IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0180

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NICHOLAS WRIGHT,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE ADAM SAUER, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court Correctly Found Officer Heinz Did Not Trespass Upon Wright's Garbage Containers.

Authorities

California v. Greenwood, 486 U.S. 35 (1988)
Katz v. United States, 389 U.S. 347 (1967)
United States v. Gutierrez, 760 F.3d 750 (7th Cir. 2014)
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State v. Turner, 630 N.W.2d 601 (Iowa 2001)
U.S. Const. amend. IV
Iowa Const. art. I, § 8
Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946 (2016)

II. The District Court Correctly Found Wright Did Not Have a Subjective Expectation of Privacy in His Trash That is Objectively Reasonable.

Authorities

United States v. Dzialak, 441 F.2d 212 (2d Cir. 1971)
United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979)
Com. v. Pratt, 555 N.E.2d 559 (Mass. 1990)
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Kimberly J. Winbush, *Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle*, 62 A.L.R.5th 1 (Originally published in 1998)

ROUTING STATEMENT

Wright requests the Supreme Court to retain this case to answer an issue of first impression. Wright does not set forth the issue he requests the Supreme Court to address in his routing statement; however, for distinct but related reasons, he maintains the district court erred in denying his motion to suppress evidence obtained through three trash grabs from garbage containers placed by an alley for pick-up.

Wright notes that the Iowa Court of Appeals has found, under both the Fourth Amendment of the United States Constitution and the Iowa Constitution, article I, section 8, there is generally no expectation of privacy in a person's "garbage left for collection at the side of a public street.'" *State v. Henderson*, 435 N.W.2d 394, 397 (Iowa Ct. App. 1988) (quoting *California v. Greenwood*, 486 U.S. 35, 42 (1988)); *State v. Skola,* 634 N.W.2d 687, 690 (Iowa Ct. App. 2001). However, Wright contends that his trash containers are "effects" under both constitutions and that the police trespassed upon them when removing his garbage.

Wright relies upon *United States v. Jones*, 565 U.S. 400 (2012), in contending that "[a] physical trespass in and of itself, when

performed to acquire information, constitutes a warrantless search *regardless of any reasonable expectations of privacy*." Appellant's Br. 13. The State believes this case does not involve a trespass; therefore, *Jones* is inapplicable. In any event, "[n]ot all trespasses by law enforcement are violations of the Fourth Amendment." *United States v. Sweeney*, 821 F.3d 893, 900 (7th Cir. 2016) (citing *Oliver v. United States*, 466 U.S. 170, 177, 183-84 (1984) ("the term 'effects' is less inclusive than 'property' and cannot be said to encompass open fields.")).

The State notes that Wright does not cite any case law in support of his position that *Jones* changed the analysis of the "vast majority of courts [that] have ruled that when garbage is located in a place accessible to the public, the individual who placed that garbage for collection either abandoned it or has no reasonable expectation of privacy therein, thus rendering any search and seizure of that trash lawful." Kimberly J. Winbush, *Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle,* 62 A.L.R.5th 1 (Originally published in 1998).

The issues raised in this case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Nicholas Wright, appeals the judgment and sentence entered upon his convictions of possession of marijuana and possession of a Vyvanse in violation of Iowa Code section 124.401(5). He argues the district court erred in denying his motion to suppress evidence because: (1) the police trespassed upon his "effects" to obtain trash; and (2) he maintained a reasonable expectation of privacy in the contents of his trash.

Course of Proceedings

The State accepts Wright's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

In August 2017, Clear Lake Police Officer Brandon Heinz received information that someone named "Beef" was selling heroin near Rookie's Bar in Clear Lake. Hearing Tr. p. 5, line 24-p. 6, line 9. After some investigation, Officer Heinz learned that "Beef" was

Wright's nickname and that Wright lived near Rookie's Bar. Hearing Tr. p. 6, lines 10-21,

On September 11, 2017, at approximately midnight, Officer Heinz went to Wright's residence and observed there were two unlidded trash cans "at the edge of the alley behind the residence." Hearing Tr. p. 6, line 23-p. 7, line 5. The cans were lined up, like other neighbors' trash cans, ready for pick-up. Hearing Tr. p. 7, lines 6-10. In fact, garbage pickup was scheduled for the following day, September 12. Hearing Tr. p. 7, lines 11-15.

Officer Heinz retrieved the garbage bags from the cans. Hearing Tr. p. 7, lines 23-25. Officer Heinz did not believe that his feet stepped out of the alley when he reached in the garbage cans. Hearing Tr. p. 8, lines 12-25. He recalled, "[t]hey were so close to the –to the line of the alley, I don't even believe that my feet stepped off the alley." Hearing Tr. p. 8, lines 12-16. He did not recall whether he placed his hand on the garbage container. Hearing Tr. p. 17, lines 2-4.

Officer Heinz found poppy seed packing in the trash and T-shirt squares, which were ripped up with brown stains. Hearing Tr. p. 9, lines 5-12. He submitted the seeds and T-shirt squares to the

Department of Criminal Investigations (DCI) Lab for testing. The DCI confirmed the seeds were from a poppy plant and testing showed that one T-shirt piece was positive for morphine and two T-shirt pieces were positive for the presence of morphine and cocaine. Hearing Tr. p. 10, line 23-p. 11, line 4.

Officer Heinz collected Wright's garbage again on November 6, 2017, around midnight, the evening before the garbage was scheduled for pick-up. Hearing Tr. p. 11, lines 13-25. Again, Officer Heinz believed he was in the alley when he grabbed the bags from the container. Hearing Tr. p. 12, lines 1-4. Among other things, Officer Heinz found T-shirt pieces and mail addressed to Wright. Hearing Tr. p. 13, lines 2-8. Officer Heinz could not recall whether he placed his hand on the garbage containers. Hearing Tr. p. 19, lines 16-21.

On November 20, 2017, Officer Heinz again conducted a trash grab from Wright's garbage cans under the same circumstances. Hearing Tr. p. 13, line 16-p. 14, line 1. He could not recall whether he touched the garbage containers with his hand. Hearing Tr. p. 20, line 25-p. 21, line 2. Again, he found similar items in the trash bags. Hearing Tr. p. 13, line 22-p. 14, line 2.

Officer Heinz applied for a search warrant of Wright's residence in which he detailed the three trash grabs and the resulting evidence obtained from them. Hearing Tr. p. 14, lines 2-10. The magistrate granted Officer Heinz's search warrant. Hearing Tr. p. 14, lines 8-10.

Inside Wright's residence police found "a plastic baggie containing 2.0 grams of marijuana. This baggie was found inside a room that appeared to be an office. Vyvanse capsules were found in a plastic baggie that was inside an eyeglasses container, which was located in the kitchen of Defendant's home. There was not a prescription bottle for Vyvanse found in the residence." Ruling Following Trial to the Court and Order Setting Sentencing; App. 63.

On January 5, 2018, the State filed a trial information charging Wright with possession of a prescription drug without a prescription (Count I), possession of marijuana (Count II), and possession of Vyvanse (Count III). Trial Information; Conf. App. 5. Wright filed timely motion to suppress evidence obtained from the collection of his garbage in which he argued he had a reasonable expectation of privacy in the contents of his garbage containers and that Officer Heinz physically trespassed on his property to obtain the trash. Motion to Suppress; Conf. App. 49.

At the May 16, 2018, suppression hearing, the district court took judicial notice of the City of Clear Lake Code of Ordinances Chapters 105 and 106. Hearing Tr. p. 37, line 14-p. 38, line 1, Order Regarding Motion to Suppress; Conf. App. 50. The district court denied Wright's motion to suppress finding that, despite the City Ordinances, Wright had no reasonable expectation of privacy in his trash. Order Regarding Motion to Suppress; Conf. App. 50.

Wright filed a motion to enlarge the suppression order requesting the district court to rule on the question of whether there was a trespass. Motion to Enlarge; Conf. App. 55. The district court granted the motion to enlarge and ruled that there was no trespass. Order Granting Motion to Enlarge; Conf. App. 57.

Wright waived his right to a jury and the district court found him guilty of Counts II and III following a trial on the minutes of evidence. Ruling following Trial to Court; Conf. App. 61.

Additional facts will be set forth below as relevant to the State's argument.

ARGUMENT

I. The District Court Correctly Found Officer Heinz Did Not Trespass Upon Wright's Garbage Containers.

Preservation of Error

The State agrees Wright has preserved error on this issue by raising it in the district court and obtaining a ruling upon it. Motion to Suppress; Order Regarding Motion to Suppress, Order Granting Motion to Expand; Conf. App. 49, 50, 57. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998) (adverse ruling on motion to suppress preserves error for appellate review).

Standard of Review

"[W]hen a constitutional issue is presented, the evidence relevant to the issue is reviewed de novo." *State v. Jump*, 269 N.W.2d 417, 423 (Iowa 1978). Under de novo review the court "'make[s] an independent evaluation of the totality of the circumstances as shown by the entire record.'" *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001) (quoting *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993)). The court "give[s] deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but [is] not bound by those findings." *Id.*

Merits

The Fourth Amendment of the United States Constitution and Article I, section 8 of the Iowa Constitution provide that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; Iowa Const. art. I, § 8.

Relying upon *United States v. Jones,* 565 U.S. 400 (2012), Wright argues that Officer Heinz violated his Fourth Amendment and Iowa Constitutional rights when he allegedly trespassed upon his "effects," the garbage containers, to obtain information used to investigate him. Wright contends the three trespasses, for the "purpose of discovering information about the activities occurring inside the home" constitute warrantless searches. Appellant's Brief p. 13.

In *Jones,* police attached a GPS tracking device on the undercarriage of defendant's "Jeep while it was parked in a public parking lot." *United States v. Jones*, 565 U.S. 400, 402 (2012). For four weeks the Government tracked the Jeep's location through satellite signals. When the defendant was ultimately charged with

conspiracy to distribute cocaine, he moved to suppress the evidence collected through the GPS device. *Id.* at 403.

The District Court found that data collected while the defendant "traveled in an automobile on public thoroughfares" was admissible evidence because the defendant had 'no reasonable expectation of privacy in his movements from one place to another.'" *Id.* The Supreme Court reversed the District Court's decision.

The Court explained that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* at 406. The "*Katz* reasonable-expectation-of privacy test has been *added to, not substituted for,* the common law trespassory test." *Id.* at 408.

The Court found the defendant's Jeep was an "effect," under the Fourth Amendment. It concluded the Government's "installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitute[ed] a 'search.'" *Jones,* 565 U.S. at 404.

Wright maintains his garbage containers are, like the Jeep in *Jones*, his personal property upon which Officer Heinz physically

trespassed by touching them and "the opaque bags inside to remove them." Appellant's Brief, p. 13.[1] Because Officer Heinz was engaged in an investigation, Wright argues this was a search in violation of the Fourth Amendment and evidence obtained therefrom should have been suppressed.

It should first be noted that in *Jones* "[f]our concurring justices would have examined the case solely under the reasonable expectation of privacy rubric from *Katz v. United States,* 389 U.S. 347 [ ] (1967), and they criticized the majority's approach as 'unwise' and as having 'little if any support in the Fourth Amendment case law.'" *United States v. Gutierrez,* 760 F.3d 750, 756 (7th Cir. 2014) (quoting *Jones,* 565 U.S. at 419 (Alito, J., concurring in judgment)). In fact, it is uncertain whether *Jones* is supported by a majority of the Court because Justice Sotomayor filed a concurring opinion in *Jones* in which she expressed commitment to the idea that "even in the absence of trespass, 'a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society

[1] The district court found Officer Heinz testified he touched the garbage cans on two of the trash grabs. Order Regarding Motion to Suppress; Conf. App. 51.

recognizes as reasonable.'" 565 U.S. at 414 (Sotomayor, J., concurring in judgment) (citation omitted).

One commentator has observed there are three major failures in the *Jones* decision. Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection,* 125 Yale L.J. 946 (2016). First, "*Jones* failed to define what constitutes a "trespass" to an effect, besides acknowledging that a physical invasion qualified[,]" next, *"Jones* did not provide a definition of "effects[,]" finally, "and [the] most serious, problem with the per se rule is that *Jones* did not clarify whether all effects are protected if trespassed upon to obtain information, or if only some subset of effects is." *Id.* at 959-961.

Brady explained that "the Court's rulings on abandonment doctrine also indicate that not all trespasses on personal property to obtain information are Fourth Amendment violations." *Id.* at 962. She noted that "the most extensive treatment came in *California v. Greenwood*, in which the Court held that a person could not claim Fourth Amendment rights in curbside trash-- though the majority never used the word 'abandon.'" *Id.* "Abandonment doctrine makes clear that something besides a trespass to obtain information and a

property interest is required to prove a Fourth Amendment violation when an effect is the object of the search, but *Jones* does not explain what additional analysis is required." *Id.* at 963. Brady concluded that "[i]t remains unclear what 'effects' means and whether trespasses to all or only some subset of personal property are searches." *Id.* at 964.

Wright has provided no compelling reason, other than citing *Jones,* for changing the long-standing principle that a person "has no reasonable expectation of privacy in the inculpatory items that they discarded." *California v. Greenwood*, 486 U.S. 35, 41 (1988). In fact, Wright's proposal that a trash container is an "effect" protected by the Fourth Amendment would result in the demise of trash grabs of personal trash containers, regardless of their location and regardless of the owner's expectation of privacy. Although a few jurisdictions have found a person may have an expectation of privacy in one's trash, no court has found that trash containers are "effects." *See, e.g.*, *State v. Tanaka*, 701 P.2d 1274 (Haw. 1985); *State v. Goss,* 834 A.2d 316 (N.H. 2003); *State v. Granville*, 142 P.3d 933 (N.M. Ct. App. 2006); *State v. Hempele*, 576 A.2d 793 (N.J. 1990); *State v. Morris,* 680 A.2d 90 (Vt. 1996); *State v. Boland*, 800 P.2d 1112 (Wash. 1990).

Just as a vehicle is not entitled to the same amount of protection as a home, a trash container left out for collection is not entitled to the protection Wright seeks. The district court correctly reasoned that "[a] brief touching of a garbage can is substantially different than a GPS monitoring device being installed on a vehicle." Ruling on Motion to Enlarge; Conf. App. 58. "A garbage can directly next to a public alley should not receive the same degree of protection as a vehicle or home." Ruling on Motion to Enlarge; Conf. App. 58.

II. The District Court Correctly Found Wright Did Not Have a Subjective Expectation of Privacy in His Trash That is Objectively Reasonable.

Preservation of Error

The State agrees that Wright preserved error on this issue by raising it in his motion to suppress and obtaining the district court's ruling on his motion. Motion to Suppress, Ruling on Motion to Suppress, Order Granting Motion to Expand; Conf. App. 49, 50, 57; *Breuer*, 577 N.W.2d at 44 (adverse ruling on motion to suppress preserves error for appellate review).

Standard of Review

See Division I.

Merits

Wright argues the district court erred in finding he did not have a reasonable expectation of privacy in his trash where the city ordinances prohibited any person scavenging and regulated the collection of trash. He maintains the ordinances provided him with a reasonable expectation of privacy in his trash, set out for pick-up, until the point where a licensed collector physically takes possession of his trash. Moreover, his privacy expectation, he urges, is one the society would find reasonable.

"The vast majority of courts have ruled that when garbage is located in a place accessible to the public, the individual who placed that garbage for collection either abandoned it or has no reasonable expectation of privacy therein, thus rendering any search and seizure of that trash lawful." Kimberly J. Winbush, *Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle*, 62 A.L.R. 5th 1 (1998). "Several courts in other states have already examined the impact a city ordinance regulating waste management has in determining any privacy interest of the owner in garbage set outside for collection." *Rikard v. State,* 123 S.W.3d 114

(Ark. 2003). The Iowa Court of Appeals is among the courts that have rejected Wright's position.

In *State v. May,* the Iowa Court of Appeals considered the defendant's contention that he had a reasonable expectation of privacy in his trash "because a city ordinance required garbage removal to be performed by 'duly-authorized collectors' and because it was located on a private drive." No. 13-0638, 2014 WL 1714460, at *3 (Iowa Ct. App. April 30, 2014). In *May,* the garbage container was provided by the City of Cedar Rapids and was placed "about one foot from the street on the day designated for pickup in the area." *Id.* The Court reaffirmed its holdings in *Skola* and *Henderson* that "[w]hen a defendant puts garbage bags in an area where they are customarily removed by trash collectors, the defendant has no legitimate expectation of privacy in the garbage." *Id.* It did not find the existence of city ordinances, or the fact the garbage was set out on a private drive, changed the calculus to provide an expectation of privacy in one's trash.

The South Dakota Supreme Court reasoned that while "city ordinances may, in some cases, be reflective of societal expectations of privacy, they do not manifest such an expectation simply because

they dictate how persons are to place their trash for collection or how the trash is to be collected." *State v. Stevens*, 734 N.W.2d 344, 347 (S.D. 2007). Similarly, the Massachusetts Supreme Court provided two reasons why an "ordinance [that] allowed only licensed trash collectors to transport garbage does not make the defendant's subjective expectation of privacy any more reasonable." *Com. v. Pratt*, 555 N.E.2d 559, 567 (Mass. 1990). First, it noted that "licensed collectors may have rummaged through the defendant's garbage themselves. Secondly, once the defendant knew that the garbage would be picked up by licensed collectors and deposited at the local landfill, he should have known that others could gain access to the garbage." *Id.*

In *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979), the Court rejected the defendant's argument that the city ordinance governing trash collection increased his expectation of privacy. It noted there was no indication in the record that the defendant was even aware of the ordinance and that "[t]he purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy." *Vahalik,* 606 F.2d at 101; *see also United States v. Dzialak,* 441 F.2d 212, 215 (2d Cir. 1971) ("The town ordinance simply cannot change the fact

that he 'threw (these articles) away' and thus there 'can be nothing unlawful in the Government's appropriation of such abandoned property.").

Here, as in *Vahalik*, there is no record evidence that Wright was even aware of the Clear Lake City Ordinances regulating scavenging and trash pick-up. Here, as in *Vahalik,* the purpose of the City Ordinances was not to provide privacy in a resident's garbage. The district court correctly found that Wright did not have a reasonable expectation of privacy in his trash set out in an alley way for pick-up.

Finally, to accept Wright's contention that his expectation of privacy in his trash survived until it was picked up by the City is to also accept that his privacy expectation vanished as soon as the trash was picked up. It is nonsensical to find that one has an expectation of privacy in property up until the precise moment that it is forfeited to garbage collectors but not when it sits ready for pick-up at the edge of an alley.

The district court correctly found Wright did not have an expectation of privacy in his trash.

CONCLUSION

For all the reasons set forth above, the State respectfully requests this Court to affirm Wright's convictions.

REQUEST FOR NONORAL SUBMISSION

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,506** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 12, 2019

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