

IN THE SUPREME COURT OF IOWA

Supreme Court No. 19-0180
Cerro Gordo County No. SRCR026998

STATE OF IOWA,

Plaintiff-Appellee,

v.

NICHOLAS DEAN WRIGHT,

Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County
The Honorable Adam Sauer, Judge (Suppression Ruling)

**APPELLANT'S FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT**

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

OFFICER HEINZ TRESPASSED ON APPELLANT’S GARBAGE CONTAINERS, WHICH ARE CONSTITUTIONALLY PROTECTED “EFFECTS,” TO OBTAIN INFORMATION THAT FORMED PROBABLE CAUSE FOR THE WARRANT TO SEARCH APPELLANT’S HOUSE.

Cases:

Oliver v. United States, 466 U.S. 170 (1984)

State v. Gogg, 561 N.W.2d 360 (Iowa 1997)

United States v. Jones, 564 U.S. 400 (2012)

Other Authorities:

U.S. Const. amend. IV

Iowa Const. art. 1, § 8

APPELLANT MAINTAINS A SUBJECTIVE EXPECTATION OF PRIVACY IN THE CONTENTS OF HIS GARBAGE CONTAINERS THAT IOWA COMMUNITIES FIND OBJECTIVELY REASONABLE.

Cases:

California v. Greenwood, 486 U.S. 35 (1988)

State v. Henderson, 435 N.W.2d 394 (Iowa App. 1988)

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CLEAR LAKE CODE OF ORDINANCES § 30.08 (2017)

CLEAR LAKE CODE OF ORDINANCES § 105.11(4) (2017)

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition of the Case in the District Court

Appellant challenges the district court's ruling on his motion to suppress that concluded: (1) the "trespass-first" rationale in *United States v. Jones*, 565 U.S. 400 (2012) did not apply to trash rips by law enforcement; and (2) the local ordinance prohibiting scavenging garbage was irrelevant to Appellant's claim that he maintained a subjective expectation of privacy in the contents of his garbage containers that society deems objectively reasonable.

On January 5, 2018 the State charges Appellant in Count I with unlawful possession of a prescription drug in violation of Iowa Code section 155A.21 (2017) and in Counts II and III with possession of a controlled substance in violation of Iowa Code section 124.401(5) (2017) following the execution of a search warrant at his residence. **App. P5-P7; P8-P46.** Appellant is arraigned on February 5, 2018 and enters pleas of not guilty to the charges. **App. P47-P48.**

On April 18, 2018 Appellant files a motion to suppress challenging the three trash rips by law enforcement that provided probable cause for the warrant that was later obtained to search his home. **App. P49.** The matter is heard on May 16, 2018. Hearing Transcript. On July 16, 2018 the district court denies Appellant's motion on the ground that he lacks any expectation of privacy in abandoned garbage. **App.**

P50-P54. Because the ruling did not address, however, the “trespass-first rationale in *United States v. Jones*, Appellant moves to enlarge the order for additional legal conclusions. **App. P55-P56.** On August 13, 2018 the district court grants the motion, but subsequently concludes the rationale in *Jones* is inapplicable by distinguishing the conduct of law enforcement. **App. P57-P59.**

On October 10, 2018 Appellant waives his right to jury trial and proceeds to a trial on the minutes of testimony as to Counts II and III. **App. P60.** The State dismisses Count I. **App. P71; P72-P73.** On October 26, 2018 the district court finds Appellant guilty of Counts II and III. **App. P61-P65.** Appellant is sentenced on January 2, 2019. **App. P66-P68.** He timely files a notice of appeal on January 29, 2019. **App. P.69-P70.**

Facts Relevant to the Issues Presented for Review

On three occasions between September 11 and November 20, 2017, Clear Lake Police Officer Brandon Heinz conducts surveillance on 305 - 3rd Avenue North, a residence located within the city limits of Clear Lake, as part of an investigation into alleged narcotics activities at a nearby tavern. **App. P8-P49.**

Each time, Officer Heinz collects garbage bags from two garbage containers that are placed near the edge of the alley behind the house for collection the following morning. *Id.*; Hearing Transcript. He removes the garbage bags,

transports them to the Clear Lake Police Department and inventories the contents. *Id.* Officer Heinz cannot recall if he placed his hands on the containers themselves while removing the garbage bags. *Id.*

No evidence of criminal activity is visible until they bags are opened by Officer Heinz at the police department. Hearing Tr. at 17-18.

The contents of the garbage bags include evidence of suspected criminal activity as well as papers and other correspondence sent to Appellant at his address. **App. P8-P46.** Officer Heinz forwards some of the seized evidence for analysis at the DCI laboratory. *Id.* On November 2, 2017, the lab confirms trace amounts of controlled substance residue. *Id.*

On November 21, 2017, Officer Heinz applies for a warrant to search the residence for evidence of the use and manufacture of controlled substances. **App. P8-48.** The subsequent search leads to the filing of three serious misdemeanor charges. **App. P1-P7.**

Officer Heinz is not employed by any entity that contracts with the City of Clear Lake to collect garbage from containers nor does he have a contractor's license to collect garbage in his individual capacity. Hearing Tr. at 15. There is no department policy approved by the Clear Lake City Council that allows him to engage in the prohibited act of "scavenging" garbage without violating the

ordinance. Hearing Tr. at 23. He admits his purpose behind the trash rips was to obtain information about the activities occurring inside Appellant's house. Hearing Tr. at 21.

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2) because the case presents substantial issues of first impression, fundamental issues of broad public importance requiring prompt or ultimate determination by the Supreme Court and substantial questions of enunciating or changing legal principles.

ARGUMENT

I. OFFICER HEINZ TRESPASSED ON APPELLANT’S GARBAGE CONTAINERS, WHICH ARE CONSTITUTIONALLY PROTECTED “EFFECTS,” TO OBTAIN INFORMATION THAT FORMED PROBABLE CAUSE FOR THE WARRANT TO SEARCH APPELLANT’S HOUSE.

PRESERVATION OF ERROR / STANDARD OF REVIEW: Appellant preserved error on this issue by timely filing a Motion to Suppress Evidence and timely filing a Notice of Appeal following sentencing. It is well established that the Supreme Court’s review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

The Fourth Amendment of the United States Constitution and the Iowa Constitution both provide "[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. 1, § 8 (emphasis added).

Effects, or personal property, are "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." *See* Black's Law Dictionary (10th ed. 2014). "The Framers would have understood the term 'effects' to be limited to personal, rather than real, property." *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984).

"A trespass on 'houses' or 'effects'" is a Fourth Amendment search if the goal of the trespass is to obtain information." *United States v. Jones*, 565 U.S. 400, 408 n.5, 132 S. Ct. 945, 951 n.5, 952, 181 L. Ed. 2d 9111 (2012). The Fourth

Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Id.* at 411. "[T]he *Katz* reasonable-expectation-of-privacy-test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409.

The City of Clear Lake requires that residential containers be stored upon the premises.¹ Those containers storing garbage shall be placed at the alley line by the owner for collection.²

It is unlawful for anyone in Clear Lake to deposit garbage in any solid waste container they don't own without the written consent of the owner.³ Scavenging another's garbage that has been placed for collection is also prohibited unless that person is an authorized solid waste collector.⁴

All solid waste is collected in Clear Lake at least once each week for residential premises.⁵ The collection and disposal shall not occur prior to 7:00 a.m. in any area of the city.⁶ Solid waste collectors are specifically authorized under the

¹ *Id.* § 105.10(2).

² *Id.* § 105.10(3).

³ *Id.* § 105.11(1).

⁴ *Id.* § 105.11(4). More than a dozen other communities in Iowa similarly prohibit "scavenging," which means "tak[ing] or collect[ing] any solid waste which has been placed out for collection on any premises." See ANKENY CODE § 110.12 (2017); CLINTON CODE § 50.11 (2017); CORALVILLE CODE § 105.11 (2017); EARLHAM CODE § 105.10 (2017); MANCHESTER CODE § 105.10 (2017); NEVADA CODE § 105.10 (2017); NORTH LIBERTY CODE § 105.11 (2017); PELLA CODE § 105.12 (2017); PLEASANT HILL CODE § 105.12 (2017); PRAIRIE CITY CODE § 105.11 (2017); SERGEANT BLUFF CODE § 105.11 (2017); URBANDALE CODE § 57.11 (2017); WALCOTT CODE § 105.11 (2017).

⁵ CLEAR LAKE CODE OF ORDINANCES § 106.04 (2017).

⁶ *Id.*

ordinance to enter upon private property for the purpose of collecting garbage.⁷

No person shall engage in the business of collecting, transporting or disposing garbage from residential premises without first entering a contract with the City of Clear Lake.⁸ This also requires an annual contractor's license.⁹

The Chief of Police in Clear Lake shall establish rules for the operation of the police department that are not in conflict with the Code of Ordinances and subject to the approval by the city council.¹⁰

In *United States v. Jones*, the Court held that the actions of installing and using a GPS for monitoring a vehicle's movement constituted a Fourth Amendment search under the "trespass test." *United States v. Jones*, 565 U.S. 400 (2012).

The facts in *Jones* are straightforward. In 2004, Antoine Jones comes under suspicion of narcotics trafficking and soon became the target of an investigation. *Id.* at 403. Using information gathered from surveillance techniques, the government applies for a warrant authorizing the installation and use of an electronic tracking device on his vehicle. *Id.* Although the warrant is issued, law enforcement fails to comply with the warrant's stipulations when installing the GPS device. *Id.* The government closely monitors the vehicle's movements and location over a period of

⁷ *Id.* § 106.06.

⁸ *Id.* § 106.07.

⁹ *Id.* § 106.11.

¹⁰ CLEAR LAKE CODE OF ORDINANCES § 30.08 (2017).

28 days through data received from the device. *Id.* The locational data connects Jones to an alleged conspirator's stash house that contained \$850,000 in cash, 97 kilograms of cocaine and 1 kilogram of cocaine base. *Id.* at 404. Jones is convicted at trial and sentenced to life imprisonment. *Id.*

In holding there was an illegal search of the vehicle, the *Jones* Court reminds us that it is significant for Fourth Amendment purposes whether there is a physical intrusion by the government on a constitutionally protected area, *i.e.*, "persons, houses, papers and effects," for purposes of obtaining information. When that occurs, the trespass alone amounts to a warrantless search in violation of the Fourth Amendment. While later cases, particularly *Katz*, deviated from that exclusively property-based approach, they did not repudiate it. *Id.* at 406-07. We only look to an individual's expectation of privacy under *Katz* where a classic trespassory search is *not* involved. *Id.* at 412-413.

Like the vehicle in *Jones*, the blue garbage containers here are undoubtedly Appellant's personal property. They are "effects" as that term is understood under both federal and state constitutional law. When the Court characterized Jones' vehicle as an effect and compared it to the home, it announced that a vehicle should receive the same degree of protection from government intrusion as the home under the Fourth Amendment. The same should be said for the garbage containers here.

Officer Heinz physically trespassed onto these garbage containers. He physically touched the containers and the opaque bags inside in order to remove them. He later opened the bags themselves. He wanted to inventory the contents to find evidence of criminal activity taking place inside the home. In doing so, Officer Heinz was able to surveil up to 21 days of private, household activity occurring from inside Appellant's residence.

When police deliberately trespass upon a constitutionally protected area for the purpose of obtaining evidence, both federal and state prohibitions against unreasonable searches are violated. While the trespass here on garbage containers and their contents may seem trivial, there was an intrusion by law enforcement nevertheless with the stated purpose of discovering information about the activities occurring inside the home. A physical trespass in and of itself, when performed to acquire information, constitutes a warrantless search *regardless of any reasonable expectations of privacy*.

Under the Fourth Amendment, a search warrant must be supported by probable cause. *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). A "totality of the circumstances" standard is used to determine whether probable cause has been established. *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004)(citing *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

"Probable cause to search requires a probability determination as to the nexus between criminal activity . . . and the place to be searched." *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa App. 1994). The issuing judge simply makes a "'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information,' probable cause exists." *Gogg*, 561 N.W.2d at 363 (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548). In making the decision, "the judge may rely on reasonable, common-sense inferences from the information presented." *Davis*, 679 N.W.2d at 656.

"To impeach a search warrant, . . . [t]here must be allegations of deliberate falsehood or of reckless disregard for the truth." *Ripperger*, 514 N.W.2d at 745. The defendant "bear[s] the burden of establishing an intentional or reckless misrepresentation." *Gogg*, 561 N.W.2d at 364. The affiant's conduct must be more than mere negligence or mistake. *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998). If an affiant made a false statement in a search warrant "with reckless disregard for the truth, the Fourth Amendment requires the statement be deleted from the affidavit and the remaining contents be scrutinized to determine whether probable cause appears." *State v. Groff*, 323 N.W.2d 204, 206-07 (Iowa 1982) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667,

672 (1978)). "A 'false' affidavit statement is one which misleads the magistrate into believing the existence of certain facts which enter into his thought process in evaluating probable cause." *Id.* at 210. "Omissions of fact constitute misrepresentations only if the omitted facts 'cast doubt on the existence of probable cause.'" *State v. Green*, 540 N.W.2d 649, 657 (Iowa 1995) (quoting *Ripperger*, 514 N.W.2d at 745).

If evidence is obtained in violation of the Fourth Amendment, it is inadmissible regardless of its relevancy or probative value. *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005).

These three searches and the evidence obtained from them constitute the bulk of the search warrant application. They were performed without a warrant, which makes them unreasonable *per se*. Officer Heinz withheld information from the magistrate that he not only trespassed onto Appellant's garbage containers and garbage bags, but the same was prohibited by local ordinance. Furthermore, there was no policy by the Clear Lake Police Department that excepted the activity of garbage removal from the anti-scavenging provisions of the city code. When the offending information is redacted from the affidavit, the resulting search warrant fails for probable cause. Any evidence seized from Appellant's residence should have been suppressed as a result.

II. APPELLANT MAINTAINS A SUBJECTIVE EXPECTATION OF PRIVACY IN THE CONTENTS OF THIS GARBAGE CONTAINERS THAT IOWA COMMUNITIES FIND OBJECTIVELY REASONABLE.

PRESERVATION OF ERROR / STANDARD OF REVIEW: Appellant preserved error on this issue by timely filing a Motion to Suppress Evidence and timely filing a Notice of Appeal following sentencing. It is well established that the Supreme Court's review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

The Iowa Court of Appeals has previously upheld the warrantless search and seizure of garbage from the curbside on both federal and state constitutional grounds. *See State v. Skola*, 634 N.W.2d 687 (Iowa App. 2001); *State v. Henderson*, 435 N.W.2d 394 (Iowa App. 1988). The Court of Appeals found the following rationale from the U.S. Supreme Court persuasive:

We conclude that the respondents exposed their garbage to the public sufficiently to defeat their claim to fourth amendment protection. It is common knowledge that plastic garbage bags left on or at the site of public streets are *readily accessible to animals, children, scavengers, snoops and other members of the public*. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondent's trash or permitted others, such as the police to do so. Accordingly, having deposited their garbage in an area particularly suited for public inspection, and in the manner speaking, public consumption, for the express purpose of having strangers take it, respondents could have had *no reasonable expectation of privacy* in the inculpatory items that they discarded.

See Skola, 634 N.W.2d at 690 (quoting *California v. Greenwood*, 486 U.S. 35, 108

S. Ct. 1625, 100 L. Ed. 2d 30 (1988))(emphasis added)(relying only on a *Katz* reasonable-expectation-of-privacy standard)(not analyzed under a trespass-first rule).

Appellant acknowledges that the Iowa Court of Appeals rulings in *Henderson* and *Skola*, which rely on the rationale in *California v. Greenwood*, currently permit warrantless searches of garbage. It is important to note, however, that the respondents in *Greenwood* did not disagree with the application of the *Katz* reasonable-expectation-of-privacy standard to the case. See *California v. Greenwood*, 486 U.S. 35, 39 (1988). Perhaps that was due to a misunderstanding that the trespass-first rule had been abrogated by *Katz* in its entirety or because the government had not trespassed onto the garbage containers at all, but instead retrieved the bags from a garbage collector who first collected them at the curbside. *Id.* at 38. In any event, the published decisions in Iowa have not examined this issue from the perspective of a government trespass on an “effect” to gather information.

The evidence in this record establishes that Appellant maintained a subjective expectation of privacy in the contents of his garbage containers. The garbage was placed in opaque plastic bags and deposited into a blue container. These containers were placed near the curbside, but still on Appellant’s property, as required by local ordinance for collection. No evidence of criminal activity was visible from any

public vantage point until the bags were removed and opened by police.

In *Skola*, the Court of Appeals left open the possibility to depart from the holdings in *Greenwood* and *Henderson* if provided with "compelling reasons." See *Skola*, 634 N.W.2d at 691. In other words, the Court of Appeals acknowledges there may be a factual basis in the future that justifies a finding that an individual's legitimate expectation of privacy is objectively reasonable under the circumstances.

This is precisely the case where compelling reasons justify a conclusion that Article 1, section 8 is violated by a warrantless search of garbage containers. Not only was there a trespass on the containers to search for information, but Appellant, like so many other Iowans across the state, has an objectively reasonable expectation of privacy codified by municipal code. It is against the law in Clear Lake, Iowa for any person to scavenge garbage, which completely undermines the rationale in *Greenwood* that garbage is knowingly exposed to "children, scavengers, snoops and other members of the public." Under these ordinances, the contents of an individual's garbage inside the container remain private. Appellant can expect the privacy of his garbage will be maintained up to the point where the licensed collector physically takes possession of his garbage bags. Until then, he maintains the right to withdraw the containers and the contents from the curb.

CONCLUSION

The district court erred in denying the Motion to Suppress. The information discovered from the trash rips should not have been considered as part of the search warrant application because Officer Heinz trespassed onto Appellant's "effects" for purposes of obtaining information. Also, Appellant maintained a subjective expectation of privacy that is objectively reasonable under the anti-scavenging provisions of the Clear Lake, Iowa municipal code.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests to be heard in oral arguments upon submission of the case.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complied with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 3,927 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). The brief further complied with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because the brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font.

ATTORNEY’S COST CERTIFICATE

I, Colin Murphy, attorney for the Appellant, hereby certify that the actual cost of reproducing the necessary copies of this Brief was \$0.00 and that amount has been paid in full by me.

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 12th day of November, 2019 I served this document by serving copies to Criminal Appeals Division, Attorney General of Iowa, Hoover Building, Des Moines, Iowa 50319 by way of electronic filing.

I further certify that on the 12th day of November, 2019 I filed this document by electronically filing the same with the Clerk of the Iowa Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

Respectfully submitted,

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