate Judge, 834 F.Supp.2d 1103, entered summary judgment in defendants' favor, and plaintiffs appealed. The Court of Appeals, 709 F.3d 890, reversed and remanded. On remand, defendants moved for summary judgment, and the District Court, Bush, United States Magistrate Judge, 993 F.Supp.2d 1237, granted motion in part and denied it in part. Appeal was taken.

Holdings: On denial of panel rehearing and rehearing en banc, the Court of Appeals, Berzon, Circuit Judge, held that:

homeless persons had standing to pursue their claims even after city adopted protocol not to enforce its public camping ordinance when available shelters were full;

plaintiffs were generally barred by *Heck* doctrine from commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions;

Heck doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction;

Heck doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's ordinance; and

Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter.

Reversed and remanded.

Opinion, 902 F.3d 1031, superseded.

Owens, Circuit Judge, filed opinion concurring in part and dissenting in part.

Berzon, Circuit Judge, filed opinion concurring in the denial of rehearing en banc.

M. Smith, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Callahan, Bea, Ikuta, Bennett, and R. Nelson, Circuit Judges, joined.

Bennett, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Bea, Ikuta, and R. Nelson, Circuit Judges, joined, and in which M. Smith, Circuit Judge, joined in part.

Attorneys and Law Firms

***587** Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants.

Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B. Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

Appeal from the United States District Court for the District of Idaho, Ronald E. Bush, Chief Magistrate Judge, Presiding, D.C. No. 1:09-cv-00540-REB

Before: Marsha S. Berzon, Paul J. Watford, and John B. Owens, Circuit Judges.

Concurrence in Order by Judge Berzon;

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Dissent to Order by Judge Milan D. Smith, Jr.;

Dissent to Order by Judge Bennett;

Partial Concurrence and Partial Dissent by Judge Owens

***588 ORDER**

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

BERZON, Circuit Judge, concurring in the denial of rehearing en banc:

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a "distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court ... perceived no error." *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of rehearing en banc); *see also* Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

Despite my distaste for these separate writings, I have, on occasion, written concurrences in the denial of rehearing en banc. On those rare occasions, I have addressed arguments raised for the first time during the en banc process, corrected misrepresentations, or highlighted important facets of the case that had yet to be discussed.

This case serves as one of the few occasions in which I feel compelled to write a brief concurrence. I will not address the dissents' challenges to the *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and Eighth Amendment rulings of *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), as the opinion sufficiently rebuts those erroneous arguments. I write only to raise two points.

First, the City of Boise did not initially seek en banc reconsideration of the Eighth Amendment holding. When this court solicited the parties' positions as to whether the Eighth Amendment holding merits en banc review, the City's initial submission, before mildly supporting en banc reconsideration, was that the opinion is quite "narrow" and its "interpretation of the [C]onstitution raises little actual conflict with Boise's Ordinances or [their] enforcement." And the City noted that it viewed ***589** prosecution of homeless individuals for sleeping outside as a "last resort," not as a principal weapon in reducing homelessness and its impact on the City.

The City is quite right about the limited nature of the opinion. On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. *Martin*, 902 F.3d at 1035. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter.

Second, Judge M. Smith's dissent features an unattributed color photograph of "a Los Angeles public sidewalk." The photograph depicts several tents lining a street and is presumably designed to demonstrate the purported negative impact of *Martin*. But the photograph fails to fulfill its intended purpose for several reasons.

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be

said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.[1]

But even putting aside the use of a pre-*Martin*, outside-the-record photograph from another municipality, the photograph does not serve to illustrate a concrete effect of *Martin*'s holding. The opinion clearly states that it is not outlawing ordinances "barring the obstruction of public rights of way or the erection of certain structures," such as tents, *id.* at 1048 n.8, and that the holding "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place," *id.* at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

What the pre-*Martin* photograph *does* demonstrate is that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem. People with no place to live will sleep outside if they have no alternative. Taking them to jail for a few days is both unconstitutional, for the reasons discussed in the opinion, and, in all likelihood, pointless.

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults* 5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf. The crisis continued to burgeon while ordinances ***590** forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere* in public if one has nowhere else to do so.

For the foregoing reasons, I concur in the denial of rehearing en banc.

M. SMITH, Circuit Judge, with whom CALLAHAN, BEA, IKUTA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit. Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.[1]

I respectfully dissent from our court's refusal to correct this holding by rehearing the case en banc.

I.

The most harmful aspect of the panel's opinion is its misreading of Eighth Amendment precedent. My colleagues cobble together disparate portions of a fragmented Supreme Court opinion to hold that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018). That holding is legally and practically ill-conceived, and conflicts with the reasoning of every other appellate court[2] that has considered the issue.

A.

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). There, the Court addressed a statute that made it a "criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts, regardless of whether they actually used or possessed drugs. *Id.* at 665, 82 S.Ct. 1417. The Court

struck ***591** down the statute under the Eighth Amendment, reasoning that because "narcotic addiction is an illness ... which may be contracted innocently or involuntarily ... a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id.* at 667, 82 S.Ct. 1417.

A few years later, in *Powell*, the Court addressed the scope of its holding in *Robinson*. *Powell* concerned the constitutionality of a Texas law that criminalized public drunkenness. *Powell*, 392 U.S. at 516, 88 S.Ct. 2145. As the panel's opinion acknowledges, there was no majority in *Powell*. The four Justices in the plurality interpreted the decision in *Robinson* as standing for the limited proposition that the government could not criminalize one's status. *Id.* at 534, 88 S.Ct. 2145. They held that because the Texas statute criminalized conduct rather than alcoholism, the law was constitutional. *Powell*, 392 U.S. at 532, 88 S.Ct. 2145.

The four dissenting Justices in *Powell* read *Robinson* more broadly: They believed that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Although the statute in *Powell* differed from that in *Robinson* by covering involuntary conduct, the dissent found the same constitutional defect present in both cases. *Id.* at 567–68, 88 S.Ct. 2145.

Justice White concurred in the judgment. He upheld the defendant's conviction because Powell had not made a showing that he was unable to stay off the streets on the night he was arrested. *Id.* at 552–53, 88 S.Ct. 2145 (White, J., concurring in the result). He wrote that it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.* at 553, 88 S.Ct. 2145.

The panel contends that because Justice White concurred in the judgment alone, the views of the dissenting Justices constitute the holding of *Powell*. *Martin*, 902 F.3d at 1048. That tenuous reasoning—which metamorphosizes the *Powell* dissent into the majority opinion—defies logic.

Because *Powell* was a 4–1–4 decision, the Supreme Court's decision in *Marks v. United States* guides our analysis. 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.' " *Id.* at 193, 97 S.Ct. 990 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)) (emphasis added). When *Marks* is applied to *Powell*, the holding is clear: The defendant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less.

This is hardly a radical proposition. I am not alone in recognizing that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly compelled or involuntary. *See, e.g.*, *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his status as an alcoholic but for his conduct"); ***592** *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) ("Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness .... This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his 'status' as a schizophrenic."); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions.").[3]

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it "unnecessary to consider ... the proper application of *Marks*"). *Hughes v. United States*, ––– U.S. ––––, 138 S.Ct. 1765, 1772, 201 L.Ed.2d 72 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.[4] The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.[5]

Those criticisms, however, were based on the assumption that *Marks* means what it says and says what it means: Only the views of the Justices concurring in the judgment may be considered in construing the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. 990. The Justices did not even think to consider that *Marks* allows dissenting Justices to create the Court's holding. As a *Marks* scholar has observed, such a method of vote counting "would paradoxically create a precedent that contradicted the judgment in that very case."[6] And yet the panel's opinion flouts that common sense rule to extract from *Powell* a holding that does not exist.

What the panel really does is engage in a predictive model of precedent. The panel opinion implies that if a case like *Powell* were to arise again, a majority of the Court would hold that the criminalization of involuntary conduct violates the Eighth Amendment. Utilizing such reasoning, the panel borrows the Justices' robes and adopts that holding on their behalf.

But the Court has repeatedly discouraged us from making such predictions when construing precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). And, for good reason. Predictions about how Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell*—that have arisen since the Court's fragmented opinion. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (noting "the wisdom of allowing difficult issues to mature through ***593** full consideration by the courts of appeals").

In short, predictions about how the Justices will rule ought not to create precedent. The panel's Eighth Amendment holding lacks any support in *Robinson* or *Powell*.

B.

Our panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts.

The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. 892 P.2d 1145 (1995). The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. *Id.* at 1152. The court sensibly reasoned that because *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 1166 (quoting *Powell*, 392 U.S. at 533, 88 S.Ct. 2145). Our panel—bound by the same Supreme Court precedent—invalidates identical California ordinances previously upheld by the California Supreme Court. Both courts cannot be correct.

The California Supreme Court acknowledged that homelessness is a serious societal problem. It explained, however, that:

> Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

Id. at 1157 n.12. By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.[7]

The reasoning of our panel decision also conflicts with precedents of the Fourth and Eleventh Circuits. In *Manning v. Caldwell*, the Fourth Circuit held that a Virginia statute that criminalized the possession of alcohol did not violate the Eighth Amendment when it punished the involuntary actions of homeless alcoholics. 900 F.3d 139, 153 (4th Cir. 2018), *reh'g en banc granted* 741 F. App'x 937 (4th Cir. 2018).[8] ***594** The court rejected the argument that Justice White's opinion in *Powell* "requires this court to hold that Virginia's statutory scheme imposes cruel and unusual punishment because it criminalizes [plaintiffs'] status as homeless alcoholics." *Id.* at 145. The court found that the statute passed constitutional muster because "it is the act of possessing alcohol—not the status of being an alcoholic—that gives rise to criminal sanctions." *Id.* at 147.

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Boise's Ordinances at issue in this case are no different: They do not criminalize the status of homelessness, but only the act of camping on public land or occupying public places without permission. *Martin*, 902 F.3d at 1035. The Fourth Circuit correctly recognized that these kinds of laws do not run afoul of *Robinson* and *Powell*.

The Eleventh Circuit has agreed. In *Joel v. City of Orlando*, the court held that a city ordinance prohibiting sleeping on public property was constitutional. 232 F.3d 1353, 1362 (11th Cir. 2000). The court rejected the plaintiffs' Eighth Amendment challenge because the ordinance "targets conduct, and does not provide criminal punishment based on a person's status." *Id.* The court prudently concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs." *Id.*

We ought to have adopted the sound reasoning of these other courts. By holding that Boise's enforcement of its Ordinances violates the Eighth Amendment, our panel has needlessly created a split in authority on this straightforward issue.

C.

One would think our panel's legally incorrect decision would at least foster the common good. Nothing could be further from the truth. The panel's decision generates dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.

The panel opinion masquerades its decision as a narrow one by representing that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

That excerpt, however, glosses over the decision's actual holding: "We hold only that ... as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." *Id.* Such a holding leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

* * *

Under the panel's decision, local governments can enforce certain of their public health and safety laws only when homeless individuals have the choice to sleep indoors. That inevitably leads to the question of how local officials ought to know whether that option exists.

The number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time. Instead, volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway. Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day. Yet in massive cities ***595** such as Los Angeles, that is simply impossible. Even when thousands of volunteers devote dozens of hours to such "a herculean task," it takes three days to finish counting—and even then "not everybody really gets counted."[9] Lest one think Los Angeles is unique, our circuit is home to many of the largest homeless populations nationwide.[10]

If cities do manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under the false impression that the number of shelter beds exceeds the number of homeless people that night? According to the panel's opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws that prohibit public sleeping and camping.[12] Accordingly, ***596** our panel's decision effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.[13]

As if the panel's actual holding wasn't concerning enough, the logic of the panel's opinion reaches even further in scope. The

opinion reasons that because "resisting the need to ... engage in [ ] life-sustaining activities is impossible," punishing the homeless for engaging in those actions in public violates the Eighth Amendment. *Martin*, 902 F.3d at 1048. What else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination.[14] The panel's reasoning also casts doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.

It is a timeless adage that states have a "universally acknowledged power and duty to enact and enforce all such laws ... as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people." *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20, 22 S.Ct. 1, 46 L.Ed. 55 (1901) (internal quotations omitted). I fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.[15] As we have already begun to witness, our neighborhoods will soon feature "[t]ents ... equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic" and "human waste appearing on sidewalks and at local playgrounds." ***597** [16]

A Los Angeles Public Sidewalk

II.

The panel's fanciful merits-determination is accompanied by a no-less-inventive series of procedural rulings. The panel's opinion also misconstrues two other areas of Supreme Court precedent concerning limits on the parties who can bring § 1983 challenges for violations of the Eighth Amendment.

A.

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). As recognized by Judge Owens's dissent, that conclusion cuts against binding precedent on the issue.

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would "necessarily demonstrate the invalidity of [the plaintiff's] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005); *see also Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson's prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs' requested relief, but *Edwards* cannot bear the weight the panel puts on it. In ***598** *Edwards*, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643, 117 S.Ct. 1584. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.* at 648, 117 S.Ct. 1584.

Here, in contrast, a declaration that the Ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. According to data from the U.S. Department of Housing and Urban Development, the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited.[17] Under the panel's holding that "the government cannot criminalize indigent, homeless people

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for sleeping outdoors, on public property" "as long as there is no option of sleeping indoors," that data necessarily demonstrates the invalidity of the plaintiffs' prior convictions. *Martin*, 902 F.3d at 1048.

B.

The panel also erred in holding that Robert Martin and Pamela Hawkes, who were cited but not convicted of violating the Ordinances, had standing to sue under the Eighth Amendment. In so doing, the panel created a circuit split with the Fifth Circuit.

The panel relied on *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), to find that a plaintiff "need demonstrate only the initiation of the criminal process against him, not a conviction," to bring an Eighth Amendment challenge. *Martin*, 902 F.3d at 1045. The panel cites *Ingraham*'s observation that the Cruel and Unusual Punishments Clause circumscribes the criminal process in that "it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 1046 (citing *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401). This reading of *Ingraham*, however, cherry picks isolated statements from the decision without considering them in their accurate context. The *Ingraham* Court plainly held that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40, 97 S.Ct. 1401. And, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after* it has secured a formal adjudication of guilt." *Id.* (emphasis added). As the *Ingraham* Court recognized, "[T]he decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted* of crimes." *Id.* at 664, 97 S.Ct. 1401 (emphasis added). Clearly, then, *Ingraham* stands for the proposition that to challenge a criminal statute as violative of the Eighth Amendment, the individual must be convicted of that relevant crime.

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. ***599** *Johnson*, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise an Eighth Amendment challenge to the ordinance because although "numerous tickets ha[d] been issued ... [there was] no indication that any Appellees ha[d] been convicted" of violating the sleeping in public ordinance. *Id.* at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.* at 444–45 (citing *Robinson*, 370 U.S. at 663, 82 S.Ct. 1417; *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401).

By permitting Martin and Hawkes to maintain their Eighth Amendment challenge, the panel's decision created a circuit split with the Fifth Circuit and took our circuit far afield from "[t]he primary purpose of (the Cruel and Unusual Punishments Clause) ... [which is] the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (quoting *Powell*, 392 U.S. at 531–32, 88 S.Ct. 2145).

III.

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

I am deeply concerned about the consequences of our panel's unfortunate opinion, and I regret that we did not vote to reconsider this case en banc. I respectfully dissent.

BENNETT, Circuit Judge, with whom BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

I fully join Judge M. Smith's opinion dissenting from the denial of rehearing en banc. I write separately to explain that except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize.

I recognize that we are, of course, bound by Supreme Court precedent holding that the Eighth Amendment encompasses

a limitation "on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (citing *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)). However, the *Ingraham* Court specifically "recognized [this] limitation as one to be applied sparingly." *Id.* As Judge M. Smith's dissent ably points out, the panel ignored *Ingraham*'s clear direction that Eighth Amendment scrutiny attaches only after a criminal conviction. Because the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment, I respectfully dissent from our decision not to rehear this case en banc.

I.

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of ***600** Rights of 1689,[1] and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (observing that one of the themes of the founding era "was that Americans had all the rights of English subjects" and the Framers' "use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection"); *Timbs v. Indiana*, 586 U.S. ––––, 139 S.Ct. 682, ––– L.Ed.2d –––– (2019) (Thomas, J., concurring) ("[T]he text of the Eighth Amendment was 'based directly on ... the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989))). Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 967, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Scalia, J., concurring).

Justice Scalia's concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id.* at 966–85, 111 S.Ct. 2680 (Scalia, J., concurring). Rather than reciting Justice Scalia's *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.* at 976, 111 S.Ct. 2680, his opinion's historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

The English Declaration of Rights's prohibition on "cruell and unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.* at 967, 111 S.Ct. 2680 (Scalia, J., concurring). "Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year." *Ingraham*, 430 U.S. at 664, 97 S.Ct. 1401 (footnote omitted).

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed "vicious punishments for treason," including "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968, 111 S.Ct. 2680. In the view of some historians, "the story of The Bloody Assizes ... helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments." *Furman v. Georgia*, 408 U.S. 238, 254, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys's treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and life imprisonment, Jeffreys sentenced Oates to be "stript of [his] Canonical Habits." ***601** *Harmelin*, 501 U.S. at 970, 111 S.Ct. 2680 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972, 111 S.Ct. 2680 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was " 'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence

to a discretionary Power.' " *Id.* at 973, 111 S.Ct. 2680 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

Thus, Justice Scalia concluded that the prohibition on "cruell and unusuall punishments" as used in the English Declaration, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Harmelin*, 501 U.S. at 974, 111 S.Ct. 2680 (Scalia, J., concurring) (citing *Ingraham*, 430 U.S. at 665, 97 S.Ct. 1401; 1 J. Chitty, Criminal Law 710–12 (5th Am. ed. 1847); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969)).

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.* at 975, 111 S.Ct. 2680. "Wrenched out of its common-law context, and applied to the actions of a legislature ... the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment —specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 976, 111 S.Ct. 2680.

As support for his conclusion that the Framers of the Bill of Rights intended for the Eighth Amendment to reach only certain punishment methods, Justice Scalia looked to "the state ratifying conventions that prompted the Bill of Rights." *Id.* at 979, 111 S.Ct. 2680. Patrick Henry, speaking at the Virginia Ratifying convention, "decried the absence of a bill of rights," arguing that "Congress will loose the restriction of not ... inflicting cruel and unusual punishments. ... What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." *Id.* at 980, 111 S.Ct. 2680 (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)). The Massachusetts Convention likewise heard the objection that, in the absence of a ban on cruel and unusual punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." *Id.* at 979, 111 S.Ct. 2680 (internal quotation marks omitted) (quoting 2 J. Debates on the Federal Constitution, at 111). These historical sources "confirm[ ] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." *Id.* (internal quotation marks omitted) (quoting Granucci, 57 Calif. L. Rev. at 842) (emphasis in *Harmelin*).

In addition, early state court decisions "interpreting state constitutional provisions with identical or more expansive wording (i.e., 'cruel or unusual') concluded that these provisions ... proscribe[d] ... only certain modes of punishment." *Id.* at 983, 111 S.Ct. 2680; *see also* ***602** *id.* at 982, 111 S.Ct. 2680 ("Many other Americans apparently agreed that the Clause only outlawed certain *modes* of punishment.").

In short, when the Framers drafted and the several states ratified the Eighth Amendment, the original public meaning of the Cruel and Unusual Punishments Clause was "to proscribe ... methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction. Incorporation, of course, extended the reach of the Clause to the States, but worked no change in its meaning.

II.

The panel here held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). In so holding, the panel allows challenges asserting this prohibition to be brought in advance of any conviction. That holding, however, has nothing to do with the punishment that the City of Boise imposes for those offenses, and thus nothing to do with the text and tradition of the Eighth Amendment.

The panel pays only the barest attention to the Supreme Court's admonition that the application of the Eighth Amendment to substantive criminal law be "sparing[ ]," *Martin*, 902 F.3d at 1047 (quoting *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401), and its holding here is dramatic in scope and completely unfaithful to the proper interpretation of the Cruel and Unusual Punishments Clause.

"The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed

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for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 531–32, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)). It should, therefore, be the "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007).[2] And permitting a pre-conviction challenge to a local ordinance, as the panel does here, is flatly inconsistent with the Cruel and Unusual Punishments Clause's core constitutional function: regulating the *methods* of punishment that may be inflicted upon one convicted of an offense. *Harmelin*, 501 U.S. at 977, 979, 111 S.Ct. 2680 (Scalia, J., concurring). As Judge Rymer, dissenting in *Jones*, observed, "the Eighth Amendment's 'protections do not attach until after conviction and sentence.' "[3] 444 F.3d at 1147 (Rymer, J., dissenting) ***603** (internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).[4]

The panel's holding thus permits plaintiffs who have never been convicted of any offense to avail themselves of a constitutional protection that, historically, has been concerned with prohibition of "only certain modes of punishment." *Harmelin*, 501 U.S. at 983, 111 S.Ct. 2680; *see also United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997) (citing *Harmelin* for the proposition that a "plurality of the Supreme Court ... has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed").

Extending the Cruel and Unusual Punishments Clause to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point. I doubt that the drafters of our Bill of Rights, the legislators of the states that ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

* * *

At common law and at the founding, a prohibition on "cruel and unusual punishments" was simply that: a limit on the types of punishments that government could inflict following a criminal conviction. The panel strayed far from the text and history of the Cruel and Unusual Punishments Clause in imposing the substantive limits it has on the City of Boise, particularly as to plaintiffs who have not yet even been convicted of an offense. We should have reheard this case en banc, and I respectfully dissent.

Opinion

BERZON, Circuit Judge:

> "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."
>
> — Anatole France, *The Red Lily*

We consider whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent ***604** place of dwelling, lodging, or residence." *Id*. The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof."

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless,

Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones*'s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them. Two of the plaintiffs, we further hold, may be entitled to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.[1] The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

***605** There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — "Sanctuary" — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program.[2] The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.[3]

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days.[4] Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for

30 ***606** days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

A. The Plaintiffs

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. *Cf. Jones*, 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

After this litigation began, the Boise Police Department promulgated a new ***607** "Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise*,

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834 F.Supp.2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs' claims under the *Rooker-Feldman* doctrine. *Id.* at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applied to the plaintiffs' claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell*, 709 F.3d at 897 n.11.

Bell further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id.* at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police. *Id.* at 899–900.

Finally, *Bell* rejected the City's argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id.* at 901 & n.12. We noted that, on summary judgment, the plaintiffs "need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements." *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs' § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" to demonstrate that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87, 114 S.Ct. 2364. According to the district court, "a judgment finding the Ordinances unconstitutional ***608** ... necessarily would imply the invalidity of Plaintiffs' [previous] convictions under those ordinances," and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs' claims for retrospective relief were barred by *Heck*. The district court also rejected as barred by *Heck* the plaintiffs' claim for prospective injunctive relief under § 1983, reasoning that "a ruling in favor of Plaintiffs on even a prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions."

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no "credible threat" of future prosecution. "If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs ...." The court emphasized that the record "suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity" and that "there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families."

This appeal followed.

II. Discussion

A. Standing

We first consider whether any of the plaintiffs has standing to pursue prospective relief.[5] We conclude that there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether Martin and Anderson face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.[6]

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138,

1147, 185 L.Ed.2d 264 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury ***609** is not too speculative for Article III purposes — that the injury is *certainly* impending." *Id*. (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs " need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's ... a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere ***610** of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason — perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel — cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary

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waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

The City argues that Martin faces little risk of prosecution under either ordinance because he has not lived in Boise since 2013. Martin states, however, that he is still homeless and still visits Boise several times a year to visit his minor son, and that he has continued to seek shelter at Sanctuary and River of Life. Although Martin may no longer spend enough time in Boise to risk running afoul of BRM's 17-day limit, he testified that he has unsuccessfully sought shelter at River of Life after being placed on Sanctuary's waiting list, only to discover later in the evening that Sanctuary had no available beds. Should Martin return to Boise to visit his son, there is a reasonable possibility that he might again seek shelter at Sanctuary, only to discover (after BRM has closed for the night) that Sanctuary has no space for him. Anderson, for his part, continues to live in Boise and states that he remains homeless.

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

611 B. *Heck v. Humphrey

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the plaintiffs maintain that *Heck* should not bar their claims because, with one exception, all of the plaintiffs were sentenced to time served.[7] It would therefore have been impossible for the plaintiffs to obtain federal habeas relief, as any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." *See* 28 U.S.C. § 2254(a); *Spencer v. Kemna*, 523 U.S. 1, 7, 17–18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). With regard to prospective relief, the plaintiffs emphasize that they seek only equitable protection against *future* enforcement of an allegedly unconstitutional statute, and not to invalidate any prior conviction under the same statute. We hold that although the *Heck* line of cases precludes most — but not all — of the plaintiffs' requests for retrospective relief, that doctrine has no application to the plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id.* at 487, 500, 93 S.Ct. 1827. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (emphasis added).

Heck addressed a § 1983 action brought by an inmate seeking compensatory and punitive damages. The inmate alleged that state and county officials had engaged in unlawful investigations and knowing destruction of exculpatory evidence. *Heck*, 512 U.S. at 479, 114 S.Ct. 2364. The Court in *Heck* analogized a § 1983 action of this type, which called into question the validity of an underlying conviction, to a cause of action for malicious prosecution, *id.* at 483–84, 114 S.Ct. 2364, and went on to hold that, as with a malicious prosecution claim, a plaintiff in such an action must demonstrate a favorable termination of the criminal proceedings before seeking tort relief, *id.* at 486–87, 114 S.Ct.

2364. "[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared ***612** invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.*

Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) extended *Heck*'s holding to claims for declaratory relief. *Id.* at 648, 117 S.Ct. 1584. The plaintiff in *Edwards* alleged that he had been deprived of earned good-time credits without due process of law, because the decisionmaker in disciplinary proceedings had concealed exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed," *Edwards* held, it was "not cognizable under § 1983." *Id. Edwards* went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not *Heck*-barred, reasoning that a "prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id.* (emphasis added).

Most recently, *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), stated that *Heck* bars § 1983 suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81–82, 125 S.Ct. 1242 (emphasis omitted). But *Wilkinson* held that the plaintiffs in that case *could* seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings in the future. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." *Id.* at 82, 125 S.Ct. 1242.

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck's* favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a petition for habeas corpus. *See Muhammad v. Close*, 540 U.S. 749, 752 & n.2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004). But in *Spencer*, five Justices suggested that *Heck* may not apply in such circumstances. *Spencer*, 523 U.S. at 3, 118 S.Ct. 978.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck*, yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id.* at 18–19, 118 S.Ct. 978 (Souter, J., concurring). Justice Souter stated that in his view "*Heck* has no such effect," and that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21, 118 S.Ct. 978. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear ... that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25, 118 S.Ct. 978 n.8 (Stevens, J., dissenting).

***613** Relying on the concurring and dissenting opinions in *Spencer*, we have held that the "unavailability of a remedy in habeas corpus because of mootness" permitted a plaintiff released from custody to maintain a § 1983 action for damages, "even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits." *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. *Id.* at 1192 & n.12.

2. Retrospective Relief

Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall.* It is undisputed that

all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall.*

Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[ ] ... the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[ ] ... any criminal fines paid ... [or] costs of incarceration billed."

With respect to these two incidents, the district court erred in finding that the plaintiffs' Eighth Amendment challenge was barred by *Heck*. Where there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application. 512 U.S. at 486–87, 114 S.Ct. 2364; *see also* *Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

Relying on *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the City argues that the Eighth Amendment, and the Cruel and Unusual Punishments Clause in particular, have no application where there has been no conviction. The City's reliance on *Ingraham* is misplaced. As the Supreme Court observed in *Ingraham*, the Cruel and Unusual Punishments Clause not only limits the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to the severity of the crime, but also "imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667, 97 S.Ct. 1401. "This [latter] protection governs the criminal law process as a whole, not only the imposition of punishment postconviction." *Jones*, 444 F.3d at 1128.

***614** *Ingraham* concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual punishment." 430 U.S. at 667, 97 S.Ct. 1401. *Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted. If conviction were a prerequisite for such a challenge, "the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process." *Jones*, 444 F.3d at 1129. For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate only the initiation of the criminal process against him, not a conviction.

3. Prospective Relief

The district court also erred in concluding that the plaintiffs' requests for prospective injunctive relief were barred by *Heck.* The district court relied entirely on language in *Wilkinson* stating that "a state prisoner's § 1983 action is barred (absent prior invalidation) ... no matter the relief sought (damages or equitable relief) ... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82, 125 S.Ct. 1242. The district court concluded from this language in *Wilkinson* that a person convicted under an allegedly unconstitutional statute may never challenge the validity or application of that statute after the initial criminal proceeding is complete, even when the relief sought is prospective only and independent of the prior conviction. The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff*, *Edwards*, and *Wilkinson* compel the opposite conclusion.

Wolff held that although *Preiser* barred a § 1983 action seeking restoration of good-time credits absent a successful challenge in federal habeas proceedings, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid ... regulations." *Wolff*, 418

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U.S. at 555, 94 S.Ct. 2963. Although *Wolff* was decided before *Heck*, the Court subsequently made clear that *Heck* effected no change in the law in this regard, observing in *Edwards* that "[o]rdinarily, a prayer for ... prospective [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Edwards*, 520 U.S. at 648, 117 S.Ct. 1584 (emphasis added). Importantly, the Court held in *Edwards* that although the plaintiff could not, consistently with *Heck*, seek a declaratory judgment stating that the procedures employed by state officials that deprived him of good-time credits were unconstitutional, he *could* seek an injunction barring such allegedly unconstitutional procedures in the future. *Id.* Finally, the Court noted in *Wilkinson* that the *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement*," *Wilkinson*, 544 U.S. at 81, 125 S.Ct. 1242 (emphasis added), alluding ***615** to an existing confinement, not one yet to come.

The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*'s holding that the *Heck* doctrine bars a § 1983 action "no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration" applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. *Id.* at 81–82, 125 S.Ct. 1242 (emphasis added). As *Wilkinson* held, "claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)" are distant from the "core" of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. *Id.* at 82, 125 S.Ct. 1242.

In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.

C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.

"Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401.

Robinson, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease — "apparently an illness which may be contracted innocently or involuntarily" — and observing that a "law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of ***616** cruel and unusual punishment," *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666–67, 82 S.Ct. 1417.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones*, 444 F.3d at 1133. In *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

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Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home." *Id.* at 532, 88 S.Ct. 2145 (plurality opinion).

The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' ...." *Id.* at 533, 88 S.Ct. 2145.

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. ... For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." *Id.* at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, ... could not prevent himself from appearing in public places." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Jones*, 444 F.3d at 1135; *see also* *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, "[w]hether sitting, lying, and sleeping are ***617** defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id.* at 1137.

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Id.* at 1138. We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[8]

We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. ... As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct." *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla. 1992); *see also* *Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a "sleeping in public ordinance as applied against the homeless

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is unconstitutional"), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).[9]

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly ***618** Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." 444 F.3d at 1123.

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping" — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to the plaintiffs' requests for retrospective relief, except as such claims relate to Hawkes's July 2007 citation under the Camping Ordinance and Martin's April 2009 citation under the Disorderly Conduct Ordinance. We **REVERSE** and **REMAND** with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive, and to the plaintiffs' claims for retrospective relief insofar as they relate to Hawkes' July 2007 citation or Martin's April 2009 citation.[10]

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).

I also agree that *Heck* and its progeny have no application where there is no "conviction ***619** or sentence" that would be undermined by granting a plaintiff's request for relief under § 1983. *Heck*, 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). I therefore concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief.

Where I part ways with the majority is in my understanding of *Heck*'s application to the plaintiffs' claims for declaratory and injunctive relief. In *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), the Supreme Court explained where the *Heck* doctrine stands today:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison

> proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 81–82. Here, the majority acknowledges this language in *Wilkinson*, but concludes that *Heck*'s bar on any type of relief that "would necessarily demonstrate the invalidity of confinement" does not preclude the prospective claims at issue. The majority reasons that the purpose of *Heck* is "to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge," and so concludes that the plaintiffs' prospective claims may proceed. I respectfully disagree.

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck*'s application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards*, the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner's confinement "as a substantive matter," it improperly distinguished as not *Heck*-barred *all* claims alleging only procedural violations. 520 U.S. at 645, 117 S.Ct. 1584. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction "as a substantive matter" are barred by *Heck*. *Id.*; *see also* *Wilkinson*, 544 U.S. at 82, 125 S.Ct. 1242 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures*" and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]' " (emphasis added) (quoting *Heck*, 512 U.S. at 487, 114 S.Ct. 2364)).

Edwards thus leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. *See* ***620** *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (assuming that a § 1983 claim challenging "the constitutionality of the ordinance under which [the petitioner was convicted]" would be *Heck*-barred). I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief.

We are not the first court to struggle applying *Heck* to "real life examples," nor will we be the last. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 21, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (Ginsburg, J., concurring) (alterations and internal quotation marks omitted) (explaining that her thoughts on *Heck* had changed since she joined the majority opinion in that case). If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.

All Citations

920 F.3d 584, 19 Cal. Daily Op. Serv. 2944, 2019 Daily Journal D.A.R. 2762

Footnotes

1 Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative*, L.A. County, http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/ [https://web.archive.org/web/?20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), https://twitter.com/CountyofLA/status/936012841533894657.

1 With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev., Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018), https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

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2 Our court previously adopted the same Eighth Amendment holding as the panel in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), but that decision was later vacated. 505 F.3d 1006 (9th Cir. 2007).

3 That most of these opinions were unpublished only buttresses my point: It is uncontroversial that *Powell* does not prohibit the criminalization of involuntary conduct.

4 Transcript of Oral Argument at 14, *Hughes v. United States*, ––– U.S. ––––, 138 S.Ct. 1765, 201 L.Ed.2d 72 (2018) (No. 17-155).

5 *Id.* at 49.

6 Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

7 Justice Black has also observed that solutions for challenging social issues should be left to the policymakers:

> I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem .... [I]t seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

Powell, 392 U.S. at 539–40, 88 S.Ct. 2145 (Black, J., concurring).

8 Pursuant to Fourth Circuit Local Rule 35(c), "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." I mention *Manning*, however, as an illustration of other courts' reasoning on the Eighth Amendment issue.

9 Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist (Jan. 22, 2019, 2:08 PM), https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php. The panel conceded the imprecision of such counts in its opinion. *See Martin*, 902 F.3d at 1036 n.1 (acknowledging that the count of homeless individuals "is not always precise"). But it went on to disregard that fact when tying a city's ability to enforce its laws to these counts.

10 The U.S. Department of Housing and Urban Development's 2018 Annual Homeless Assessment Report to Congress reveals that municipalities within our circuit have among the highest homeless populations in the country. In Los Angeles City and County alone, 49,955 people experienced homelessness in 2018. The number was 12,112 people in Seattle and King County, Washington, and 8,576 people in San Diego City and County, California. *See supra* note 1, at 18, 20. In 2016, Las Vegas had an estimated homeless population of 7,509 individuals, and California's Santa Clara County had 6,556. Joaquin Palomino, *How Many People Live On Our Streets*?, S.F. Chronicle (June 28, 2016), https://projects.sfchronicle.com/sf-homeless/numbers.

11 Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-ShelteringReport.pdf. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?*, S.F. Chronicle (June 29, 2016), https://projects.sfchronicle.com/sfhomeless/shelters. Perhaps these staggering sums are why the panel went out of its way to state that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Martin*, 902 F.3d at 1048.

12 Indeed, in the few short months since the panel's decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, Sacramento Bee (Sept. 18, 2019, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html ("Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month."); Michael Ellis Langley, *Policing Homelessness*, Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/

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article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, "[a]s far as camping ordinances and things like that, we're probably holding off on [issuing citations] for a while" in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision*, KXLY (Oct. 2, 2018, 12:50 PM), https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activityfollowing-9th-circuit-court-decision/801772571 ("Because the City of Moses Lake does not currently have a homeless shelter, city officials can no longer penalize people for sleeping in public areas."); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter*, Voice of OC (Feb. 14, 2019), https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/ (stating that Judge David Carter of the U.S. District Court for the Central District of California has "warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances"); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate*, Santa Barbara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm ("In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.").

13 In 2017, for example, San Francisco received 32,272 complaints about homeless encampments to its 311-line. Kevin Fagan, *The Situation On The Streets*, S.F. Chronicle (June 28, 2018), https://projects.sfchronicle.com/sf-homeless/2018-state-of-homelessness.

14 *See* Heater Knight, *It's No Laughing Matter—SF Forming Poop Patrol to Keep Sidewalks Clean*, S.F. Chronicle (Aug. 14, 2018), https://www.sfchronicle.com/bayarea/heatherknight/article/It-s-nolaughing-matter-SF-forming-Poop-13153517.php.

15 *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosismedieval-diseases-spreading-homeless/584380/ (describing the recent outbreaks of typhus, Hepatitis A, and shigellosis as "disaster[s] and [a] public-health crisis" and noting that such "diseases spread quickly and widely among people living outside or in shelters").

16 Scott Johnson and Peter Kiefer, *LA's Battle for Venice Beach: Homeless Surge Puts Hollywood's Progressive Ideals to the Test*, Hollywood Reporter (Jan. 11, 2019, 6:00 AM), https://www.hollywoodreporter.com/features/las-homeless-surge-puts-hollywoods-progressive-ideals-test-1174599.

17 *See* U.S. Dep't of Hous. & Urban Dev., PIT Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-PITCounts-by-CoC.xlsx; U.S. Dep't of Hous. & Urban Dev., HIC Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018HIC-Counts-by-CoC.xlsx. Boise is within Ada County and listed under CoC code ID-500.

1 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) (Section 10 of the English Declaration of Rights) ("excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted.").

2 *Jones*, of course, was vacated and lacks precedential value. 505 F.3d 1006 (9th Cir. 2007). But the panel here resuscitated *Jones*'s errant holding, including, apparently, its application of the Cruel and Unusual Punishments Clause in the absence of a criminal conviction. We should have taken this case en banc to correct this misinterpretation of the Eighth Amendment.

3 We have emphasized the need to proceed cautiously when extending the reach of the Cruel and Unusual Punishments Clause beyond regulation of the methods of punishment that may be inflicted upon conviction for an offense. *See United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (repeating *Ingraham*'s direction that "this particular use of the cruel and unusual punishment clause is to be applied sparingly" and noting that *Robinson* represents "the rare type of case in which the clause has been used to limit what may be made criminal"); *see also United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) (limiting application of *Robinson* to crimes lacking an actus reus). The panel's holding here throws that caution to the wind.

4 Judge Friendly also expressed "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973).

1 The United States Department of Housing and Urban Development ("HUD") requires local homeless assistance and prevention networks to conduct an annual count of homeless individuals on one night each January, known as the PIT Count, as a condition of receiving federal funds. State, local, and federal governmental entities, as well as private service providers, rely on the PIT Count as a "critical source of data" on homelessness in the United States. The parties acknowledge that the PIT Count is not always precise. The City's Director of Community Partnerships, Diana Lachiondo, testified that the PIT Count is "not always the ... best resource for numbers," but also stated that "the point-in-time count is our best snapshot" for counting the number of homeless individuals in a particular region, and that she "cannot give ... any other number with any kind of confidence."

2 The record suggests that BRM provides some limited additional non-emergency shelter programming which, like the Discipleship Program, has overtly religious components.

3 The intake form states in relevant part that "We are a Gospel Rescue Mission. Gospel means 'Good News,' and the Good News is that Jesus saves us from sin past, present, and future. We would like to share the Good News with you. Have you heard of Jesus? ... Would you like to know more about him?"

4 The parties dispute the extent to which BRM actually enforces the 17- and 30-day limits.

5 Standing to pursue retrospective relief is not in doubt. The only threshold question affecting the availability of a claim for retrospective relief — a question we address in the next section — is whether such relief is barred by the doctrine established in *Heck*.

6 Although the SAC is somewhat ambiguous regarding which of the plaintiffs seeks prospective relief, counsel for the plaintiffs made clear at oral argument that only two of the plaintiffs, Martin and Anderson, seek such relief, and the district court considered the standing question with respect to Martin and Anderson only.

7 Plaintiff Pamela Hawkes was convicted of violating the Camping Ordinance or Disorderly Conduct Ordinance on twelve occasions; although she was usually sentenced to time served, she was twice sentenced to one additional day in jail.

8 Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes. *Id.* at 1136.

9 In *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id.* Those unrefuted facts were critical to the court's holding. *Id.* As discussed below, the plaintiffs here have demonstrated a genuine issue of material fact concerning whether they have been denied access to shelter in the past or expect to be so denied in the future. *Joel* therefore does not provide persuasive guidance for this case.

10 Costs shall be awarded to the plaintiffs.

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168 Cal.App.4th 1062
Court of Appeal, First District, Division 5, California.

The PEOPLE, Plaintiff and Respondent,
v.
Boot HUGHSTON, Defendant and Appellant.

No. A118939.
|
Nov. 26, 2008.
|
Certified for Partial Publication.*

Synopsis

Background: Defendant pleaded guilty after denial of motion to suppress evidence in the Superior Court, Mendocino County, No. SC–UK–CR–CR–06–72017–02, David E. Nelson, J., of possession of cocaine, methylenedioxymethamphetamine (MDMA), and psilocybin mushrooms for sale, and possession of nitrous oxide. Defendant appealed.

Holdings: The Court of Appeal, Simons, J., held that:

defendant had reasonable expectation of privacy in tarp structure where car containing drugs was kept;

automobile exception to search warrant requirement did not authorize entry into tarp structure; and

automobile's contents were not admissible under inevitable discovery exception to exclusionary rule.

Reversed and remanded with directions.

Attorneys and Law Firms

****893** Joseph Morehead, San Francisco, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, René A. Chacón and Bruce Ortega, Deputy Attorneys General for Plaintiff and Respondent.

SIMONS, J.

***1064** Like a 19th-Century itinerant peddler, appellant Boot Hughston arrived in Mendocino County in the summer of 2006 to sell his wares. ***1065** Instead of pushing a cart, he drove a rented Hummer, and in place of pots, pans and other dry goods, he sold illegal drugs. At a designated campsite, appellant pitched a tent-like structure that surrounded the Hummer, several smaller tents and an eating area. Then he began pitching his products. An undercover federal drug enforcement agent observed him engage in two hand-to-hand transactions. Searches of his backpack and the Hummer revealed an inventory sufficient to justify charges for four narcotics offenses: possession of cocaine for sale (Health & Saf.Code, § 11351) (count one),[1] possession of methylenedioxymethamphetamine (MDMA) for sale (Health & Saf.Code, §§ 11378, 11401, subd. (a)) (count two), possession of psilocybin mushrooms for sale (Health & Saf.Code, § 11378) (count three), and possession of nitrous oxide (Pen.Code, § 381b) (count four). Appellant unsuccessfully challenged the two searches in the trial court pursuant to Penal Code section 1538.5 and renews that challenge on appeal. In the unpublished portion of our decision, we uphold the backpack search; in the published portion we conclude the warrantless search of the Hummer, located inside the tent structure, violated the Fourth Amendment to the United States Constitution. We remand to permit appellant to withdraw his guilty plea if he chooses to do so.

FACTUAL AND PROCEDURAL BACKGROUND

At the hearing on the motion to suppress, special agent Nishiyama testified that he was working in an undercover capacity for the California Department of Justice, Bureau of Narcotic Enforcement, on June 23, 2006, at the Sierra Nevada World Music Festival held at the Mendocino County Fairgrounds. One of his goals was to look for sales of controlled substances within the fairgrounds, because the World Music Festival had experienced previous problems with such transactions. At approximately 7:30 p.m., Nishiyama first noticed appellant on the fairgrounds, standing with two other people, holding an open backpack into which all three were peering. He saw appellant reach into the backpack, take out a small baggie, remove two capsules from it, and hand them to one of the other two people. He then saw

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that person hand appellant a couple of bills, at least one of which did not appear to be a $1 bill.

Based on his observations, as well as his training and experience with illegal drug sales, Nishiyama concluded the exchange was a narcotics transaction. He decided to detain appellant, and he believed appellant's backpack contained other narcotics. ****894** Nishiyama called the sheriff's office and asked that a uniformed sheriff's deputy respond to his location and detain appellant.

***1066** Before a deputy arrived, Nishiyama observed appellant meet up with another person, an unidentified male. Nishiyama again observed a transaction between the men: appellant reached into the backpack, removed a capsule from a plastic baggie and handed it to the other man. After looking at the capsule in the palm of his hand, the unidentified male handed one bill to appellant.

The first uniformed deputy to respond to Nishiyama's call for assistance, Deputy Nordine, drove by appellant in a marked patrol car. Nishiyama thought appellant appeared “unsettled because [as] the patrol car had gone by him,” appellant immediately changed direction and walked away from the it. Two other uniformed deputies, McBride and Riboli, arrived on the scene, and Nishiyama told them to detain appellant. They did so.

Appellant was transported to a fire station across the street from the fairgrounds that served as a base of operations for the officers. Nishiyama arrived shortly thereafter, was informed by the deputies of the backpack's contents, and searched the backpack himself. Nishiyama testified he discovered approximately 20 more of the capsules he had observed earlier. These capsules were later determined to contain MDMA. He also found plastic baggies containing psilocybin mushrooms, and several other small baggies containing cocaine. In the backpack, Nishiyama also discovered a set of keys on a keychain with a small card stating the keys were for a Hertz rental, a white Hummer, with a specific license plate number.

Upon completion of the search, Nishiyama placed appellant under arrest. At no point was appellant read his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Nishiyama questioned appellant about the Hummer, and appellant informed Nishiyama he was the renter. Nishiyama then asked appellant where the vehicle was parked, and appellant told him “it was in a parking lot somewhere in the front of the fairgrounds.” Nishiyama directed Riboli to search the fairgrounds' parking lots for the Hummer.

Riboli eventually located the vehicle on the fairgrounds and confirmed its license plate number. Nishiyama walked to the Hummer's location. All but the left front bumper of the vehicle was covered by tarps, which were attached to a 10–by 30–foot aluminum A-frame. The tarps were attached with “zip ties” to the A-frame and to the front grill, mirrors, and other parts of the Hummer. One side of the tarp structure had a flap that was not zip tied all the way down; it appeared to be a means to enter and exit the tarp-covered area. Almost the entire vehicle, as well as a makeshift kitchen, sleeping bags, chairs, and tents were contained within the tarp structure.

***1067** Nishiyama pulled aside the untied tarp flap, entered the structure and tested the key in the driver's side door to see if it fit the lock, which it did. After opening the Hummer's door, Nishiyama searched the vehicle. The search revealed approximately 800 more MDMA capsules, “a couple pounds” of psilocybin mushrooms, marijuana, approximately a quarter pound of cocaine, a tank of nitrous oxide approximately 5 feet tall, about 1,000 balloons, cash, and appellant's wallet.

After the search was completed, Nishiyama learned that Hertz had requested the Hummer be towed. Nishiyama directed Nordine to have the vehicle towed and to “do the CHP 180,” a form used by law ****895** enforcement agencies in California whenever they tow a vehicle. Completion of the form involves a survey of the condition of the exterior and interior of the vehicle, as well as an inventory of all articles found inside of the vehicle. After the CHP 180 form was completed, the Hummer was loaded onto a flatbed towing truck and driven away.

An information was filed September 20, 2006, charging appellant with the four narcotics offenses. After his motion to suppress was denied by the trial court, appellant pled guilty to counts one and two and admitted the special allegation to count one. The court sentenced him to three years eight months in prison, stayed execution, and placed him on formal probation for 60 months.

DISCUSSION

I. *Standard of Review*

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362, 45 Cal.Rptr.2d 425, 902 P.2d 729; see also *People v. Woods* (1999) 21 Cal.4th 668, 673–674, 88 Cal.Rptr.2d 88, 981 P.2d 1019 ["while we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, we exercise our independent judgment in determining the legality of a search [or detention] on the facts so found"].)

II.–III.[**]

***1068** IV. *Did the Trial Court Err in Denying the Motion to Suppress as to the Contraband Found in the Hummer?*

The trial court concluded the search of appellant's Hummer was legal under the so-called automobile exception to the Fourth Amendment's warrant requirement. The exception permits the warrantless search of a vehicle if there is probable cause to believe the vehicle contains evidence of a crime, even though there are no exigent circumstances that preclude obtaining a search warrant. (*Maryland v. Dyson* (1999) 527 U.S. 465, 466–467, 119 S.Ct. 2013, 144 L.Ed.2d 442.) Appellant contends the search was outside the scope of the automobile exception because in order to access the interior of the vehicle the officers first had to enter the tarp structure that enclosed the Hummer, and this entry violated the Fourth Amendment. Respondent argues appellant lacked a legitimate privacy interest in the tarp structure and, in any event, the evidence was admissible under the inevitable discovery exception to the exclusionary rule.

A. *Did Appellant Have an Objectively Reasonable Expectation of Privacy in the Tarp Structure?*

"The Fourth Amendment protects an individual's reasonable expectation of privacy against unreasonable intrusion on the part of the government." (*People v. Jenkins* (2000) 22 Cal.4th 900, 971, 95 Cal.Rptr.2d 377, 997 P.2d 1044.) A person seeking to invoke the protection of the Fourth Amendment must demonstrate both that he harbored a subjective expectation of privacy and that the expectation was objectively reasonable. ****896** (*People v. Ayala* (2000) 23 Cal.4th 225, 255, 96 Cal.Rptr.2d 682, 1 P.3d 3.) An objectively reasonable expectation of privacy is "one society is willing to recognize as reasonable." (*People v. Camacho* (2000) 23 Cal.4th 824, 831, 98 Cal.Rptr.2d 232, 3 P.3d 878.) Stated differently, it is an expectation that has " ' "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ' " (*Ayala,* at p. 255, 96 Cal.Rptr.2d 682, 1 P.3d 3.) In this case, the parties agree appellant demonstrated a subjective expectation of privacy in the tarp structure; thus, we need only decide whether appellant met his burden of showing his expectation of privacy was objectively reasonable. (*Jenkins,* at p. 972, 95 Cal.Rptr.2d 377, 997 P.2d 1044.) Because the relevant facts are not in dispute, our review on this issue is de novo. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1172, 9 Cal.Rptr.2d 834, 832 P.2d 146.)

It is important to describe the appearance and location of the structure at issue in this case. The structure was composed of an aluminum frame covered with tarps; the tarps were tied to and draped over and around the frame and the Hummer. The structure completely enclosed a 10–by 30–foot area that ***1069** included within it tents, an eating area, and the Hummer. A loose flap permitted ingress and egress. The front fender of the Hummer was exposed to the outside, providing a view of the vehicle's license plate. Nishiyama described the location of the tarp structure as follows: "It's a camping area. There's tents, there's cars, there's people, campsites. By campsites, I mean people had laid out chairs to sit in various areas. It's part of the [fairgrounds] that's set aside for people to camp in." Appellant's companions testified they erected the structure as a place to stay during the three days of the music festival.

The particular arrangement of the vehicle and tarp structure in this case is unusual if not unique in Fourth Amendment jurisprudence. However, we conclude the tarp structure is equivalent to a large camping tent. There are superficial differences from common camping tents: the structure was makeshift, it was large enough to encompass smaller tents and an eating area, and its design incorporated the entirety of the Hummer. Nevertheless, the structure was functionally identical to a camping tent, in that it was a temporary structure designed to provide its occupants a degree of protection from the elements and privacy while staying outdoors. No California court has ruled on whether a person has a reasonable expectation of privacy in a camping tent, but other courts have extended Fourth Amendment protections to them. *U.S. v. Gooch* (9th Cir.1993) 6 F.3d 673 (*Gooch*)

held a defendant had an objectively reasonable expectation of privacy in a tent pitched in a legal public campground. *Gooch* declined to analogize the tent to a mobile home, which may be subject to the automobile exception. (*Id.* at p. 677.) In *U.S. v. Sandoval* (9th Cir.2000) 200 F.3d 659, 660 (*Sandoval*), the court extended the holding in *Gooch* to reach a "makeshift tent" that was "located on Bureau of Land Management ... land." (See also *People v. Schafer* (Colo.1997) 946 P.2d 938, 944 [tent pitched on "unimproved, publicly accessible land"]; *Alward v. State* (1996) 112 Nev. 141, 150, 912 P.2d 243 (*Alward*), overruled on another ground in *Rosky v. State* (2005) 121 Nev. 184, 191 & fn. 10, 111 P.3d 690 [tent pitched on Bureau of Land Management (BLM) land].)

Respondent relies on *People v. Thomas* (1995) 38 Cal.App.4th 1331, 45 Cal.Rptr.2d 610 (*Thomas*) to argue appellant was required to show he and his friends were camped lawfully, and asserts "where a tent is pitched on public property without permits ****897** or permission or in violation of law there can exist no reasonable expectation of privacy." But *Thomas* held only that a homeless man living in a cardboard box on a public sidewalk, in violation of a law expressly prohibiting him from doing so, did not have a reasonable expectation of privacy in the box. (*Id.* at pp. 1333–1334, 45 Cal.Rptr.2d 610; see also *United States v. Ruckman* (10th Cir.1986) 806 F.2d 1471, 1472–1473 (*Ruckman*) [person occupying natural cave on federal land does not have reasonable expectation of privacy].) The defendant in *Thomas* was aware of the illegality because the ***1070** city previously had removed another box he had occupied from the same location. (*Thomas,* at pp. 1333–1334, 45 Cal.Rptr.2d 610.)

Thomas's holding provides little support for respondent's contention that appellant was required to prove his occupancy of the searched site was legal by showing he had paid required camping fees and erected a structure of permissible size. In *Thomas,* the illegality and defendant's knowledge of the illegality were undisputed. (*Thomas, supra,* 38 Cal.App.4th at pp. 1333–1335, 45 Cal.Rptr.2d 610.) Further, the ultimate issue is not whether appellant had "a property right" in the location searched by the police, but whether he had "a legitimate expectation of privacy" in that location. (*Rakas v. Illinois* (1978) 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387; see also *Gooch, supra,* 6 F.3d at p. 677; *Alward, supra,* 112 Nev. at p. 150, 912 P.2d 243.) *Sandoval* is directly on point. Although it was "unclear" whether the defendant had permission to camp on the BLM land, the court held the reasonableness of the defendant's expectation of privacy did not turn on that issue. (*Sandoval, supra,* 200 F.3d at pp. 660–661.) "Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights." (*Id.* at p. 661.) In distinguishing an earlier decision denying Fourth Amendment rights to a squatter in a private residence, *Sandoval* pointed out that "camping on public land, even without permission, is far different from squatting in a private residence. A private residence is easily identifiable and clearly off-limits, whereas public land is often unmarked and may appear to be open to camping. Thus, we think it much more likely that society would recognize an expectation of privacy for the camper on public land than for the squatter in a private residence." (*Sandoval,* at p. 661.)

The tent structure was erected on land specifically set aside for camping during the music festival. Appellant's occupancy is clearly distinguishable from the squatter in a private residence (*Sandoval*), or the occupant of a cardboard box (*Thomas*) or a cave (*Ruckman*), who could not reasonably believe he or she had permission to live there. Considering the totality of the circumstances (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132, 12 Cal.Rptr.3d 483), we reject respondent's argument that more evidence of appellant's right to camp at the site was required to justify an objectively reasonable expectation of privacy in the tarp structure. As the Colorado Supreme Court reasoned in *Schafer, supra,* 946 P.2d at p. 944: "Whether pitched on vacant open land or in a crowded campground, a tent screens the inhabitant therein from public view. Though it cannot be secured by a deadbolt and can be entered by those who respect not others, the thin walls of a tent nonetheless are notice of its occupant's claim to privacy unless consent to enter be asked and given. One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated. Whether of short or longer term duration, one's occupation of ***1071** a tent is ****898** entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms. [Citations.]"

Because appellant had a reasonable expectation of privacy, entry into the tarp structure violated the Fourth Amendment unless an exception to the warrant requirement applied. (See *Katz v. U.S.* (1967) 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576; *Woods, supra,* 21 Cal.4th at p. 674, 88 Cal.Rptr.2d 88, 981 P.2d 1019.) The trial court concluded the automobile exception authorized the vehicle search. However, in order to access the Hummer's interior, Nishiyama had to enter and pass through the tarped-off area. Respondent

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cites no authority for the proposition that the automobile exception authorized that warrantless entry. (See 3 LaFave, Search and Seizure (4th ed.2004) § 7.2(b), p. 561 [lesser expectation of privacy in vehicle does not extend to premises housing the vehicle].) Nor does respondent argue that the exigent circumstances exception, or any other exception to the warrant requirement, was applicable. The warrantless entry into the tarp structure invalidated the subsequent vehicle search.[3]

B. *Does the Inevitable Discovery Exception Apply?*

Respondent contends that even if the search in this case was unlawful, the trial court properly denied appellant's motion to suppress under the inevitable discovery doctrine. The inevitable discovery doctrine acts as an exception to the exclusionary rule, and permits the admission of otherwise excluded evidence "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police." (*Nix v. Williams* (1984) 467 U.S. 431, 447, 104 S.Ct. 2501, 81 L.Ed.2d 377 (*Nix*).) The purpose of the exception is "to prevent the setting aside of convictions that would have been obtained without police misconduct." (*People v. Robles* (2000) 23 Cal.4th 789, 800, 97 Cal.Rptr.2d 914, 3 P.3d 311.) It is the prosecution's burden to "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." (*Nix,* at p. 444, 104 S.Ct. 2501; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 62, 17 Cal.Rptr.3d 710, 96 P.3d 30.)[4] In that event, the deterrence rationale ***1072** underlying the exclusionary rule would have "so little basis that the evidence should be received." (*Nix,* at p. 444, 104 S.Ct. 2501.)[5]

At the outset, we note the existence of sufficient probable cause to obtain a warrant to enter the tent and search the ****899** Hummer legally does not justify application of the inevitable discovery exception. (*Walker, supra,* 143 Cal.App.4th at p. 1215, 49 Cal.Rptr.3d 831.) A violation of the Fourth Amendment may not be disregarded " 'simply because the police, had they thought about the situation more carefully, *could* have come up with a lawful means of achieving their desired results.' [Citation.]" (*Id.* at p. 1216, fn. 30, 49 Cal.Rptr.3d 831; see also *Robles, supra,* 23 Cal.4th at p. 801, 97 Cal.Rptr.2d 914, 3 P.3d 311 [inevitable discovery exception inapplicable even accepting that police could have obtained a warrant based on plain view of stolen car in garage]; *U.S. v. Reilly* (9th Cir.2000) 224 F.3d 986, 995 [" 'to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the [F]ourth [A]mendment' "].)

Instead, in order to justify application of the inevitable discovery exception, respondent must demonstrate by a preponderance of the evidence that, due to a separate line of investigation, application of routine police procedures, or some other circumstance, the drugs seized from the Hummer would have been discovered by lawful means. The showing must be based not on speculation but on "demonstrated historical facts capable of ready verification or impeachment." (*Nix, supra,* 467 U.S. at pp. 444–445, fn. 5, 104 S.Ct. 2501.) The inevitable discovery exception requires the court " 'to determine, viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred.' " (*U.S. v. Cabassa* (2d Cir.1995) 62 F.3d 470, 473.)

For example, in *Nix,* police officers discovered the location and condition of the victim's body through an unlawful interrogation of the defendant, but the court concluded that a simultaneous independent search would have inevitably led to discovered of the evidence. (*Nix, supra,* 467 U.S. at pp. 449–450, 104 S.Ct. 2501.) In other cases, a search would have occurred as a matter of routine police procedure. (See, e.g., *United States v. Andrade* (9th Cir.1986) 784 F.2d 1431, 1433 [narcotics in bag in possession of lawfully arrested defendant inevitably would have been discovered through lawful inventory search]; *United States v. Martinez–Gallegos* (9th Cir.1987) 807 F.2d 868, 869–870 [fact that defendant previously had been deported inevitably would ***1073** have been discovered through examination of his immigration file]; see also *U.S. v. Boatwright* (9th Cir.1987) 822 F.2d 862, 864–865 [citing and discussing cases].)

There are no comparable circumstances in this case. Respondent's argument is largely based on the fact that appellant's companions packed up the tarp structure and left the fairgrounds after appellant was taken into custody and the Hummer was towed away, leaving the entire site empty. From this fact, respondent speculates that "the dismantling of the tent/tarp structure would have left the Hummer alone on public land and available for the officers to search per the automobile exception" or pursuant to impound and inventory of the vehicle, which would have led to discovery of the contraband. But appellant's friends departed only *after* the police had searched the Hummer, found the drugs, and seized

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both. The record provides no basis for concluding that, absent the search, appellant's friends would have departed before the end of the World Music Festival, abandoning the Hummer and its illegal cargo to the police.

Moreover, respondent provided no evidence that appellant's companions would not have gained access to the interior of ****900** the Hummer and removed or destroyed the drugs. A number of courts have recognized that the possibility someone would have removed or destroyed the evidence at issue undermines a showing of inevitability. (See *People v. Bennett* (1998) 17 Cal.4th 373, 392, fn. 7, 70 Cal.Rptr.2d 850, 949 P.2d 947 ["[w]e do not know of any decision holding that the prosecution may resort to the inevitable discovery doctrine to prevent suppression of illegally seized evidence when, as here, a defendant could have caused the removal or destruction of the evidence"]; *U.S. v. Cabassa, supra,* 62 F.3d at p. 473 ["[i]f the process of obtaining a search warrant has barely begun, for example, the inevitability of discovery is lessened by the probability, under all the circumstances of the case, that the evidence in question would no longer have been at the location of the illegal search when the warrant actually issued"]; *U.S. v. Boatwright, supra,* 822 F.2d at p. 865 [the defendant "would not have waited patiently beside his weapons for an agent to arrive with a warrant"]; *U.S. v. Roberts* (2d Cir.1988) 852 F.2d 671, 676 ["we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena. Thus, the government cannot show that its subpoena would have inevitably resulted in the discovery of the suppressed documents"]; *United States v. Owens* (10th Cir.1986) 782 F.2d 146, 153 [the defendant or a friend might have moved the contraband]; cf. *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1217, 100 Cal.Rptr.2d 556 (conc. opn. by Morrison, J.) [noting the evidence showed the occupant of the house "was not poised to destroy the evidence"].)

***1074** Because respondent failed to present evidence sufficient to support a finding that the contraband would have been discovered by lawful means, the trial court erred in denying appellant's motion to suppress with respect to the contraband located in the Hummer.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court. That court is directed to vacate the guilty plea if appellant makes an appropriate motion within 30 days after the remittitur is issued. In that event, the superior court should reinstate the original charges contained in the information, if the prosecution so moves, and proceed to trial or another appropriate disposition. If no timely motion to vacate the guilty plea is filed by appellant, the superior court is directed to reinstate the original judgment.

We concur: JONES, P.J., and NEEDHAM, J.

All Citations

168 Cal.App.4th 1062, 85 Cal.Rptr.3d 890, 08 Cal. Daily Op. Serv. 14,593, 2008 Daily Journal D.A.R. 17,599

Footnotes

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, parts II. and III. of this opinion are not certified for publication.

1 As to count one, the information alleged that appellant possessed for sale a substance containing 28.5 grams or more of cocaine and 57 grams or more of a substance containing cocaine (Pen.Code, § 1203.073, subd. (b)(1)).

** See footnote *, *ante*.

3 There is evidence that Hertz requested that Nishiyama seize the Hummer, but this request provided no justification for the warrantless entry of the tarp structure housing the Hummer.

4 Elsewhere, respondent's burden has been described as a showing of a " 'reasonable probability that [the challenged evidence] would have been procured in any event by lawful means.' [Citation.]" (*People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1215, 49 Cal.Rptr.3d 831 (*Walker*).) We understand these two formulations to be substantively

identical. (See *Walker,* at pp. 1215–1216, 49 Cal.Rptr.3d 831 [referring to, at different points in the decision, both formulations].)

5 “The inevitable discovery doctrine ... is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.” (*Murray v. United States* (1988) 487 U.S. 533, 539, 108 S.Ct. 2529, 101 L.Ed.2d 472.)

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207 Cal.App.4th 954
Court of Appeal, First District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,
v.
Charles Byon NISHI, Defendant and Appellant.

No. A129724.
|
July 13, 2012.
|
Certified for Partial Publication.*
|
Review Denied Oct. 17, 2012.

Synopsis

Background: Defendant was convicted in the Superior Court, Marin County, No. SC169462A, Paul M. Haakenson, J., of attempting to deter or resist an executive officer in the performance of duty. Defendant appealed.

Holdings: The Court of Appeal, Dondero, J., held that:

defendant did not have a reasonable expectation of privacy in unauthorized campsite on public land;

defendant's statement in e-mail, that he was "armed and will now fire on all Sheriff and Fish & Game after this email," was a direct threat of violence that was not protected under the First Amendment; and

evidence of defendant's e-mail threat supported conviction.

Affirmed.

Attorneys and Law Firms

****886** Hilda Scheib, Esq., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Seth K. Schalit, Supervising Deputy Attorney General, Laurence K. Sullivan, Supervising Deputy Attorney General, for Plaintiff and Respondent.

DONDERO, J.

***957** Defendant Charles Nishi was convicted following a jury trial of one count of attempting to deter or resist an executive officer in the performance of duty in violation of Penal Code section 69.[1] In this appeal he challenges the denial of his pretrial motion to suppress evidence, and complains that he was denied the right to testify at trial. He also argues that the conviction is not supported by the evidence, and objects to the imposition of a probation condition that directs him to undergo a psychological evaluation and take medication as directed by a physician. In a supplemental brief, defendant claims instructional error and improper denial of his motion for ***958** self-representation. We conclude that defendant had no reasonable expectation of privacy in the area searched, and was not denied the right to testify at trial. The evidence supports the conviction and defendant's motion for self-representation was untimely. No instructional error occurred. The medication condition of probation is both reasonably related to deterring future criminality, and neither vague nor overbroad. We therefore affirm the judgment.

STATEMENT OF FACTS

The United States Air Force Freedom of Information and Privacy Act Office of ****887** the Department of Defense received an e-mail signed by Charles Nishi, who referred to himself as "The Shepherd," dated March 27, 2010, which was designated as an "EMERGENCY COMMUNICATION." In the e-mail Nishi stated he had been located after numerous California Highway Patrol helicopter flights, and complained that California's Department of Fish and Game had been repeatedly and unlawfully shooting at protected mountain lions in the "Open Space" to "PROVOKE AN ATTACK which endangers the public." Nishi petitioned for an immediate "shut down" of "Marin County Sheriffs and Fish & Games operations," and asked the United States Fish and Wildlife Service and the Department of Justice to "take control of all wild life activities" in the Marin County Indian Valley Open Space Preserve to prevent further slaughter of mountain lions. He also declared: "I am armed and will now fire on all Sheriff and Fish & Game after this email so either shut them down or put some boots on the ground to join the battle, remember that if they kill me what is going to happen to the human race by APOLLO or the same beings on Codex Dresden." Defendant further pointed out he had informed California's Department of Fish and Game that the United

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States Air Force was "monitoring their activities" through air support.

The Department of Defense forwarded the e-mail to the Marin County Sheriff's Department on March 29, 2010. Deputy Sheriff Christopher Henderson, an officer who had often investigated cases of "criminal threats" to law enforcement, was given the e-mail with directions to "take care of it." Deputy Henderson reviewed the e-mail and was alarmed by its nature, detail, length and content. He decided the message represented a "credible threat" and "safety issue," so he issued a computer-generated "Officer Safety/Welfare Check" bulletin, which he sent to regional law enforcement agencies, including the Department of Fish and Game. In the bulletin the deputy identified defendant Charles Nishi of Novato as the author of an angry, confrontational e-mail sent to military officials, and included a description and photograph of him. The bulletin also mentioned a warning from defendant in the e-mail that he "is armed and will 'fire on' Sheriff and Fish and Game personnel if confronted." Deputy Henderson's primary objective in issuing the bulletin was to effectuate a medical evaluation of defendant.

***959** Brian Sanford, superintendant in charge of operations for the Indian Valley Open Space Preserve, received the e-mail and Deputy Henderson's bulletin. As a result, he posted the e-mail and directed his staff "not to go into that preserve" until contact was made with defendant. Charles Armor, regional manager for the Bay Delta region of California's Department of Fish and Game, became concerned for the safety of his staff after learning of the contents of defendant's e-mail. He advised his staff "not to wear their uniforms," and be "a little more vigilant" while working in the field.

Marin County Deputy Sheriff Brenndon Bosse, who has patrol responsibilities in the Indian Valley Open Space Preserve, also received defendant's e-mail and the associated bulletin from Deputy Henderson. He was delegated the duty to proceed to the Indian Valley Open Space Preserve to contact defendant. Deputy Bosse was acquainted with defendant due to prior contacts: his prior infractions in 2009 for camping in the preserve without a permit, and unsubstantiated reports made by defendant of the shooting of mountain lions. Defendant had been cooperative and nonthreatening with Deputy Bosse in the past. Nevertheless, "because of the threatening statement" in the e-mail that he "would ****888** fire upon Sheriff's deputies or Fish and Game officers," Bosse stayed near cover as he hiked in the preserve searching for defendant.

About 6:00 p.m. on March 31, 2010, Deputy Bosse located defendant at a fire road in the Indian Valley Open Space Preserve. Defendant affirmed he sent the e-mail, but did not acknowledge he wrote the paragraph that threatened to "fire upon Sheriff's deputies or Fish and Game officers." Defendant consented to a search for weapons, and exclaimed that the e-mail "worked" by keeping the officers "off the preserve." He was then arrested and transported to the psychiatric facility at Marin General Hospital. During a subsequent search of defendant's campsite Bosse discovered boxes of new shotgun shells under a tarp next to a tent, although no firearm was found.

DISCUSSION

I. The Denial of the Motion to Suppress Evidence.

Defendant complains of the warrantless search of his campsite, and specifically the seizure of the boxes of shotgun shells from a tarp "immediately surrounding" his tent. Defendant argues that his "expectation of privacy in the campsite was subjectively as well as objectively reasonable, given his homeless status and the presumed willingness of society to recognize an expectation of privacy for a homeless camper on secluded public land." Defendant's position is that the tarp was within the "curtilage" of his campsite, and thus "entitled to Fourth Amendment protections." The Attorney ***960** General responds that defendant "had no reasonable expectation of privacy in the location where the ammunition was found," so no Fourth Amendment violation occurred as a result of the warrantless search.

In reviewing the trial court's denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182, 58 Cal.Rptr.2d 385, 926 P.2d 365; *People v. Miranda* (1993) 17 Cal.App.4th 917, 922, 21 Cal.Rptr.2d 785.) We independently review the trial court's application of the law to the facts. (*People v. Alvarez, supra,* at p. 182, 58 Cal.Rptr.2d 385, 926 P.2d 365.)

The threshold issue before us is " 'whether the challenged action by the officer "has infringed an interest of the defendant which the Fourth Amendment was designed to protect." [Citations.] ...' [Citations.]" (*People v. Shepherd* (1994) 23 Cal.App.4th 825, 828, 28 Cal.Rptr.2d 458.) " 'An illegal search or seizure violates the federal constitutional

rights only of those who have a legitimate expectation of privacy in the invaded place or seized thing. [Citation.] The legitimate expectation of privacy must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge.' [Citation.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171, 9 Cal.Rptr.2d 834, 832 P.2d 146, italics omitted; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 971, 95 Cal.Rptr.2d 377, 997 P.2d 1044; *People v. Roybal* (1998) 19 Cal.4th 481, 507, 79 Cal.Rptr.2d 487, 966 P.2d 521.)

"A defendant has the burden at trial of establishing a legitimate expectation of privacy in the place searched or the thing seized." (*People v. Jenkins, supra,* 22 Cal.4th 900, 972, 95 Cal.Rptr.2d 377, 997 P.2d 1044.) "A person seeking to invoke the protection of the Fourth Amendment must demonstrate both that he harbored a subjective expectation of privacy and that the expectation was objectively ****889** reasonable. [Citation.] An objectively reasonable expectation of privacy is 'one society is willing to recognize as reasonable.' [Citation.] Stated differently, it is an expectation that has ' " 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " ' [Citation.]" (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1068, 85 Cal.Rptr.3d 890 (*Hughston*); see also *Smith v. Maryland* (1979) 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220; *United States v. Dodds* (10th Cir.1991) 946 F.2d 726, 728 (*Dodds*).)

" 'A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. [Citation.]' [Citation.]" (*Rains v. Belshé* (1995) 32 Cal.App.4th 157, 173, 38 Cal.Rptr.2d 185.) "There is no set formula for determining whether a person has a reasonable expectation of privacy in the place searched, but the totality of the ***961** circumstances are considered. [Citation.] Among the factors sometimes considered in making the determination are whether the defendant has a possessory interest in the thing seized or place searched [citation], 'whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion; whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.' [Citation.]" (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132, 12 Cal.Rptr.3d 483.)

The most significant, and ultimately controlling, factor in the case before us is that defendant was not lawfully or legitimately on the premises where the search was conducted. The uncontradicted evidence reveals that camping on the Indian Valley Open Space Preserve was prohibited without a permit. Defendant had no authorization to camp within or otherwise occupy the public land. On at least four or five recent occasions he had been cited by officers for "illegal camping" and evicted from other campsites in the preserve.

Thus, both the illegality, and defendant's awareness that he was illicitly occupying the premises without consent or permission, are undisputed. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (*Rakas v. Illinois* (1978) 439 U.S. 128, 143, fn. 12, 99 S.Ct. 421, 58 L.Ed.2d 387.) Defendant was not in a position to legitimately consider the campsite—or the belongings kept there—as a place society recognized as private to him. (*Dodds, supra,* 946 F.2d 726, 728–729.) Nor did he have the right to exclude others from that place. He had no ownership, lawful possession, or lawful control of the premises searched. (See *United States v. Gale* (D.C.Cir.1998) 136 F.3d 192, 195–196; *United States v. Carr* (10th Cir.1991) 939 F.2d 1442, 1446.) A "person can have no reasonable expectation of privacy in premises on which they are wrongfully present... ." (*United States v. Gutierrez–Casada* (D.Kan.2008) 553 F.Supp.2d 1259, 1270; see also *United States v. McRae* (6th Cir.1998) 156 F.3d 708, 711; *Dodds, supra,* at pp. 728–729.)

Defendant's unlawful, temporary occupation of the campsite distinguishes the present case from *United States v. Gooch* (9th Cir.1993) 6 F.3d 673, 676–677, in which the court concluded that the defendant had an objectively reasonable expectation of privacy in a tent pitched for several days in a public campground where he was "legally permitted to camp." (*Id.* at p. 677; see also *United States v. Basher* (9th Cir.2011) 629 F.3d 1161, 1167–1168.) In ****890** *United States v. Sandoval* (9th Cir.2000) 200 F.3d 659, 660–661 (*Sandoval*), the court extended the holding in *Gooch* to find a legitimate expectation of privacy associated with the seizure of a medicine bottle discovered during a search of a "makeshift ***962** tent" "located on Bureau of Land Management" property, (*id.* at p. 660), where it was "unclear whether Sandoval had permission to be there." (*Id.* at p. 661.) The defendant's tent in *Sandoval* was located in an area that was heavily covered by vegetation and virtually impenetrable. In addition, the tent was closed on all four sides, and the medicine bottle was not visible from outside. (*Id.* at p. 660.)

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The court in *Sandoval* concluded: "[W]e do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land. Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights." (*Id.* at p. 661, fn. omitted.)

Similarly, in *Hughston, supra,* 168 Cal.App.4th 1062, 1068–1069, 1071, 85 Cal.Rptr.3d 890, the defendant was found to have "a reasonable expectation of privacy" for Fourth Amendment purposes in an aluminum frame covered with tarps that was erected within a designated site on land specifically set aside for camping during a music festival. The court in *Hughston* declared: " 'One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated.' " (*Id.* at p. 1070, 85 Cal.Rptr.3d 890, quoting *People v. Schafer* (Colo.1997) 946 P.2d 938, 944.)

Here, in contrast to *Sandoval* and *Hughston,* not only was defendant clearly camped in a prohibited location, the shotgun shells were seized from *outside* his tent, in a pile of debris under a loose tarp. While a tent located in a public campground may be considered a private area where people sleep and keep valuables, functionally somewhat comparable to a house, apartment, or hotel room, the remainder of defendant's unauthorized, undeveloped campsite was a dispersed, ill-defined site, exposed and open to public view. The area around the tent was not within a defined residential curtilage in which defendant had a reasonable expectation of privacy. (*United States v. Basher, supra,* 629 F.3d 1161, 1169.) Also, after his repeated removal by officers from campsites he had occupied in the same preserve in the recent past, defendant was conscious of the illegality, which further tends to negate his legitimate expectation of privacy in that location. (*People v. Thomas* (1995) 38 Cal.App.4th 1331, 1333–1334, 45 Cal.Rptr.2d 610 (*Thomas*).)

We find the decision in *United States v. Ruckman* (10th Cir.1986) 806 F.2d 1471, persuasive in the present case. In *Ruckman,* the defendant lived in a natural cave located in a remote area of southern Utah on land owned by the United States and controlled by the Bureau of Land Management. He attempted to enclose the cave by "fashioning a crude entrance wall from boards and other materials which surrounded a so-called 'door.' " (*Id.* at p. 1472.) A warrantless search of the cave resulted in seizure of firearms and "anti-personnel booby traps." (*Ibid.*) As in the case before us, the evidence established that ***963** "Ruckman was admittedly a trespasser on federal lands and subject to immediate ejectment" (*ibid.*) by authorities "at any time." (*Id.* at p. 1473.) The court pointed out that " 'whether the occupancy and construction were in bad faith,' " and the " 'legal right to occupy the land and build structures on it,' " were factors " 'highly relevant' " to the issue of the defendant's expectation of privacy. (*Id.* at p. 1474, quoting *Amezquita v. Hernandez–Colon* (1st Cir.1975) 518 F.2d 8, 12.) The court determined "that Ruckman's cave is ****891** not subject to the protection of the Fourth Amendment." (*Ruckman, supra,* at p. 1472.)

Here, as in *Ruckman,* defendant was a trespasser on public land, and occupied the campsite without authority in bad faith. "Where, as here, an individual 'resides' in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does *not* have an objectively reasonable expectation of privacy. (*United States v. Ruckman* (10th Cir.1986) 806 F.2d 1471, 1474 [rejecting a claim of privacy in a cave on federal property because the determination whether a place constitutes a person's 'home' must take into account the means by which it was acquired and whether it is occupied without any legal right]; *Amezquita v. Hernandez–Colon* (1st Cir.1975) 518 F.2d 8, 11–12 [no privacy right in a squatter's community on public property]; *State v. Cleator* (1993) 71 Wash.App. 217 [857 P.2d 306, 308–309] [no privacy right in a tent on public property]; *State v. Mooney* (1991) 218 Conn. 85 [588 A.2d 145, 152, 154] [no privacy right in a squatter's 'home' under a bridge abutment].)" (*Thomas, supra,* 38 Cal.App.4th 1331, 1334–1335, 45 Cal.Rptr.2d 610.)[2] We therefore conclude that the warrantless search of defendant's campsite did not violate the Fourth Amendment.

II. The Failure of the Trial Court to Advise Defendant of his Right to Testify.[**]

III. The Evidence to Support the Conviction of a Violation of Section 69.

Next, defendant maintains that his conviction of a violation of section 69 is not supported by the evidence. Defendant contends that his e-mail neither "directly threatened the sheriff or Fish & Game department," nor "showed any intent that the federal government convey" his threat to those officers. He also argues that his "threat did not have as its requisite purpose the deterrence of local officials from performing their duties," but rather was "intended to ***964** convince the federal agencies" to intervene to halt actions

defendant considered unlawful—that is, the unauthorized shooting of mountain lions.

A. The Standard of Review.

We first consider the nature of our review of the evidence. Defendant requests that we "employ [an] independent review standard," due to the "plausible First Amendment defense to [the] charge."

"In *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499 [104 S.Ct. 1949, 80 L.Ed.2d 502], the United States Supreme Court explained that 'in cases raising First Amendment issues ... an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 36, 82 Cal.Rptr.3d 323, 190 P.3d 664.) "[W]hen the appellate issue is whether a particular communication falls outside the protection of the First Amendment, independent review is called for, 'both to be sure that the speech in question actually falls within the unprotected category and to confine the ****892** perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' [Citation.]" (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161–1162, 72 Cal.Rptr.3d 231 (*Krinsky*).) "Relying on *Bose,*" the California Supreme Court "held in *In re George T.* [(2004) 33 Cal.4th 620, [16 Cal.Rptr.3d 61, 93 P.3d 1007]], that when a plausible First Amendment defense is raised, a reviewing court should independently review the entire record in determining the sufficiency of evidence supporting a juvenile court's finding that the minor made a criminal threat within the meaning of section 422." (*Lindberg, supra,* at p. 37, 82 Cal.Rptr.3d 323, 190 P.3d 664.) The court "explained that independent review of the constitutionally relevant facts is necessary in cases involving First Amendment issues 'to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat.' ([*In re George T., supra,*] at p. 632 [16 Cal.Rptr.3d 61, 93 P.3d 1007].) Independent review is employed 'precisely to make certain that what the government characterizes as speech falling within an unprotected class actually does so.' [Citation.]" (*Ibid.*)

"Thus, when called upon to draw ' "the line between speech unconditionally guaranteed and speech [that] may legitimately be regulated," ' 'we "examine for ourselves the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." ' [Citations.]" (*Krinsky, supra,* 159 Cal.App.4th 1154, 1161–1162, 72 Cal.Rptr.3d 231.) " 'Independent review is not the equivalent of ***965** de novo review "in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes" ' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue... .' [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th 1, 36, 82 Cal.Rptr.3d 323, 190 P.3d 664.) "[T]o the limited extent that the court below resolved evidentiary disputes, made credibility determinations, or made findings of fact that are not relevant to the First Amendment issue, we uphold those rulings if they are supported by substantial evidence." (*Krinsky, supra,* at p. 1162, 72 Cal.Rptr.3d 231, citing *In re George T., supra,* 33 Cal.4th 620, 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.)

Here, the charge of a violation of section 69 focused on defendant's proclamation that he was "armed and will now fire on all Sheriff and Fish & Game after this email." The direct threat of violence to Fish and Game or sheriff's department officials who entered the Marin County Indian Valley Open Space Preserve was not protected speech under the First Amendment. (*People v. Monterroso* (2004) 34 Cal.4th 743, 776, 22 Cal.Rptr.3d 1, 101 P.3d 956.) "[T]rue threats are not constitutionally protected." (*People v. Dunkle* (2005) 36 Cal.4th 861, 919, 32 Cal.Rptr.3d 23, 116 P.3d 494.) As the California Supreme Court explained in *People v. Toledo* (2001) 26 Cal.4th 221, 233, 109 Cal.Rptr.2d 315, 26 P.3d 1051, "penalizing speech does not offend First Amendment principles as long as, ' "the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." ' [Citations.]" (*People v. Jackson* (2009) 178 Cal.App.4th 590, 598, 100 Cal.Rptr.3d 539.) " ' "[T]he state may penalize threats, even ****893** those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, ' "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs... ." ' [Citations.]" ... A statute that

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is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. [Citation.]' [Citation.]" (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 536–537, 118 Cal.Rptr.3d 420.)

" ' "When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." ' [Citations.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 804, 112 Cal.Rptr.3d 542.) Further, " ' "As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its ***966** circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out," a statute proscribing such threats "is not unconstitutional for lacking a requirement of immediacy or imminence." ' [Citations.]" (*People v. Monterroso, supra,* 34 Cal.4th 743, 776, 22 Cal.Rptr.3d 1, 101 P.3d 956.)

Therefore, "defendant has not raised any First Amendment arguments, and an independent standard of review is not applicable. When the First Amendment is not implicated, defendant's sufficiency of the evidence challenge is evaluated under the substantial evidence test. [Citations.] 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]" (*People v. Wilson, supra,* 186 Cal.App.4th 789, 805, 112 Cal.Rptr.3d 542.) The standard is " 'whether any rational trier of fact could find the legal elements [of section 69] satisfied beyond a reasonable doubt... .' [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th 1, 36–37, 82 Cal.Rptr.3d 323, 190 P.3d 664.)

B. The Evidence That Supports the Conviction of a Violation of Section 69.

Former section 69, under which defendant was charged and convicted, stated, "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." (Stats.1983, ch. 1092, § 232, p. 4022.) "The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the ****894** second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814, 66 Cal.Rptr.2d 701, 941 P.2d 880.) The first form of a violation of section 69 "encompasses attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future." (*In re Manuel G., supra,* at p. 817, 66 Cal.Rptr.2d 701, 941 P.2d 880, italics omitted.) The second form of violating section 69 "assumes that the officer is engaged in such duty when resistance is offered," and "the officers must have been acting lawfully when the defendant resisted arrest." (*In re Manuel G., supra,* at p. 816, 66 Cal.Rptr.2d 701, 941 P.2d 880.)

***967** The case against defendant proceeded exclusively on the first form of a violation of section 69, which has "been called ' "attempting to deter," ' " (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984, 77 Cal.Rptr.3d 912) and is "established by ' "[a] threat, unaccompanied by any physical force" ' and may involve either an officer's immediate or future performance of his duty. [Citation.]" (*Id.* at p. 985, 77 Cal.Rptr.3d 912.) To avoid infringement on protected First Amendment speech, "the term 'threat' has been limited to mean a threat of unlawful violence used in an attempt to deter the officer. [Citations.] The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made." (*In re Manuel G., supra,* 16 Cal.4th 805, 814–815, 66 Cal.Rptr.2d 701, 941 P.2d 880; see also *People v. Superior Court* (*Anderson*) (1984) 151 Cal.App.3d 893, 896–897, 199 Cal.Rptr. 150.) "[A] violation of section 69 requires a specific intent to interfere with the executive officer's performance of his duties... ." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153, 124 Cal.Rptr.2d 373, 52 P.3d 572; see *People v. Patino* (1979) 95 Cal.App.3d 11, 27, 156 Cal.Rptr. 815.)

We find substantial evidence in the record to support the conviction. While defendant submits that the purpose of his e-mail was merely to dissuade the Fish and Game and sheriff's

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departments from continuing to proceed with a program of unlawfully eradicating mountain lions or "his cats," either directly or through the assistance of federal authorities, the evidence also convincingly demonstrates an intent to deter officials from patrolling or otherwise performing duties in the Indian Valley Open Space Preserve by threatening to "fire on" them if they appeared there. Attempts to deter either an officer's immediate performance of a duty or the performance of such a duty at some time in the future constitute a violation of the statute. (*In re Manuel G., supra,* 16 Cal.4th 805, 817, 66 Cal.Rptr.2d 701, 941 P.2d 880.) Defendant essentially acknowledged as much when he was encountered by Deputy Bosse, and remarked that the e-mail "worked" by keeping the officers "off the preserve." Moreover, the message had the contemplated effect. The superintendent in charge of operations for the Indian Valley Open Space Preserve directed his staff "not to go into that preserve" until contact was made with defendant. The regional manager for the Bay Delta region of the Department of Fish and Game advised his staff "not to wear their uniforms," and be "a little more vigilant when they're working in the fields." Deputy Bosse testified that in light of the e-mail, he patrolled with greater care during his search for defendant.

That the e-mail was not separately or directly sent to the intended victims fails to negate proof of either an attempt to deter or prevent an officer from ****895** performing a duty or the requisite specific intent to interfere with the executive officer's performance of duties. The statute does not require that a threat be personally communicated to the victim by the person who makes ***968** the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861, 123 Cal.Rptr.2d 193; *In re David L.* (1991) 234 Cal.App.3d 1655, 1659, 286 Cal.Rptr. 398.) The inference may be drawn from the evidence that defendant intended, and expected or at least foresaw, a message with an unequivocal threat to shoot Fish and Game and sheriff's department officers would be conveyed from the Department of Defense to the intended law enforcement targets of the threat. (*People v. Hamilton* (2009) 45 Cal.4th 863, 936, 89 Cal.Rptr.3d 286, 200 P.3d 898.) Section 69 also does not require a showing that defendant had the present ability to carry out the threats; evidence that the letter contained the threats was sufficient to support a finding that defendant violated section 69. (*Hamilton, supra,* at p. 936, 89 Cal.Rptr.3d 286, 200 P.3d 898; *People v. Hines* (1997) 15 Cal.4th 997, 1060, 64 Cal.Rptr.2d 594, 938 P.2d 388.) We conclude that the elements of a violation of section 69 are established by substantial evidence.

IV.–VI.[***]

DISPOSITION

Accordingly, the judgment is affirmed.

We concur: MARCHIANO, P.J., and MARGULIES, J.

All Citations

207 Cal.App.4th 954, 143 Cal.Rptr.3d 882, 12 Cal. Daily Op. Serv. 8017, 2012 Daily Journal D.A.R. 9687

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II., IV., V., and VI.

1 All further statutory references are to the Penal Code unless otherwise indicated. Defendant was acquitted by the jury of additional counts of making criminal threats. (§ 422.)

2 *Thomas* held that a homeless man living in a cardboard box on a public sidewalk, in violation of a law expressly prohibiting him from doing so, did not have a reasonable expectation of privacy in the box. (*Thomas, supra,* 38 Cal.App.4th 1331, 1333–1335, 45 Cal.Rptr.2d 610.)

** See footnote *, *ante*.

*** See footnote *, *ante*.

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946 P.2d 938
Supreme Court of Colorado,
En Banc.

The PEOPLE of the State of Colorado, Plaintiff–Appellant,
v.
Scott E. SCHAFER, Defendant–Appellee.

No. 97SA142.
|
Sept. 15, 1997.

Synopsis
After he was charged with aggravated robbery and carrying concealed weapon, defendant moved to suppress evidence. The District Court, Montezuma County, Sharon Hansen, J., granted motion. People brought interlocutory appeal. The Supreme Court, Hobbs, J., held that: (1) person camping on unimproved and apparently unused land that is not fenced or posted against trespassing, and in absence of personal notice against trespass, has reasonable expectation of privacy in tent and personal effects therein, for purposes of Fourth Amendment and state constitutional provision prohibiting unreasonable searches and seizures; (2) defendant had standing to contest warrantless search of his tent and backpack inside tent on unimproved land under Fourth Amendment; (3) defendant had reasonable expectation of privacy in his closed tent and backpack inside tent; and (4) neither exigent circumstances nor probable cause existed so as to justify warrantless search.

Affirmed and case returned.

Attorneys and Law Firms

***940** Michael F. Green, District Attorney, Twenty–Second Judicial District, Cortez, for Plaintiff–Appellant.

David F. Vela, Colorado State Public Defender, William Herringer, Deputy State Public Defender, Durango, for Defendant–Appellee.

Opinion

Justice HOBBS delivered the opinion of the court.

This interlocutory appeal is brought by the prosecution, pursuant to section 16–12–102(2), 8A C.R.S. (1996 Supp.), and C.A.R. 4.1, from an order of the Montezuma County District Court granting the motion of defendant Scott E. Schafer (Schafer) to suppress evidence discovered as the result of a warrantless search of his tent and backpack. The District Attorney for the Twenty–Second Judicial District contends that the order should be reversed because Schafer lacked standing to challenge the search, or, alternatively, because exigent circumstances obviated the need for a search warrant. We affirm the district court's suppression ruling.

I.

On the morning of October 19, 1996, at approximately 10:00 a.m., an armed robbery took place at the Chief One Stop convenience store in Cortez, Colorado. The clerk reported that the robber had fled the store on foot, heading east. Cortez police officers arrived at the scene and began to search the area based on the store clerk's description of the perpetrator. The police were informed by a friend of the clerk that a "transient" was camping in a tent behind Stromstead's Restaurant, about a half mile east of the Chief One Stop. Two police officers proceeded to the location of the tent, where they were joined by two other officers.

The district court found that the tent was standing on vacant land that was "junky, with broken glass, trash, and many dirt tracks/roads." Although the land was privately owned, it was publicly accessible and used by townspeople for parties. There were no fences or signs prohibiting entry onto the land. Schafer owned the tent and personal items therein, including the backpack.[1] Schafer was not present when the police officers arrived or at any time during the ensuing search. The flaps of the tent were closed and the entrance was zippered shut. The officers did not have a search warrant.

One of the officers opened the flaps and zipper and entered the tent, where he found clothes, a bedroll, and a backpack. The officer opened the backpack, removed an address book, and copied the name "Scott Robert Schafer" from an envelope therein.[2] He ***941** then returned the address book to the backpack, and the officers left without removing any object from the scene.

Several months later, following a domestic violence complaint, Schafer was arrested in Montrose, Colorado for possession of a weapon which had been stolen in Montezuma

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County, in which Cortez is located. The police included Schafer's photograph in a photo lineup that was transmitted to Cortez. The clerk of the Chief One Stop identified Schafer as the person who robbed the store on October 19, 1996. Thereafter, Schafer was charged with aggravated robbery, in violation of section 18–4–302, 8B C.R.S. (1986), and carrying a concealed weapon, in violation of section 18–12–105, 8B C.R.S. (1986). Prior to trial, Schafer moved to exclude testimony and other evidence based on the warrantless search of his tent and backpack on October 19 in Cortez. The district court granted the motion for suppression, finding that "[Schafer] closed the tent and his knapsack. He clearly had a reasonable expectation that they would remain in that condition." The court further held that

> [n]o exigent circumstances existed for a search without a warrant, as the police were unaware of any connection between the occupant of the tent and the robbery for several months. Therefore there was no basis presented by the evidence to enter the tent, examine its contents and write down information.

The district attorney then brought this appeal, challenging Schafer's standing to raise the constitutionality of the search and asserting that exigent circumstances justified the warrantless entry and search. We uphold the district court's suppression order.

II.

We determine under the Fourth Amendment of the United States Constitution and its Colorado counterpart, Colo. Const. art. II, § 7,[3] that a person camping in Colorado on unimproved and apparently unused land that is not fenced or posted against trespassing, and in the absence of personal notice against trespass, has a reasonable expectation of privacy in a tent used for habitation and personal effects therein.

A.

Standing

The prosecution first contends that the district court erred in recognizing Schafer's standing to contest the search of the tent and backpack. In order to assert a Fourth Amendment violation, a defendant must show that he or she had "a legitimate expectation of privacy in the areas searched or the items seized." *People v. Naranjo,* 686 P.2d 1343, 1345 (Colo.1984). Whether a person has a legitimate expectation of privacy in a particular place or object is determined by considering the totality of the circumstances, including "whether an individual has a possessory or proprietary interest in the areas or items which are the subject of the search." *Id.*

The prosecution observes that "[a] defendant who does not reside on the premises, had no right to be on the premises, and does not have a possessory interest in the premises is not an aggrieved person and cannot complain of the unlawfulness of a search." *People v. Juarez,* 770 P.2d 1286, 1289 (Colo.1989). However, *Juarez* does not apply for two reasons. First, Schafer owned the tent and the backpack and was using the tent for an overnight stay. Second, a possessory ***942** interest in the premises "may be established by one lawfully in possession at the time of the search, or by one reasonably believing he has a ... colorable interest in the premises or vehicle." *People v. Pearson,* 190 Colo. 313, 319, 546 P.2d 1259, 1264 (1976).

In Colorado, one who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege in the absence of personal or posted notice. Section 18–4–201(3), 8B C.R.S. (1986), provides:

> Except as is otherwise provided in section 33–6–116(1), C.R.S., a person who enters or remains upon unimproved and apparently unused land which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice against trespass is personally communicated to him by the owner of the land or some other authorized person or unless notice forbidding entry is given by posting with signs at intervals of not more than four hundred forty yards or, if there is a readily identifiable entrance to the land, by posting with signs at such entrance to the private land or the forbidden part of the land.

Schafer was given no notice that he was trespassing on private land or that the owner thereof intended to exclude the public. Accordingly, he enjoyed "license and privilege" to enter, was in lawful possession of the tent and the personal effects therein, and has standing to contest the search.

B.

Tents As Habitation

The Fourth Amendment to the United States Constitution and its Colorado counterpart are intended to protect from unreasonable governmental intrusion one's legitimate expectation of privacy. *See People v. Oates,* 698 P.2d 811, 814 (Colo.1985). The highest protection is afforded to one's residence; a search thereof without a warrant is presumptively unreasonable. *See People v. O'Hearn,* 931 P.2d 1168, 1173 (1997). In determining whether Schafer had a reasonable expectation of privacy in his tent, we take notice that tents have long been utilized as temporary or longer term habitation in Colorado and the West.

Carved out of the public domain secured to the United States by the Louisiana Purchase and the Treaty of Guadalupe Hidalgo, *see* Charles F. Wilkinson, *Crossing the Next Meridian* 34 (1992), thirty-seven percent of Colorado remains in federal ownership, consisting primarily of Bureau of Land Management, Forest Service, National Park, and National Monument lands which are widely available for hiking, hunting, fishing, rafting, wildlife watching, and tent camping. Mel Griffiths & Lynnell Rubright, *Colorado* 161 (1983). Colorado's twenty-four federally designated wilderness areas, *see Sierra Club v. Yeutter,* 911 F.2d 1405 (10th Cir.1990), are accessed solely by foot or horseback, usually for multi-day treks utilizing tents as the predominant mode of shelter. Colorado state parks, federal lands, and some private lands offer opportunities for long term camping as well as overnight or weekend visits. Because wind, hail, rain, or snow may strike without warning any day of the year, particularly in the mountains,[4] the typical and prudent ***943** outdoor habitation in Colorado for overnight or extended stay is the tent.

Tents have long served humans as a form of habitation in Colorado and the West. Lewis and Clark, their interpreter Charbonneau, his wife Sacajawea, and their child shared a tent of dressed buffalo skins as they traveled from Fort Mandan to the Rocky Mountains in search of a passage to the Pacific Coast:

> This tent is in the Indian stile, formed of a number of dressed Buffaloe skins sewed together with sinues. It is cut in such manner that when foalded double it forms the quarter of a circle, and is left open at one side here it may be attached or loosened at pleasure by strings which are sewed to its sides for the purpose.

The Journals of Lewis and Clark 92 (Bernard DeVoto ed., 1953)(entry of April 7, 1805).

The twenty-one member expedition of 1820 led by Major Stephen Long up the Platte River to the Continental Divide in Colorado was housed by means of "three tents, sufficiently large to shelter all our party ... from the storm." *From Pittsburgh To The Rocky Mountains, Major Stephen Long's Expedition 1819–1820* 150–151 (Maxine Benson ed., 1988) (journal account of the Long Expedition compiled by Edwin James, entry of June 1, 1820). Long's report to Congress included a watercolor by Samuel Seymour depicting the expedition's tents, and another by T.R. Peale illustrating the conical-shaped hide lodges inhabited by the Otos, a Native American tribe they encountered on their journey of exploration.

Canvas tents sheltered surveyor/mapmaker Dr. Ferdinand V. Hayden and his party during four field seasons of the early 1870s in their preparation of the first Colorado Atlas.[5] Richard A. Bartlett, *Great Surveys Of The American West* 40, 80, and accompanying photographs (1962). When Red Mountain Town caught fire on August 12, 1892, canvas tents sheltered the homeless. Robert L. Brown, *An Empire Of Silver* 244 and accompanying photograph (1965).

From September of 1913 to April of 1914, coal miners and their families, approximately nine hundred persons, lived in labor union tents at Ludlow across the railroad tracks from three Colorado National Guard tents housing twelve troopers during the coal field strike. George S. McGovern & Leonard F. Guttridge, *The Great Coalfield War* 210–11, 213 and accompanying photographs (1972). The tent colony burned to the ground during the fatal conflict of Easter 1914 between the Guard and striking miners. *Id.* at 224–25. Seeking refuge from bullets, women and children suffocated in pits to which they had retreated underneath the tents.[6] *Id.* at 226–227.

"Your Wilderness Home" proclaims the Scout Field Book through a chapter title followed by text which identifies the "ideal camp site" as being located "on the outskirts of a clearing in the forest. The trees give you *shelter* against the wind if you pitch your tents so that they are protected from the North and West." James E. West & William Hillcourt, *Scout Field Book, Boy Scouts of America* 143 (1948). Today, wilderness trekkers, families car-camping for the weekend, and many travelers passing through Colorado, make tents their home away from home.[7]

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***944** C.

Reasonable Expectation of Privacy

The Fourth Amendment "protects people, not places. What a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Whether pitched on vacant open land or in a crowded campground, a tent screens the inhabitant therein from public view. Though it cannot be secured by a deadbolt and can be entered by those who respect not others, the thin walls of a tent nonetheless are notice of its occupant's claim to privacy unless consent to enter be asked and given. One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated. Whether of short or longer term duration, one's occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms. *See United States v. Gooch,* 6 F.3d 673, 677 (9th Cir.1993) (reasonable expectation of privacy existed for tent on state campground); *Alward v. State,* 112 Nev. 141, 912 P.2d 243, 249 (1996) (person has reasonable expectation of privacy in tent while camping on BLM land).

An integral facet of Colorado's economy and allure is recreational tourism. Visitors and residents of Colorado who choose to stay in a hotel room, cabin, or tent away from their permanent abode presumptively enjoy Fourth Amendment protection. "A guest in Yellowstone Lodge, a hotel on government park land, would have no less reasonable an expectation of privacy in his hotel room than a guest in a private hotel, and the same logic would extend to a campsite when the opportunity is extended to spend the night." *Gooch,* 6 F.3d at 678. The scenic and historic town of Cortez, the gateway to Mesa Verde National Park and the locus of this case, depends significantly on visitation to Southwestern Colorado and the Four Corners region.

Ordinarily, a person who occupies land as a trespasser, or a person who should anticipate under the circumstances that privacy cannot reasonably be expected, does not justifiably rely upon the Fourth Amendment. *See United States v. Ruckman,* 806 F.2d 1471, 1473 (10th Cir.1986) (person occupying natural cave on federal land does not have reasonable expectation of privacy); *State v. Mooney,* 218 Conn. 85, 588 A.2d 145, 153 (1991) (presuming that space under a bridge abutment owned by state transportation department cannot be considered one's home).

Here, the district court found that Schafer was not in trespass because he was using his tent for camping on unimproved, publicly accessible land which was neither fenced nor posted, and he enjoyed a license or privilege to do so. The land was often used by local youth for parties and bore no indication that it was not available for camping, despite its rough appearance. Schafer had spent the previous night in the tent. There was no basis for the police officers to reasonably believe that the tent and the personal effects therein had been abandoned by their owner.

The officers conducting the entry and search relied solely on the characterization spoken to them by a friend of the robbery victim that a "transient" was camping on land behind the restaurant. No description or other identifying information tied the robber to the inhabitant of the tent. Without a warrant, the officers nevertheless unzipped the tent, opened the backpack, extracted the notebook, and recorded information contained on an envelope therein.

The prosecution informed the trial court that it intended to offer this information "as circumstantial evidence that [Schafer] was in town at the time" of the robbery. This it may not do. The district court was ***945** correct in excluding testimony and other evidence based on this warrantless search. Schafer was using the tent for camping and had secured it in a closed position. The officers discovered the information they seek to utilize in this regard solely by means of their unauthorized intrusion. The exclusionary rule functions to redress such deprivation of a constitutional right and to deter like official misconduct. *Cf. People v. Shinaut,* 940 P.2d 380, 383 (Colo.1997).

D.

Probable Cause and Exigent Circumstances

The prosecution argues that the search was justified by exigent circumstances. Exigent circumstances have been found to support a warrantless search in three situations: where "(1) the police are engaged in a bona fide pursuit of a fleeing suspect, (2) there is a risk of immediate destruction of evidence, or (3) there is a colorable claim of emergency threatening the life or safety of another." *People v. Crawford,* 891 P.2d 255, 258 (Colo.1995).

The prosecution asserts that this case fits within the second category, because a tent is readily moveable and the evidence therein can be effectively "destroyed" or removed for law enforcement purposes from the jurisdiction. However, this exception to the warrant requirement demands that the threat of evidence destruction be real and immediate: "[t]he mere fact that evidence is of a type that can be easily destroyed does not, in itself, constitute an exigent circumstance." *People v. Marez,* 916 P.2d 543, 547 (Colo.App.1995). The characteristic mobility of luggage does not justify dispensing with the Warrant Clause. *See United States v. Chadwick,* 433 U.S. 1, 13, 97 S.Ct. 2476, 2484–85, 53 L.Ed.2d 538 (1977).

Here, the danger of evidence destruction was not immediate. The tent and its contents were in existence when the police arrived and would have remained so had surveillance been maintained. Instead, the four police officers chose to search the tent and backpack rather than posting one of them to wait until a person—who might or might not have matched the store clerk's description of the suspect—returned to the tent. The robbery occurred at approximately 10:00 a.m., and the police officers arrived at the tent site soon thereafter. Schafer returned, struck the tent, and left about noon the same day.

Even when exigent circumstances exist, a warrantless search must be based on probable cause. *See People v. Miller,* 773 P.2d 1053, 1057 (Colo.1989). The only link between the convenience store robbery and the tent was a statement by the victim that the robber had headed east on foot, combined with a statement by her friend that a "transient" was camping behind a local restaurant east of the convenience store. These statements did not establish probable cause to believe that the tent might contain either the suspect or evidence relating to the robbery.

The record does not support a finding of probable cause that the suspect might be found inside the tent. We have identified factors which might justify a warrantless search for a suspect as including the following:

> (1) a grave offense is involved; (2) the suspect is reasonably believed to be armed; (3) there exists a clear showing of probable cause to believe that the suspect committed the crime; (4) there is a strong reason to believe that the suspect is in the premises being entered; (5) the likelihood exists that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

O'Hearn, 931 P.2d at 1175 (quoting *People v. Miller,* 773 P.2d 1053, 1057 (Colo.1989)).

The police observed no one in the vicinity of Schafer's campsite and they had no reasonable belief that the robbery suspect was the camper or was inside the tent. If the officers had been looking for the suspect, an inquiry to determine the presence of a person, rather than a search of the empty tent and the closed backpack, would have sufficed.

The district court determined that probable cause and exigent circumstances did not exist. We have reviewed the record and ascertain no evidence of their existence. After hearing testimony by five witnesses, the district court found that no facts justified the warrantless search and that Schafer had a ***946** reasonable expectation of privacy in his tent and backpack. These findings are supported by the record and will be upheld. *See People v. D.F.,* 933 P.2d 9, 14 (Colo.1997).

III.

Accordingly, we affirm the ruling of the district court suppressing testimony and other evidence based upon the warrantless search of Schafer's tent and backpack, and we return the case for further proceedings consistent with this opinion.

All Citations

946 P.2d 938, 97 CJ C.A.R. 1914

Footnotes

1 The two-person sized tent and its contents were described by Schafer at the suppression hearing:

> Q: Okay. Whose tent is that?
>
> A: It's my tent.
>
> Q: And—how were you using it?

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A: As a place to live while I was passing through the area.

Q: ... [W]as it you who put it there when it was there on the morning of October 19th, 1996?

A: Yes, I did.

Q: When did you put it there?

A: The night of the 18th.

Q: Okay. And did you leave the tent in that area at any time after you had set it up?

A: Yes, in the morning on the—of the 19th I took off and went and had some breakfast and did a few things around town before I packed up and left for Montrose.

Q: Okay. Before you left the tent, what did you do to it?

A: I set it up and put everything inside.

Q: Okay. And around what time did you get back to the tent?

A: Oh, it was probably around—12:00, 12:30, 1:00 o'clock somewhere around in that area.

Q: What did you do when you got back to the tent?

A: I was getting ready to take off, go back to Montrose, so I opened up the tent and found everything was ransacked.

Q: What property did you have inside the tent?

A: I had two or three pairs of clothing, change of clothing. I had an address book. A day planner is what they call them I guess. And my packsack (sic). Sleeping bag. Pair of tennis shoes was in there too. Personal items in the packsack.

Q: Was the packsack closed?

A: Yes, it was.

2 There is some confusion in the testimony as to whether the name on the envelope was that of Schafer or his brother. Either way, the name could be used to link Schafer to the tent and place him in Cortez at the time of the robbery.

3 The Fourth Amendment to the United States 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 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.

Article II, section 7 of the Colorado Constitution provides:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

4 Description of Colorado's natural beauty has often included its quickly changing weather:

> Being out-of-doors is a basic part of Colorado. Climate makes the landscape visceral, where the skin, not the eyes, is the primary mode of perception. You feel the heat of the sun or the bite of the wind on your face; winter wets and chills you to the core. Western weather changes rapidly; it is typically unpredictable. Sun-filled skies become thick with thunderclouds, gentle snows change to blizzards, a dry wash is inundated by a flash flood, sweltering heat turns

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> to freezing temperature in hours. Captain John Bell in 1820 spoke of clouds filled with "electric fluid," and John C. Fremont remarked on entering "the storehouse of the thunderstorms." William Parsons, part of the Lawrence Party in 1858, said: "We had a thunder shower almost each day while we remained in the camp—and SUCH thunder as no other country ever saw. On such occasions it seemed as if the old mountain rocked to its very base. The lightning, as if let loose for holiday pastime, played among the deep gorges and rocky canons of the mountains with appalling splendor." The climate is volatile and violent: chinooks, avalanches, floods, lightning, hail, brutal sun. An 1875 summer hailstorm broke windows in railroad cars and made steel boilers look like they had smallpox. During a storm in the summer of 1990, thousands of Denver automobiles became pockmarked in a single ten-minute burst of pellets. The National Hail Research Experiment has its field headquarters located near Grover, Colorado.

Kenneth I. Helphand, *Colorado Visions of an American Landscape* 29–30 (1991).

5 "More than any other explorer or survey leader, Hayden dramatized the West as a wonderland—a paradise for tourists. He created 'the Tourist's West.' " William H. Goetzmann, *New Lands, New Men, America and the Second Great Age of Discovery* 411 (1986).

6 Five miners, one militiaman, two women, and eleven children died at Ludlow that day. Carl Ubbelohde, et al., *A Colorado History* 256 (rev. ed.1976).

7 The attraction of Colorado has included tourism and health since before statehood, which occurred in 1876:

> Although the promoters of Colorado played down the lack of rainfall, frequently denied that the Great American Desert extended so far west, and emphasized the possibilities of irrigation when addressing themselves to prospective settlers, there was one area of the "sell Colorado" program where the lack of humidity was an asset: the field of health and tourism. The Rockies widen in Colorado, dividing into several ranges with high mountain parks between, providing an area, more than half the width of the state, whose high, dry climate earned it the title "The Switzerland of America."

Robert G. Athearn, *The Coloradans* 92 (1976).

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695 So.2d 278
Supreme Court of Florida.

Danny Harold ROLLING, Appellant,
v.
STATE of Florida, Appellee.

No. 83638.
|
March 20, 1997.
|
Rehearing Denied June 12, 1997.

Synopsis

After defendant pled guilty to murders of five college students, jury recommended sentence of death and the Circuit Court, Alachua County, Stan R. Morris, J., imposed sentence of death, and defendant appealed. The Supreme Court held that: (1) pretrial publicity did not require change of venue: (2) statements to fellow inmate and to investigators were not result of Sixth Amendment violation; (3) inventory search of tote bag found at campsite was proper; (4) defendant waived claim of error in joinder of offenses for penalty phase; (5) instruction on heinous, atrocious, or cruel (HAC) aggravating factor was proper; and (6) penalty was not disproportionate.

Affirmed.

Anstead, J., filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

***281** Nancy A. Daniels, Public Defender; and Nada M. Carey, David A. Davis, Paula S. Saunders and Michael Wasserman, Assistant Public Defenders, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn Snurkowski, Assistant Attorney General, Tallahassee, for Appellee.

REVISED OPINION

PER CURIAM.

Danny Harold Rolling, a prisoner under sentence of death, pled guilty to the murders of five college students—Sonya Larson, Christina Powell, Christa Hoyt, Manual Taboada and Tracy Paules—and other related charges. He now appeals the trial court's imposition of five death sentences after adjudicating him guilty of each of the murders and holding a penalty phase proceeding pursuant to section 921.141(1), Florida Statutes (1995). We have jurisdiction under article V, section 3(b)(1), of the Florida Constitution. For the reasons expressed below, we affirm the imposition of the death sentences.

FACTS OF THE CASE

The record reflects that in the early morning hours of August 24, 1990, Danny Rolling, armed with both an automatic pistol and a Marine Corps K–Bar knife, broke through the rear door of an apartment shared by college students Sonya Larson and Christina Powell. Upon entering the apartment, Rolling observed Christina Powell asleep on the downstairs couch. He stood over her briefly, but did not awaken her.

Rolling then crept upstairs where he found Sonya Larson asleep in her bedroom. After pausing to decide with which young woman he desired to have sexual relations, he attacked Ms. Larson as she lay in her bed, stabbing her first in the upper chest area. ***282** He then placed a double strip of duct tape over her mouth to muffle her cries and continued to stab her as she unsuccessfully attempted to fend off his blows. During the attack, she was stabbed on her arms and received a slashing blow to her left thigh. Ms. Larson maintained consciousness for less than a minute and died as a direct result of the stab wounds inflicted by Rolling.

After killing Ms. Larson, Rolling returned to the downstairs of the apartment where Ms. Powell remained asleep. He pressed a double strip of tape over her mouth and taped her hands behind her back. Rolling cut off her clothing and undergarments with the K–Bar knife and sexually battered Ms. Powell, threatening her with the knife. Thereafter, Rolling forced her to lie facedown on the floor near the couch and stabbed her five times in the back, causing her death. Rolling posed the bodies of the victims and left the apartment.

Approximately forty-two hours later, during the evening hours of Saturday, August 25, Rolling broke into the apartment of college student Christa Hoyt, located about two miles away from the first crime scene, by prying open the

sliding glass door with a screwdriver. Armed with the same automatic pistol and K–Bar knife, Rolling waited in the living room for the arrival of Ms. Hoyt, a young woman into whose bedroom he had peeked a few days earlier. When Ms. Hoyt eventually returned home at about 11 a.m., Rolling surprised her from behind, placing her in a choke-hold and subduing her after a brief struggle. He taped her mouth and her hands and then led her into her bedroom where, after cutting and tearing off her clothing and undergarments, he forced her onto her bed, threatened her with his knife, and sexually battered her. Rolling subsequently turned Ms. Hoyt facedown in her bed and stabbed her through the back, rupturing her aorta and killing her. Just as he had done with his first two victims, Rolling posed the body of his third victim and left the apartment.

A little over a day later, at approximately 3 a.m. on August 27, Rolling entered a third apartment, occupied by roommates and college students Tracy Paules and Manuel Taboada. Again, Rolling broke into the apartment by prying open the double-glass sliding door with the same screwdriver he used to enter Ms. Hoyt's apartment. Armed with the same pistol and knife, Rolling crept into one of the bedrooms where he found Manny Taboada asleep. Rolling attacked Taboada, stabbing him in the solar plexus and penetrating his thoracic vertebra. Taboada was awakened by the blow and struggled to fight off his assailant. Rolling repeatedly stabbed him on the arms, hands, chest, legs and face and eventually killed him.

Hearing the commotion caused by the struggle, Tracy Paules approached Taboada's bedroom and, catching a glimpse of Rolling, fled to her room where she attempted to lock her door. Rolling, who was covered with Taboada's blood, followed Ms. Paules and broke through her bedroom door. Rolling subdued her, taped her mouth and her hands, and cut or tore off her t-shirt. He sexually battered her and threatened her with his knife before turning her over on the bed and killing her with three stabbing blows to her back. Finally, Rolling cleaned and posed the body of Tracy Paules and left the apartment.

PROCEDURAL POSTURE

This case originated in the Eighth Judicial Circuit Court in and for Alachua County. On November 15, 1991, the grand jury of Alachua County indicted appellant, Danny Rolling, for these serial murders. He was charged with five counts of first-degree murder, three counts of sexual battery, and three counts of armed burglary of a dwelling with a battery. On June 9, 1992, Rolling entered a plea of not guilty on all counts. Subsequently, on February 15, 1994, the day set for trial, Rolling changed his plea to guilty on all counts. The trial court accepted Rolling's plea after reviewing with him the factual basis for it and adjudicated him guilty on all counts.

A penalty phase proceeding was held, and the jury recommended that Rolling be sentenced to death for each murder by a vote of twelve to zero. The trial court followed the jury's advisory recommendation and sentenced Rolling to death for each homicide, ***283** finding four aggravating circumstances applicable to each homicide: (1) Rolling had been previously convicted of a violent felony; (2) each murder was cold, calculated, and premeditated; (3) each murder was heinous, atrocious, or cruel; (4) each murder was committed while Rolling was engaged in the commission of a burglary or sexual battery. The trial court found as statutory mitigating factors that (1) Rolling had the emotional age of a fifteen-year-old; and (2) Rolling committed the crimes while under the influence of extreme mental or emotional disturbance. As for nonstatutory mitigators, the trial court found: (1) Rolling came from a dysfunctional family where he suffered physical and mental abuse during his childhood, and this background contributed to his mental condition at the time of the offenses; (2) Rolling cooperated with law enforcement officers by confessing and entering a guilty plea on all counts, thereby saving the criminal justice system time and expense; (3) Rolling felt remorse for his actions; (4) Rolling's family has a history of mental illness; and (5) Rolling's ability to conform his conduct to the requirements of law was impaired because of his mental illness.[1]

Rolling raises six claims of error on appeal: (1) the trial court abused its discretion in denying his motion for a change of venue and thereby violated his Sixth Amendment right to be fairly tried by an impartial jury because pervasive and prejudicial pretrial publicity so infected the Gainesville and Alachua County community that seating an impartial jury there was patently impossible; (2) the trial court erred in denying Rolling's motion to suppress his statements which were obtained in violation of his Sixth Amendment right to counsel; (3) the trial court erred in denying Rolling's motion to sever and conduct three separate sentencing proceedings; (4) the trial court erred in denying Rolling's motion to suppress physical evidence seized from his tent because the warrantless search and seizure violated his reasonable expectation of privacy under the Fourth Amendment; (5) the trial court erred in finding as an aggravating circumstance that the homicide

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of Sonya Larson was especially heinous, atrocious, or cruel; and finally (6) the trial court erred by giving an invalid and unconstitutional jury instruction on the heinous, atrocious, or cruel aggravating circumstance. We now address each issue in turn.

CHANGE OF VENUE

Rolling and his defense counsel made a deliberate and strategic choice not to file a motion for a change of venue at any time during the three years Rolling awaited trial for these offenses because they believed he could be fairly tried by an impartial jury in Gainesville. Instead, contrary to the dictate of Florida Rule of Criminal Procedure 3.240(c), which requires that a change of venue motion be filed no less than ten days before trial,[2] Rolling waited until the sixth day of jury selection to request a change of venue for the first time, when defense counsel admitted to the court: "I have to swallow my pride and admit that I was incorrect in my original opinion that this case could be fairly tried here."[3] The trial court subsequently denied the motion after a hearing.

Rolling now argues on appeal that the trial court erred in denying his motion for a change of venue because the record shows the pretrial publicity in this case during the three and a half years between the time the murders occurred in August 1990 and Rolling's guilty plea in February 1994 was so pervasive and prejudicial that this Court must presume as a matter of law that the venire, as well as the actual members of the jury, were biased against him. Rolling points also to the responses of certain prospective and actual jurors during voir dire as ***284** further evidence that the entire Gainesville and Alachua County community had been victimized by Rolling's crimes and harbored an inherent prejudice and animosity against him.

To the contrary, the State, while candidly acknowledging that this case generated massive pretrial publicity, maintains that the three and one-half years between the crimes and the trial served to distance the community from most of the media coverage surrounding Rolling's case, and, even assuming otherwise, the publicity was not presumptively prejudicial because it consisted of "straight news stories," relating "cold, hard facts." Moreover, the State contends that "[b]eyond a doubt the trial court undertook extraordinary measures to ensure jurors who sat were fair and impartial," and "all jurors who served affirmatively and unequivocally stated that they could put aside any prior knowledge and decide the case based solely on the evidence presented at trial." Upon thorough review of the record in this case, we agree with the State.[4]

It is a well-settled principle under our caselaw that a criminal trial may be held in a county other than that designated by the constitution or by statute if prejudice in the proper county makes it impossible for a defendant, like Danny Rolling, to secure a fair trial by an impartial jury there. Such prejudice may warrant a change of venue when widespread public knowledge of the case in the proper county causes prospective jurors there to judge the defendant with great disfavor because of his character or the nature of the alleged offense. When this occurs, the defendant's right, under the United States and Florida Constitutions, to a fair trial by an impartial jury is protected by moving the trial from the proper, but partial county, to an impartial one. *Manning v. State,* 378 So.2d 274, 276 (Fla.1979)

In *McCaskill v. State,* 344 So.2d 1276 (Fla.1977), we set out the test for determining whether a change of venue is required because of prejudice in the proper county:

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Id. at 1278 (quoting *Kelley v. State,* 212 So.2d 27, 28 (Fla. 2d DCA 1968)).

The trial court in its discretion must determine whether a defendant has ***285** raised such a presumption of prejudice under this standard. *Manning,* 378 So.2d at 276. On appeal, however, the appellate court has "the duty to make an independent evaluation of the circumstances." *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). In exercising its discretion, a trial court must make a two-pronged analysis, evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975).

Of course, as the trial court properly noted in its order here, pretrial publicity is normal and expected in certain kinds of cases, like this one, and that fact standing alone will not require a change of venue. *Provenzano,* 497 So.2d at 1182. Rather, in evaluating the nature and effect of any pretrial

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publicity on the knowledge and impartiality of prospective jurors, the trial court must consider numerous factors, such as: (1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred, *Oats v. State,* 446 So.2d 90, 93 (Fla.1984); (2) whether the publicity consisted of straight, factual news stories or inflammatory stories, *Provenzano,* 497 So.2d at 1182; (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version, *Manning,* 378 So.2d at 275; (4) the size of the community in question, *Copeland v. State,* 457 So.2d 1012, 1017 (Fla.1984); and (5) whether the defendant exhausted all of his peremptory challenges. *Hoy v. State,* 353 So.2d 826 (Fla.1977), *cert. denied,* 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

The second prong of the analysis requires the trial court to examine the extent of difficulty in actually selecting an impartial jury at voir dire. If voir dire shows that it is impossible to select jurors who will decide the case on the basis of the evidence, rather than the jurors' extrinsic knowledge, then a change of venue is required. *Copeland,* 457 So.2d at 1017. The ability to seat an impartial jury in a high-profile case may be demonstrated by either a lack of extrinsic knowledge among members of the venire or, assuming such knowledge, a lack of partiality. *Oats,* 446 So.2d at 93.

To be qualified, jurors need not be totally ignorant of the facts of the case nor do they need to be free from any preconceived notion at all:

> To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642–43, 6 L.Ed.2d 751 (1961). Thus, if prospective jurors can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury, and a change of venue is not necessary. *Davis,* 461 So.2d at 69. Although such assurances are not dispositive, they support the presumption of a jury's impartiality. *Copeland,* 457 So.2d at 1017.

In some instances, the percentage of prospective jurors professing an extrinsic knowledge of the case or a fixed opinion has been used to determine whether pervasive community prejudice exists. However, even where a substantial number of prospective jurors admit a fixed opinion, community prejudice need not be presumed. For instance, in *Murphy,* the United States Supreme Court evaluated these percentages as follows:

> In the present case, by contrast, 20 of 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

421 U.S. at 803, 95 S.Ct. at 2037–38 (footnote omitted). Consistent with the *Murphy* rationale, courts of this state have found in other cases, where similar percentages of prospective jurors voiced a bias during voir dire, that a change of venue was not required because ***286** the partiality of certain individual venire members did not reflect a pervasive prejudice infecting the entire community. *See Provenzano; Copeland; see also* *Pitts v. State,* 307 So.2d 473 (Fla. 1st DCA 1975).

In this case, the trial court's order, which we find to be supported by the record, details the meticulous jury selection and screening process which it employed in an effort to ultimately seat a jury able to impartially recommend an appropriate sentence. Here, the court individually reviewed each of the 1233 responses filed by prospective jurors and, prior to voir dire, summarily excused over 800 of those summoned because they were either exempt or legally ineligible to serve or otherwise demonstrated some "hardship" requiring excusal. The trial court, in its own words, used a "strict standard of acceptance ... in determining which jurors should be retained" and "excused those who claimed to have a state of mind that would render them unable to be impartial either to the State or the Defendant."

Moreover, panels of twenty to twenty-four prospective jurors were questioned in two phases. The first round of questioning focused on attitudes regarding the death penalty and exposure to pretrial publicity. The second round of questioning addressed all other matters. Prospective jurors heard only the responses of others placed on the same panel, and did not observe the questioning and responses of other panels. In both phases, prospective jurors were reminded that they could respond to the questions privately to the court and counsel outside the presence of other panel members. The record reflects that throughout the process, the trial court gave the attorneys wide latitude in questioning prospective jurors. The court also liberally granted Rolling's challenges for cause, often over the State's objection, and allotted Rolling

six additional peremptory challenges after he exhausted his initial twenty.

Finally, the trial court analyzed the pretrial publicity in this case as follows:

> Another factor to be viewed by the Court in a case with this degree of pretrial publicity is the nature of the publicity itself. Publicity, in and of itself, is not sufficient grounds for change of venue. The publicity must be hostile publicity. *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). An analysis of the publicity given this case by the local media shows that, while the media has kept the public apprised of all court procedures which have not been held in camera, the approach of the local media has been objective, not directed toward inflaming the citizens or suggesting to them the penalty that ought to be imposed in this case. The most inflammatory item of pretrial publicity was that written, not by a journalist local to the area, but by a columnist for the Miami Herald. Indeed, in a story involving one of the interviews conducted out of state, the lead to the story indicated that the evidence from the interviewee might well support the Defendant's position with respect to the penalty that should be imposed. The tenor of the presentation was that the interview showed that there may be evidence supporting the mitigating factors which the defense might raise. To further protect the Defendant from hostile pretrial publicity, photographs of the victims and the crime scenes were not released to the public, and have not been published. Some of the pretrial publicity was favorable to the position of the Defendant, rather than hostile to the Defendant. There was one significant issue, not hostile to the Defendant, but opposing the imposition of the death penalty. A number of local ministers had written publicly, urging the State Attorney to offer the Defendant the opportunity to plead to the offenses in return for sentences to life imprisonment. They presented various reasons for their position, including a general opposition to the death penalty itself, the fiscal savings which would result from entry of a plea of guilty, and the like. The Gainesville Sun published responses from readers reacting to the letter. In the publication, the responses were presented effectively on both sides of the issue.

The trial court then found that the publicity, although pervasive, was not so hostile as to inflame the community in general and further found that the pretrial publicity did not ***287** so prejudice prospective jurors that they could not evaluate impartially those factors which were to be evaluated in determining the penalty to be imposed in a capital case.

As to the first prong of our analysis, it is undisputed that the brutal slaying of five young students deeply affected the college community of Gainesville, Florida and generated overwhelming local and national media attention. While the amount of media coverage in this case makes it unique, the extent of publicity it received was certainly not surprising or unwarranted given the circumstances of this case. Indeed, in light of the fact that Rolling chose not to request a change of venue pretrial, it appears that even he was not concerned or otherwise disturbed by the extent or nature of the coverage at any time during the three years he awaited trial.

Likewise, the trial court's order denying Rolling's request for a change of venue reflects a candid and legally grounded review of the media attention this case received. Because we find the trial court's evaluation of the media coverage in this case to be consistent with our own review of the record, we reject Rolling's claim that the pretrial publicity presumptively prejudiced the entire Alachua County community against him.

We also find unpersuasive Rolling's related assertion that the responses of both prospective and actual jurors during voir dire further demonstrated a real, community-wide prejudice and animosity toward him. Not surprisingly, of course, every member of the venire had some extrinsic knowledge of the facts and circumstances surrounding this case. Also as expected, the responses of certain prospective jurors showed that their knowledge of the case prevented them from sitting impartially on the jury. Nevertheless, the animus toward Rolling expressed by these individuals reflected nothing more than their own personal beliefs or opinions. Contrary to Rolling's assertions, we find no reason to believe that certain prospective jurors who voiced a bias against Rolling—none of whom sat on Rolling's jury—somehow spoke for the entire Alachua County community.

We also must reject Rolling's claim that the responses of actual jurors demonstrated a community-wide bias against him because we find it to be completely contrary to the evidence in the record. Rolling never challenged for cause any member of his actual jury based on bias or any other grounds; and the trial court found credible the assurances of every member of Rolling's jury that they could lay aside their extrinsic knowledge of the case and recommend a penalty based only upon the evidence presented in court.

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As to the second prong of our analysis, we must determine whether any difficulty encountered in selecting a jury in this case reflected a pervasive community bias against Rolling which so infected the jury selection process that it was impossible to seat an impartial jury in Alachua County. Jury selection in this case was no small task. In fact, the process spanned a three-week period. Nevertheless, we do not believe the sheer length of this selection process indicates that impartial jurors could not be found. Rather, the amount of time it took to select a jury was largely attributable to the trial court's extensive and deliberate efforts to ensure that the jurors selected were, without a doubt, impartial and unbiased.

After meticulously culling the initial pool down to those venire members who were not obviously biased or otherwise ineligible to serve, the trial court allowed the parties wide latitude in questioning prospective jurors so that open animosity, as well as more subtle, unconscious prejudices, could be detected. When the responses of prospective jurors raised even the slightest concern that they perhaps could not sit impartially, the court liberally granted Rolling's challenges for cause—resolving even questionable cases in favor of the defendant. In addition, the court gave Rolling six additional peremptory challenges as a further safeguard to ensure juror impartiality.[5]

***288** Once again, critical to the issue here is that the trial court found credible the assurances of all the members of Rolling's jury that they could lay aside their extrinsic knowledge of the case and recommend a penalty based only upon the evidence presented in court; and Rolling never challenged for cause any member of his actual jury based on bias or any other grounds. Rather than revealing a pervasive community bias against him as Rolling suggests, the intricate jury selection process employed in this case and the responses of actual jurors during questioning shows that it was possible to seat an impartial jury in Alachua County. In this regard, we must commend the trial court for employing a jury selection process with ample safeguards. Consequently, because we find that the trial court's system was an effective one which produced an impartial jury, we affirm the trial court's denial of Rolling's motion for a change of venue. Neither the pretrial publicity in this case nor the lengthy jury selection process evidenced a community bias so pervasive as to make it impossible, under any circumstances, to seat an impartial jury in Gainesville.

SUPPRESSION OF CONFESSIONS

Next, Rolling claims the trial court erred in denying his pretrial motion to suppress statements he made to Gainesville Homicide Task Force investigators on January 18, 1993, January 31, 1993, and February 4, 1993, and all other written and oral statements to a fellow inmate, Bobby Lewis. These statements were admitted against him at his penalty phase proceeding.

On appeal, Rolling challenges the trial court's findings that (1) his statements to Lewis and law enforcement officers did not violate his right to counsel because Lewis was not acting as a de facto state agent and, (2) that the assistant state attorney's involvement in the interrogations was not unethical and did not warrant suppression of Rolling's statements.[6] Specifically, Rolling maintains that law enforcement officers and prison officials knowingly exploited the relationship between himself and fellow inmate Bobby Lewis such that Lewis was acting as a de facto government agent when he elicited inculpatory statements from Rolling. Consequently, he argues, the statements were inadmissible at his sentencing trial pursuant to *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). Alternatively, Rolling asserts that his statements must be suppressed because the Homicide Task Force, which interviewed Rolling in January and February of 1993, served as the alter ego of assistant state attorney Jim Nilon, whose authorization and orchestration of the interrogations without notifying Rolling's defense counsel prior to the meetings constituted a serious breach of ethics in violation of the Rules Regulating the Florida Bar 4–4.2 and 4–5.3.[7]

***289** Bobby Lewis befriended Rolling shortly after Rolling arrived at Florida State Prison to await trial for the Gainesville homicides. During this time, Rolling made several statements to Lewis alluding to his involvement in the homicides. Armed with this information, Lewis believed he could benefit financially by (1) selling this information to Sondra London, Rolling's fiance and biographer or, (2) obtaining his freedom or a reduced sentence by becoming a prosecution witness against Rolling. Lewis's attorney, Mr. Link, contacted the State Attorney on Lewis's behalf to determine whether Lewis could obtain a deal from the State in exchange for Rolling's statements and information about the student murders. Lewis was informed, through his attorney, that the State would not

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enter into any kind of agreement with Lewis for information he might have about Rolling or the murders.

On several occasions between July 1992 and December 1992, Task Force investigators spoke with Lewis, who initiated each meeting, but continually refused Lewis's requests to receive some kind of benefit or inducement for the information he claimed to have about the homicides. Nevertheless, Lewis remained steadfast in his belief that he could benefit personally from Rolling's statements. When Rolling returned to FSP in December 1992 after spending six months in the mental health facility at Chattahoochee, Lewis continued to tap Rolling for information about the Gainesville murders while they were together in "general population" and after they individually were moved into the "protective management" program at the prison pursuant to independent requests by each of them to be placed there because of safety concerns. During this time, Rolling decided that he wanted to assist Lewis in his plan to strike a deal or receive some benefit from the State for the statements Rolling had made to him about the homicides. In an effort to enhance Lewis's bargaining position with the State, Rolling made Lewis his "confessor"—instructing Lewis to write out in his own handwriting each of Rolling's written statements about the homicides and then return the originals to Rolling to be destroyed.

On January 17, 1993, Lewis advised prison officials that Rolling desired to talk with Task Force investigators about the Gainesville murders. After verifying with Rolling directly that he wished to speak with law enforcement officers, Task Force investigators went to FSP to interview Rolling on the next day, January 18. Before the interview, investigators made it clear to Rolling that they could not and would not meet Rolling's conditions for the interview—one of which was Lewis' release for his assistance in obtaining Rolling's statements about the crimes—and also reminded Rolling that he had invoked his right to counsel and his lawyer "would not be happy" if he spoke with them. At this point, discussions concerning the format for the interview itself broke down and investigators did not talk with Rolling about the homicides on January 18.

In the days following the aborted interview, Lewis initiated numerous contacts with prison authorities to further discuss the possibility of making a deal with the State in exchange for testimony or information about statements Rolling allegedly had made to him. Prison authorities forwarded the information to the Homicide Task Force, which responded with a letter to prison authorities instructing them to (1) merely listen to Lewis and refrain from instructing him in any way; (2) refrain from initiating any contact with Lewis or Rolling; (3) treat any request by Lewis or Rolling as they would a request from any other inmate; and (4) tape record any meetings initiated by Lewis.

Shortly thereafter, Rolling advised prison authorities that he again wished to talk with officers investigating the student murders. Prior to interviewing Rolling about the homicides on January 31, 1993, Task Force investigators discussed with him at great length the format for the interview. It was agreed that Lewis could serve as Rolling's "mouthpiece" during the interview, and Rolling would verify the accuracy of each of Lewis's statements. Moreover, investigators reminded Rolling that he had invoked his right to counsel and reiterated to both Rolling and Lewis once again that they could not promise Lewis any type of benefit for the information Rolling might relate—through Lewis—about ***290** the homicides. Rolling and Lewis agreed to the format for the interview and Rolling confirmed that he wanted to waive his right to counsel and talk to investigators without his attorney. Rolling's subsequent statement to Task Force investigators on January 31, made after a valid waiver of his right to counsel, was audiotaped; and the February 4 statement, also preceded by a valid waiver, was videotaped. Bobby Lewis served as Rolling's "mouthpiece" and Rolling confirmed the accuracy of Lewis's statements during these interviews.

In *Massiah,* the United States Supreme Court announced for the first time that the Sixth Amendment prohibits law enforcement officers from interrogating a defendant after his or her indictment and in the absence of counsel.[8] Consequently, statements "deliberately elicited" from a defendant after the right to counsel has attached and in the absence of a valid waiver are rendered inadmissible and cannot be used against the defendant at trial. 377 U.S. at 206, 84 S.Ct. at 1203. Nevertheless, incriminatory statements by a defendant will not be excluded merely because the statements are made after judicial proceedings have been initiated and in the absence of a valid waiver. Rather, law enforcement officials must do something that infringes upon the defendant's Sixth Amendment right.

While the "deliberately elicited" standard is clearly satisfied when the police directly interrogate or question a defendant in some fashion, it also may be satisfied by less direct types of questioning. *See State v. Wooley,* 482 So.2d 595, 596 (Fla. 4th DCA 1986). Usually, determining whether the

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"deliberately elicited" standard has been met becomes an issue in cases, like this one, where incriminatory statements from a defendant were obtained through persons other than the police who allegedly acted as police informants or surrogates. In *Massiah,* for instance, the Court found that the state violated the defendant's right to counsel where police officers concealed a radio transmitter on a codefendant's person, arranged for the codefendant to meet the defendant in the codefendant's car to discuss their pending case, and then listened to conversations incriminating the defendant via the transmitter. 377 U.S. at 206, 84 S.Ct. at 1203.

Similarly, in *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Court concluded that police conduct met the "deliberately elicited" standard where law enforcement officers contacted a paid informant in jail with the defendant and advised the informant to be alert to any statements made by federal prisoners, but not to initiate any conversations or question the defendant regarding his offense. *Id.* at 274, 100 S.Ct. at 2189; *but see Kuhlmann v. Wilson,* 477 U.S. 436, 455, 106 S.Ct. 2616, 2628, 91 L.Ed.2d 364 (1986) (concluding that defendant's right to counsel not violated under *Henry* where police placed informant in defendant's cell because informant obeyed instructions not to question defendant, but merely to listen for information). Consistent with its decisions in *Massiah* and *Henry,* the Court found in *Moulton* that, even though it was the defendant who initiated the meeting, the defendant's right to counsel nonetheless was violated where an undercover codefendant met with the defendant and actively obtained ***291** incriminating statements from him. 474 U.S. at 176–77, 106 S.Ct. at 487.

On the whole, these cases demonstrate that the culpability of law enforcement is dependent upon the extent of their role in securing the confession indirectly. That is, a violation of a defendant's right to counsel turns on whether the confession was obtained through the active efforts of law enforcement or whether it came to them passively. In *Moulton,* the Court emphasized that "passivity on the part of law enforcement" is the critical factor in this analysis:

> [A] knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

Id. at 176, 106 S.Ct. at 487.

Florida courts also have focused on the role of law enforcement officers in determining whether a confession was obtained in violation of the defendant's right to counsel. For instance, in *Sikes v. State,* 313 So.2d 436 (Fla. 2d DCA 1975), the district court held that voluntary statements made to prison authorities by an incarcerated defendant are not subject to the *Massiah* rule, concluding, "We cannot expect prison guards to wear earplugs at all times while in the performance of their duties." *Id.* at 437. Likewise, in *Muehleman v. State,* 503 So.2d 310 (Fla.), *cert. denied,* 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987), we interpreted the "deliberately elicited" standard in terms of its plain meaning and found that the defendant's right to counsel had not been violated because his statements were not a product of a "stratagem deliberately designed to elicit an incriminating statement." *Id.* at 314 (quoting *Miller v. State,* 415 So.2d 1262, 1263 (Fla.1982)). *See also Malone v. State,* 390 So.2d 338, 339–40 (Fla.1980).

We turn now to the trial court's order denying Rolling's motion to suppress statements made to Bobby Lewis and law enforcement officers.[9] A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. *McNamara v. State,* 357 So.2d 410, 412 (Fla.1978).

The record supports the trial court's description of Lewis's persistent attempts to strike a deal with the State even in the face of numerous responses from the State that no deal would be forthcoming. The record also supports the trial court's conclusion that prison officials did not house Rolling and Lewis in close proximity to each other or grant Lewis privileges as a trustee in order to facilitate or encourage Lewis in his efforts to gain information from Rolling about the homicides. Rather, we find that prison officials acted in accordance with Department of Corrections policy and guidelines when they granted the independent requests of Rolling and Lewis to be placed in the "protective management" program.

Finally, we find that the record and relevant caselaw clearly support the trial court's conclusion that Rolling's right to counsel was not violated because Bobby Lewis was not acting as a government agent when he elicited incriminatory statements from Rolling or served as Rolling's "mouthpiece" during the January 31 and February 4 interviews with Task Force investigators. As the trial court explained:

> For the State to have violated a defendant's Right to Counsel, the State must have taken some affirmative steps toward obtaining information in derogation of that right. Whether it be as blatant as the use of paid informant under a contingency agreement (*Henry*), or merely the intentional placing of an inmate in a certain location in order that the inmate may elicit conversations from a defendant, there must be some state action directed to obtaining statements of a defendant in the absence of his counsel. As pointed out ***292** above, the Defendant herein has failed to establish that there was any such state action. Lewis was at no time an agent of the State, nor was the state involvement such that Lewis's actions with respect to the Defendant are in any way attributable to the State.

The repeated interactions between law enforcement and prison officials and Bobby Lewis were necessitated solely by Lewis's refusal to take no for an answer and his own opportunistic strategy to somehow benefit from the relationship he cultivated with Rolling. Thus, we find that Rolling's incriminatory statements to Lewis and the officers were in no way the product of “the State's stratagem deliberately designed to elicit an incriminating statement” from him. *Malone,* 390 So.2d at 339. Accordingly, we affirm the trial court's denial of Rolling's motion to suppress on this ground.

Finally, we also find the trial court properly denied Rolling's further claim that unethical conduct on the part of the state attorney warranted suppression of his statements. The trial court concluded:

> As legal advisor to the law enforcement officers, he [Nilon] made himself available to render such advice as was appropriate under the circumstances. Mr. Nilon was careful to insure that he did not participate in any of the interviews with the Defendant, but was available to advise law enforcement officers should such advice be sought. The fact that Mr. Nilon was in geographic proximity to the site of the interview, rather than merely being available to render advice by telephone, does not rise to the level of violation of the Code of Professional Responsibility.

The record confirms, and Rolling does not argue to the contrary, that the prosecutor did not actually participate in the interrogations. By making himself available at FSP to investigators, with whom Rolling himself requested the meetings, Mr. Nilon was there to ensure that Rolling's constitutional rights were not violated by any conduct of Task Force investigators who, unlike Mr. Nilon, were not lawyers or otherwise professionally trained in the law. Because the evidence in the record and inferences derived therefrom support the trial court's finding that the prosecutor's presence at the prison to render advice if needed did not violate the Rules of Professional Conduct, we affirm the trial court's denial of Rolling's motion to suppress on this ground as well. *See McNamara.*

SEARCH AND SEIZURE

As his third claim of error, Rolling contends that the trial court erred in denying his pretrial motion to suppress physical evidence seized from a totebag found inside a tent pitched in a wooded area owned by the University of Florida. Rolling argues that the warrantless search and seizure of these items violated his rights under article I, section 12 of the Florida Constitution and the Fourth Amendment of the United States Constitution.

Generally, the Fourth Amendment does safeguard against a warrantless entry into a person's home for purposes of a routine felony arrest. *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).[10] Where exigent circumstances exist, ***293** however, certain warrantless entries are permitted. *Arango v. State,* 411 So.2d 172 (Fla.), *cert. denied,* 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982). The kinds of exigencies or emergencies that may support a warrantless entry include those related to the safety of persons or property, *see Richardson v. State,* 247 So.2d 296 (Fla.1971), as well as the safety of police. *Jones v. State,* 440 So.2d 570 (Fla.1983). Of course, a key ingredient of the exigency requirement is that the police lack time to secure a search warrant. Police may not enter and search for dangerous instrumentalities or other evidence, even if they have probable cause to believe it is on the premises or otherwise subject to removal or destruction, if they have time to obtain a warrant and then enter under that authority. *Jennings v. State,* 419 So.2d 750 (Fla. 2d DCA 1982); *Graham v. State,* 406 So.2d 503 (Fla. 3d DCA 1981). Moreover, an entry based on an exigency must be limited in scope to its purpose. Thus, an officer may not continue her search once she has determined that no exigency exists. *Anderson v. State,* 665 So.2d 281 (Fla. 5th DCA 1995).

The record reflects that Rolling was living in a tent pitched in a fenced, wooded area owned by the University of Florida when Deputy Merrill saw Rolling and a black male companion enter the woods through the fence gate at 1 a.m. on August 28, 1990, and called for back-up. There were an unusually large

number of officers patrolling the area that night and early morning because of the discovery of three murder victims and recent bank robberies that remained unsolved. The officers followed Rolling and his cohort into the woods and, when within shouting distance, announced their presence. The black male, Tony Danzy, turned back to the officers but Rolling fled into the woods. Deputy Liddell chased Rolling off the path into denser woods but was unable to apprehend him. However, a canine tracking unit called to the area led police to Rolling's campsite. As the officers approached the campsite, they found a raincoat and dye-stained money on the ground. Knowing that the bank across the street had been robbed the preceding day and the white male robber had been armed, the officers decided to secure the tent. After a search dog entered the tent and came out, Deputy Liddell followed department procedure and lifted the flaps of the tent to confirm it was empty. While doing so, he observed a tote bag sitting on top of more red-stained money. Fearing that the fleeing suspect may have returned to the tent for a gun, and concerned about the safety of officers at the scene, Liddell searched the bag for a weapon and found a gun box. He opened the box and discovered a blue steel Taurus handgun. He then called for a crime scene unit.

Crime scene investigators arrived at the campsite at approximately 1:30 a.m. and collected various items from the campsite and tent, including the tote bag with the weapon. Six days later, on September 4, 1990, investigator Jack Smith inventoried the contents of the tote bag and found a screwdriver, duct tape and a dark ski mask. These items of evidence were turned over to the Florida Department of Law Enforcement and later admitted into evidence against Rolling at his sentencing trial.

Rolling argues that the trial court erred in denying his motion to suppress because officers were not justified in conducting a warrantless search of the interior of his tent. Rolling contends that once the dog entered the tent and found it empty, all exigencies dissipated. Any additional examination of the tent's interior was nugatory in terms of officer safety, and even if there was a weapon in the tent, the officers could not be assured that the suspect in the woods was armed. Furthermore, because the campsite area was secured after the initial search of the tent and totebag until the crime scene unit arrived, it certainly could have remained secured until a warrant was obtained for a further search and seizure. Because officers were not acting pursuant to a warrant or a recognized exception to the warrant requirement, ***294** Rolling maintains the search and seizure of the tent and bag were unlawful. *See Jones v. State,* 648 So.2d 669 (Fla.1994). Moreover, the purported "inventory" search of the tote bag six days later was also unlawful, he argues. Consequently, Rolling contends that the physical evidence recovered from his totebag was improperly admitted against him at his sentencing trial and therefore he is entitled to a new sentencing proceeding.

In its order denying Rolling's motion to suppress the physical evidence recovered from the totebag in his tent, the trial court first found that even though Rolling was a trespasser on university land, he had standing to challenge the search and seizure of items from his tent because he had a proprietary interest in the tent itself. The trial court further concluded, however, that the warrantless search and seizure of the physical evidence at issue here was reasonable in light of the exigent circumstances. The officers' legitimate concern for their safety from an unapprehended individual who might be armed in the dark, heavily wooded area around the campsite "excused the officers from the requirement of obtaining a warrant."

At the suppression hearing, Deputy Liddell testified that he initially searched the tote bag for weapons because he was concerned for officer safety. Additionally, he remained near the tent with the gun secured while waiting for the crime scene unit to arrive because of his continuing concern that the suspect might return to the tent to retrieve the weapon or still remain in the area armed with other weapons. Contrary to Rolling's assertions, these exigent circumstances, i.e., the danger to police, which justified Deputy Liddell's initial warrantless search of the tote bag for weapons, remained even after the crime scene unit arrived at the campsite. Thus, we find that the trial court's conclusion that the warrantless search of Rolling's tent and totebag was justified by exigent circumstances, i.e., danger to police, is supported by the record.

Furthermore, although the trial court's order does not expressly address the propriety of Investigator Smith's search of the contents of the totebag six days later, we find that it was a valid inventory search. An inventory search is a Fourth Amendment search and seizure, *Elson v. State,* 337 So.2d 959 (Fla.1976), but is unique in that its purposes are for the protection of property and persons rather than to investigate criminal activity. *Miller v. State,* 403 So.2d 1307 (Fla.1981). Contraband or evidence seized in a valid inventory search is admissible because the procedure is a recognized exception to the warrant requirement. *Caplan v.*

State, 531 So.2d 88 (Fla.1988). The nature of this exception, however, is determined by the nature of the intrusion.

In *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the United States Supreme Court discussed the protective, noncriminal basis of this particular intrusion and pointed out that the probable cause standard and the warrant requirement are not relevant to an inventory search analysis. The test is solely one of "reasonableness." The reasonableness of a purported inventory search is dependent upon it being a true good-faith inventory search and not a subterfuge for a criminal, investigatory search. If the search is not, in fact, an inventory search, then it must be justified on some other basis. *Fields v. State,* 369 So.2d 603 (Fla. 1st DCA 1978).

Investigator Smith testified at the suppression hearing that his search of September 4, in which he itemized the contents of the totebag and cataloged the serial numbers on the red-stained money recovered from the campsite, was a "routine inventory" pursuant to his investigation of the bank robbery which occurred the night before police found Rolling's campsite. Because we find that Smith's inventory of the contents of the totebag meets the *Opperman* standard and was reasonable in light of the circumstances of this case, we affirm the trial court's denial of Rolling's motion to suppress physical evidence recovered from his tent and totebag.

SEVERANCE

Rolling asserts that the trial court improperly joined these cases under ***295** Florida Rule of Criminal Procedure 3.150(a) for purposes of his sentencing trial. Consequently, he urges us to vacate his sentences, sever the three cases and remand for a fair determination of his sentence in three separate penalty proceedings.

The record reflects that Rolling killed Larson and Powell in their apartment on Friday, August 24 at approximately 3 a.m. About forty-two hours later, in an apartment two miles away, Christa Hoyt was murdered on Saturday, August 25 at around 11 a.m. Finally, on Monday, August 27, at around 3 a.m., Rolling killed Taboada and Paules in their apartment located in a complex about one mile from each of the first two crime scenes. Thus, within a seventy-two hour period, Rolling had stabbed to death five college students in their apartments, sexually battering three of his victims before killing them.

Initially, Rolling's pretrial motion to sever was made solely on grounds that "[a] severance is necessary to promote a fair determination of the defendant's guilt or innocence as to each count in the indictment." Rolling did not argue pretrial that a severance was also warranted, should a penalty phase trial become necessary, in order to fairly determine the appropriate sentences for these crimes. Florida Rule of Criminal Procedure 3.150 states in pertinent part:

> (a) Joinder of Offenses. Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses ... are based on the same act or transaction or on 2 or more connected acts or transactions.

Relying on our decisions in *Bundy v. State,* 455 So.2d 330 (Fla.1984), *Wright v. State,* 586 So.2d 1024 (Fla.1991), *Fotopoulos v. State,* 608 So.2d 784 (Fla.1992), *Crossley v. State,* 596 So.2d 447 (Fla.1992), and *Ellis v. State,* 622 So.2d 991 (Fla.1993), the trial court concluded that the instant offenses were connected by temporal and geographical association, the nature of the crimes, and the manner in which they were committed. The court explained:

> From a review of those cases, the [Florida Supreme] Court discerns several rules to be applied to determine whether or not offenses are 'connected' for purposes of the rules of joinder. First, the Court found that 'for a joinder to be appropriate the crimes in question must be linked in some significant way.' *Ellis,* at [1000]. Two recognized 'links' were mentioned by the Court in its opinion: the fact that one crime is causally related to the other, and the fact that the crimes occurred "during a 'spree' interrupted by no significant period of respite." *Id.* The Court then added that the general temporal and geographical proximity is not, in and of itself, a link, but is considered insofar as it "helps prove a proper and significant link between the crimes." Citing *Crossley.*
>
> In this case, based on the testimony present at the hearing, the [trial] [c]ourt finds no causal link between the offenses in the sense that one offense was used to induce someone to commit another. *Fotopoulos.* The [c]ourt finds, however, that the offenses charged at the three crime scenes are linked by a temporal continuity, not merely a temporal proximity. Temporal continuity is one of the 'significant links' recognized by the Supreme Court in *Ellis* as found in *Bundy*—although by a different name. The [c]ourt noted that the offenses in *Bundy* occurred "during a 'spree' interrupted by no significant period of respite." It

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> is apparent from the context and from the reference to "respite" that the word, "spree," was meant to refer to a temporal continuity. From the factual information provided to the court at the hearing, the [c]ourt finds that the events were so linked as to constitute a single prolonged episode during which the deaths of five persons were effected.

Prior to jury selection, Rolling orally objected to the joinder of the three crime scenes for penalty phase purposes on grounds that a severance was necessary to prevent a "carryover effect" of aggravating factors applicable to one crime scene from influencing the evaluation of aggravating factors applicable to another crime scene. After hearing arguments from the parties, the trial court denied this motion also in light of ***296** the fact that the statutory aggravators, as well as all of the mitigating evidence, would apply to all three of the crime scenes; and the jury would be given specific instructions as to the death of each victim and an opportunity to render five separate sentencing recommendations. Because the record and relevant caselaw support the trial court's findings that these murders were properly joined under rule 3.150(a) for penalty phase purposes, we reject Rolling's severance claim as being without merit.

THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR

Rolling argues that the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance as to the murder of Sonya Larson because there was no evidence that Ms. Larson, who was attacked in her sleep, anticipated her death or otherwise endured "extreme pain or prolonged suffering." *Elam v. State,* 636 So.2d 1312 (Fla.1994).

The trial court's sentencing order states in pertinent part:

> Sonya Larson was killed in her own bed by multiple stab wounds.... The attack was characterized by the medical examiner as a "blitz" attack after which the victim would have remained alive for a period from thirty to sixty seconds. Despite the relative shortness of the event, the fact that many of the wounds were characterized as defensive wounds indicates that the victim was awake and aware of what was occurring. During all this time, the victim's mouth was taped shut so that she could not cry out.

Contrary to Rolling's assertion that there was no evidence that Ms. Larson endured "prolonged suffering" or "anticipated her death," the record reflects the medical examiner testified that Ms. Larson sustained defensive wounds on her arms during Rolling's attack and was awake between thirty and sixty seconds before losing consciousness and dying. Moreover, Rolling's statement to police on January 31 is consistent with the medical examiner's testimony and the trial court's finding. Rolling told police he stabbed Ms. Larson and put duct tape over her mouth to muffle her cries. He explained that he continued to stab her as she fought and tried to fend off his blows.

Finally, as the State correctly notes, Rolling's guilty plea to this murder on February 15, 1994, is supported by a factual basis which also shows that Rolling muffled Ms. Larson's cries and that she sustained defensive wounds on her arms and left thigh.

Because the evidence in the record demonstrates that Ms. Larson was awake but disabled by the duct tape over her mouth while she struggled with her attacker, sustained several defensive wounds to her arms and leg, and did not die instantaneously, we find that the trial court properly found the heinous, atrocious, or cruel aggravator proved beyond a reasonable doubt. *See Geralds v. State,* 674 So.2d 96 (Fla.), *cert.denied,* 519 U.S. 891, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); *Merck v. State,* 664 So.2d 939, 943 (Fla.1995); *Garcia v. State,* 644 So.2d 59, 63 (Fla.1994); *Dudley v. State,* 545 So.2d 857, 860 (Fla.1989).

JURY INSTRUCTION

Rolling argues that the trial court erred in giving an unconstitutionally vague jury instruction as to the heinous, atrocious, or cruel (HAC) aggravating factor. Here, the trial court gave the following HAC jury instruction:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means especially wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> In order for you to find a first-degree murder was heinous, atrocious or cruel, you must find that it was accompanied by additional acts that showed that the crime was conscious [sic] or pitiless, and was unnecessarily torturous to the victim.

> Events occurring after the victim dies or loses consciousness should not be considered by you to establish that this crime was especially heinous, atrocious, or cruel.

As the State correctly explains, the instant instruction, which is similar in all material ***297** aspects to the instruction upheld by this Court in *Hall v. State,* 614 So.2d 473, 478 (Fla.1993), has been reaffirmed on numerous occasions. *See Geralds v. State,* 674 So.2d 96 (Fla.1996); *Merck v. State,* 664 So.2d 939, 943 (Fla.1995). Consequently, we reject Rolling's claim that the trial court's instruction to the jury on the HAC aggravator was unconstitutional. We find that the jury in Rolling's penalty phase trial received a specific instruction which fairly apprised the jurors of the definition of each term as well as the surrounding circumstances the State had to prove to support this aggravating factor.

PROPORTIONALITY

Finally, albeit not argued by Rolling on appeal, our review of the entire record in this case shows that death is the appropriate sentence for each of these brutal murders and is not disproportionate given the facts and circumstances of this case. *See Robinson v. State,* 610 So.2d 1288 (Fla.1992); *Coleman v. State,* 610 So.2d 1283 (Fla.1992); *Henderson v. State,* 463 So.2d 196 (Fla.1985); *Bundy v. State,* 455 So.2d 330 (Fla.1985); *Francois v. State,* 407 So.2d 885 (Fla.1981).

Accordingly, we affirm Rolling's sentences of death.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ANSTEAD, Judge, concurring in part and dissenting in part.
I cannot concur in the majority's conclusion that appellant was not entitled to a change of venue.

We have held that a change of venue is mandated when a record contains "evidence that a substantial number of the veniremen had lived in fear during a defendant's 'reign of terror.' " See *Thomas v. State,* 374 So.2d 508, 516 (Fla.1979). If ever those words had meaning, they have meaning here. This case, consistent with the change of venue from Tallahassee to Miami in *Bundy v. State,* 455 So.2d 330 (Fla.1984), involving similar horrifying circumstances, should not have been tried in the same college community so deeply scarred by its crimes. We are only fooling ourselves, and closing our eyes to what is obvious to all, when we deny the magnitude and depth of the fear and loss sustained by the Gainesville community as reflected in this record. A justice system asks too much when it asks a community so deeply torn asunder to decide the fate of the person admittedly responsible for the unspeakable crimes at issue.

There is an obvious and substantial qualitative difference between the task facing the citizens of Gainesville compared to this case being tried anywhere else in Florida. While any community or group of potential jurors would have difficulty being objective in a case of this nature, the community actually violated has been affected in a way profoundly unique because of its relationship to the crimes and the victims. Sometimes we ask too much. I fear we have done so here.

All Citations

695 So.2d 278, 22 Fla. L. Weekly S141, 22 Fla. L. Weekly S347

Footnotes

1 The trial court concluded that Rolling's impairment "did not rise to the level of being substantial, and is therefore not a statutory mitigating factor." *See* § 921.141(6)(f), Fla.Stat. (1995).

2 Florida Rule of Criminal Procedure 3.240(c) states in full:

> A motion for change of venue shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to file within such time.

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3 Apparently, the public defender believed that Rolling had a better chance of receiving a fair trial in Gainesville, a community known as a liberal college town, than anywhere else in the state. *See* Initial Brief of Appellant at 133.

4 As a preliminary matter, the State contends that Rolling has, at least in part, waived any claim that the trial court erred in denying his motion for a change of venue because his motion was not timely. The State emphasizes that Rolling chose not to file a change of venue motion pretrial because he did not believe the pretrial publicity—which was available to him and of which he was fully aware—existed in such a quantity as to deny him a fair trial in Alachua County. The State argues that because Rolling waited until the sixth day of voir dire to request a change of venue, the news articles and other documentation of community feelings prior to February 15, 1994, when Rolling pled guilty to these offenses, are no longer germane to the issue, and thus we cannot consider that evidence in determining whether the trial court properly denied Rolling's motion.

We agree that Rolling's deliberate strategy choice to proceed to trial in Gainesville despite the publicity indicates he did not believe it to be prejudicial at that time. We find, however, that Rolling's motion filed after the first phase of voir dire preserved his claim for review on appeal. *See Provenzano v. State,* 497 So.2d 1177, 1183 (Fla.1986), *cert. denied,* 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987) (finding defendant's oral motion for change of venue on first day of voir dire was timely and approving trial court's denial of motion only after parties began to impanel a jury); *Davis v. State,* 461 So.2d 67, 69 n. 1 (Fla.1984), *cert. denied,* 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985) (stating that ruling on change of venue should not be made prior to jury selection because impartial jury may be seated if trial court finds credible the assurances of prospective jurors that they can set aside extrinsic knowledge and decide case on the evidence); *Manning v. State,* 378 So.2d 274, 276 (Fla.1979) (approving procedure where ruling on defendant's motion for change of venue is delayed until attempt has been made to select jury). We reiterate that our affirmance of the trial court's order denying Rolling's motion is based on a review of all the evidence of pretrial publicity contained in the record. Moreover, our conclusion that this issue was properly preserved for review in no way suggests that a defendant should delay filing a motion for a change of venue, as Rolling did here.

5 Rolling argues extensively that the trial court's award of additional peremptory challenges was insufficient in this case, because the court refused Rolling's request for a seventh one to peremptorily strike Ms. Kerrick, who sat as member of the jury. Rolling never challenged Ms. Kerrick for cause at any time during the voir dire or otherwise stated for the record why he wished to strike Ms. Kerrick. As with the other members of the jury, the court found credible Ms. Kerrick's assurances that she could put aside her extrinsic knowledge of this case and recommend a sentence based on the trial court's instructions and the evidence presented in court. Thus, we reject Rolling's argument that he was prejudiced by the trial court's failure to award him an additional peremptory challenge.

6 We reject the State's argument that these claims of error are not properly appealable to this Court under *Krawczuk v. State,* 634 So.2d 1070 (Fla.1994), and *Robinson v. State,* 373 So.2d 898 (Fla.1979), because they do not survive his guilty plea. Rolling is not challenging the court's pretrial ruling as to the validity of his guilty plea, nor is he challenging the plea itself. To the contrary, Rolling challenges the court's pretrial denial of his motion to suppress as it pertains solely to the *penalty phase* proceedings. Here, Rolling's statements to Lewis and law enforcement officers were offered at the penalty phase to support three aggravating factors: in the course of a sexual battery; heinous, atrocious, or cruel; and cold, calculated, and premeditated. Rolling objected to the admission of these statements prior to opening statements and repeated his objection each time the evidence was introduced. Thus, this claim was properly preserved for our review.

7 Respectively: prohibiting a lawyer from communicating about the subject of a representation with a person known to be represented by counsel unless the lawyer has the consent of the other lawyer; holding a lawyer responsible for conduct of other persons that would be a violation of professional obligations if the other person was a lawyer where the lawyer orders or otherwise ratifies the conduct involved.

8 The United States Supreme Court has since clarified the *Massiah* rule in *Patterson v. Illinois,* 487 U.S. 285, 290–91, 108 S.Ct. 2389, 2393–94, 101 L.Ed.2d 261 (1988). In that case, the Court noted that, while the Sixth Amendment right to counsel attached with the filing of the indictment, police officers were not precluded from initiating questioning of the accused. Rather, the Court further explained in *Patterson* that the right to counsel must attach and be acknowledged by the accused before he or she receives the benefit of the Sixth Amendment protections set out in *Massiah. Id.. See also Phillips v. State,* 612 So.2d 557, 558 n. 2 (Fla.1992) (recognizing that under article I, section 9 of the Florida Constitution,

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"[r]egardless of when the right attaches, the defendant must still invoke the right in order to be protected"); *Traylor v. State,* 596 So.2d 957, 968 (Fla.1992) (reiterating that under article I, section 9 of Florida Constitution, the state may not initiate any crucial confrontation with a defendant once a lawyer has been requested or retained). We note, however, that the United States Supreme Court's *Patterson* decision modifying the *Massiah* rule is not critical to the analysis of Rolling's claim in this case because he already was represented by counsel at the time of the alleged Sixth Amendment violation here. Thus, consistent with *Patterson* and our own caselaw, Rolling's Sixth Amendment right had attached and been sufficiently invoked.

9 The trial court granted Rolling's motion to suppress as to statements Rolling made to Florida Department of Law Enforcement agents on April 17, 1991. These statements were not admitted against Rolling at his sentencing proceeding.

10 In 1982, article I, section 12 of the Florida Constitution, relating to search and seizure, was amended:

> Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

The underlined portions above constitute the 1982 amendment. *See* Fla.H.J.R. 31–H (1982).

With the conformity clause amendment we are bound to follow the interpretations of the United States Supreme Court with respect to the Fourth Amendment and provide to Florida citizens no greater protection than those interpretations. *Bernie v. State,* 524 So.2d 988, 990–91 (Fla.1988). In addition, article I, section 12 applies to both past and future United States Supreme Court decisions. *Id.* Nevertheless, when the United States Supreme Court has not previously addressed a particular search and seizure issue which comes before us for review, we are free to look to our own precedent for guidance. *See State v. Cross,* 487 So.2d 1056, 1057 (Fla.), *cert. dismissed,* 479 U.S. 805, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986).

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145 Idaho 623
Supreme Court of Idaho,
Boise, March 2008 Term.

STATE of Idaho, Plaintiff–Appellant,
v.
David PRUSS, Defendant–Respondent.

No. 33617.
|
March 27, 2008.

Synopsis
Background: Defendant, charged with 21 felonies and 14 misdemeanors, moved to suppress items obtained from search of his "hooch," which consisted of frame structure in woods and backpacking tent erected inside wooden frame. The District Court, Second Judicial District, Clearwater County, John H. Bradbury, J., ordered all of the items seized suppressed from evidence. State appealed.

Holdings: The Supreme Court, Eismann, C.J., held that:

defendant had reasonable expectation of privacy in his hooch, and

search of hooch could not be justified as incident to defendant's lawful arrest.

Affirmed.

Attorneys and Law Firms

****1232** Hon. Lawrence G. Wasden, Attorney General, Boise, for appellant. Ralph R. Blount argued.

Molly J. Huskey, State Appellate Public Defender, Boise, for respondent. Sara B. Thomas argued.

Opinion

EISMANN, Chief Justice.

***624** This is an appeal from an order suppressing evidence obtained from the warrantless search of a "hooch" constructed by the Defendant on public forest lands. We hold that the district court did not err in holding that the Defendant had a reasonable expectation of privacy in his hooch and that the search cannot be justified as incident to his lawful arrest where it occurred after he had been arrested, handcuffed, and removed from the scene.

I. FACTS AND PROCEDURAL HISTORY

During the summer of 2005, the Clearwater County sheriff's department was investigating a series of burglaries and property damage crimes. The damaged property included logging equipment and public utility facilities that had been shot with a high-powered rifle and a handgun. Sheriff deputies learned from confidential informants that the person responsible was one David Pruss (Pruss), that he was armed with a .357 caliber ***625 **1233** handgun and a MAK–90 semi-automatic rifle, and that he talked about shooting public utilities facilities in order to draw law enforcement personnel so he could ambush them. According to the informants, Pruss was living in a "hooch" in the forest.

Based upon the information obtained during the investigation, the State filed a complaint on July 12, 2005, charging Pruss with felony crimes of malicious injury to property and burglary. On the same date, a warrant was issued for Pruss's arrest, with bond set in the amount of $150,000.

A house near the site of the vandalized logging equipment had been burglarized twice, with coffee being stolen. In an attempt to locate Pruss, a deputy put a transmitter in a coffee can at the home. The can was stolen in another burglary, and on August 30, 2005, a group of eight to ten deputies tracked the signal to a steep, heavily-wooded ravine adjacent to the logging site. There they found a frame structure camouflaged with tree branches that was about six feet square and three to five feet high. The frame was made of sections of limbs or small trees that were lashed together. The frame was covered by a plastic blue tarp, which was then covered by the tree boughs. A backpacking tent was erected inside the wooden frame, which extended a few feet beyond the front of the tent to form a small vestibule. For simplicity, the word "hooch" will be used to refer to both the tent and wooden structure.

When they approached the hooch, deputies could hear noise coming from inside it.[1] One deputy ordered the occupant to come out, and when there was no response he fired two rounds of CS gas into the hooch. The deputy moved closer and saw someone partially exposed at the hooch's doorway.

He ordered the person to come out and show his hands, and the person began crawling out. As he was doing so, the deputy could see a MAK–90 rifle lying on the tent floor near the person's leg. When the person was about halfway out of the hooch, he paused and appeared about to re-enter it. The deputy then forced him to the ground and ordered him not to move. When other officers covered the person, the deputy handcuffed him, searched him for weapons, and then had him stand up outside the structure. The person turned out to be Pruss. The deputies immediately escorted Pruss to an all terrain vehicle, which they used to transport him out of the ravine up to a nearby road. He was then put in a patrol car and taken to jail. After deputies had removed Pruss from the scene, other deputies searched the hooch without a warrant.

On March 21, 2006, the State filed an amended criminal complaint charging Pruss with twenty-one felonies and fourteen misdemeanors. After a preliminary hearing, Pruss was bound over to answer to the charges in district court.

On June 6, Pruss moved to suppress the items obtained from the search of the hooch on the ground that the warrantless search and seizure violated the Constitutions of the United States of America and the State of Idaho. The State contended that Pruss did not have a reasonable expectation of privacy in the hooch; that the search was incident to a lawful arrest; that the portability of the hooch removed it from protection of the Fourth Amendment to the United States Constitution and Article 1, § 17, of the Idaho Constitution; and that the MAK–90 rifle and coffee can were lawfully seized because they were in plain view. After an evidentiary hearing, the district court held that the search and seizure violated the Fourth Amendment and ordered all of the items seized suppressed from evidence. The State then timely appealed.

II. ISSUES ON APPEAL

1. Did Pruss have a reasonable expectation of privacy in his hooch?

2. Were the MAK–90 rifle and the coffee can seized as part of a lawful search incident to Pruss's arrest?

****1234 *626 III. ANALYSIS**

Pruss alleged in his motion to suppress that the search of his hooch violated both Article 1, § 17, of the Idaho Constitution and the Fourth Amendment to the Constitution of the United States. The district court based its decision upon the Fourth Amendment and did not address the Idaho Constitution. The guarantee against unreasonable search and seizure under Article 1, § 17, is substantially similar to the guarantee under the Fourth Amendment, although this Court has at times construed the provisions of our Constitution to grant greater protection than that afforded under the United States Supreme Court's interpretation of the federal Constitution. *State v. Fees,* 140 Idaho 81, 88, 90 P.3d 306, 313 (2004). Because Pruss relied upon the provisions of both Constitutions, our opinion in this case is based upon both the Idaho and federal Constitutions.

"When we review an order granting or denying a motion to suppress, we accept the trial court's factual findings, unless they are clearly erroneous. We exercise free review, however, over the trial court's determination of whether or not those facts require suppression of the evidence." *Fees,* 140 Idaho at 84, 90 P.3d at 309 (citations omitted).

A. Did Pruss Have a Reasonable Expectation of Privacy in His Hooch?

A person challenging a search has the burden of showing that he or she had a legitimate expectation of privacy in the item or place searched. *Rawlings v. Kentucky,* 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633, 641 (1980); *State v. Cowen,* 104 Idaho 649, 651, 662 P.2d 230, 232 (1983). That involves a two-part inquiry: (1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable? *California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811–12, 90 L.Ed.2d 210, 215–16 (1986); *State v. Donato,* 135 Idaho 469, 473, 20 P.3d 5, 9 (2001).

The first inquiry under the two-part test is an issue of fact. Did Pruss have a subjective expectation of privacy in his hooch? The district court found that he did. That finding is supported by substantial and competent evidence. Pruss attempted to camouflage his hooch so that it would not be readily observable. More significantly, one can certainly infer that a person has a subjective expectation of privacy in his dwelling, even if it is a temporary structure like a tent, travel trailer, or the hooch in this case.

The second inquiry is an issue of law. Is society willing to recognize Pruss's expectation of privacy as being reasonable? Stated differently, "the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver*

v. United States, 466 U.S. 170, 182–83, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214, 227 (1984).

"[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton v. New York,* 445 U.S. 573, 601, 100 S.Ct. 1371, 1387–88, 63 L.Ed.2d 639, 660 (1980). The respect for the sanctity of the home does not depend upon whether it is a mansion or hut, or whether it is a permanent or a temporary structure. As stated eloquently by William Pitt, " 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!' " *Miller v. United States,* 357 U.S. 301, 307, 78 S.Ct. 1190, 1195, 2 L.Ed.2d 1332, 1337 (1958) (quoting remarks attributed to William Pitt).

A structure need not be one's "home" in order for the occupant to have a legitimate expectation of privacy there. *Minnesota v. Olson,* 495 U.S. 91, 96, 110 S.Ct. 1684, 1687–88, 109 L.Ed.2d 85, 92–93 (1990). " '[T]he Fourth Amendment protects people, not places,' and provides sanctuary for citizens wherever they have a legitimate expectation of privacy." *Id.* at 96 n. 5, 110 S.Ct. at 1688 n. 5, 109 L.Ed.2d at 93 n. 5.

Throughout our State's history, its citizens have engaged in various types of outdoor recreational activities on public lands. Idaho's ***627 **1235** first game laws were enacted by the Territorial Legislature in 1864. Idaho's state park system will celebrate its centennial this year. While engaging in outdoor recreational activities on public lands, our citizens often use various types of portable shelters such as backpacking tents, wall tents, tent trailers, and travel trailers. The central purpose of the constitutional protection against unreasonable searches and seizures forecloses any distinction between such types of shelters. *See, United States v. Ross,* 456 U.S. 798, 822, 102 S.Ct. 2157, 2171–72, 72 L.Ed.2d 572, 592 (1982) ("a constitutional distinction between 'worthy' and 'unworthy' containers would be improper"). If the travel trailer is protected against government intrusion, then so is the tent.

Utilizing public lands for outdoor recreational activities is a longstanding custom in this State that is recognized as valuable to society. For example, on May 1, 2007, the Governor of Idaho issued a proclamation declaring June 2007 to be "Great Outdoors Month" and "invit[ing] citizens to observe this month by taking advantage of the many opportunities our state offers for family outdoor recreation activities." As the Governor recognized in his proclamation, "[O]utdoor activities contribute to the physical well-being and happiness of the people of the state." We hold that a person using a temporary shelter[2] on public lands as his or her living quarters has a reasonable expectation of privacy in that shelter and that the government may not intrude into the shelter without a search warrant, absent an exception to the warrant requirement.

We recognize that such temporary shelters will often be located far from courthouses.[3] In this case, the deputies were in radio contact with the sheriff's office. Idaho law permits telephonic applications for a search warrant and authorizes the magistrate to have a peace officer sign the magistrate's name on the warrant. *State v. Zueger,* 143 Idaho 647, 152 P.3d 8 (2006); *State v. Fees,* 140 Idaho 81, 90 P.3d 306 (2004); I.C. § 19–4406. In addition, many permanent homes in our State are located in remote areas. Remoteness does not justify waiving the warrant requirement.

Relying upon Idaho Code § 58–312,[4] the State argues that Pruss did not have a reasonable expectation of privacy because he was a squatter[5] and trespasser on state land. The applicable part of that statute provides, "All persons using or occupying any state land without a lease from the state ... shall be regarded as trespassers." We need not address the scope of that statute because the deputies in this case were not the owners of the land or in charge of it. There is nothing in the record indicating that the Department of Lands had told Pruss to leave or had asked the deputies to evict him.

****1236 *628** The State next contends that the place where Pruss had established his camp was not a designated campground. That has no relevance to whether his expectation of privacy was reasonable. The longstanding tradition of camping on public lands in Idaho is not limited to camping at designated campgrounds. Many backpackers, fishermen, hunters and others seek isolated areas far from designated campgrounds to engage in their activities.

The State also asserts that Pruss should not have a reasonable expectation of privacy in his hooch because he was not engaged in ordinary outdoor recreation. Rather, he was using his hooch as a base from which to commit the crimes of

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burglary and malicious injury to property and he was a danger to others. In addition, the State adds that Pruss wrongfully cut tree branches to construct his hooch and left trash around his campsite. The protections of the Fourth Amendment and Article 1, § 17, extend even to those who are engaged in illegal activities. Virtually all of the judicial decisions interpreting and applying those constitutional provisions arise out of criminal cases in which a search or seizure produced evidence showing that the person claiming the protection of the Constitution had committed a crime. Any holding that the protection against a warrantless search depends upon whether it produced evidence of criminal activity would diminish the rights of law-abiding citizens.

The State noted several times in its brief and argument that Pruss was armed with a rifle and handgun, apparently asserting that persons with firearms do not have a reasonable expectation of privacy on public lands. Many people utilizing public lands in Idaho carry firearms for hunting, protection, or simply recreational shooting. When doing so, they do not lose their rights under the Fourth Amendment and Article 1, § 17.

Finally, the State contends that Pruss did not have a reasonable expectation of privacy because the place where he was camping was subject to the "open fields doctrine" stated in *Oliver v. United States,* 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). In *Oliver,* the Supreme Court held that the government's intrusion upon an open field located outside the curtilage of the home did not violate the Fourth Amendment, even if the field was posted with "No Trespassing" signs. The State argues, "Because the forest land upon which Pruss pitched a tent and covered with branches was accessible to the public, and the police, it was subject to the open fields doctrine. Pruss had no expectation of privacy in his activity on that land." Although the State is correct that Pruss did not have a reasonable expectation of privacy in the forest land surrounding his campsite, the interior of Pruss's hooch was not an open field. Police officers acting without a warrant are entitled to the same intrusion as a reasonably respectful citizen. *State v. Christensen,* 131 Idaho 143, 147, 953 P.2d 583, 587 (1998). A reasonably respectful citizen would not make an uninvited entry into another's tent pitched on public lands. Although the police could certainly have walked up to Pruss's hooch and while doing so could have lawfully observed anything in plain view, the open fields doctrine would not justify their entry into the hooch.

B. Were the MAK–90 Rifle and the Coffee Can Seized as Part of a Lawful Search Incident to Pruss's Arrest?

During the search of Pruss's tent, the deputies seized his MAK–90 rifle and the stolen coffee can in which the transmitter had been placed. The State argues that those items should at least be admissible in evidence. Because Pruss had a reasonable expectation of privacy in his hooch, the State has the burden of showing an exception to the warrant requirement. *United States v. Jeffers,* 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59, 64 (1951); *State v. Curl,* 125 Idaho 224, 225, 869 P.2d 224, 225 (1993). The State argues two exceptions.

First, the State contends that the search of Pruss's hooch can be justified as a search incident to his arrest. When making a lawful custodial arrest, law enforcement personnel are entitled to search an arrestee and the area immediately surrounding him. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); ***629 **1237** *State v. Watts,* 142 Idaho 230, 127 P.3d 133 (2005). "This rule was justified by the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence." *Thornton v. United States,* 541 U.S. 615, 620, 124 S.Ct. 2127, 2130, 158 L.Ed.2d 905, 912 (2004); *accord, State v. LaMay,* 140 Idaho 835, 838, 103 P.3d 448, 451 (2004).

In this case, the district court found that Pruss was arrested at about 7:16 a.m.;[6] that he was immediately transported by all-terrain vehicle out of the ravine to a road, which took twenty to twenty-five minutes; that by about 8:12 a.m. he was being transported in a patrol car to the sheriff's office; and that the search began at about 9:00 a.m.[7]

"[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.' " *Mincey v. Arizona,* 437 U.S. 385, 393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290, 300 (1978) (quoting from *Terry v. Ohio,* 392 U.S. 1, 25–26, 88 S.Ct. 1868, 1882–83, 20 L.Ed.2d 889, 908–09 (1968)). The search in this case began about forty-five minutes after Pruss had been driven away in the patrol car. At that time, there was absolutely no danger that Pruss could have used any weapon in the hooch or could have destroyed any evidence of a crime. The district court did not err in holding that the intrusion into Pruss's hooch could not be justified as a search incident to his arrest. *Chambers v. Maroney,* 399 U.S. 42, 47, 90 S.Ct. 1975, 1978, 26 L.Ed.2d 419, 426 (1975) ("the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house"); *LaMay,* 140 Idaho at 839, 103 P.3d at 452 (where

defendant had been arrested, handcuffed, and placed in a hallway under guard, the search of a backpack located fifteen feet away in another room was not justified as a search incident to his arrest merely because the backpack had been in his immediate control prior to his arrest).

The State argues that the MAK–90 rifle and the coffee can were plainly visible when Pruss was crawling out of his hooch. “The plain view exception allows police officers to make warrantless seizures of evidence viewed from a location where the officer has a right to be. Thus, the plain view exception applies to warrantless seizures of readily visible items, not warrantless searches.” *State v. Christensen,* 131 Idaho 143, 146, 953 P.2d 583, 586 (1998); *accord, Horton v. California,* 496 U.S. 128, 134–36, 110 S.Ct. 2301, 2306–08, 110 L.Ed.2d 112, 121–23 (1990). “[A]pplication of the plain view exception also requires that officer have ‘a lawful right of access to the object itself.’ ” *State v. Buti,* 131 Idaho 793, 799, 964 P.2d 660, 666 (1998) (quoting from *Horton* at 137, 110 S.Ct. at 2308, 110 L.Ed.2d at 123). The deputies did not enter Pruss's hooch prior to the warrantless search. Their observation of the items from outside the hooch was lawful and could have been information submitted to obtain a search warrant, but it does not justify the warrantless intrusion into the hooch in order to search it.

Second, the State contends that concern about the possibility of booby-traps was a valid reason for not immediately searching the hooch incident to Pruss's arrest. The confidential informants had stated that Pruss was fascinated with and knowledgeable about bombs and booby-traps, and the information that the deputies had learned about him certainly ***630 **1238** justified caution. The deputies did not need a warrant to search the area around Pruss's hooch for any possible booby-traps. However, the State has not pointed to anything in the record indicating that they were concerned enough to do so. It likewise has not pointed to any evidence indicating that the deputies believed the interior of Pruss's hooch may have been booby-trapped or that it contained explosives. The State did not raise this argument in the trial court and has not shown that it justifies the warrantless search in this case. A more likely reason for the delay, based upon the testimony presented, is that the deputies desired to make a methodical search of the hooch and its contents, photographing and recording the various items found.

IV. CONCLUSION

The order of the district court suppressing the items seized during the search of Pruss's hooch is affirmed.

Justices BURDICK, J. JONES, W. JONES and Justice Pro Tem WALTERS concur.

All Citations

145 Idaho 623, 181 P.3d 1231

Footnotes

1 The noise included the sound of a zipper, which may have been Pruss unzipping the door of the tent.

2 By “temporary,” we mean not permanent. Temporary does not refer to the length of time the person utilizes the temporary shelter as his or her abode.

3 The activity log of radio transmissions maintained by dispatch indicates that it would be about an hour drive from where Pruss was put into the patrol car to the sheriff's office.

4 That statute provides:

> All persons using or occupying any state land without a lease from the state, and all persons who shall use or occupy state lands for more than thirty (30) days after the cancellation or expiration of a lease, shall be regarded as trespassers, and upon conviction shall be fined in a sum of not less than twenty-five dollars ($25.00) nor more than $500, or shall be punished by imprisonment in the county jail for a term of not to exceed six (6) months, or by both such fine and imprisonment. Any criminal suit under this section may be instituted by any person against any trespasser, and regardless of the fact whether or not the said land is under lease to any person other than the trespasser, and in case of a lessee, the sureties of his bond shall be liable to a civil suit for all damages sustained by the state by reason of the trespass. Any suit for civil damages against a trespasser, may be instituted by the attorney

general in the name of the state, or in the event the land trespassed upon is leased, such suit for civil damages may be brought by the lessee in his own name: provided further, it shall be the duty of the prosecuting attorney to commence and prosecute all criminal actions under this section, arising in his county.

5 There was evidence in the record that Pruss had been living in the woods for slightly over two months, although no finding was made or requested as to whether he had been living in the same place during that time. The parties assumed that Pruss's hooch was located on State land.

6 The time stated for the arrest may be a typographical error. The testimony was that the arrest occurred at about 7:36 a.m., which would be consistent with the immediate transport to the waiting patrol car taking twenty to twenty-five minutes and the car being en route to the sheriff's office at 8:12 a.m. The difference between 7:16 a.m. and 7:36 a.m. is not of constitutional significance in this case. The times of the arrest and transport were based upon entries in dispatch activity log recording radio transmissions from the deputies.

7 The district court found that the search occurred about an hour after Pruss's arrest. During oral argument, the State contended that the search began fifteen minutes after Pruss's arrest and that the trial court's findings to the contrary were clearly erroneous. Because the State did not raise that issue in its opening brief, we will not consider it on appeal. *Hogg v. Wolske,* 142 Idaho 549, 557–58, 130 P.3d 1087, 1095–96 (2006); *Rowley v. Fuhrman,* 133 Idaho 105, 108, 982 P.2d 940, 943 (1999); *State v. Lewis,* 126 Idaho 77, 82, 878 P.2d 776, 781 n. 2 (1994).

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941 F.3d 1058
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Wali Ebbin Rashee ROSS, a.k.a. Wali Ibn Ross, a.k.a. Wal Ebbin Rashee Ross, Defendant - Appellant.

No. 18-11679
|
(October 29, 2019)

Synopsis

Background: After defendant's motion to suppress evidence was denied, he pled guilty in the United States District Court for the Northern District of Florida, No. 3:17-cr-00086-MCR-1, Margaret C. Rodgers, J., 2017 WL 5162819, possession of a firearm and ammunition by a convicted felon and possession with intent to distribute heroin to denied the motion and reserved the right to appeal the denial of the motion to suppress. Defendant appealed.

Holdings: The Court of Appeals, Newsom, Circuit Judge, held that:

the government's failure to contest the issue in the trial court of whether defendant had Fourth Amendment standing to challenge the government's initial entry and sweep of motel room did not waive the issue on appeal;

evidence was insufficient to establish defendant had abandoned motel room at the time of police officers' initial entry and protective sweep;

police officers' warrantless entry and protective sweep of defendant's motel room, for the purpose of executing an arrest warrant, complied with the Fourth Amendment; and

defendant, a short-term motel guest, had no reasonable expectation of privacy in motel room after checkout time.

Affirmed.

Newsom, Circuit Judge, filed a concurring opinion.

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 3:17-cr-00086-MCR-1.

Before WILSON and NEWSOM, Circuit Judges, and PROCTOR,* District Judge.

Opinion

NEWSOM, Circuit Judge:

***1061** This appeal arises out of the denial of a defendant's motion to suppress evidence found in two separate, warrantless searches of his motel room—the first turned up a gun; the second, drugs and associated paraphernalia. On appeal, the defendant, Wali Ross, challenges the constitutionality of both searches. The government responds by defending the searches on the merits and, as a threshold matter, by disputing Ross's Fourth Amendment "standing" to contest them. (For the uninitiated, Fourth Amendment "standing" really has nothing to do with true-blue standing; rather, it constitutes a threshold element of a defendant's constitutional challenge on the merits. More on that later.) With respect to the standing issue, the government first argues that Ross "abandoned" his room, and any privacy interest therein, when, after seeing police officers staked out in the parking lot, he fled the motel on foot. Accordingly, the government says, Ross lacks Fourth Amendment standing to challenge either of the two subsequent searches. Moreover, and in any event, the government contends that any reasonable expectation of privacy that Ross might have had in the room expired at the motel's standard 11:00 a.m. checkout time, and that he therefore lacks standing, at the very least, to challenge the second of the two searches.

We hold as follows: In the circumstances of this case, Ross did not abandon his room when he ran, and he therefore has Fourth Amendment standing to challenge the officers' initial entry and the ensuing protective sweep, which they conducted within about 10 minutes of his flight. We further hold, however, that Ross's constitutional challenge to the officers' entry and sweep fails on the merits. As to the second search, which officers carried out with the consent of hotel management shortly after 11:00 a.m., we hold that Ross lost any reasonable expectation of privacy in his room at checkout time—and with it, his Fourth Amendment standing to contest the search.

I

A

The following took place between [approximately] 8:00 a.m. and 12:00 p.m. on July 21, 2017.

Early that morning, a joint state-federal task force gathered outside a Pensacola motel to arrest Wali Ross on three outstanding felony warrants—for trafficking hydrocodone, failure to appear on a battery charge, and failure to appear on a controlled-substances charge. Although the ***1062** officers had information that Ross was staying at the motel, he wasn't a registered guest, so they set up surveillance around the building and waited for him to make an appearance. The officers knew that Ross was a fugitive who had a history of violence and drug crimes.

Sometime between 9:00 and 9:30 a.m., Special Agent Jeremy England saw Ross leave Room 113, head for a truck, return to his room briefly, and then approach the truck again. When Ross spotted the officers, he made a break for it, scaling a chain-link fence and running toward the adjacent Interstate 10. The officers went after Ross, but when they reached the opposite side of the interstate to intercept him, he wasn't there. In the meantime, it dawned on Agent England that none of the officers had stayed behind at the motel, and he feared that Ross might have doubled back to the room unnoticed. So, about ten minutes after the chase began, Agent England and Detective William Wheeler returned to the motel to see if Ross had snuck back into his room. The door to Room 113 was closed, and Ross's truck remained in the parking lot.

Detective Wheeler obtained a room key and a copy of the room's registration from the front desk—the latter showed that the room was rented for one night to a woman named Donicia Wilson. (Although the name meant nothing to the officers at the time, they later learned that Ross was "a friend of a friend" of Wilson's husband; she had rented the room after she and her husband refused Ross's request to spend the night at their home because they had children and didn't know him very well.) Using the key, Agent England and Detective Wheeler entered Room 113 to execute the warrants and arrest Ross; they entered without knocking, as they believed that someone inside—Ross, a third party, or both—might pose a threat to them. Agent England testified that because Ross had a history of violence it was "just protocol" to operate on the premise that there would "possibly [be] someone [in the motel room] to hurt" them—in light of that risk, he said, the officers "made a tactical entry into the room." Once inside, they conducted a quick protective sweep, and on their way out Agent England saw in plain view a grocery bag in which the outline of a firearm was clearly visible. Agent England seized the gun, touched nothing else, and left.

Deputy U.S. Marshal Nicole Dugan notified ATF about the gun while Agent England and Detective Wheeler continued to surveil the motel. ATF Special Agent Kimberly Suhi arrived at the motel around 10:45 a.m. to retrieve the firearm. The motel's manager, Karen Nelson, told Agent Suhi that she could search Room 113 after the motel's standard 11:00 a.m. checkout time; up until that point, Suhi testified, Nelson "st[ood] in the doorway of the room" to "mak[e] sure no one was entering."[1] Nelson explained that if it looked like a guest was still using his room at checkout time, she might place a courtesy call to ask if he wanted to stay longer; otherwise, she said, motel management assumed that every guest had departed by 11:00 a.m., at which point housekeepers would enter the room to clean it. Nelson also explained that it was the motel's policy to inventory and store any items that guests left in their rooms and to notify law enforcement if they found any weapons or contraband.

***1063** At 11:00 a.m., Agent Suhi again sought and received Nelson's permission to search Room 113. When ATF agents entered the room, they found a cell phone and a Crown Royal bag filled with packets of different controlled substances—including around 12 grams of a heroin-laced mixture—cigars, and a digital scale.

B

Ross was charged with one count of being a felon in possession of a firearm and ammunition, one count of knowingly possessing heroin with intent to distribute, one count of firearms-related forfeiture, and one count of forfeiture related to the property and proceeds obtained by a controlled-substances violation. He moved to suppress the evidence found in both searches of his motel room. In his motion, Ross argued that the officers' initial entry—and the ensuing protective sweep, which turned up the gun—violated the Fourth Amendment "because there were no grounds for them to believe that a dangerous individual (or anyone) was inside the room." He asserted that "it would have been unrealistic for the officers to believe that [he] had returned to the room and was inside at that time (after fleeing from them)." Accordingly, he said, the officers didn't have the requisite reasonable belief either to enter the room or to conduct the sweep. Ross also argued that the second search —which was conducted with Nelson's permission just after 11:00 a.m., and in which the drugs were discovered—violated the Fourth Amendment "regardless of the alleged consent of the hotel management because it would not have occurred absent the illegal first search." According to Ross, "[t]he illegal seizure of the firearm ... directly [led] to the agents' desire to conduct the second search and their discussion with management to try to get its consent."

With respect to the initial entry and the protective sweep, the government responded (1) that because the officers couldn't find Ross near the interstate, they had reason to believe that he had returned to his motel room; (2) that Ross's multiple drug- and violence-related felony arrest warrants led the officers to conclude that he could be armed and dangerous; and (3) in addition, that exigent circumstances justified the entry, as "there was a definite likelihood that further delay could cause the escape of the defendant" and "jeopardize the safety of the officers and the public." With respect to the second search, the government argued that Ross didn't have Fourth Amendment "standing" to challenge it, as he had no reasonable expectation of privacy in Room 113 after the 11:00 a.m. checkout time and that, in any event, the search was valid because the officers reasonably believed that Nelson had the authority to consent to the search. Finally, the government contended that even if the second search was tainted, motel staff would inevitably have entered the room after checkout time and alerted police when they found the gun in plain view.

The district court denied Ross's motion to suppress. With respect to the initial entry and sweep, the court found that "[t]he arrest warrant granted officers a limited ability to enter to effectuate the arrest on [their] reasonable belief that Ross was in the room." Moreover, the court observed, the fact that Room 113 was not registered in Ross's name gave the officers "reason to be concerned that someone else might be in the room as well." Finally, the court held that "the chase and the fact that the officers lost sight of Ross presented exigent circumstances" that further justified the sweep—because the officers were in hot pursuit of a suspect with a history of violent activity for whom they had an arrest warrant, and ***1064** who reasonably could have returned to the room, the first search was lawful.

With respect to the second search, the district court concluded that after checkout time, Ross—who hadn't requested a late checkout or paid for an additional day—had no protectible privacy interest in the room. The court separately held that even if the initial entry and sweep were unlawful, Nelson's consent provided ample authority for the officers' post-checkout search. Finally, the court found that the inevitable-discovery and independent-source doctrines applied—either motel employees would have found the incriminating evidence when cleaning Room 113 after checkout time, or the task-force officers would have eventually searched the room.

Ross pleaded guilty to possession of a firearm and ammunition by a convicted felon and possession with intent to distribute heroin, reserving the right to appeal the denial of his motion to suppress.[2]

II

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. As already explained, this case involves two separate searches of Ross's motel room. We will consider them in turn.

A

Ross first challenges the officers' initial entry and the ensuing protective sweep, which they conducted roughly 10 minutes after Ross fled the motel on foot and shortly after they lost sight of him during the chase. The government not only defends the entry and sweep on the merits but also contends that Ross "abandoned" his motel room when he ran and, therefore, that he lacks Fourth Amendment "standing" to

complain. Because standing presents a threshold question, we will address it first and then turn—if and as necessary—to the merits.

1

The Fourth Amendment's protections extend to any thing or place with respect to which a person has a “reasonable expectation of privacy,” *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (quotation omitted)—including a hotel room, *see, e.g.*, *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). By contrast, an individual's Fourth Amendment rights are *not* infringed—or even implicated—by a search of a thing or place in which he has no reasonable expectation of privacy. *See, e.g.*, *United States v. Brazel*, 102 F.3d 1120, 1147 (11th Cir. 1997). This threshold issue—whether an individual has a reasonable expectation of privacy in the object of the challenged search—has come to be known as Fourth Amendment “standing.” To be clear—stay tuned for additional detail—Fourth Amendment “standing” and traditional Article III standing are *not* the same thing.

The government argues here that Ross “abandoned” any reasonable expectation of privacy in his room when he fled the motel with no intention of returning. Accordingly, the government says, Ross lacks Fourth Amendment standing to challenge ***1065** either the initial entry and the ensuing protective sweep—which occurred after the officers’ ill-fated pursuit of Ross toward I-10, and in which they discovered the gun—or the subsequent search—which occurred shortly after 11:00 a.m., and in which officers discovered the drug-related evidence.[3]

Although it's a close call, we reject the government's abandonment argument. We hold, therefore, that Ross has standing—at least to challenge the officers’ initial entry and sweep. (As explained below, we conclude for other reasons that Ross lacks standing to challenge the officers’ second, post-checkout search. *See infra* at 1068–71.)

a

Before addressing the substance of the government's position regarding abandonment, we first have to deal with a threshold procedural issue—namely, that the government didn't argue abandonment in the district court. Accordingly, we must determine whether the government has waived its Fourth Amendment standing objection—abandoned its abandonment argument, so to speak—vis-à-vis the initial entry and sweep.

As a general matter, we have held that if the government fails to contest Fourth Amendment standing before the district court, it waives the issue for appellate purposes. *See United States v. Gonzalez*, 71 F.3d 819, 827 n.18 (11th Cir. 1996), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *United States v. Kapperman*, 764 F.2d 786, 791 n.6 (11th Cir. 1985). The government contends, though, that a different rule applies here under our decision in *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015). *Sparks*, the government correctly says, holds that where a defendant has abandoned a premises, he suffers no injury from a search of it—and therefore has no standing in *either* the Fourth Amendment sense *or* the Article III sense. *Id.* at 1341 n.15. And, the argument goes, because abandonment implicates Article III standing—and thus subject matter jurisdiction—the issue isn't waivable. *Id.*

We have misgivings about the correctness of *Sparks*, which seems to “confuse[ ]” Fourth Amendment and Article III standing in precisely the way that the Supreme Court has forbidden. *See Byrd v. United States*, ––– U.S. ––––, 138 S. Ct. 1518, 1530, 200 L.Ed.2d 805 (2018) (“The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits.”). Even so, we recognize that we are bound by *Sparks*’s holding that where, as here, the challenge to Fourth Amendment standing results from a defendant's alleged act of abandonment, the challenge likewise implicates Article III jurisdiction, rendering it non-waivable. *See, e.g.*, *Breslow v. Wells Fargo Bank*, 755 F.3d 1265, 1267 (11th Cir. 2014) (“[I]t is the firmly established rule of ***1066** this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.”) (alteration in original) (quotation omitted). Rightly or wrongly, therefore, we find ourselves constrained to agree with the government that its failure to contest Ross's standing to challenge the officers’ initial entry and sweep in the district court doesn't bar it from doing so here.

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We turn, then, to address the government's abandonment argument on the merits.

b

"[I]t is settled law that one has no standing to complain of a search or seizure of property he has voluntarily abandoned." *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973) (en banc) (citations omitted).[4] While a defendant bears the initial burden of demonstrating that he has a reasonable expectation of privacy in a place or thing, the government bears the burden of proving that he has abandoned the property and, with it, his expectation of privacy. *See United States v. Ramos*, 12 F.3d 1019, 1023 (11th Cir. 1994).

The "critical inquiry" for present purposes is whether Ross "voluntarily discarded, left behind, or otherwise relinquished his interest in [his motel room] so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id.* at 1022 (emphasis omitted) (quoting *United States v. Winchester*, 916 F.2d 601, 603 (11th Cir. 1990)). His intent "may be inferred from acts, words and 'other objective facts.' " *Id.* at 1023 (quoting *United States v. Pirolli*, 673 F.2d 1200, 1204 (11th Cir. 1982)). In assessing abandonment, we consider "[a]ll relevant circumstances existing at the time of the alleged abandonment," *Colbert*, 474 F.2d at 176 (citation omitted), as well as subsequent events, which may provide "evidence of the defendant's intent to abandon the property at the previous time," *Winchester*, 916 F.2d at 604 (citation omitted). Abandonment under the Fourth Amendment "is not abandonment in the 'strict property-right sense' " but rather is evaluated using a "common sen[s]e approach." *Sparks*, 806 F.3d at 1342 (alteration in original) (quoting *United States v. Edwards*, 441 F.2d 749, 753 (5th Cir. 1971)).

The abandonment issue here is close; we can see both sides. For the reasons explained below, however, we conclude that the government has not discharged its burden of demonstrating that Ross had abandoned his room at the time of the officers' initial entry and protective sweep—which, again, occurred no more than 10 minutes after Ross fled the motel.

The facts pertaining to Ross's alleged abandonment are not well developed—in large part because, as already noted, the government didn't argue abandonment in the district court. And indeed, on appeal, the government doesn't really make much of a *factual* argument regarding Ross's abandonment, aside from asserting that Ross never returned to Room 113 or sought to extend his stay. Instead, the government relies primarily on statements in Ross's opening brief. There, Ross said, for instance, that "it was objectively unreasonable to think that [he] would have returned to the room"—and, indeed, that "[t]he premise that [he] would have returned to the room was absurd." Br. of Appellant at 26. In fairness, though, Ross ***1067** made those statements in an effort to rebut the government's merits-based argument, in support of the initial entry's constitutionality, that the officers had good reason to believe that Ross was in Room 113—an argument that tends (rather conspicuously) to undermine its contention that Ross had abandoned the very same room.[5] In his reply brief, Ross hastened to clarify that "[t]he government [was] confus[ing his] lack of intent to return to Room 113 *while police officers [we]re present* with an abandonment of the property contained within the room." Reply Br. of Appellant at 7.

To be clear, we have held that an individual *can* abandon a reasonable expectation of privacy solely as a result of police pursuit or presence. In *United States v. Edwards*, a defendant involved in a high-speed chase that ended in a car crash exited his vehicle—ditching it on a public highway, leaving the engine and lights on—and fled from police on foot. 441 F.2d 749, 750 (5th Cir. 1971). After unsuccessfully pursuing the defendant, officers returned to the car to inspect it, where they found illegal whiskey in the trunk. *Id.* The defendant moved to suppress the whiskey, arguing that he had a reasonable expectation of privacy in the car's trunk. *Id.* at 749. We held that even if the defendant might initially have had a protectible privacy interest in his car, he had abandoned it by running away. *Id.* at 751.

There are obvious similarities between *Edwards* and this case —like the defendant there, Ross saw the police, bolted, and left his belongings in order to avoid arrest. We conclude, though, that there are also important differences. Two, in particular, convince us that the government hasn't carried its burden of demonstrating Ross's abandonment.

First, the object of the search at issue here was a hotel room, not a car. Cars have historically been accorded a reduced level of Fourth Amendment protection. *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 569–70, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); *United States v. Holland*, 740 F.2d 878, 879–80 (11th Cir. 1984) (explaining that there is "a diminished expectation of privacy in automobiles" and that

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their "inherent mobility" distinguishes them from homes). By contrast, while a hotel room is not exactly a "house[ ]" within the meaning of the Fourth Amendment—one needn't ever "check out" of his own residence, for instance—the courts have long held that hotel rooms are entitled to a home-like level of constitutional protection. *See Stoner*, 376 U.S. at 490, 84 S.Ct. 889 ("No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.") (citation omitted); *see also United States v. Forker*, 928 F.2d 365, 370 (11th Cir. 1991) (stating that a person's hotel room is the "equivalent" of his home).

Second, there are meaningful factual distinctions between *Edwards* and this case. The defendant there left his car in the middle of a public highway, with the keys in the ignition and the lights on, before running from the police. 441 F.2d at 750. When Ross fled the motel, by contrast, ***1068** he locked his room and kept his key with him. Especially given that only 10 minutes elapsed between Ross's flight and the officers' warrantless entry, we simply can't say that, by that time, Ross had abandoned his privacy interest in the room.

We hold, therefore, that Ross has the requisite standing to challenge the officers' initial entry and protective sweep on the merits.

2

That, for Ross, is the good news. The bad: We hold that the task-force officers' initial entry and accompanying protective sweep of Ross's room complied with the Fourth Amendment.

As already explained, when the officers arrived at the motel on the morning of July 21, 2017, their objective was to arrest Ross on several outstanding warrants. "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is a reason to believe the suspect is within." *United States v. Williams*, 871 F.3d 1197, 1201 (11th Cir. 2017) (alteration in original) (quotation omitted). We can assume for present purposes that a person's hotel room counts as a "dwelling," *see Forker*, 928 F.2d at 370, and, therefore, that the rules we have articulated for in-home arrests pursuant to valid warrants apply here, as well.

In particular, in order to enter a hotel room to execute an arrest warrant, a law enforcement officer "must have a reasonable belief" both (1) that the room is in fact the suspect's and (2) that the suspect is inside. *See Williams*, 871 F.3d at 1201. "In undertaking this two-part inquiry, we consider the totality of the circumstances known to the officer at the time the warrant is executed and are guided by 'common sense factors.' " *Id.* (quotations omitted). Officers need not be "absolutely certain" that a suspect is inside before entering "to execute an arrest warrant." *United States v. Magluta*, 44 F.3d 1530, 1538 (11th Cir. 1995). Rather, they "may make reasonable inferences and presumptions based on the time of day or observations at the scene"—for instance, "that a person is [there] when his vehicle is parked outside." *Williams*, 871 F.3d at 1201. If, based on such rational deductions, the officers have a reasonable belief that a suspect is inside, they may search for him "until [he] is found." *Id.* Moreover, in order "[t]o protect their safety while making, and after, an arrest, [the] officers may also perform a 'protective sweep' " of the premises. *Id.* (quotation omitted). And finally, while inside, the officers "are permitted to seize any contraband in plain view." *Id.*

Here, the officers clearly knew that Ross was staying in Room 113—they had watched him walk out the door, approach a truck in the parking lot, return to the room, and then reemerge. The facts also support the conclusion that the officers had the requisite "reasonable belief"—based on "common sense factors" and permissible "inferences and presumptions"—that Ross had returned to the room following his flight toward I-10. The officers knew, for instance, not only that Ross had been in Room 113 but also that he had left his truck in the motel's parking lot. They also knew that after chasing Ross, they had lost sight of him and that no one had thought to stay behind to surveil the motel. Finally, they knew that when they returned, Ross's truck was still in the motel's parking lot, eliminating the possibility that he had driven away and (on balance) increasing the probability that he was back inside the room. Particularly given that the ***1069** officers' ill-fated pursuit of Ross had lasted no more than 10 minutes, we think it was eminently reasonable for them to conclude that Ross had doubled back to the motel and taken refuge in his room.

Because the officers reasonably believed that Ross was in Room 113, they had authority (1) to enter the room to execute the arrest warrants, (2) to conduct a limited protective sweep of the room to ensure that no one inside posed a danger to them,[6] and (3) to seize the gun, which they found in plain view. *See Williams*, 871 F.3d at 1201. The officers'

entry, sweep and seizure, therefore, complied with the Fourth Amendment. We affirm the district court's denial of Ross's motion to suppress the gun.

B

We turn, then, to the second search, which the officers conducted with motel management's consent shortly after 11:00 a.m. and in which they discovered drug-related evidence. Once again, we begin—and this time find that we can end—with the government's contention that Ross lacks Fourth Amendment standing. The government's standing argument concerning the second search—which it clearly made, and thus preserved, in the district court—is slightly different from its argument concerning the initial entry. With regard to the second search, the government contends that Ross's reasonable expectation of privacy in his motel room expired—lapsed—as of the motel's standard 11:00 a.m. checkout time. For the reasons that follow, we agree.

While our existing precedent provides a few hints, it doesn't squarely answer what we'll call the "checkout time" question. In *United States v. Savage*, for instance, we stated in a footnote that the defendant there had "automatically relinquished possession of [his room] ... at 11 a.m., the motel's checkout time." 564 F.2d 728, 730 n.5 (5th Cir. 1977). In that case, though, the defendant "had turned in his key the night before," thereby clearly evidencing an affirmative intent to quit the room. *Id.* In a later decision, *United States v. Ramos*, we clarified that "[m]ore evidence than mere possession of a key" after checkout time "is necessary to satisfy a claimant's burden of establishing a legitimate expectation of privacy." 12 F.3d at 1024 (citation omitted). There, we concluded that because the defendant had a two-month rental agreement for a specific condominium unit and still had a key to the unit when the lease expired, he had a "far more 'regular or personal' " connection to the premises than a short-term hotel guest like the one in *Savage*. *Id.* As a result, we held that the defendant retained an expectation of privacy in a locked briefcase that he had failed to remove from the condo before the mandatory moveout time. *Id.* at 1025–26.

Neither *Savage* nor *Ramos* is precisely on point here. Like the defendant in *Ramos*—and unlike the defendant in *Savage*—Ross apparently kept the key to his room beyond the motel's standard 11:00 a.m. checkout time. (There's certainly no evidence that he returned it early.) But *Ramos* teaches that one's post-checkout possession of a room key isn't conclusive, and its holding, in any event, ultimately ***1070** concerned only the defendant's expectation of privacy in a locked briefcase left in a room—not the room itself.[7] Moreover, unlike the defendant in *Ramos*, Ross had no long-term interest in Room 113. Quite the contrary, in fact; like the defendant in *Savage*, Ross was an overnight guest in an ordinary motel room—and even further attenuating Ross's interest, "his" room was rented in someone else's name. Accordingly, Ross's connection to Room 113 was not remotely (in the words of *Ramos*) "regular or personal."

We hold, with one minor caveat explained below, that a short-term hotel guest like Ross has no reasonable expectation of privacy in his room after checkout time, and thus no standing to object to a room search that police conduct with the consent of hotel management after checkout time has passed. What, one might ask, is the magic of checkout time? After all, even before then, during a hotel guest's tenure, hotel employees may enter the guest's room—say, to make the bed or restock toiletries. It's about control. Those sorts of fleeting, pre-checkout entries don't fundamentally compromise a guest's reasonable expectation of privacy in his room because as long as the guest is lawfully in the room, he has at least a qualified right to exclude others, including hotel staff—*see, e.g.*, the "DO NOT DISTURB" doorhanger. Unsurprisingly, therefore, the Supreme Court has held that hotel employees may not validly consent to a search of an occupied hotel room without the guest's permission—during his authorized tenancy, he has a right to privacy in the space that the hotel cannot pierce. *See, e.g.*, *Stoner*, 376 U.S. at 489–90, 84 S.Ct. 889.

At checkout time, everything changes. At that point the housekeeping crew will need to—and has the authority to—access the room to clean and prepare it for the next registered guest, often on a very tight turnaround. A guest's doorhanger no longer bars entry. Accordingly, as the Second Circuit has held, after checkout time, even if a guest "ha[s] not completely vacated [his] room, the motel manager ha[s] the right to enter and examine the room as if it had been relinquished," because the guest no longer has "sufficient control over the premises to establish a right to privacy therein." *United States v. Parizo*, 514 F.2d 52, 55 (2d Cir. 1975); *see also* *United States v. Akin*, 562 F.2d 459, 464 (7th Cir. 1977) (holding that "[s]ince the record supports the district court's conclusion that the rental period ended at the 1:00 [p.m.] check-out time rather than at 6:00 [p.m.] when an individual would be billed for an additional day, ... the authorized representative of the hotel had the authority to consent to the search of the room" after 1:00 p.m.).

We hold, therefore, that a hotel guest loses his reasonable expectation of privacy in his room following checkout time, and that hotel management can validly consent to a search of the room at that point.[8] Because Ross had no cognizable ***1071** privacy interest in Room 113 after 11:00 a.m., he has no Fourth Amendment standing to challenge the second, post-checkout-time search of the room.[9] On that basis—and without considering the constitutionality of the second, consent-based search on the merits—we affirm the district court's denial of Ross's motion to suppress the drug-related evidence found during the post-checkout-time search.

III

In sum, we hold as follows:

1. The government has not carried its burden of demonstrating that Ross abandoned his motel room—and his reasonable expectation of privacy in it—before the initial entry and accompanying protective sweep, which officers conducted no more than 10 minutes after he fled on foot. Accordingly, Ross has Fourth Amendment standing to challenge the entry and sweep, which resulted in the seizure of the gun.

2. Ross's challenge to the initial entry and sweep fails on the merits. Because the officers had reason to believe that Ross was in Room 113, they had authority to enter the room to execute their arrest warrants, to conduct a protective sweep to ***1072** ensure their safety, and to seize the gun, which they found in plain view.

3. Ross forfeited any reasonable expectation of privacy in Room 113 following the 11:00 a.m. checkout time, at which point the motel's management had the authority to consent to a search; accordingly, he has no Fourth Amendment standing to challenge the ensuing search, during which officers discovered the drug-related evidence.

AFFIRMED.

NEWSOM, Circuit Judge, concurring:
As noted in the main opinion, under our decision in *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015), we are obliged to consider the government's argument—which it raises for the first time on appeal—that Ross abandoned Room 113, and any Fourth Amendment privacy interest therein, when he fled the motel on foot shortly after spotting the task-force officers in the parking lot. *See* Maj. Op. at 1065–66. The reason: *Sparks* holds that when a suspect abandons his possessory interest in the object of a search, the search causes him no "injury," and he thus has no "standing" to contest it—not just in the Fourth Amendment sense, but in the more fundamental Article III case-or-controversy sense. *See Sparks*, 806 F.3d at 1339–41. And because, *Sparks* says, a person must "of course" have standing "for a court to have jurisdiction," the abandonment issue "may not be waived for forfeited," and a reviewing court must if necessary consider the matter sua sponte. *Id.* at 1340. So, to put it slightly differently, even where, as here, "the issue of abandonment ... ha[s] never been mentioned in the case previously," this Court "still ha[s] an obligation to consider whether the record show[s] abandonment because where abandonment occurs, we lack jurisdiction." *Id.* at 1341 n.15.

For the reasons explained below, I'm not convinced that *Sparks* is correct—indeed, I'm fairly well convinced that it's not, and I urge the Court to reconsider it en banc, either in this case or in another that properly presents the abandonment-as-Article-III-jurisdiction issue.

First, *Sparks* contravenes Supreme Court precedent, which has clearly, consistently, and recently distinguished between Fourth Amendment "standing" (scare quotes intended) and Article III standing. Most recently, in *Byrd v. United States*, the Court—building on its earlier decision in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)—explained that while "[t]he concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search," it "should not be confused with Article III standing, which is jurisdictional and must be assessed before" addressing other aspects of a Fourth Amendment claim. ––– U.S. ––––, 138 S. Ct. 1518, 1530, 200 L.Ed.2d 805 (2018); *cf. also United States v. Leon*, 468 U.S. 897, 924, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) ("Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate."). *Sparks*, it seems to me, "confuse[s]" Fourth Amendment standing and Article III standing in exactly the way that *Byrd* forbids.[1]

***1073** Second, *Sparks* bucks the general trend in the law—which the Supreme Court instituted and which

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we have faithfully followed—that courts should not "jurisdictionalize" issues that are more properly characterized as "claim-processing" rules or, as here, aspects of a party's merits case. *See, e.g.*, *Orion Marine Constr., Inc. v. Carroll*, 918 F.3d 1323, 1328–29 (11th Cir. 2019); *Secretary v. Preston*, 873 F.3d 877, 881–82 (11th Cir. 2017); *cf. also Target Media Partners v. Specialty Marketing Corp.*, 881 F.3d 1279, 1292 (11th Cir. 2018) (Newsom, J., concurring) (observing that *Rooker-Feldman* doctrine has a tendency to unduly "jurisdictionalize" ordinary preclusion rules). *Sparks* takes an issue that is part and parcel of a Fourth Amendment claim on the merits—whether a suspect had but somehow relinquished a reasonable expectation of privacy in a place or thing—and converts it into a jurisdictional prerequisite.

Third, *Sparks* defies common sense. As the main opinion here points out, in the typical Fourth Amendment "standing" case —in which the controlling question is whether the defendant had a reasonable expectation of privacy in the first place —the government waives its standing objection by failing to raise it before the district court. *See United States v. Gonzalez*, 71 F.3d 819, 827 n.18 (11th Cir. 1996) ("[S]ince the government declined to press this standing issue before the district court, we conclude that this issue has been waived."), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *United States v. Kapperman*, 764 F.2d 786, 791 n.6 (11th Cir. 1985) ("Given the government's failure to raise th[e standing] question, we do not address it."). *Sparks* suggests that abandonment somehow uniquely implicates Article III subject-matter jurisdiction in a way that differentiates it from the typical scenario. That distinction strikes me as counterintuitive, if not 180º wrong. Why would a person who once had but later abandoned a reasonable expectation of privacy be un-"injured" in the Article III sense, while a person who never even had a reasonable expectation of privacy isn't? Either, it would seem, both persons are equally uninjured or, perhaps more likely, the latter individual—who never had a protectable privacy interest to begin with—is the *more* uninjured.

Fourth, *Sparks* offends—or is at the very least capable of offending—considerations of fundamental fairness. This case is Exhibit A. The government raised no abandonment issue in the district court, and that court (unsurprisingly) didn't address it. In his opening brief on appeal, therefore, Ross sensibly proceeded directly to the merits of his argument that the officers' initial entry and protective sweep of his motel room violated the Fourth Amendment—on the ground that they had no "reasonable belief that [he] was located" in there. Br. of Appellant at 23. In so arguing, Ross asserted, among other things, that "it was objectively unreasonable to think that [he] would have returned to the room"—and, indeed, that "[t]he premise that [he] would have returned to the room was absurd." Br. of Appellant at 26. The government then filed an answering brief that led with the argument, never ***1074** so much as mentioned before, that Ross had abandoned the room —and in so doing proceeded to clobber Ross with his opening brief's statements, making them a focus of its position. Br. of Appellee at 16–17. Rope-a-dope, bait-and-switch, whipsaw, whatever you want to call it—just doesn't seem very fair.

Finally, *Sparks* impedes sound judicial administration. This Court treats determinations regarding abandonment as findings of fact and reviews them only for clear error—which makes sense, as "[w]hether abandonment occurred is a question of intent." *United States v. Ramos*, 12 F.3d 1019, 1022–23 (11th Cir. 1994). By permitting the government to raise abandonment for the first time on appeal as a "jurisdictional" issue, *Sparks* thrusts this Court into the uncomfortable position of making a *de novo* determination of a purely factual issue, with respect to which there has been no fact-finding and no lower-court analysis. That strikes me as more than a little topsy-turvy—and unnecessarily so.

* * *

Sparks seems not just wrong to me, but also wrongheaded. I urge the Court to revisit it en banc and to clarify that a suspect's alleged abandonment of his privacy interest in a place or thing—just like the absence of a reasonable expectation of privacy in the first place—is an issue that runs to the merits of his Fourth Amendment claim rather than Article III jurisdiction, and that the government waives any abandonment-based standing argument by failing to raise it in the district court.

All Citations

941 F.3d 1058, 28 Fla. L. Weekly Fed. C 522

Footnotes

* Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

1 Nelson testified that she had arrived at work after Ross fled from police, that she hadn't seen anyone enter the room, and that she had no knowledge of the officers' earlier entry and sweep.

2 "A ruling on a motion to suppress presents a mixed question of law and fact. We review the district court's findings of fact for clear error and its legal conclusions *de novo*." *United States v. Johnson*, 777 F.3d 1270, 1273–74 (11th Cir. 2015) (quotation omitted). "All facts are construed in the light most favorable to the party prevailing below"—here, the government. *Id.* at 1274 (quotation omitted).

3 In a footnote in its brief, the government seems to suggest, separately, that because Ross's name wasn't on the hotel registration, he never "established a legitimate expectation of privacy in Room 113 such that he had standing to contest either search [even] absent any abandonment." It's an interesting question—whether an individual who stays alone overnight in a hotel room rented by someone else has a protectible privacy interest in that room. But because the parties didn't brief that issue, and it wasn't raised before the district court, we won't address it here.

4 *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting pre-October 1981 Fifth Circuit case law as binding precedent).

5 Indeed, both parties are trying to have it both ways—Ross argues with respect to the merits of the initial entry and sweep that the officers had no reason to believe that he would have gone back to the room, while asserting with respect to abandonment that his flight didn't reflect an intention not to return. For its part, the government simultaneously contends that the officers reasonably thought that Ross was in the room—and accordingly were justified in entering to arrest him and in conducting a protective sweep—and that it was inconceivable that Ross would have returned. Inconsistency all around.

6 Recall that before they entered, the officers knew that Room 113 was rented in someone else's name, which increased the risk that a second person, in addition to Ross, might also be inside. *Cf. United States v. Standridge*, 810 F.2d 1034, 1037 n.2 (11th Cir. 1987) (holding that a protective sweep of a hotel room was permissible where "the police had not followed [the defendant] when he went to the motel and the room had not been constantly watched," and "thus, the police could not know whether [the defendant] was alone").

7 We note that Ross argues here only that he retained an expectation of privacy in Room 113 itself; he does not assert a separate privacy interest in any closed containers inside the room—say, for instance, the Crown Royal bag full of drugs. That might—or might not, we needn't decide—have presented a different issue. *Cf. United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (holding that even if an individual "did not retain a protected privacy interest in his [motel] room" after checkout time, "it certainly would have been reasonable for him to expect that the contents of closed containers he kept in his room would not be exposed to scrutiny by the police or motel personnel").

8 We add the following commonsense caveat: If a guest asks for and receives a late checkout—say, from the standard 11:00 a.m. to 12:00 noon—then he retains his reasonable expectation of privacy until the arrival of the mutually agreed upon time. Because Ross neither sought nor received permission to extend his stay, we needn't explore our caveat's application here. To the extent, though, that some courts have held, more generally—and even absent express agreement between management and guest—that a hotel's "policies," "patterns," or "practices" can extend a guest's expectation of privacy beyond checkout time, *see, e.g.*, *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001); *United States v. Kitchens*, 114 F.3d 29, 32 (4th Cir. 1997), we disagree. As the Sixth Circuit has explained, "[j]ust because a hotel does not change keycards at 11:00 a.m. [every day], or does not charge guests for an extra night every time they have not removed all of their personal items by 11:00 a.m., does not mean that the guest, as opposed to the hotel, retains control over the room." *United States v. Lanier*, 636 F.3d 228, 233 (6th Cir. 2011). "What the hotel may voluntarily give as a general matter it can take away in an individual instance, at least where the guest has not secured a promise from the hotel that he may stay late." *Id.* For the good of citizens and police alike, courts have long preferred clear Fourth Amendment rules, and extending a guest's reasonable expectation of privacy based on an uncommunicated and ethereal policy, pattern, or practice would only obscure matters.

9 There is one loose end. Ross argues that he had a continuing possessory interest in Room 113 due to the motel's failure to honor Fla. Stat. § 509.141(1), which states that "[t]he operator of any public lodging establishment ... may remove ... in the manner hereinafter provided, any guest of the establishment ... who ... fails to check out by the time agreed upon

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in writing by the guest and public lodging establishment at check-in unless an extension of time is agreed to ... prior to checkout." The statute requires a hotel "operator [to] ... notify such guest that the establishment no longer desires to entertain the guest and shall request that such guest immediately depart from the establishment"—if the guest doesn't comply, he is guilty of a second-degree misdemeanor. *Id.* § 509.141(2)–(3). Ross contends that because the motel didn't provide such notice to vacate before the search of his room, he still "had a continuing possessory interest in Room 113 ... [and] hotel management did not possess the legal authority to consent to the search." Reply Br. of Appellant at 10.

We agree with the government that nothing in § 509.141 justifies the conclusion that Ross continued to enjoy an exclusive right to occupy an unpaid-for room absent formal notice. Rather, the hotel's noncompliance with the statute simply means that Ross couldn't be charged with misdemeanor trespassing for his holdover. *See, e.g.*, *Brown v. State*, 891 So. 2d 1120, 1122 (Fla. Dist. Ct. App. 2004). Under Ross's expansive reading of the statute, an individual could maintain an indefinite possessory interest—and a reasonable expectation of privacy for Fourth Amendment purposes—in a hotel room as long as the hotel doesn't explicitly tell him to vacate. We don't think the statute can be read so broadly.

1 Indeed, the *Sparks* opinion seems to bounce back and forth between traditional Article-III-standing phraseology and Fourth-Amendment-facing language. The decision begins its abandonment analysis with an Article III overview, *see* 806 F.3d at 1339 ("Article III of the Constitution extends the jurisdiction of federal courts to 'Cases' and 'Controversies' only."); *id.* at 1340 ("[S]tanding requires a showing of injury in fact, causation, and redressability."), before verging into a discussion of Fourth Amendment basics, *id.* ("[I]f the person from whom the item was seized lacks a cognizable possessory interest in the item, that person's Fourth Amendment rights are not violated ...."), only to double back to Article III, *id.* at 1340–41 ("[F]ederal courts are 'obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking,' and the issue may not be waived or forfeited.")—all in the span of four short paragraphs.

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845 F.Supp. 1531
United States District Court,
M.D. Florida,
Tampa Division.
.

UNITED STATES of America
v.
Kenneth ADAMS and Judith Adams.

No. 93–225–CR–T–25C.
|
March 15, 1994.

Synopsis

Defendants moved to suppress evidence. The District Court, Adams, J., held that: (1) vehicle exception to search warrant requirement did not justify warrantless search of defendants' motor home; (2) inventory search of motor home was not justified under search incident to lawful arrest or protective sweep exception to search warrant requirement; (3) warrantless inventory search of motor home was not justified by probable cause to seize motor home as evidence of crime; and (4) good faith exception to exclusionary rule did not apply to police officers' execution of search warrants on storage facilities used by defendants after improper search of motor home.

Motions granted.

Attorneys and Law Firms

***1534** Thomas M. Findley, Asst. U.S. Atty., Tampa, FL, for U.S.

Thomas L. Gacio, Tampa, FL, for Kenneth and Judith Adams.

ORDER

ADAMS, District Judge.

Before the Court is Defendant's, Kenneth Adams, Motion to Suppress and Exclude Evidence Illegally Seized.[1] Upon consideration of the Motion to Suppress, the Government's Response to Motion to Suppress,[2] and the evidence and arguments of counsel presented at the hearing on the motion held on March 1, 1994, the Court grants the motion based on the following findings.

I

On October 2, 1993, the Defendants were arrested by Special Agent Dennis L. Trubey of the Florida Department of Law Enforcement and Linda S. Perkins of the Florida Highway Patrol, pursuant to arrest warrants, outside of their motor home located in a "wooded area of a rural section of southern Suwanee County."[3] Once the Defendants were in custody and the area was secured, the police conducted an investigative inspection and inventory search of the entire contents of the motor home. Information obtained from this search revealed to police that Defendants leased several storage facilities because of "restrictive storage limitations of the [Defendants] living in a mobile recreational camper type vehicle."[4] Based upon this information, as elicited through Special Agent Trubey's affidavits, the police acquired warrants to search the Defendants' storage facilities.

The Defendants seek to suppress the evidence seized from their motor home as an illegal warrantless search of their home and the evidence discovered at the storage facilities under the "fruit of the poisonous tree" doctrine. The Government attempts to justify these searches under (1) the vehicle exception,[5] (2) search incident to lawful arrest[6] or (3) seizure as evidence of a crime and inventory search exception.[7] The Government added that if the search of the motor home was illegal, the subsequent searches of the storage facilities under search warrants were in good faith reliance on the magistrate's finding of probable cause.[8]

II

Generally, a warrantless search based on probable cause is *per se* illegal, unless the government shows that it falls into one of the few limited and well-defined exceptions recognized by law. *U.S. v. Campbell,* 920 F.2d 793, 795 (11th Cir.1991); ***1535** *U.S. v. Alexander,* 835 F.2d 1406, 1408 (11th Cir.1988). These exceptions include the vehicle exception, search incident to lawful arrest and seizure as evidence of a crime, and are asserted by the Government in this case.

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A warrantless search of a home is presumptively unreasonable, unless probable cause and exigent circumstances exist. *U.S. v. Forker,* 928 F.2d 365, 370 (11th Cir.1991). Exigent circumstances is the only exception to a warrantless search of a home. *U.S. v. Ladson,* 774 F.2d 436, 440 (11th Cir.1985). The exigency exception applies when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. *U.S. v. Lynch,* 934 F.2d 1226, 1232 (11th Cir.1991). Recognized circumstances where exigency exists include (1) hot pursuit of a suspect, (2) danger to an arresting officer or to the public, and (3) the risk of removal or destruction of evidence. *Id.; U.S. v. Satterfield,* 743 F.2d 827, 843–844 (11th Cir.1984). These circumstances must be such that they present a real and present danger to the police that the evidence or a suspect may be lost. *Forker,* 928 F.2d at 370.

A. *The Vehicle Exception*

1. *Generally*

A warrantless search of a vehicle is permitted where "(1) there is probable cause to believe the vehicle contains contraband or other evidence which is subject to seizure under the law, and (2) exigent circumstances necessitate a search or seizure." *Alexander,* 835 F.2d at 1409. The justifications for this rule are (1) to prevent vehicles from being easily moved from the jurisdiction to thwart detection efforts of law enforcement officers and (2) that passengers in vehicles have a lesser expectation of privacy. *Carney,* 471 U.S. at 392, 105 S.Ct. at 2070.

In most cases, involving ordinary automobiles with easy access to public streets or highways, the requirement of exigency is satisfied by the ready mobility inherent in all automobiles that reasonably appear to be capable of functioning. *U.S. v. Nixon,* 918 F.2d 895, 903 (11th Cir.1990); *Alexander,* 835 F.2d at 1409. It is important that these types of cases typically do not involve motor homes. They usually involve regular automobiles stopped or travelling on a public highway or road. The Government argues that ready mobility of the Defendants' motor home is sufficient exigency to justify this warrantless search under the vehicle exception. However, the vehicle exception should not be extended to a motor home which is objectively indicated by the circumstances as being used as a residence. *See Carney,* 471 U.S. at 392–394, 105 S.Ct. at 2070–2071; *U.S. v. Gooch,* 6 F.3d 673, 677 (9th Cir.1993) (citing *Carney,* 471 U.S. at 392, 105 S.Ct. at 2070) (vehicle exception only applies when a vehicle is on the open road or is capable of movement and is "in a place not regularly used for residential purposes—temporary or otherwise").

2. *The Vehicle Exception Should Not Apply to a Motor Home Which is Objectively Indicated by the Circumstances Being Used as a Residence*

In *Carney,* the Supreme Court held that under certain circumstances a motor home falls within the vehicle exception because it involves concerns similar to those surrounding automobiles and other readily mobile vehicles. The Court emphasized that "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use **and is found stationary in a place not regularly used for residential purposes**—temporary or otherwise—the two justifications for the vehicle exception come into play." *Carney,* 471 U.S. at 392–393, 105 S.Ct. at 2070 (emphasis added). The Supreme Court also stressed that:

> The exception has historically turned on the **ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.... These two requirements for application of the exception** ensure that law enforcement officials are not unnecessarily hamstrung in their efforts to detect and prosecute criminal activity, and that the legitimate privacy interests of the public are protected.

***1536** *Id.,* 471 U.S. at 394–395, 105 S.Ct. at 2070–2071 (emphasis added). Accordingly, in order to justify a warrantless search under the vehicle exception, the Government must establish both that (1) the vehicle was readily mobile and (2) it was located in a setting that objectively indicated it was being used for transportation. *Id.*

The Supreme Court recognized that extending the vehicle exception to motor homes would not be appropriate under some circumstances. Consequently, the Court left open such a possibility by stating:

> We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

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Id., 471 U.S. at 395, 105 S.Ct. at 2071 n. 3. Thus, the vehicle exception should not apply to a motor home which is situated in such a way, or located in such a place, that objectively indicates it is being used as a residence. *Id.; Gooch,* 6 F.3d at 677 (9th Cir.1993).

The *Carney* case involved the search of a motor home located in a public parking lot in downtown San Diego, California. It was clear in that case the vehicle was being used for transportation and not as a residence. Moreover, all other cases finding the vehicle exception applicable to a motor home involved vehicles which were being used for transportation purposes and which were not present in a setting objectively indicating they were being used as residences.[9] The instant case is distinguishable from this line of cases.

Consider also *U.S. v. Holland,* 740 F.2d 878 (11th Cir.1984), *cert. denied,* 471 U.S. 1124, 105 S.Ct. 2654, 86 L.Ed.2d 271 (1985), where the Court held the searched motor homes were being used solely for transportation and were subject to the vehicle exception where the Defendants rented motel rooms during their travels, parked their motor homes in commercial parking lots, had no personal living effects therein and were stopped while in transit on the highway. The 11th Circuit suggested that:

> [t]he use of a vehicle, not its shape, should control the standard that applies. As an analogy, the extent that there may be different Fourth Amendment standards for a home and a business would not depend upon whether the business was in a building that looked like a home. The difference in standards is based on the reduced expectation of privacy in a business.

Id. at 880.

3. *Application of the Vehicle Exception to the Instant Case*

Again, to justify a warrantless search or seizure under the vehicle exception, the Government must establish that (1) probable cause existed to believe the vehicle contained contraband or other evidence which is subject to seizure under the law, (2) the vehicle was readily mobile, and (3) it was located in a setting that objectively indicated it was being used for transportation. *Carney,* 471 U.S. at 394, 105 S.Ct. at 2070–2071; *Forker,* 928 F.2d at 368.

This motor home was located in a rural area on a private wooded lot owned by the ***1537** Defendants. An electric generator was operating at the time of this arrest. Additionally, other motor vehicles used for transportation purposes were located on the property. The Defendants' personal effects, including clothing and food items, were located in the motor home. Moreover, the motor home contained a kitchenette, sink, bed, sofa and a dining room table. Finally, there was no convenient or easy access to a public road from where the motor home was located.

The Court finds that probable cause did exist that the motor home contained evidence of a crime. However, although readily mobile because of its inherent ability to function, the instant vehicle was so situated that an objective observer would conclude that it was not being used for transportation, but as a residence. Accordingly, the vehicle exception does not justify the instant warrantless search.

Further, the justification for the vehicle exception—that passengers of vehicles have a reduced expectation of privacy—is not present in this case. The Court finds that the motor home was being used as the residence of the Defendants.[10] The Defendants held a reasonable expectation of privacy more akin to that present in an ordinary home, as opposed to an automobile stopped or traveling along a public thoroughfare. Therefore, exigent circumstances was the only exception to a warrantless search of this motor home. *See Ladson,* 774 F.2d at 440.

B. *Search Incident to a Lawful Arrest or Protective Sweep Exception*

The Government attempts to justify the inventory search of the Defendants' home under the exception which allows for a search of the surrounding area contemporaneously with the lawful arrest of the Defendants. The Court is not persuaded by this position.

Incident to an arrest the police may, as a precautionary matter and without probable cause, look into closets and other spaces immediately adjoining the place of arrest from which an attack could immediately be launched. *Maryland v. Buie,* 494 U.S. 325, 334, 110 S.Ct. 1093, 1098, 108 L.Ed.2d 276 (1990); *U.S. v. Delgado,* 903 F.2d 1495, 1502 (11th Cir.1990). Searches beyond that must be supported by articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to the arrest scene. *Id.* The Supreme Court emphasized that:

> "such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless

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> not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."

Buie, 494 U.S. at 335, 110 S.Ct. at 1099.

Exigent circumstances may also arise, justifying a warrantless search of a home, when the facts would lead a reasonably experienced agent to believe that evidence might be destroyed or removed before a warrant could be secured. *U.S. v. Rodgers,* 924 F.2d 219, 222 (11th Cir.1991). However, there should exist a present and real danger that the suspect or evidence may be lost in order to search the home without a warrant. *Forker,* 928 F.2d at 370. The Defendants were arrested outside of their motor home. Thus, under the search incident to lawful arrest or protective sweep exception, the officers were entitled to search:

(1) any spaces immediately adjoining the place of arrest from which an attack could immediately be launched; and

(2) any area, supported by articulable facts, which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to the arrest scene or to evidence sought.

Here, the police did not have reason to believe, based on articulable facts, that the motor home harbored any individuals other than the Defendants which posed a threat to the arrest scene. However, even assuming ***1538** they had authority to sweep the inside of the motor home, that search could last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Buie,* 494 U.S. at 335, 110 S.Ct. at 1099. "An arrest within a home does not provide a license for the police to search the entire residence for evidence." *Satterfield,* 743 F.2d at 845. The search of this motor home, after all occupants had been taken into custody, extended beyond that authorized under the circumstances. No immediate threat of harm, or fear that evidence will be destroyed or removed, existed once the Defendants were in custody and the officers conducted a cursory sweep of the inside of the motor home. Thus, any exigent circumstances present had ceased to exist at the time of the inventory search. Accordingly, the inventory search was not justified under the search incident to a lawful arrest or protective sweep exception to the warrant requirement.

C. *Search as Evidence of a Crime and Inventory Search*

The Government contends that since the officers had probable cause to seize the motor home as evidence of a crime, the inventory search was justified. The Government cites to *U.S. v. Cooper,* 949 F.2d 737, 746–47 (5th Cir.1991) to support this proposition. This argument is unpersuasive and inconsistent with the application of the vehicle exception provided in *Carney.* The seizure of a motor home as evidence of a crime is only consistent with the vehicle exception when both requirements of *Carney* are satisfied (ready mobility and location of vehicle in place not regularly used for residential purposes).

Indeed, the *Cooper* case provides that:

> [P]robable cause alone suffices to justify seizing a vehicle **on a public street.** As a warrant is not required when the police have probable cause to believe the car contains evidence of crime, there is little sense in requiring a warrant before seizing a car when the police have probable cause to believe the car itself is such evidence or is an instrument of a crime. Therefore, we hold that the police may seize a car from a public place without a warrant when they have probable cause to believe that the car itself is an instrument or evidence of a crime.

Id. (emphasis added). The principles enunciated in *Cooper,* clearly do not apply to the instant case where the motor home was being used as a residence and was located on private property in a rural setting.

Furthermore, when the privacy of the home is involved, "there is only one type of case in which a warrant is not required. Because, the protection of private dwellings lies at the very heart of the fourth amendment, 'only exigent circumstances will justify a warrantless intrusion into a home.' " *See Ladson,* 774 F.2d at 440. Absent exigent circumstances, the Government must obtain a warrant to inspect and conduct an inventory search of a seized house. *Id.* Therefore, the inventory search of a motor home being used as a residence is not valid as a search as evidence of a crime.

D. *Good Faith Exception to the Exclusionary Rule*

The Government suggests that the police officers' execution of the search warrants on the storage facilities is valid since such was in good faith reliance on the magistrate's finding of probable cause. Therefore, the evidence obtained from those locations should not be suppressed. *U.S. v. Leon,* 468

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U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Government's position lacks merit and is not supported by any persuasive authority.

The Government correctly recites the general rule first recognized in *Leon,* that the good faith exception to the exclusionary rule keeps evidence from being suppressed when law enforcement officers obtain evidence through objective good faith reliance on a facially valid warrant that is later found to be invalid. *Id.,* 468 U.S. at 920, 104 S.Ct. at 3419.[11] The Government ***1539** omitted from the analysis that suppression of evidence obtained pursuant to a warrant can be ordered where exclusion will further the purposes of the exclusionary rule. *Id.,* 468 U.S. at 918, 104 S.Ct. at 3418. The purposes of the rule are to deter police misconduct and encourage the law enforcement profession to conduct itself in accordance with the Fourth Amendment.

The 11th Circuit explained the application of the good faith exception to the exclusionary rule.

> [T]he proper test is whether the officer acted in objective good faith under all the circumstances. The focus in *Leon* is on the officer. "[The] officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable...." *Leon,* 468 U.S. at 922, 104 S.Ct. at 3420. The "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances ... may be considered." *Id.* at 922 n. 23, 104 S.Ct. at 3420 n. 23.

U.S. v. Taxacher, 902 F.2d 867, 871 (11th Cir.1990), *cert. denied,* 499 U.S. 919, 111 S.Ct. 1307, 113 L.Ed.2d 242 (1991).

The good faith exception does not apply here. The police in this case conducted a warrantless illegal search of the Defendants' motor home. There were no exigent circumstances present to justify the inventory search. Subsequently, based upon information obtained from the motor home, the police were issued warrants to search certain storage facilities which led to the discovery of more evidence. To suppress this evidence furthers the purposes of the exclusionary rule. It will deter police from searching without a warrant a motor home which is objectively indicated by the circumstances being used as a residence. Furthermore, suppression of this evidence will encourage the law enforcement profession to conduct itself in accord with the Fourth Amendment, including the proper application of the vehicle exception to the warrant requirement.

It cannot be determined that the officers in this case acted in objective good faith. The officers' reliance on the judges' probable cause determinations supporting the search warrants were not reasonable. The same officers that conducted the warrantless search of the Defendants' motor home, applied for and executed such warrants. A reasonable well trained officer would have known that the searches were improper despite the Judges' authorizations. Accordingly, the good faith exception to the exclusionary rule does not apply here.

None of the exceptions asserted by the Government justify the warrantless search of the Defendants' motor home or subsequent searches of the Defendants' storage facilities. Accordingly, the evidence listed in the Defendants' motions was illegally obtained and is suppressed.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that

1. The Defendants' Motions to Suppress and Exclude Evidence Illegally Seized are **GRANTED.**

DONE AND ORDERED.

All Citations

845 F.Supp. 1531

Footnotes

1 Docket # 41. Co–Defendant, Judith Adams, adopted the Motion to Suppress and Exclude Evidence Illegally Seized at Docket # 49.

2 Docket # 51. The Government also filed a Supplement to Government's Previously Filed Response to Motion to Suppress at Docket # 52.

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3 Affidavit for Search Warrant of Special Agent Dennis L. Trubey, Docket # 41, Exhibits # 5–7. Specifically, the motor home was located at Lot 13, Golden Chance Farms, County Road 57 in O'Brien, Suwanee County, Florida.

4 Affidavit for Search Warrant of Special Agent Dennis L. Trubey, Docket # 41, Exhibits # 5–7.

5 *California v. Carney,* 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).

6 *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

7 *U.S. v. Cooper,* 949 F.2d 737 (5th Cir.1991).

8 Government's Response to Motion to Suppress, Docket # 41 at n. 1. *See U.S. v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

9 *See U.S. v. Hamilton,* 792 F.2d 837, 843 (9th Cir.1986) (search of motor home fell within scope of vehicle exception where mobile home was moved the night before, was licensed in California, and was located in a residential driveway having easy access to public road); *U.S. v. Markham,* 844 F.2d 366, 369 (6th Cir.1988) (vehicle exception applied where motor home was parked in a private driveway connected to a public street and no utility lines were connected to motor home; *U.S. v. Ervin,* 907 F.2d 1534, 1538–1539 (5th Cir.1990) (warrantless search of a camper-trailer was proper where trailer was parked in a motel parking lot and not in a place regularly used for residential purposes, the Defendant was not using the trailer as a home, and trailer was readily mobile. *See also U.S. v. Hill,* 855 F.2d 664, 668 (10th Cir.1988) (warrantless search of houseboat fell within vehicle exception where, although capable of functioning as a home, houseboat was readily mobile, not present in setting objectively indicating it was being used as a residence, and was seen traveling up and down the lake the night of search).

10 The Defendants had purchased a more permanent trailer to be placed on the lot. However, until its arrival the motor home was serving as the residence of the Defendants.

11 The good faith exception does not apply to allow in evidence obtained on an invalid warrant where: (1) the issuing magistrate or judge was misled by information in an affidavit that the affiant knew was false or, would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his judicial role; (3) the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" and (4) where the warrant issued is so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. *Id.* 468 U.S. at 923, 104 S.Ct. at 3421, 82 L.Ed.2d 677.

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241 F.3d 1124
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Denis DORAIS, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Laurie Gomes, Defendant–Appellant.

Nos. 99–10091, 99–10267.
|
Argued and Submitted Jan. 12, 2001
|
Filed March 1, 2001

Synopsis

Defendants were convicted of possessing methamphetamine with intent to distribute, following entry of conditional guilty pleas in the United States District Court for the District of Hawaii, Helen Gillmor, J. Defendants appealed. The Court of Appeals, Graber, Circuit Judge, held that: (1) defendant's reasonable expectation of privacy in hotel room, required for standing to challenge search of room, extended past noon check-out time but ended at 12:30 p.m., (2) police had reasonable suspicion to stop second defendant's rented automobile upon receiving report from automobile's owner that automobile was "overdue."

Affirmed.

Attorneys and Law Firms

***1125** Karyn H. Bucur, Laguna Hills, California; Edmundo Espinoza, Del Mar, California, for the defendants-appellants.

***1126** Kenneth Sorenson and Larry L. Butrick, Assistant United States Attorneys, Honolulu, Hawaii, for the plaintiff-appellee.

Appeals from the United States District Court for the District of Hawaii Helen Gillmor, District Judge, Presiding. D.C. No. CR–98–00485–HG

Before: SNEED, GRABER, and PAEZ, Circuit Judges.

Opinion

GRABER, Circuit Judge:

Defendants Denis Dorais and Laurie Gomes became the focus of a police drug investigation after a hotel manager reported suspicious activities in their room at the New Otani Hotel. Police eventually arrested Gomes for drug possession after they stopped her because of a rental agency's report that her rental car was overdue. During the stop, Gomes consented to a search of her purse, which yielded methamphetamine, and made incriminating statements about Dorais. Later, police arrested Dorais when they found methamphetamine in Defendants' hotel room while they were helping the hotel manager evict him.

In their joint motion to suppress, Defendants sought to suppress evidence of the methamphetamine in Gomes' purse; Gomes' incriminating statements about Dorais, made during the stop; the methamphetamine in the hotel room; and statements made by Dorais in the hotel room. They argued that (1) the police had neither probable cause nor reasonable suspicion to stop the car and Gomes' consent and statements were a product of the illegal stop;[1] and (2) the warrantless search of the hotel room violated the Fourth Amendment.

The district court denied Defendants' motion to suppress. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Hotel*

Gomes checked into the New Otani Hotel on July 1, 1998. She informed the hotel that two men, Dorais and another, would be staying in her room; completed a registration card that included Dorais' name; registered two vehicles to the room; and paid $1,400 in cash to cover the cost of the room through July 5, 1998. The hotel assigned her to room 610.

At some point, Gomes and Dorais decided to extend their stay.[2] Because room 610 was not available for the night of July 5, the hotel reassigned Dorais and Gomes to room 421. At first they resisted the move but, after repeated requests by the hotel, they relocated to room 421 at 2:30 p.m. on July 5. After the move, the hotel asked Dorais several times to come to the front desk to sign a new registration card, but Dorais never signed the card.

On July 6, 1998, Curtis Kawamoto, the evening manager, contacted acquaintances of his who worked for the Hawaii Police at the airport. Kawamoto expressed concern about "suspicious actions" that had been occurring in room 610. As a result, the police ran a background check on Dorais and Gomes. In response to Kawamoto's report, Officer Yamamoto contacted Glen Manaba, the assistant front-office manager and security manager of the New Otani Hotel, on the morning of July 7, 1998. The two agreed to meet to discuss Kawamoto's report. Manaba requested a background check on the guests who were now in room 421; Yamamoto informed him that he had already run a check and that Gomes was the only guest with a criminal record. Yamamoto told Manaba to call if he noticed suspicious conduct by the occupants of room 421 but did not inform the ***1127** hotel manager that the guests already were the subjects of a drug investigation.

At some point on July 7, the hotel decided that it would not permit Gomes and Dorais to extend their stay past July 8. There is no evidence in the record that the guests requested an extension; likewise, there is no evidence in the record that the hotel informed them of its decision. On the morning of July 8, Yamamoto contacted Manaba to find out if Dorais and Gomes had checked out and to request permission to search the room *after* they checked out. He also told Manaba that he would be parked outside the hotel, in case the hotel required his assistance.

At 10 a.m. on July 8, the hotel left a message on the voicemail in room 421, reminding the guests of the noon checkout time. Gomes left the hotel before noon. Dorais remained. Shortly after noon, the executive housekeeper knocked on the door of room 421 to inquire when Dorais would be checking out. Dorais told her that he intended to stay until 12:30. The housekeeper told Dorais "OK" and said that she would tell the front desk. She could not remember whether she reported to the front desk Dorais' intent to stay until 12:30.

Around noon, Manaba spoke with the Hawaii Police officers, who entered the hotel to inquire whether the occupants of room 421 had checked out yet. Manaba informed them that the guests remained in the room, and he told the officers that he wished to evict them if they stayed past checkout time. One of the officers contacted his supervisor to arrange for permission to proceed with the investigation of the room and to assist the hotel in the eviction. At about 12:40, Manaba and six officers went to room 421 to evict Dorais. Manaba knocked on the door and told Dorais that he was there to evict him. When Dorais opened the door, one of the officers identified himself and told Dorais that the police would assist in the eviction. The police entered the room and saw a substance on the coffee table that resembled methamphetamine. At that point, the police arrested Dorais and conducted a pat-down search incident to arrest. The search yielded a baggie containing a substance resembling crystal methamphetamine. The police then obtained a search warrant to search the closed boxes and envelopes that they found in the room and on Dorais.

B. *The Car*

At 8:23 p.m. on July 4, 1998, Defendant Gomes rented a car from Dollar Rent–a–Car. The car was due back at the same time two days later. On July 6, after the hotel had contacted the police to express concern about Dorais' and Gomes' activities, Yamamoto called Dollar to inquire about the car rental. He asked when the car was due back and asked the rental agency to contact him when Gomes returned it.

As of July 8, Gomes had not returned the car. *See* Haw.Rev.Stat. § 708–837 (providing a 48–hour grace period before a rental car is considered stolen). Dollar tried without success to contact her. When it could not reach her, it notified the police at 10 a.m. that the car was overdue. The manager of Dollar testified at the hearing on the motion to suppress that it was an oversight on the part of Dollar that it contacted the police before a full 48 hours had elapsed.

Based on the complaint from Dollar, Officer Yamamoto stopped Gomes between 10:30 a.m. and 12 p.m. on July 8.[3] Gomes signed a consent to search her purse, after stating that there were drugs in it that "Deni" had given her. The search yielded crystal methamphetamine.

Dorais filed the motion to suppress that is the subject of this appeal, and Gomes later joined in it. The district court held a three-day evidentiary hearing, after which it denied the motion to suppress.

***1128** Thereafter, Dorais and Gomes conditionally pleaded guilty to possessing more than 100 grams of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. Both Defendants reserved the right to appeal the district court's denial of their motion to suppress. After being sentenced, they timely filed their notices of appeal.

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STANDARD OF REVIEW

We review de novo the denial of a motion to suppress. *United States v. Henderson,* No. 99–10526, 2000 WL 1804068, *6 (9th Cir. Dec.11, 2000). Whether a defendant has standing to challenge a search under the Fourth Amendment is a mixed question of law and fact. *United States v. Armenta,* 69 F.3d 304, 306–07 (9th Cir.1995). We review the district court's legal conclusions de novo and its factual findings for clear error. *Id.* at 307.

DISCUSSION

A. *Standing to Challenge the Police Entry into the Hotel Room*

The district court held that Defendants lacked standing to challenge as a search the police entry into the hotel room because neither had a reasonable expectation of privacy in the room. The court reasoned that (1) Gomes had no privacy interest in the room because she had checked out of the hotel before the search took place, and (2) Dorais' privacy interest expired at checkout time, which was noon on July 8, 1998, also before the entry. The court's reasoning and conclusion are correct with respect to Gomes. *United States v. Haddad,* 558 F.2d 968 (9th Cir.1977) (holding that a guest has no expectation of privacy in a hotel room after checking out, whether voluntarily or involuntarily). As to Dorais, we affirm on different grounds the ruling that Dorais had no reasonable expectation of privacy in room 421 at 12:40 p.m.

1. *General Principles*

In order to have standing to challenge the search of a hotel room under the Fourth Amendment, a defendant must establish a reasonable expectation of privacy in the room. *Minnesota v. Olson,* 495 U.S. 91, 95, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). "A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as 'reasonable'." *Id.* at 95–96, 110 S.Ct. 1684 (citation and internal quotation marks omitted).

This court has held that a defendant has *no* reasonable expectation of privacy in a hotel room when the rental period has expired and the hotel has taken affirmative steps to repossess the room. *United States v. Huffhines,* 967 F.2d 314 (9th Cir.1992). On the other hand, this court has concluded that the lessee of a rental car maintains a reasonable expectation of privacy in the car after the expiration of the lease, when the rental agency has taken no affirmative steps to repossess the car and when it has a policy of permitting lessees to keep cars and simply charging them for the extra time. *Henderson,* 2000 WL 1804068, at *6–*7. Other courts that have considered the issue have recognized that a guest may retain a reasonable expectation of privacy in a hotel room after checkout time based on the relationship between the guest and the hotel or based on the hotel's generally lax practices in enforcing its checkout time. *See, e.g., United States v. Kitchens,* 114 F.3d 29, 31–32 & 32 n. 3 (4th Cir.1997); *United States v. Owens,* 782 F.2d 146, 149–50 (10th Cir.1986).

In *Huffhines,* we stated that "[a] guest in a motel has no reasonable expectation of privacy in a room after the rental period has expired." 967 F.2d at 318. We held that the defendant lacked standing to challenge a search of his hotel room when the rental period expired at noon, the motel manager repossessed the room in the afternoon, and the manager consented to a search of the room in the evening. *Id.* Similarly, in *Haddad,* we held that the defendant lacked a reasonable expectation ***1129** of privacy in a hotel room after the hotel ejected him from the room and required him to check out. 558 F.2d at 975.

We have recognized, however, that the mere expiration of the rental period, in the absence of affirmative acts of repossession by the lessor, does not automatically end a lessee's expectations of privacy. In *Henderson,* we concluded that a defendant had a reasonable expectation of privacy in a rental car that was four days overdue. 2000 WL 1804068, at *6–*7. We reasoned that the rental company had not attempted to repossess the car, that it was not unusual for a customer to keep a car past the time specified in the rental agreement, and that the company had a routine practice of simply charging the customer for the late return. *Id.* In *Henderson,* we distinguished *Huffhines* and *Haddad* on the ground that, in those cases, the hotel management had terminated the defendants' control of their hotel rooms through private acts of dominion. *Id.* at *7.

Similarly, in *Owens,* the Tenth Circuit held that a motel guest had a reasonable expectation of privacy in his room after checkout time. 782 F.2d at 149–51. There, the police arrested one occupant of the room (the defendant), and, afterward, contacted the front desk to inform the motel of the arrest and to check on the status of the room. *Id.* at 148–49. The motel manager informed the police that the rental period on the room had expired, and the manager authorized the police to

evict the remaining occupant. *Id.* at 148. The court based its conclusion that the defendant's expectation of privacy in the motel room was reasonable on three factors. First, a few days earlier, when the defendant had stayed past checkout time, instead of evicting him the hotel permitted him to extend his stay and pay for the additional term of occupancy. *Id.* at 150. Second, the manager testified that it was the motel's policy to ask those guests staying past checkout time whether they would be leaving or extending their stay; it was not the motel's policy to evict guests who were staying past checkout time for brief periods. Third, the defendant had given a large cash deposit, which may have led him to believe that he was paid up through the rest of the week. *Id.*

By contrast, in *Kitchens,* the Fourth Circuit concluded that the defendants lacked standing to challenge a search of their hotel room an hour after checkout time. 114 F.3d at 32. The court recognized that "[a] guest may still have a legitimate expectation of privacy even after his rental period has terminated, if there is a pattern or practice which would make that expectation reasonable." *Id.* It further acknowledged that a warrantless search immediately after checkout time "would be improper if the hotel, as most hotels do, had a pattern or practice of allowing guests some leeway regarding the checkout time." *Id.* at 32 n. 3. However, the court found that the defendants did not have a pattern or practice of staying past checkout time and that the hotel had a *strict* policy of enforcing checkout times. *Id.* As a result, the defendants' reasonable expectation of privacy in the room expired at checkout time.

Under *Huffhines,* as a general rule a defendant's expectation of privacy in a hotel room expires at checkout time. However, consistent with *Henderson,* we hold that the policies and practices of a hotel may result in the extension past checkout time of a defendant's reasonable expectation of privacy. The existence and duration of that expectation depend on the facts and circumstances in each case.

2. *Application to This Case*

In this case, the district court found that Gomes had checked out of the hotel before noon on July 8. That finding is not clearly erroneous. Thus, under *Haddad,* she lacks standing to challenge the entry into the hotel room.

As to Dorais, the answer is the same, but the explanation more complex. Having concluded that a hotel guest's expectation of privacy does not expire automatically at checkout time, we examine the ***1130** record to determine whether Dorais presented sufficient evidence to meet his burden of proving that he held a reasonable expectation of privacy in room 421 at the time of the search. *See United States v. Singleton,* 987 F.2d 1444, 1447 (9th Cir.1993) (holding that a defendant bears the burden of proving a legitimate expectation of privacy). On the record before us, Dorais has not met his burden.

Dorais demonstrated that his reasonable expectation of privacy in room 421 extended past noon; but that reasonable expectation expired at 12:30 p.m.

First, the hotel communicated the noon checkout time to Dorais. The noon checkout time was clearly posted in the room, and the hotel, following its standard checkout procedure, reminded Dorais at 10 a.m. of the noon checkout time.

Second, Dorais proved that the hotel did not enforce its checkout time strictly. Manaba testified that it was not normal hotel policy to issue trespass notices to overstaying guests immediately at noon but, rather, that the standard practice was to ask guests at noon when they would be leaving. Additionally, the executive housekeeper testified that it was hotel practice for the housekeeping staff to ask guests when they would be leaving.

Third, however, we concluded for four reasons that these practices extended Dorais' expectation of privacy in room 421 only until 12:30.(a) The housekeeper testified that the reason why the housekeeping staff did not tell guests to leave immediately at noon was that "thirty minutes is ... not that much difference." Her testimony suggests that, although the New Otani permits guests some leeway with respect to checkout time, the leeway time is limited. (b) The district court found, and the record supports the finding,[4] that Dorais stated only that he planned to remain in the room *until 12:30.* (c) Gomes had left the room already. (d) The hotel's 10 a.m. reminder of the checkout time, and the housekeeper's noon visit, put Dorais on notice that any extension past noon would be of limited duration. Those factors establish that Dorais' expectation of privacy was reasonable only until 12:30. Therefore, we affirm the district court's ruling that Dorais lacked standing to challenge the police entry, which occurred at 12:40.

B. *The Stop of the Car*

Defendants also challenge the stop of the rental car, arguing that the police lacked probable cause or reasonable suspicion

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to stop the car. They further argue that the lack of probable cause or reasonable suspicion rendered Gomes' consent to search invalid and that, as a result, the drugs that they found in her purse and the incriminating statements that she made about Dorais must be suppressed.

This court recently clarified that "the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops." *United States v. Lopez–Soto,* 205 F.3d 1101, 1105 (9th Cir.2000). Therefore, we examine only whether the police had reasonable suspicion to stop Gomes' car. "Reasonable suspicion is formed by 'specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.' " *Id.* (quoting *United States v. Michael R.,* 90 F.3d 340, 346 (9th Cir.1996)).

In this case the police stopped Gomes' car after they had received a report from Dollar Rent–a–Car, the car's owner, that the car was "overdue." Had Dollar intentionally made a false police report, it would have been subject to criminal penalties under Hawaii law. *See* Haw.Rev.Stat. § 710–1015 (defining the crime of false reporting to law-enforcement authorities). Based on the report, the police were reasonable to suspect that Gomes may have been committing a crime because, under ***1131** Hawaii law, a person who keeps a rental car for more than 48 hours after it is due commits a misdemeanor. Haw.Rev.Stat. § 708–837. Thus, the police had reasonable suspicion when they stopped Gomes. *See Illinois v. Gates,* 462 U.S. 213, 233–34, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (holding that "if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary"); *United States v. Butler,* 74 F.3d 916, 921 (9th Cir.1996) (holding that police had probable cause to stop a Camaro and arrest the driver without a warrant when they were acting on a report from an identified citizen that the Camaro had been stolen).

Defendants argue that the officers had an affirmative duty to determine whether Gomes' car was a full 48 hours overdue and that, because the car was not yet quite 48 hours late, the officers lacked "jurisdiction" to make the stop. Defendants' argument fails under the reasoning of *Gates.* Because the officers were acting on a police report from Dollar, whose honesty has not been questioned, they had reasonable suspicion to stop the car even if the report turned out to be mistaken due to its timing.

Defendants further contend that this court's decision in *United States v. Twilley,* 222 F.3d 1092 (9th Cir.2000), establishes that the police lacked reasonable suspicion to stop Gomes. Defendants misapprehend *Twilley.* In that case, a police officer stopped the defendant based on his mistaken belief that defendant was violating California law by displaying only one license plate; but, in actuality, California law required the defendant to display only one license plate. *Id.* at 1096. This court held that the officer lacked reasonable suspicion to stop the defendant because reasonable suspicion cannot be premised on a mistaken understanding of the law. *Id.*

Unlike in *Twilley,* the officers here stopped Gomes not because of a mistaken understanding of the law, but because of a mistake of fact. The officers correctly understood that Hawaii law criminalizes the possession of a rental car more than 48 hours beyond its return time; the officers simply made a mistake of fact as to how long overdue the car was. That mistake of fact does not defeat the officers' reasonable suspicion. *Cf. United States v. Wallace,* 213 F.3d 1216, 1220–21 (9th Cir.2000) (holding that an officer had reasonable suspicion to stop a car with tinted windows when California law prohibited certain tinted windows, even though it was later established that the windows were not sufficiently tinted to violate the law).

Because the police had reasonable suspicion to stop Gomes' car, the stop neither tainted Gomes' consent to search her purse nor required the suppression of the incriminating statements that she made about Dorais. The district court correctly denied the motion to suppress the statements and the drugs found in Gomes' purse.

AFFIRMED.

All Citations

241 F.3d 1124, 01 Cal. Daily Op. Serv. 1692, 2001 Daily Journal D.A.R. 2187

Footnotes

1 Defendants did not otherwise challenge the voluntariness of Gomes' statements or of her consent to search.

2 Although the district court made no findings about the timing of Defendants' extension, it appears from the receipt in Exhibit 1 that, on July 5, Defendants extended their stay until July 6 and that, on July 6, they extended their stay until July 8.

3 There was conflicting testimony in the record about the time of the stop. The district court found that Gomes had been arrested "sometime before noon."

4 The housekeeper stated: "I ask: What time are you checking out, and he say 12:30," and "He just answer me 12:30 he checking out."

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907 F.2d 1534
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Jerry Wayne ERVIN, Defendant-Appellee.

No. 89-1673.
|
July 26, 1990.

Synopsis

Defendant who had been indicted for possession of more than 100 kilograms of marijuana with intent to distribute moved to suppress marijuana seized during warrantless search of camper-trailer. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, Chief Judge, granted defendant's motion to suppress, and Government appealed. The Court of Appeals, Barksdale, Circuit Judge, held that: (1) warrantless search of camper-trailer fell within automobile exception to warrant requirement, and (2) border agents had "probable cause" for search based, *inter alia,* on driver's late arrival and short stay at site of suspected narcotics transaction.

Reversed and remanded.

Attorneys and Law Firms

***1535** LeRoy Morgan Jahn, Asst. U.S. Atty., Helen M. Eversberg, U.S. Atty., San Antonio, Tex., for plaintiff-appellant.

Thomas H. Hirsch, Odessa, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GEE and BARKSDALE, Circuit Judges.

Opinion

BARKSDALE, Circuit Judge:

After being indicted for possession of more than 100 kilograms of marijuana with intent to distribute, Jerry Wayne Ervin moved to suppress the marijuana, seized during a search of his trailer. The district court held that the defendant did not consent to the search and that the search did not fall within an exception to the search warrant requirement imposed by the Fourth Amendment. Finding, however, that the search fell within the automobile exception to that requirement, we REVERSE.

I.

On August 5, 1988, United States Border Patrol Agent Burns inspected a camp site at Chimney Trails, located along the Rio Grande in Big Bend National Park.[1] He observed tracks of four or more horses and a motor vehicle and trailer, interspersed with footprints. Based on his training and experience, Burns determined that a meeting had taken place the previous night.[2] He "followed these tracks back and found they were coming from the village of Santa Elena, Chihuahua, Mexico, which is directly opposite the ranger station at Castolon, [Texas,] in the Big Bend National Park."[3] He noted that a horse and rider could easily make this six-mile trip undetected. Burns "conclu [ded] that the horses were packing in contraband and they were putting them in vehicles which met them there [at the Chimney Trails site]." Consequently, he established a surveillance point at the intersection of two roads near the site.

Approximately three weeks later, on the evening of August 25, Burns went to the surveillance point. He first "drove over the mouth of the driveway that goes into the Chimney camp site so that [if] a vehicle ... entered or left after that [time, it] would drive over the top of my car tracks." At 10:00 p.m., he observed a pickup truck pulling "a small travel trailer ... [which] had an air conditioner mounted on the top" approach Chimney Trails. At 11:00 p.m., Burns called Border Patrol Agent McRae for assistance, because Burns had received a call requiring him to investigate suspicious activity at the border. McRae arrived about 30 minutes later, and Burns "explained fully to [McRae] what [Burns] had seen ... [and] suspected." Burns then left.

At approximately 12:05 a.m., McRae observed "a white travel trailer [with] an air conditioner on top," leave Chimney Trails. The travel trailer matched the description that Burns had given him and was the only vehicle that he saw at the site. McRae

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***1536** reported to Burns, and Burns informed him that he was returning to meet McRae.

McRae followed the pickup and trailer until it stopped at the Big Bend Motor Inn Motel in Study Butte, a community outside of the park. McRae approached the truck, which contained Ervin and his wife. McRae asked the driver, Ervin, for permission to look into the vehicle and trailer; and Ervin assented. After McRae looked through the pickup, Ervin opened the door of the trailer. McRae "gave a cursory glance" inside but detected no contraband. McRae testified that "being by myself I could not really turn my back on anybody, especially at night. So I did not search it very thoroughly...." In response to McRae's questions, Ervin stated that he had seen no other vehicles or horses at the park; and that because his wife felt ill and their trailer air conditioning did not work, they had decided to sleep in the motel. McRae observed that Ervin's wife appeared ill. McRae concluded the questioning; and, after watching the Ervins check into the motel, McRae left.

In the interim, Burns returned to the Chimney Trails site to check the tire tracks. Although the tracks of the vehicle pulling the trailer did not appear to be the same as those he had observed on August 5, the trailer tire tracks "looked to be identical to those that [Burns] had seen" then. He also observed that the vehicle pulling the trailer had dual wheels. He also noted numerous fresh horse tracks, as well as fresh footprints. He could "tell that there were a group of horses ... probably four or more," and that the hoof prints were the "same age as those vehicle tracks...." Burns radioed McRae about his findings and drove to the motel.

McRae was returning to the surveillance point when he received Burns' call that "the dual wheel vehicle pulling the trailer, had met some horses at Chimney Trails campground." McRae returned to the motel; and, after the manager told him which room the Ervins occupied, he "knocked on the door and ... they invited me in." McRae told Ervin "there seemed to be a little discrepancy in what he [Ervin] told me earlier and what we had found on sign." McRae asked Ervin to wait outside with him until Burns arrived.

Burns arrived at 1:10 a.m. and began questioning Ervin. Burns testified that Ervin stated that he had "gone down to [Chimney Trails] ... about midnight," and that in driving away from the site, he passed by another vehicle, an El Camino, coming from the opposite direction. Burns testified that Ervin's trailer "looked like the one that I had seen turning in [earlier at the Chimney Trails and that] ... the wheels on both the truck and the trailer ... looked like the ones that I had just seen at Chimney campsite." Burns advised Ervin of his rights and testified that he said "we would like to look in your trailer, do we have permission.... [and Ervin] said yes." Burns and McRae walked in the trailer and "knew something was wrong ... [because] the distance was too small between my head and the trailer." Burns and McRae continued searching, without success, with the assistance of other agents who had arrived.

Burns testified that "at this time Mr. Ervin was sitting in the backseat of the patrol car. He called me over and said he wanted to talk, and he said it is in the floor." Burns asked Ervin how to get it, and Ervin explained that they would have to take up the carpet and offered a screwdriver. Subsequently, the agents found 470 pounds of marijuana in the floor of the trailer. The agents had neither obtained, nor tried to obtain, a search warrant.

Defendant Ervin was indicted with possessing more than 100 kilograms of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Upon Ervin's motion, the district court suppressed the marijuana found in the search. After hearing testimony, the court ruled that the "Defendant did not consent to the search and that the Border Patrol Agents searched the trailer without a search warrant or an applicable exception to the search warrant requirement. The search was conducted in violation of the Fourth Amendment." The ***1537** government timely appealed.[4]

II.

The government contends that the search was constitutional because (1) there was probable cause for the search, and (2) Ervin's trailer came under the automobile exception to the search warrant requirement.

In reviewing the grant of a motion to suppress, "the trial court's purely factual findings must be accepted unless clearly erroneous, or influenced by an incorrect view of the law...." *United States v. Muniz-Melchor,* 894 F.2d 1430, 1433-34 (5th Cir.), *cert. denied,* 495 U.S. 923, 110 S.Ct. 1957, 109 L.Ed.2d 319 (1990) (quoting *United States v. Maldonado,* 735 F.2d 809, 814 (5th Cir.1984)). The evidence is viewed in the light most favorable to the prevailing party. *United States v. Reed,* 882 F.2d 147, 149 (5th Cir.1989); *United States v. Lanford,*

838 F.2d 1351, 1354 (5th Cir.1988). Of course, we freely review questions of law. *Muniz-Melchor,* 894 F.2d at 1433.

A.

We turn first to whether the trailer fell under the automobile exception. The Fourth Amendment expressly protects against "*unreasonable* searches and seizures...." (Emphasis added.) And in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court held:

> [T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id. at 149, 45 S.Ct. at 283. The Court justified the automobile exception on the grounds that

> the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153, 45 S.Ct. at 285. Historically, "individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." *California v. Carney,* 471 U.S. 386, 392, 105 S.Ct. 2066, 2069, 85 L.Ed.2d 406 (1985), (*citing* *United States v. Ross,* 456 U.S. 798, 806, n. 8, 102 S.Ct. 2157, 2163, n. 8, 72 L.Ed.2d 572 (1982)).

The Court has "consistently recognized *ready* mobility as one of the principal bases of the automobile exception." *Carney,* 471 U.S. at 390, 105 S.Ct. at 2068 (emphasis added):

> However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said are twofold. (citation omitted)
>
> "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[5]

***1538** *Carney,* 471 U.S. at 391, 105 S.Ct. at 2069 (*citing* *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976)). "Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily-mobile vehicle justified application of the vehicular exception." *Carney,* 471 U.S. at 391, 105 S.Ct. at 2069. "In this class of cases, the [Carroll] Court held that a warrantless search of an automobile is not unreasonable." *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 2164, 72 L.Ed.2d 572 (1982).

As the district court held, the critical issue in this case is not whether there was probable cause for the search (as discussed *infra,* we find that there was), but whether the trailer was more like a house or automobile for purposes of the Fourth Amendment. The Supreme Court has held that the warrantless search of a mobile home was within the automobile exception to the warrant requirement. *Carney,* 471 U.S. at 393, 105 S.Ct. at 2070.

In *Carney,* a Drug Enforcement Administration agent had information that the defendant's mobile home was being used to exchange marijuana for sex. The mobile home was parked in a lot in downtown San Diego; it was stationary; and its shades were drawn. The Court noted that it "possessed some if not many of the attributes of a home...." *Id.* at 393, 105 S.Ct. at 2070. The agent requested that a youth, who had just left the mobile home, return and knock on the door. When the defendant stepped out, the agent, without a warrant or consent, entered the mobile home and observed marijuana.

The Supreme Court held that the search did not violate the Fourth Amendment; that "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle." *Id.* at 393, 105 S.Ct. at 2070. The Court relied on "two requirements for application of the [vehicle] exception": first, "the ready mobility of the vehicle"; and second, its "presence in a setting that objectively indicates the vehicle is being used for transportation." *Id.* at 394, 105 S.Ct. at 2070.

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The Court rejected the defendant's argument that his vehicle should be distinguished because it was capable of functioning as a home:

> To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles such as the motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity.

Id. at 393-94, 105 S.Ct. at 2070.[6]

Ervin's trailer falls squarely under *Carney:* (1) it was not parked in a place regularly used for residential purposes but in a motel parking lot; (2) Ervin and his wife were not occupying the trailer as a home; and (3) it was readily mobile. Moreover, the district court's ruling that Ervin had an expectation of privacy is contradicted by ***1539** the Ervins' not using the trailer as a home, nor was there any evidence that it was being used as a camper. Therefore, under *Carney,* the automobile exception to the warrant requirement applies to the search of Ervin's trailer.

B.

We turn now to the issue of probable cause; for, of course, the automobile exception is applicable only if "the overriding standard of probable cause is met." *Carney,* 471 U.S. at 392, 105 S.Ct. at 2069.[7]

1.

We agree with the district court that "[w]hen Agent McRae stopped Ervin for the first time as Ervin was exiting the vehicle at the Motel, he had specific, articulable facts upon which to base his suspicions." The district court found:

> The Government had every right to be suspicious of that trailer, particularly in view of the fact that they were told that it didn't meet anybody, in view of the fact that according to the tracks, at least the trailer had been down there and met the horses. *The only issue that we have got is whether or not the Government should have obtained a search warrant on that trailer* .... (Emphasis added.)

A border patrol agent conducting a roving patrol in a border area may make a temporary investigative stop of a vehicle if aware of "specific articulable facts, together with the rational inferences from those facts, that reasonably warrants suspicion" that the vehicle is engaged in illegal activities. *United States v. Brignoni-Ponce,* 422 U.S. 873, 884, 95 S.Ct. 2574, 2581, 45 L.Ed.2d 607 (1975).

In assessing reasonable suspicion, a court is to examine "the totality of the circumstances, including the 'collective knowledge' of all officers...." *United States v. Muniz-Ortega,* 858 F.2d 258, 260 (5th Cir.1988), *citing United States v. Kohler,* 836 F.2d 885, 888 (5th Cir.1988). Some of the factors that can be considered include the characteristics of the area, the proximity to the border, traffic patterns, the agent's previous experience with criminal traffic, the type and appearance of the vehicle, and the driver's behavior. *Brignoni-Ponce,* 422 U.S. at 884-85, 95 S.Ct. at 2581-82. "While any single factor in isolation would be insufficient to support the stop, we consider the reasonableness of the officer's suspicion under 'the totality of the particular circumstances.' " *Kohler,* 836 F.2d at 888-89 (*citing Brignoni-Ponce,* 422 U.S. at 885, n. 10, 95 S.Ct. at 2582, n. 10).

Here, the collective facts known to the agents were more than sufficient to support the stop, including: (1) the pattern of tracks observed at Chimney Trail site over the past few months; (2) the proximity of those tracks and the border; (3) the tracing of those tracks to a Mexican town; (4) the likelihood that smuggling activities were being carried on at the site; (5) the late hour at which Ervin had driven into the area and his short stay there; (6) the pattern of travel, as well as Ervin's tire tracks matching those of the vehicles that were believed to have been loaded at the site on August 25 and one of the vehicles on August 5; and (7) Ervin's vehicles were ideal for smuggling activities. Therefore, we find that the record amply supports the court's finding of reasonable suspicion.

2.

The question is whether that reasonable suspicion rises to a level of probable ***1540** cause. *See United States v. Espinoza-Seanez,* 862 F.2d 526, 533 (5th Cir.1988) (citing *United States v. Martinez,* 808 F.2d 1050, 1055 (5th Cir.) *cert. denied,* 481 U.S. 1032, 107 S.Ct. 1962, 95 L.Ed.2d 533 (1987). The standard of reasonable suspicion, is "a less demanding standard than probable cause...." *Alabama*

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v. White, 496 U.S. 325, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990); *United States v. Espinoza-Seanez,* 862 F.2d 526, 533 (5th Cir.1988). A finding of probable cause involves "a practical common-sense decision whether ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Muniz-Melchor,* 894 F.2d at 1438 (citations omitted); *See, e.g., White,* 110 S.Ct. at 2416 (citing *Gates,* 462 U.S. at 238, 103 S.Ct. at 2332). Probable cause determinations are a "laminated total" and are predicated upon what border patrol agents "have heard, what they know, and what they have observed as trained officers." *Espinoza-Seanez,* 862 F.2d at 532 (citations omitted).[8]

The reasonable suspicion that the agents had for the initial stop was fortified by Burns' additional evidence of the meeting of horses and vehicles at Chimney Trails, the matching of the tires on Ervin's vehicle to the tracks found at the camp site, and Ervin's false explanations of his activities and whereabouts. The total of all these observations and events, when viewed in light of the agents' experience, established more than a fair probability that Ervin's trailer contained contraband. *Illinois v. Gates,* 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328-29, 76 L.Ed.2d 527 (1983); *United States v. Mendoza,* 722 F.2d 96, 100-02 (5th Cir.1983). "If there was not already probable cause for search of the [trailer] ..., these facts, combined with the reasonable suspicion the agents already had, strengthened that suspicion into probable cause." *Espinoza-Seanez,* 862 F.2d at 533.

Accordingly, the district court erred in holding that Ervin's trailer could not be searched without a warrant. Consequently, the fruits of the search are admissible. *United States v. Sutton,* 850 F.2d 1083, 1085 (5th Cir.1988) (warrantless searches of vehicles would be reasonable if based on consent or probable cause).[9]

III.

Accordingly, the district court's order suppressing the evidence found in the search of Ervin's trailer is

REVERSED and this case is REMANDED for proceedings consistent with this opinion.

All Citations

907 F.2d 1534

Footnotes

1 Burns testified: "We [Border Patrol Agents] ... had on several occasions seen tracks of horses coming up to this campsite, and apparently meeting a vehicle and presumably unloading something from the horses onto the vehicle. This always happened at night. We never saw the vehicle. The people who came into the campsite were never registered with the Park Service to occupy that campsite."

2 Burns testified that the tracks had been made "the previous night, judging from the tracks, that four horses had come up to this campsite or within a few yards of it, that a vehicle had come into the campsite which was a vehicle that we figured was the size of a standard pickup; that this vehicle was pulling a single axle trailer and there was a lot of tracks back and forth between where the horses were and where the trailer and vehicle were.... We took pictures of what we saw there."

3 Burns had received training in "cutting sign," the tracking of animals and vehicles, as "a routine part of the job is to cut sign and follow tracks."

4 18 U.S.C. § 3731 authorizes the government to appeal "from a decision or order of a district courts suppressing or excluding evidence ... if the United States Attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of fact material in the proceeding." The United States Attorney made the requisite certification.

5 The Court has noted that "[a]utomobiles, unlike homes, are subject to pervasive and continuing government regulation and controls, including periodic inspection and licensing requirements." *Opperman,* 428 U.S. at 368, 96 S.Ct. at 3096. The Court noted that police stop and examine vehicles as "an everyday occurrence." *Id.; see also Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 110 S.Ct. 2481, 2488, 110 L.Ed.2d 412 (1990) (Court upheld sobriety checkpoint).

6 Other Circuits have followed the reasoning in *Carney. See, e.g. United States v. Tartaglia,* 864 F.2d 837, 841 (D.C.Cir.1989) (automobile exception applied, no heightened expectation of privacy in a train roomette); *United States v.*

Markham, 844 F.2d 366, 368-69 (6th Cir.), *cert. denied,* 488 U.S. 843, 109 S.Ct. 116, 102 L.Ed.2d 90 (1988) (a warrantless search supported by probable cause of an unattended motor home parked in a private driveway did not violate the Fourth Amendment); *United States v. Hill,* 855 F.2d 664, 667-68 (10th Cir.1988) (warrantless search of a houseboat allowed because it was readily mobile and not in a setting that objectively indicated that it was being used for a residence); *United States v. Hamilton,* 792 F.2d 837, 843 (9th Cir.1986) (the search of the motor home fell within the scope of the vehicle exception even though it was located in a residential driveway and was attached to utilities by an extension cord).

7 As the district court found, McRae's earlier encounters with the Ervins did not violate the Fourth Amendment. Neither the first stop and search by McRae nor the second contact at the motel "tainted" the subsequent search. As to the initial search, the district court found that "Ervin consented to the search ... [and] the circumstances of the request to search the vehicle were such that the consent was voluntarily given and did not offend the Fourth Amendment." The second encounter, which occurred when McRae knocked on the motel room door, does not trigger Fourth Amendment scrutiny for Ervin responded voluntarily. *United States v. Mason,* 661 F.2d 45, 47 (5th Cir.1981); *see United States v. Santana,* 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976) (person standing in the threshold of doorway to residence is in a "public place").

8 "The determination whether law enforcement officers had probable cause to conduct a warrantless search involves a mixed question of law and fact." *Muniz-Melchor,* 894 F.2d at 1439 n. 9. We are bound by the findings of a district court unless clearly erroneous, "however, the ultimate determination as to probable cause for a warrantless search seems to be a question of law for this Court to decide." *Id.*

9 The district court found that "[t]he [second] search of the vehicle could not be considered to be performed with the 'voluntary consent' of Ervin under these circumstances." As discussed above, the agents had probable cause. Consequently, this court need not reach the issue of whether the district court erred in concluding that Ervin's consent to search was involuntary.

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967 F.2d 314
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Richard Samuel HUFFHINES, Defendant–Appellant.

No. 91–50426.
|
Argued and Submitted April 8, 1992.
|
Decided June 15, 1992.

Synopsis

Defendant was convicted in the United States District Court for the Central District of California, Edward Rafeedie, J., of being felon in possession of firearm, and he appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that: (1) evidence supported conviction, and (2) conviction for being felon in possession of firearm was not crime of violence for purpose of sentencing defendant as career offender.

Conviction affirmed; sentence vacated; case remanded.

Attorneys and Law Firms

***315** Denise Meyer, Deputy Public Defender, Los Angeles, Cal., for defendant-appellant.

Brad M. Sonnenberg, Asst. U.S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: PREGERSON, D.W. NELSON and THOMPSON, Circuit Judges.

Opinion

DAVID R. THOMPSON, Circuit Judge:

A jury convicted Richard Samuel Huffhines of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In sentencing Huffhines, the district court considered this crime to be a crime of violence. Because Huffhines had two previous convictions for crimes of violence, the district court treated him as a career offender under Sentencing Guideline § 4B1.1 and sentenced him to 120 months in prison followed by three years of supervised release.

Huffhines appeals his conviction and sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm Huffhines's conviction. We vacate his sentence, because we hold, consistent with our recent opinion in *United States v. Sahakian,* 965 F.2d 740, 742 (9th Cir.1992), that the crime of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) is not a crime of violence under the 1989 amendment to guideline section 4B1.2. We remand for resentencing.

FACTS

On September 29, 1989, James Shaw reported to the Beverly Hills Police Department that he had been followed by Huffhines, who was driving a Chevrolet Blazer with New Mexico license plates. Detective Stephen Miller investigated the incident. Based on interviews with Shaw and his ***316** wife, Miller learned that Huffhines was a previous friend of Mrs. Shaw.

Shaw showed Miller a picture of Huffhines. He also told Miller that Huffhines had a prior federal conviction for mailing a strychnine-laced pie to his in-laws and a prior Texas conviction for possession of a firearm silencer. Miller confirmed these convictions.

On October 4, 1989, Shaw informed Miller that Huffhines had called the night before insisting that Shaw meet with him. Shaw had told Huffhines to call him at his office the next day. On that day, Miller accompanied Shaw to his office. During the afternoon, Huffhines was spotted in the lobby coffee shop in Shaw's office building. Miller was informed and went to the coffee shop.

According to Miller, as Huffhines was leaving the coffee shop, Miller walked up to him and identified himself as a police officer. Three other officers were in the lobby area, but none was in uniform or displayed any weapon, and no one touched Huffhines. Miller told Huffhines that he wanted to speak to him about a matter he was investigating. When he asked Huffhines his name, Huffhines said “Larry Connelly.” Miller told Huffhines to come with him outside the building.

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Huffhines did so and as soon as he was outside, he was arrested for falsely identifying himself to a police officer in violation of California Penal Code § 148.9. He was searched and a set of car keys was found in his possession.

When he was interviewed by the police, Huffhines denied ownership of a Chevrolet Blazer. By this time, two officers had located a Blazer with New Mexico license plates a few blocks from Shaw's office. The keys found on Huffhines fit the door of this vehicle. The vehicle identification number (VIN) visible on the dashboard was the VIN of another vehicle.

A magistrate issued a warrant to search the Blazer. The search revealed that the VIN on the Blazer's dashboard was false. The Blazer had been stolen. Inside the Blazer the police found a key to room 211 of the Foghorn Harbor Inn Motel in Marina Del Rey.

The police went to this motel on the evening of October 5, 1989. The motel assistant manager, Ric Wilson, informed them that on October 3 room 211 had been rented to a person who gave his name as "Goode" and paid cash for two nights' rent. When the rental period expired at noon on October 5, Wilson had repossessed the room and locked the guest out.

Wilson gave the police permission to search the room. In the course of the search, the police looked beneath a mattress on one of the two beds in the room and found two plastic bags. One of these bags contained the gun which became the subject of Huffhines's indictment. His motion to suppress the evidence of the gun was denied. He was convicted following a jury trial.

The probation officer who prepared Huffhines's presentence report recommended that he be sentenced as a career offender under the Sentencing Guidelines. The district court agreed. It treated Huffhines's conviction of being a felon in possession of a firearm as a crime of violence. Huffhines was classified as a career offender on the basis that he had two prior felony convictions for crimes of violence. *See* Guidelines Manual, § 4B1.1 (Nov. 1990). He was sentenced to 120 months imprisonment and three years supervised release.[1] This appeal followed.

MOTION TO SUPPRESS EVIDENCE OF THE GUN

We accept a district court's findings of fact at a suppression hearing unless they are clearly erroneous. *United States v. Kerr,* 817 F.2d 1384, 1386 (9th Cir.1987). The lawfulness of searches and seizures usually presents mixed questions of law and fact, which we review de novo. *United States v. Linn,* 880 F.2d 209, 214 (9th Cir.1989).

***317** A. Huffhines's Arrest

The district court found that Huffhines falsely identified himself to the police prior to his arrest. This finding is not clearly erroneous. *See United States v. Attson,* 900 F.2d 1427, 1433 (9th Cir.) (district court's factual findings on matters of credibility rarely overturned), *cert. denied,* 498 U.S. 961, 111 S.Ct. 393, 112 L.Ed.2d 403 (1990).

Huffhines argues that even if he falsely identified himself to the police, the district court erred in ruling that this provided probable cause for his arrest under California Penal Code § 148.9,[2] because the police knew his real name. We reject this argument.

Section 148.9 applies even when the police are not deceived by the person giving a false identification. *See People v. Hunt,* 225 Cal.App.3d 498, 275 Cal.Rptr. 367, 370–71 (3d Dist.1990) (officer had probable cause to arrest vehicle passenger under section 148.9 for giving false name when officer received information from DMV indicating passenger was not who he purported to be).

Huffhines next contends that the officers' failure to release him after his arrest, pursuant to California Penal Code § 853.6,[3] shows his arrest was simply a pretext to enable the police to search for evidence of other crimes, and as such the evidence obtained by the search should have been suppressed. He relies on *Taglavore v. United States,* 291 F.2d 262 (9th Cir.1961).

In *Taglavore,* we held that the police had engaged in a "deliberate, pre-planned" scheme to evade the requirements of the fourth amendment by using a traffic arrest warrant to search the defendant. *Id.* at 267. Several factors indicated the arrest was pretextual. It was not ordinary procedure to take a person into custody for a minor traffic violation. *Id.* at 265. The warrant was acquired by an inspector in the vice squad who suspected the defendant of having connections with illegal narcotics activities of the defendant's employer. *Id.* The inspector kept the warrant until after the employer's arrest, late at night, when he gave it to two other officers with

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instructions to arrest the defendant, and a warning that he might have narcotics in his possession. *Id.*

In the present case, Huffhines was lawfully detained as part of the investigation of Shaw's complaint.[4] During this detention, Huffhines falsely represented himself as another person. A person under lawful detention who falsely represents or identifies himself or herself to a peace officer as another person is guilty of a misdemeanor. Cal.Penal Code § 148.9; *Hunt,* 275 Cal.Rptr. at 370–71. Thus, Miller was authorized to arrest Huffhines.

"Whether an arrest is a mere pretext to search turns on the motivation or primary purpose of the arresting officers." *United States v. Smith,* 802 F.2d 1119, 1124 (9th Cir.1986). There is no evidence that Miller's motive for confronting Huffhines was anything other than to investigate ***318** Shaw's complaint. The only similarity to *Taglavore* is that Miller failed to follow ordinary procedures by not releasing Huffhines pursuant to California Penal Code § 853.6.

We conclude the district court did not clearly err in determining Huffhines's arrest was not pretextual.

B. Search of the Vehicle

A person who voluntarily abandons property lacks standing to challenge its search. *United States v. Nordling,* 804 F.2d 1466, 1469 (9th Cir.1986). The inquiry into abandonment "should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search." *Id.*

Evidence established that during his interview at the police station, Huffhines denied ownership or knowledge of the Blazer. He claimed that the keys found on him were keys to his Cadillac, which was parked in Dallas, Texas, and that he had been dropped off near Shaw's office building by a friend in a red Corvette. When asked why his keys fit the Blazer, Huffhines responded with a shrug of his shoulders.

The district court found that Huffhines disavowed any connection to the Chevrolet Blazer. This finding is not clearly erroneous. *See id.* (determination of abandonment reviewed for clear error). Having disavowed any connection to the Blazer, Huffhines may not challenge its search. Thus, we do not consider his argument that the warrant to search the Blazer was not supported by probable cause or that the search was otherwise invalid.

C. Search of the Motel Room

The police did not have a warrant to search the motel room at the Foghorn Harbor Inn. Huffhines contends this search violated the fourth amendment because it was not justified by exigent circumstances, hot pursuit or a search incident to his arrest. This argument overlooks the fact that this was a consensual search.

A search conducted pursuant to valid consent is an exception to the fourth amendment's warrant and probable cause requirements. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). The motel's assistant manager, Ric Wilson, consented to a search of the motel room on the evening of October 5, after he had repossessed the room for nonpayment of rent.

Huffhines contends the assistant manager's consent was invalid. He argues he continued to have an expectation of privacy in the room after the rental period expired because his arrest prevented him from returning to the motel to renew the rental agreement. We reject this argument.

A guest in a motel has no reasonable expectation of privacy in a room after the rental period has expired. *United States v. Ramirez,* 810 F.2d 1338, 1341 (5th Cir.), *cert. denied,* 484 U.S. 844, 108 S.Ct. 136, 98 L.Ed.2d 93 (1987); *United States v. Croft,* 429 F.2d 884, 887 (10th Cir.1970); *see also United States v. Haddad,* 558 F.2d 968, 975 (9th Cir.1977). Here, the rental period ended at noon on October 5. Huffhines was not arrested until after 1:00 p.m. that afternoon. By then the rental period had expired.

Moreover, it was Huffhines's own conduct in giving a false name to the police that precipitated his arrest and prevented him from returning to the motel to renew the rental period. He cannot rely on his own misconduct to extend the period of his expectation of privacy in the motel room. *Croft,* 429 F.2d at 887 (no continued expectation of privacy in rented room when defendant's illegal conduct caused his arrest which prevented his return to extend the rental period); *accord United States v. Reyes,* 908 F.2d 281, 285–86 (8th Cir.1990) (defendant lacked standing to contest warrantless search of a rented locker which occurred after the rental period expired, even though he was prevented from renewing the rental period or removing the locker's contents because of his lawful arrest),

cert. denied, 499 U.S. 908, 111 S.Ct. 1111, 113 L.Ed.2d 220 (1991).

***319** Huffhines's fall-back argument is that even if the assistant manager's consent to search the room was valid, the police exceeded the scope of the assistant manager's consent when they searched under the mattress where they found the gun. We disagree.

We review the totality of the circumstances to determine whether a search exceeds the scope of consent. *United States v. Mines,* 883 F.2d 801, 803 (9th Cir.), *cert. denied,* 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 549 (1989). A district court's finding as to the scope of consent is reviewed for clear error. *Id.*

The district court found that a search under the mattress came within the scope of the assistant manager's consent. The court stated:

> [T]he innkeeper did have the right to consent to a search of the room other than the personal belongings of the defendant. The search of the room, in the view of the court, will include the search under the mattress where the alleged gun was found.... And since the mattress and the bed belongs to the hotel, the consent to search it was appropriately given by the hotel.

Rep.Tr., Vol. 4 at 6.

We agree with the district court. Although the assistant manager lacked the authority to consent to a search of Huffhines's belongings left in the room, it was not clearly erroneous for the court to find that the assistant manager's consent to a search of the room included the area under the mattress where the gun was found. *Cf. United States v. Brandon,* 847 F.2d 625, 630 (10th Cir.) (court's determination that search under the mattress of defendant's motel room, exposing narcotics, did not exceed scope of consent was not clearly erroneous where consent was based on defendant's request that police retrieve money left on the bed), *cert. denied,* 488 U.S. 973, 109 S.Ct. 510, 102 L.Ed.2d 545 (1988).

Huffhines further contends the officers should have obtained a warrant prior to opening the plastic bag found under the mattress. He argues the bag, which contained the gun, was an opaque container that concealed its contents from plain view.

Huffhines's container argument is meritless. There can be no reasonable expectation of privacy in a container if its contents can be discerned from its outward appearance. *Arkansas v. Sanders,* 442 U.S. 753, 764–65 n. 13, 99 S.Ct. 2586, 2593 n. 13, 61 L.Ed.2d 235 (1979);[5] *United States v. Miller,* 769 F.2d 554, 558 (9th Cir.1985). The gun was in the bag, and Officer Lombardi, who searched the motel room, testified at trial that he could tell what was in the bag by looking at it. This testimony was neither challenged nor controverted. *See United States v. Miller,* 929 F.2d 364, 365 (8th Cir.) (police could open bag without a warrant because its size and shape indicated it contained a gun), *cert. denied,* 502 U.S. 844, 112 S.Ct. 139, 116 L.Ed.2d 105 (1991).

SUFFICIENCY OF THE EVIDENCE

"[O]ur review [of the question of sufficiency of the evidence] is limited to the question whether, viewing the evidence in the light most favorable to the government, a reasonable jury could have found the elements of the crime beyond a reasonable doubt." *United States v. Mares,* 940 F.2d 455, 460 (9th Cir.1991).

Huffhines argues the evidence was insufficient to establish his possession of the gun. At best, he says the evidence established only that he had been present in the room where the gun was found.

At trial, Huffhines called Michael Connelly as a witness. Connelly testified that the gun found under the mattress belonged to him. He said he had bought the gun at a gun show in Las Vegas where he met Huffhines. He stated that he accepted a ride to Los Angeles with Huffhines and ***320** stayed in his room at the motel. He further testified that he put the gun under the mattress when Huffhines was not present and forgot to take it with him when he left.

When premises are shared by more than one person, more than the mere proximity to the contraband, presence on the property where it is found, and association with the person or persons having control of it is required to establish constructive possession. *United States v. Rodriguez,* 761 F.2d 1339, 1341 (9th Cir.1985).

Here, the motel clerk testified that Huffhines rented the room and checked in alone. He rented the room on October 3 for two days. The gun was found on October 5. The clerk testified that each time Huffhines came to the desk with questions he was alone, and as far as the motel clerk was aware no one else was staying in the room. An expert from the police department's crime laboratory testified that Huffhines's fingerprints were

found on the plastic bag that contained the gun, and on an ammunition container. At a pretrial conference, Huffhines told a special agent of the Bureau of Alcohol, Tax and Firearms: "You still have the firearm I had."

Based on this evidence, a reasonable jury could have found beyond a reasonable doubt that Huffhines exercised dominion over, and had constructive possession of, the gun that was found in the motel room. *Id.* (constructive possession requires evidence that the defendant knew of the presence of the contraband and had power to exercise dominion and control over it).

ADMISSION OF PRIOR CONVICTION

In proving that Huffhines was a felon, the government introduced into evidence a copy of a Texas state court judgment certified by the Texas Department of Corrections. Huffhines argues that Texas law precluded the admission of this judgment because it was not certified by the clerk of the original convicting court. This argument is meritless.

Copies of judgments certified by the Texas Department of Corrections custodian of records are admissible under Texas law. *Reed v. State,* 811 S.W.2d 582, 583 n. 3, 586–87 (Tex.Crim.App.1991) (en banc). Moreover, they are admissible in federal court under Federal Rule of Evidence 902(4). *United States v. Darveaux,* 830 F.2d 124, 126 (8th Cir.1987); *see also United States v. Dancy,* 861 F.2d 77, 79 (5th Cir.1988) (copy of prior criminal judgment prepared and certified by official of California Department of Corrections admissible under Rule 902(4) in section 922(g)(1) prosecution).

SENTENCING

Under Guidelines Manual § 4B1.1 (Nov. 1990), a court may classify a defendant as a career offender if his offense is a felony that is a crime of violence and he has two prior felony convictions for crimes of violence. We review de novo a district court's interpretation of the sentencing guidelines. *United States v. Nazifpour,* 944 F.2d 472, 473 (9th Cir.1991).

A. Unlawful Possession of a Firearm Silencer

The district court used Huffhines's Texas conviction for unlawful possession of a firearm silencer and a federal conviction for mailing an injurious article as the two prior felony convictions for crimes of violence. Huffhines contends his prior conviction for unlawful possession of a firearm silencer should not be counted as a prior crime of violence under section 4B1.1 because a silencer does not pose a threat as does a gun or other weapon.

A categorical approach, by which only the statutory definition of the crime is examined, is appropriate to determine whether a prior conviction is a crime of violence under section 4B1.1. *United States v. Alvarez,* 960 F.2d 830, 837 (9th Cir.1992). The crime of possession of a firearm silencer does not have as an element the use, attempted use or threatened use of physical force required by section 4B1.2(1)(i). *See* ***321** Tex.Penal Code Ann. § 46.06(a)(4) (West 1989 & Supp.1992).[6] Thus, in order for the offense to be a crime of violence, it must "involve [ ] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1)(ii).

The unlawful possession of a silencer presents such a risk. In *United States v. Dunn,* 946 F.2d 615, 620–21 (9th Cir.), *cert. denied,* 502 U.S. 950, 112 S.Ct. 401, 116 L.Ed.2d 350 (1991), we held that possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d) constituted a crime of violence for purposes of section 4B1.1. We noted that, under 26 U.S.C. § 5861(d), not all firearms must be registered, only those that Congress found to be inherently dangerous and lacking in lawful purposes, such as sawed-off shotguns and grenades. We reasoned that the possession of an unregistered firearm of the kind defined in section 5845 involved a blatant disregard of the law and a substantial risk of improper physical force. *Id.* at 621.

This reasoning also applies to the unlawful possession of a silencer. A silencer is specifically listed in section 5845's definition of "firearm." 26 U.S.C. § 5845(a)(7). Like a sawed-off shotgun and other firearms of the kind enumerated in that section, a silencer is practically of no use except for a criminal purpose. *See United States v. Kayfez,* 957 F.2d 677, 679 (9th Cir.1992) (silencer rarely possessed for lawful purpose). Indeed, the silencer Huffhines was convicted of possessing was attached to a loaded gun. Possession of a silencer thus demonstrates a disregard of law and a substantial risk of improper physical force. *See id.* (possession of an unregistered silencer threatens personal safety).

Huffhines asserts that under the test applied in *United States v. Potter,* 895 F.2d 1231 (9th Cir.), *cert. denied,* 497 U.S. 1008,

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110 S.Ct. 3247, 111 L.Ed.2d 757 (1990), his conviction for possession of a silencer is not a crime of violence. In *Potter,* we analyzed the defendant's prior conviction for purposes of sentencing under 18 U.S.C. § 924(e)(1).[7] We stated: "If the defendant could have been convicted of the prior crime without using or threatening force against or risking serious injury to another person, then the prior conviction does not constitute a 'violent felony' and cannot be used to enhance his sentence." *Id.* at 1237.

The possession of a silencer qualifies as a "violent felony" under *Potter.* By analogy to *Dunn,* if possession of a silencer demonstrates a risk of improper physical force, it necessarily also carries a risk of serious injury, one of the tests for a "violent felony" under *Potter.* The district court correctly determined that Huffhines's prior conviction was a crime of violence.

B. Felon in Possession of a Firearm

In sentencing Huffhines as a career offender under guideline section 4B1.1, the district court relied on *United States v. O'Neal,* 937 F.2d 1369, 1375 (9th Cir.1990), and held that the crime of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), is a crime of violence. Section 4B1.2 of the guidelines defines "crime of violence" for purposes of section 4B1.1. On November 1, 1989, section 4B1.2 was amended. Huffhines was sentenced under the 1989 version of section 4B1.2.

The sentence which we reviewed in *O'Neal* was imposed under the pre–1989 version of section 4B1.2. In *United States v. Sahakian,* 965 F.2d at 742 (9th Cir.1992), we stated that the 1989 amendment to section 4B1.2 "called into question the continuing viability of *O'Neal*'s conclusion that being a felon in possession of a firearm is a crime of violence for purposes of the Career Offender guideline." We held that a ***322** "conviction of being a felon in possession [of a firearm] is not a conviction of a crime of violence under the 1989 amendment." *Sahakian,* 965 F.2d at 742.

Consistent with *Sahakian,* we vacate Huffhines's sentence and remand to the district court for resentencing on the basis that Huffhines's crime of conviction, felon in possession of a firearm, 18 U.S.C. § 922(g)(1), is not a crime of violence for sentencing under guideline section 4B1.1.

Conviction AFFIRMED. Sentence VACATED and case REMANDED for resentencing.

All Citations

967 F.2d 314

Footnotes

1 The presentence report calculated Huffhines's sentence based on a base level of 24 and a criminal history category of VI. The applicable sentencing range was 100 to 125 months.

2 Section 148.9 states, in relevant part:

> (a) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer listed in Section 830.1 or 830.2, upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.

Cal.Penal Code § 148.9(a) (West 1988).

3 Section 853.6 provides, in relevant part:

> (a) In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter.

Cal.Penal Code § 853.6 (West 1985).

4 Huffhines does not dispute that Miller had reasonable suspicion to justify detaining him for an investigatory stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). He concedes that the police had information that a

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certain individual may have been harassing a couple and someone appearing to be the suspect was present at the coffee shop when the officers arrived. He further concedes that "[a]rguably, this was reasonable suspicion under *Terry* to justify a stop, [but] it at no point escalated to the level of probable cause necessary for the immediate arrest ... that occurred."

5 We recognize that *Sanders* was recently overruled by *California v. Acevedo,* 500 U.S. 565, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991). However, because *Acevedo* was expressly based on an application of the automobile exception, *see id.* 111 S.Ct. at 1990–91, it does not alter the principle set forth in *Sanders* that there is no reasonable expectation of privacy in a container that discloses its contents.

6 Section 46.06(a)(4) provides that "[a] person commits an offense if he intentionally or knowingly possesses, manufactures, transports, repairs, or sells: a firearm silencer." Tex.Penal Code Ann. § 46.06(a)(4). An offense under this section is a felony. *Id.* at § 46.06(e).

7 Section 924(e)(1) requires that all those convicted under 18 U.S.C. § 922(g) who have three prior convictions for a violent felony or a serious drug offense, or both, receive a minimum sentence of fifteen years. 18 U.S.C. 924(e)(1) (1988). The term "violent felony" is defined in section 924(e)(2)(B). The language of U.S.S.G. § 4B1.2, defining "crime of violence," is derived from 18 U.S.C. § 924(e). U.S.S.G. App. C, amend. 268.

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551 F.3d 809
United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,
v.
Corey Lorent MOLSBARGER, Appellant.

No. 07-3874.
|
Submitted: Nov. 12, 2008.
|
Filed: Jan. 6, 2009.

Synopsis

Background: After the United States District Court for the District of North Dakota, Ralph R. Erickson, J., denied defendant's motion to suppress, 2007 WL 2077644, defendant was convicted of possession with intent to distribute a controlled substance. Defendant appealed.

Holdings: The Court of Appeals, Wollman, Circuit Judge, held that:

defendant had no reasonable expectation of privacy in hotel room under the Fourth Amendment, and

sufficient evidence supported defendant's conviction for possession with intent to distribute a controlled substance.

Affirmed.

Attorneys and Law Firms

***810** Todd D. Burianek, argued, Grafton, ND, for appellant.

Paul Raymond Emerson, AUSA, argued, Bismarck, ND, for appellee.

Before WOLLMAN, BEAM, and BENTON, Circuit Judges.

Opinion

WOLLMAN, Circuit Judge.

Corey Molsbarger was convicted of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and sentenced to 192 months' imprisonment. He appeals, arguing that the district court[1] improperly denied his motion to suppress evidence and that the evidence was insufficient to support the jury's verdict. We affirm.

I.

In the early morning hours of January 6, 2006, the night manager of the Ramada Inn Hotel in Grand Forks, North Dakota, contacted the Grand Forks Police, requesting assistance with quelling a disturbance in Room 101. The manager explained that he had received several complaints about loud partying in the room. He told the police that he had seen many people entering and exiting the room and that he suspected illegal drug activity. The manager said that he had warned the occupants of the room to be quiet, and that he now wanted the police to help evict them.

Officers Schauer, Jacobson, and Moe responded to the call. After speaking with the manager, the officers went with him to Room 101. As they stood outside, the officers heard loud noise and what they believed was a discussion about illegal drug trafficking. Officer Schauer briefly conferred with the hotel manager, who reiterated that he wanted the occupants evicted. Officer Schauer then knocked on the door and asked for permission to enter the room. A woman named Ashley Bigalke answered, but refused to allow the officers to enter the room because it was not hers and she did not know who had rented it. At that point, Officer Schauer told Bigalke that hotel management wanted everyone in the room evicted. He also stated that he was coming into the room and that all the occupants should gather their belongings and leave the hotel.

Shortly after entering the room, Officer Jacobson recognized one of the occupants as Corey Molsbarger, for whom there were outstanding arrest warrants. Molsbarger was lying sideways on the bed, apparently asleep. The officers handcuffed Molsbarger and performed a search ***811** incident to arrest. In a nightstand next to the bed, the officers found a methamphetamine pipe and a small butane torch. Molsbarger was carrying $940 cash, and the officers found at the foot of the bed an empty beer box containing approximately one-half pound of methamphetamine, a small digital scale, and some marijuana.

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Molsbarger sought to suppress all of the evidence, contending that the search of the hotel room violated his Fourth Amendment rights. The district court denied Molsbarger's motion, and the case proceeded to trial. At trial, the government offered a variety of evidence to prove that the methamphetamine found in the hotel room was Molsbarger's and that he intended to sell it to others. In addition to the officers' testimony about the physical evidence found in the room, Bigalke testified that the methamphetamine belonged to Molsbarger and that she had purchased a small quantity of it from him. Jason Mikula, who was also in the room that night, testified that Molsbarger had agreed to supply him with methamphetamine. Cory Olson, one of Molsbarger's associates, testified that he rented the room for Molsbarger and that he had purchased methamphetamine from Molsbarger on a previous occasion. A Drug Enforcement Administration (DEA) agent provided expert testimony that the quantity of methamphetamine found in the hotel room was consistent with narcotics trafficking.

II.

Molsbarger's initial argument is that the warrantless search of the hotel room violated his Fourth Amendment rights. In considering a denial of a motion to suppress evidence, "we review the district court's conclusions of law *de novo* and its factual findings for clear error." *United States v. Va Lerie,* 424 F.3d 694, 700 (8th Cir.2005) (en banc).

The Fourth Amendment protects individuals from warrantless searches in places where they have a reasonable expectation of privacy, a protection that may extend to a hotel room if certain factors are present. *See United States v. Esquivias,* 416 F.3d 696, 702 (8th Cir.2005) (discussing factors such as whether the defendant checked into, paid for, or occupied the room). Both parties focused on the threshold question whether Molsbarger ever had a reasonable expectation of privacy in the room. It is unnecessary to resolve that question, however, because whatever expectation of privacy Molsbarger may have had, it ceased when he was justifiably evicted from the hotel.

Justifiable eviction terminates a hotel occupant's reasonable expectation of privacy in the room. *See United States v. Rambo,* 789 F.2d 1289, 1295-96 (8th Cir.1986); *see also United States v. Allen,* 106 F.3d 695, 699 (6th Cir.1997) ("Once 'a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room.' ") (quoting *United States v. Rahme,* 813 F.2d 31, 34 (2d Cir.1987)). This rule is consistent with the Fourth Amendment's goal of protecting the sanctity of private behavior. Disruptive, unauthorized conduct in a hotel room invites intervention from management and termination of the rental agreement. Thus, an individual "cannot assert an expectation of being free from police intrusion upon his solitude and privacy in a place from which he has been justifiably expelled." *Rambo,* 789 F.2d at 1296.

Molsbarger and the other occupants of the room were creating a public disturbance that prompted several complaints from other hotel occupants about the noise level in the room. Notwithstanding the manager's warning that they quiet down, the occupants of Room 101 continued their raucous behavior. When the police arrived, ***812** the manager confirmed that he wanted the occupants evicted. The police justifiably entered the room to assist the manager in expelling the individuals in an orderly fashion. Any right Molsbarger had to be free of government intrusion into the room ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so. At that point, Molsbarger was identified and determined to be the subject of outstanding arrest warrants, leading to the discovery of the contraband in a search incident to his arrest. We conclude, therefore, that the district court did not err in denying Molsbarger's motion to suppress evidence.

III.

Molsbarger also contends that the evidence was insufficient to sustain his conviction. "We review the sufficiency of the evidence *de novo,* viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." *United States v. Hakim,* 491 F.3d 843, 845 (8th Cir.2007) (quotation omitted). The verdict will be upheld "if there is any interpretation of the evidence that could lead a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt." *Id.* (quoting *United States v. Hamilton,* 332 F.3d 1144, 1149 (8th Cir.2003)).

The thrust of Molsbarger's argument is that the government's primary witness, Ashley Bigalke, was unpersuasive because she was high on the night of Molsbarger's arrest and because she gave conflicting testimony at various stages of the government's case. Bigalke's credibility, however, was a

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question for the jury. *See United States v. Barajas,* 474 F.3d 1023, 1026 (8th Cir.2007) ("[W]e do not review questions involving the credibility of witnesses, but leave credibility questions to the jury.") (quotation omitted). Defense counsel subjected Bigalke to a vigorous cross-examination, and it was the jury's prerogative to determine whether her testimony was credible. Moreover, the government presented the jury with other evidence that the room was rented for Molsbarger, that he had agreed to supply Mikula with methamphetamine, and that the quantity of methamphetamine found in the room was consistent with drug trafficking. Thus, a reasonable jury could have found Molsbarger guilty.

The conviction is affirmed.[2]

All Citations

551 F.3d 809

Footnotes

1 The Honorable Ralph R. Erickson, United States District Judge for the District of North Dakota.

2 We have considered, and conclude that it is without merit, Molsbarger's late-raised claim that his brief pre-trial transfer from federal to state court violated the Interstate Agreement on Detainers Act, 18 U.S.C. app. § 2, art. III. *See United States v. Pardue,* 363 F.3d 695, 698 (8th Cir.2004) (observing that the Act does not apply to pre-trial detainees).

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