10-12-2018

State v. Simmons Appellant's Brief Dckt. 45891

Electronically Filed
10/12/2018 11:29 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Melanie Gagnepain, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45891**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-17-16292**
v.	)	
	)	
TERRI LEE SIMMONS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE NANCY A. BASKIN
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Terri Simmons contends the district court erred by denying her motion to suppress the evidence the officer found when he warrantlessly searched the closed containers in which she, being homeless at the time, stored her personal belongings. She had had left those containers neatly stacked beside the cat carrier in which she had also left her cat while she went into a nearby business. Because that initial search of those closed containers was illegal, she asserts that, under recent Court of Appeals precedent, her subsequent denial of ownership of those containers does not deprive her of "standing" to challenge the initial warrantless search of those containers. As such, this Court should reverse the district court's order denying her motion to suppress all the fruits of the initial warrantless search of the closed containers.

Statement of the Facts and Course of Proceedings

Ms. Simmons was unlawfully evicted from her home and had nowhere to go. (*See* Tr., p.86, L.18 - p.87, L.10 (Ms. Simmons explaining at the sentencing hearing that she was close to resolving this issue and getting her Section 8 housing opportunity back).) During that time, she carried all her possessions in a backpack and few small containers, and she carried her cat in a pet carrier. (Tr., p.17, Ls.1-2, p.19, Ls.15-17.) She stayed for a time, with permission, next to a dumpster behind a car wash. (Tr., p.16, Ls.18-23; *see* R., p.121 (the district court noting that an employee of the car wash confirmed Ms. Simmons had permission to be there).)

On the day in question, she stacked her closed containers and some books neatly next to her cat in its carrier and left it all next to the dumpster while she went to a nearby dollar store in order to charge her phone. (*See* Prelim. Tr., p.5, Ls.3-7 (the officer explaining how the containers were stacked); p.11, Ls.4-10 (the officer explaining he had picked the items up off the

ground to search them); Tr., p.20, Ls.13-17 (Ms. Simmons testifying about going to the nearby store).) Around the same time, an employee from the car wash called police, and the officer testified the report was essentially that "there was somebody that had been staying behind the [car wash] next to the dumpster. And what I think was the most concerning was that some property was left behind. Specifically there was a box that had a picture of a gun on it, and I think the staff was concerned about that."[1] (Prelim. Tr., p.4, Ls.10-15.)[2] The officer testified that the reporting employee did not give any impression as to exactly how long Ms. Simmons had been staying there, just that "it was strained." (Prelim. Tr., p.9, Ls.2-6.)

The officer went to the car wash and saw the neatly-stacked containers as well as the cat in its carrier. (Prelim. Tr., p.4, L.23 - p.5, L.7.) Nevertheless, the officer decided to warrantlessly search the closed containers. (Prelim. Tr., p.4, L.19 ("when I opened the box . . .). The officer testified that one of the containers (the Tupperware container) had personal effects inside, such as photographs of Ms. Simmons' family. (Prelim. Tr., p.10, Ls.10-11.) However, the officer testified he found a substance he recognized as methamphetamine as well as some syringes and other paraphernalia in the box with the picture of the BB gun on it. (Prelim. Tr., p.5, L.19 - p.6, L.7.)

[1] The officer described the picture on the box as showing depicting a BB gun like an "AR-15." (Prelim. Tr., p.9, L.16.) However, the video from the officer's body camera clearly shows the picture, and it was of a pistol, not a rifle. (State's Exhibit 1, ~10:08.) The prosecutor also described it as depicting a BB gun. (Tr., p.70, L.9.)

[2] Ms. Simmons' attorney submitted the transcript of the preliminary hearing as an exhibit at the hearing on her subsequent motion to suppress, and the district court indicated it had reviewed that transcript. (Tr., p.8, Ls.2-4, p.9, Ls.3-5.)

While the officer was searching the containers, Ms. Simmons came back from the store. (*See* Prelim. Tr., p.11, Ls.12-25.) She told the officer that was her property.[3] (Prelim. Tr., p.11, L.22 - p.12, L.3.) However, when the officer subsequently told her there were drugs and drug paraphernalia in one of the boxes, Ms. Simmons told him that box was not hers. (Prelim. Tr., p.12, Ls.4-10.) The State ultimately charged her with possession of methamphetamine, possession of paraphernalia, and possession of marijuana.[4] (R., pp.28-29.)

Ms. Simmons filed a motion to suppress, arguing, *inter alia*, that the officer had unlawfully searched the closed containers and all the fruits of that unlawful search should be suppressed. (R., pp.67-76.) The State objected, asserting that Ms. Simmons did not have standing to challenge the search of the closed containers because she had subsequently denied ownership of them. (R., pp.83-88.) The State attached the video from the officer's body camera as an exhibit. (R., p.89; *see* Tr., p.11, Ls.1-4 (the district court noting it had reviewed the video).) At the hearing on that motion, the State elected not to present any other evidence. (Tr., p.26, Ls.14-16.)

The district court found Ms. Simmons had displayed a subjective expectation of privacy in her property left near the dumpster. (R., p.125.)[5] However, it concluded that expectation was

---

[3] A second officer arrived on scene while the first officer was asking Ms. Simmons about the containers after ordering her to stop, put her bag down, sit on a nearby raised curb, and keep her hands out of her pockets. (*See* State's Exhibit 1.)

[4] The officer's report indicates that he also found a substance he recognized as marijuana in the Tupperware container, and he can be heard on the video asserting that fact to Ms. Simmons. (Presentence Investigation Report (*hereinafter*, PSI), p.40; State's Exhibit 1, ~12:55.) However, he did not actually testify about the marijuana during the preliminary hearing and he did not testify at all at the hearing on the motion to suppress. (*See generally* Tr.; Prelim. Tr.)

[5] While the district court issued a ruling from the bench, it reserved the right to prepare a substitute written decision if it determined it was necessary to do so in order to adequately explain its reasoning. (Tr., p.41, Ls.15-20.) The district court decided such a clarification was ultimately necessary. (R., p.120.) Therefore, Ms. Simmons' argument will address the written order as reflecting the district court's final analysis of the issues in this case.

not objectively reasonable for several reasons. First, it found that Ms. Simmons did not have standing to challenge the initial warrantless search of the closed containers because she had subsequently denied ownership of them. (R., p.126.) Second, it concluded that, because the containers themselves had been left in the open near the dumpster, they had been abandoned, like trash set out for collection. (R., p.125.) Third, it found that, because one box had a picture of a gun on it, there were "unique community safety issues that weigh against finding that [Ms. Simmons] had a reasonable expectation of privacy in the items," since, despite the fact that this occurred on a Saturday, the alleyway was close to a nearby school. (R., p.126.)

Ms. Simmons subsequently entered a conditional guilty plea to the charge of possessing methamphetamine, reserving her right to challenge the district court's decision on her motion to suppress. (*See* Tr., p.60, Ls.11-16.) In exchange, the State dismissed the charges for possession of marijuana and drug paraphernalia. (*See* Tr., p.61, Ls.3-5.) The district court imposed a unified sentence of five years, with two years fixed, which it suspended for a five-year term of probation. (R., p.140.) Ms. Simmons filed a notice of appeal timely from the judgment of conviction. (R., pp.139, 149.)

ISSUE

Whether the district court erred when it denied Ms. Simmons' motion to suppress the evidence found as a result of the initial warrantless search of her closed containers.

ARGUMENT

The District Court Erred When It Denied Ms. Simmons' Motion To Suppress The Evidence Found As A Result Of The Initial Warrantless Search Of Her Closed Containers

A. Standard Of Review

When reviewing the district court's decision to deny a motion to suppress evidence, the Court applies a bifurcated standard of review. *State v. Lee*, 162 Idaho 642, 646-47 (2017). Specifically, the Court accepts the district court's findings of fact if they are not clearly erroneous, but it freely reviews the application of constitutional principles to those facts. *Id*.

B. Society Recognizes A Reasonable Expectation Of Privacy In The Closed Containers Which A Homeless Person Possesses And In Which She Stores Personal Possessions, And The State Has Failed To Prove That The Initial Warrantless Search Of Ms. Simmons' Closed Containers Fell Under One Of The Exceptions To The Warrant Requirement

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. . . ." U.S. CONST. amend IV. Warrantless searches are, therefore, *per se* unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). That means, a warrantless search is presumed to violate the Fourth Amendment unless the State demonstrates that one of the exceptional, well-established, and well-delineated exceptions to this requirement is applicable to the facts. *Id*. at 390-91. However, the defendant needs to also demonstrate she has "standing" to challenge the search, in that she has to show she had a privacy interest in the property searched, such that she is entitled to suppression of the resulting evidence. *State v. Hanson*, 142 Idaho 711, 716 n.2 (Ct. App. 2006).

1. The Fourth Amendment's protections apply to the closed containers in this case

"The United States Supreme Court has recognized that containers and other items which serve as a repository for one's personal belongings are entitled to as much protection under the Fourth Amendment as one's home." *State v. Dreier*, 139 Idaho 246, 251 (Ct. App. 2003) (citing *United States v. Chadwick*, 433 U.S. 1, 11 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991)).[6] There is no distinction between "worthy" and "unworthy" containers – the Fourth Amendment applies to them all. *United States v. Ross*, 456 U.S. 798, 822 (1982) ("a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possession from official inspection as the sophisticated executive with the locked attaché case."). Thus, the closed containers in this case were protected by the Fourth Amendment.

The fact that the containers were, themselves, in the open does not divest them of those protections: "what [a defendant] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *compare State v. Youngblood*, 117 Idaho 160, 165 (1990) (explaining there was no viable motion to suppress that counsel could have filed because "*the bag's contents* were in plain view and the bag had been left by Youngblood on the parking lot pavement *with the top open*.") (emphasis added). That is because a search of such a container is, ultimately, a violation of the person's privacy interest in that particular effect of hers. *See United States v. Jones*, 565 U.S. 400, 411 (2012) (finding a violation of the Fourth Amendment when officers warrantlessly attached a

[6] *Acevedo* held that *Chadwick*'s rule regarding the need for a warrant to search closed containers did not apply when the warrantless search of those containers was independently justified under the separate automobile exception to the warrant requirement. *Acevedo*, 500 U.S. at 580; *accord Dreier*, 139 Idaho at 251 (in citing *Chadwick* for the closed container rule, noting it has been "*overruled on other grounds by California v. Acevedo* . . .") (italics from original).

tracking device to a car while it was temporarily left behind in a public parking lot because of the government's trespass, "its intrusion on the 'effect' at issue").

The *Chadwick* rule is particularly applicable when the case involves the property of homeless persons, who, more or less by definition, have to keep their property in areas open to the public, especially those who do not have a tent or other shelter in which to store their property. Idaho's appellate courts have not addressed this specific question. *Cf. State v. Pruss*, 145 Idaho 623 (2008) (finding a reasonable expectation of privacy in a tent within a wood frame erected on public land). Other courts, however, have directly addressed this question and found the Fourth Amendment protects such property from warrantless searches. *E.g.*, *Lavan v. City of Los Angeles* (*Lavan I*), 797 F.Supp.2d 1005, 1013 (C.D. Cal. 2011), *aff'd by Lavan v. City of Los Angeles* (*Lavan II*), 693 F.3d 1022 (9th Cir. 2012); *State v. Mooney*, 588 A.2d 145, 161 (Conn. 1991).

The United States Constitution, as the Washington Court of Appeals aptly noted, "is meant to apply to the real world, and the realities of homelessness dictate that dwelling places are often transient and precarious," but that does not mean the Fourth Amendment does not extend to property kept there. *State v. Pippin*, 403 P.3d 907, 915 (Wash. Ct. App. 2017) (like *Pruss*, finding a reasonable expectation of privacy in a tent erected on public property). Even the United States Supreme Court has suggested as much, as it eloquently observed:

> A sane, decent, civilized society must provide some oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Silverman v. United States, 365 U.S. 505, 512 n.4 (1961).

For persons like Ms. Simmons who do not have a tent or shelter, but who only have containers in which to store their possessions, those containers provide the insulated enclosure

called for in *Silverman*: "The interior of those [containers] represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police." *Mooney*, 588 A.2d at 161. Ms. Simmons, for example, kept the pictures of her grandchildren safely stored in one of the closed containers the officer searched without a warrant. (*See* Prelim. Tr., p.10, Ls.10-11.) For her, then, as for other people in similar situations, the warrantless search of such containers is no less invasive than an officer warrantlessly going through the pictures and other personal documents stored on a cell phone. *See Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2489 (2014) (explaining that a warrant was required to search a cell phone because, prior to the advent of cell phones, to carry around the same sort of information, a person would have had to (as Ms. Simmons essentially did) carry a truck with them, and police would have needed a warrant to search that trunk under *Chadwick*). As a result, the *Mooney* Court found the warrantless search of a box and a bag sitting in the open next to the defendant's bedroll where he lived under an overpass was unlawful: "Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy and would recognize its assertion as reasonable." *Mooney*, 588 A.2d at 161.

As such, the district court's conclusion – that Ms. Simmons did not have a reasonable expectation of privacy in the closed containers because the containers themselves were in the open (R., p.125) – is erroneous. Rather, society is willing to recognize as reasonable a homeless person's expectation of privacy in their closed containers even if the container might be in the open itself. Therefore, the Fourth Amendment applied to Ms. Simmons' closed containers. Holding otherwise would regulate the poorest members of society to second-class citizens under the Fourth Amendment simply based on the fact that they cannot erect a structure in which to store their property. That, of course, is wholly improper. *Cf. Martin v. City of Boise*, 902 F.3d

1031, 1048 (9th Cir. 2018) (holding that criminalizing conduct that is an unavoidable consequence of being homeless – sitting, lying, or sleeping in public areas – is impermissible under the Eighth Amendment when there is no viable alternative available).

2. Ms. Simmons had standing to challenge the initial warrantless search of the closed containers

The Court of Appeals recently explained that abandonment of property which is precipitated by unlawful police conduct does not divest the defendant of standing to challenge the search of that property. *State v. Ross*, 160 Idaho 757, 759-60 (Ct. App. 2016). That means, if the initial warrantless search of the closed containers was unlawful, then Ms. Simmons' subsequent denial of ownership did not divest her of standing to challenge the initial warrantless search and seek suppression of all the evidence obtained as a result of that unlawful search. *Id*. As such, the district court's conclusion – that Ms. Simmons did not have standing to challenge the search of the closed containers because, after the officer had searched those containers, Ms. Simmons denied ownership of them (R., p.126) – is directly contrary to the applicable precedent.

The reason this is the rule is that the warrantless search must be objectively reasonable based on the facts *known to the officer at the time of the search*. *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985); *State v. Newman*, 149 Idaho 596, 599 n.1 (Ct. App. 2010). Thus, "one who voluntarily abandons property *prior to the search*, cannot be said to possess the requisite privacy interest" in the property at the time of the search because, in such cases, the officer knows the property has been abandoned. *Ross*, 160 Idaho at 759 (emphasis added). It is the fact that the officer knows the property was abandoned when he searched it that reveals the lack of an expectation of privacy in the property. *See, e.g.*, *State v. Zaitseva*, 135 Idaho 11 (2000) (holding

there was no standing to challenge the search when, after the officer told the driver to leave a bag in the car, both the driver and the defendant-passenger denied ownership of the bag prior to the officer searching the car and bag)[7]; *State v. Rawlings*, 121 Idaho 930 (1992) (same when officer said he wanted to conduct a pat-down search of the defendant, but had not actually started that search at the point the defendant discarded certain items in his possession); *State v. Snapp*, 163 Idaho 460 (Ct. App. 2018) (same when, while being properly signaled to stop for a traffic violation, the defendant threw an item out of his car); *State v. Melling*, 160 Idaho 209 (Ct. App. 2016) (same when defendant spontaneously disclaimed ownership of a safe prior to the officers searching the safe); *State v. Harwood*, 133 Idaho 50 (Ct. App. 1999) (same for a defendant who denied ownership when officer asked about a fanny pack under the bed prior to searching it).

Unlike in those cases, the officer here *did not* know that Ms. Simmons had denied ownership when he began to search the closed containers because, at that point, she actually had done no such thing. As such, her subsequent denial of ownership can have no relevance to the question of whether she maintained a privacy interest in the closed containers at the time the officer began the initial warrantless search of those containers. (*See* Tr., p.28, L.18 - p.29, L.23.) Moreover, since (as discussed in Section B(3), *supra*) the initial warrantless search was not objectively reasonable, and so, was unlawful, Ms. Simmons' subsequent denial of ownership – precipitated by the officer confronting her with the fruits of his unlawful search – did not divest

[7] It does not appear that the lawfulness of the officer's order to leave the car in the bag was at issue in *Zaitseva*. *See generally Zaitseva*, 135 Idaho 11. However, the Court of Appeals has recently confronted that question and held that such an order was unlawful because the officer was refusing to honor the defendant's attempt to exercise his Fourth Amendment right to limit the scope of consent to search the car. *State v. Greub*, 162 Idaho 581, 587 (Ct. App. 2017). If, indeed, the officer's order to leave the bag were unlawful, the subsequent denial would not divest the defendant of standing to challenge it, even in the situation presented in *Zaitseva*. *See Ross*, 160 Idaho at 759-60.

her of standing to challenge that search. *Ross*, 160 Idaho at 759-60. Therefore, the district court's erroneous ruling that Ms. Simmons had no standing on that basis should be reversed.

3. The State failed to prove the initial warrantless search of the closed containers fell within the "abandoned property" exception to the warrant requirement

The only exception the State invoked to meet its burden in this case was the "abandoned property" exception. (R., p.86.) Certainly, when a container is left in a manner which reveals the intent to relinquish all control over the container or the property therein, officers may search such an abandoned container without a warrant. *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that, by putting a trash bag on the curb with the expectation that a third party would take it and dispose of it, there was no longer a reasonable expectation of privacy in the bag or its contents). However, as *Greenwood* itself indicates, the question of abandonment is dependent on the intent of the owner and has always been assessed by looking at 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 or seizure." *United States v. Lopez-Cruz*, 730 F.3d 803, 808 (9th Cir. 2013); *accord United States v. Repentigny*, 72 U.S. 211, 243 (1866) ("Authorities show that the 'abandonment' must be on the part of the owner a complete renunciation and giving up of the thing, with intent not henceforth to reassert any dominion over it.").

If, for example, the trash bag discussed in *Greenwood* had not yet been placed on the curb for pickup, but instead, remained in the curtilage of the home, a reasonable expectation of privacy may still have existed in the bag. *See State v. Donato*, 135 Idaho 469, 472 (2001) (explaining there is no reasonable expectation of privacy in "garbage left at the curb for collection, *outside the curtilage of a home*"). That conclusion is also demonstrated by the fact

that the "reasonable expectation" analysis only added to, not replaced, the traditional trespass analysis that exists under the Fourth Amendment. *Jones*, 565 U.S. at 411. Certainly, the car at issue in *Jones* had not been abandoned just because it had been left in a public parking lot. (*See* Tr., p.40, Ls.10-19 (defense counsel explaining this point with the hypothetical of leaving a bicycle propped next to the dumpster).)

Therefore, the question for the Court in this case is whether the State proved that a reasonable person would have concluded the closed containers had been left with an intent to dispose of them, as opposed to left with an intent to return and collect them. *See, e.g.*, *Lavan I*, 797 F.Supp.2d at 1013. The *Lavan* case directly addressed this aspect of the Fourth Amendment question which, as noted *infra*, Idaho has yet to consider. In *Lavan*, a group of homeless persons sued the City over its decision to seize and destroy property which they had temporarily left on public sidewalks, claiming that decision violated, *inter alia*, their rights under the Fourth and Fourteenth Amendments. *Lavan I*, 797 F.Supp.2d at 1009. The City, like the State here, argued that, by leaving the property unattended in a public space, the homeless persons had abandoned it, and so, the Fourth Amendment did not apply. *Id*.

Both the district and appellate courts soundly rejected the City's argument. As the Ninth Circuit succinctly put it: "the City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected interest in their possessions by leaving them momentarily unattended." *Lavan II*, 693 F.3d at 1032. Rather, as the federal district court explained: "'[T]he homeless often arrange their belongings in such a manner as to suggest ownership – e.g., they may lean it against a tree or other object or cover it with a pillow or blanket; []by its appearance, the property belonging to homeless persons is reasonably distinguishable from truly abandoned property.'" *Lavan I*, 797

F.Supp.2d at 1013 (quoting *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1559 (S.D. Fla. 1992) (alterations from *Lavan I*). In other words, those items, despite being left in public, were still the effects of the homeless persons, and as such, were still entitled to protection under the Fourth Amendment against government trespass, just like the car parked in a public parking lot in *Jones* was. *See Jones*, 565 U.S. at 411.

Both *Lavan I* and *Pottinger* acknowledged that the City had a legitimate interest in keeping public areas clear of unsightly or unsafe items, but both also held that interest did not override the Constitution's requirement that the government's agent get a warrant or otherwise comply with due process before seizing such items. *Lavan I*, 797 F.Supp.2d at 1015; *Pottinger*, 810 F.Supp. at 1573. Here, too, there certainly was a legitimate interest in ensuring a BB gun was not left in a place where children at the nearby school might access it. (*See* R., p.126.) However, that fact does not, as the district court believed, mean Ms. Simmons did not have a reasonable expectation of privacy in the closed container. Rather, it spoke to the possibility that there were exigent circumstances which would independently justify the warrantless search of the closed container.

And yet, the district court's factual finding – that school was not in session on that day (R., p.126) – actually reveals that, as in *Lavan* and *Pottinger*, the interest in removing unsafe items did not create an exigency that would justify a decision to ignore the requirement to get a warrant before actually searching the closed container in question. *Cf. Missouri v. McNeely*, 569 U.S. 141, 154-55 (2013) (noting the technological advances which have drastically reduced the time it takes an officer, even out of normal business hours, to seek and receive a search warrant, and citing, *inter alia*, I.C. §§ 19-4404, -4406 as examples of statutes streamlining the warrant-application process). Rather, as *Chadwick* pointed out, such a fact might justify warrantlessly

seizing the closed container to ensure it remained secure, but it does not justify warrantlessly *searching* it because, at that point it is under police control, the risk was neutralized, and so, there was no exigency to justify the warrantless *search*. *Chadwick*, 433 U.S. at 7; *compare Illinois v. McArthur*, 531 U.S. 326, 331-32 (2001) (approving of a situation where one officer prevented the occupant from entering his trailer, in which they had probable cause to believe the owner had hidden marijuana, while a second went to seek a warrant to actually search the trailer, because the officers made "reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy").

In this case, considering a totality of the circumstances known to the officer at the time he began the initial warrantless search, a reasonable person would conclude that the closed containers were left in such a manner as to suggest ownership by a homeless person who was intending to return for it.[8] The officer testified that he had been told a person had been using that place in the alley next to the dumpster as a temporary place to stay.[9] (*See* Prelim. Tr., p.4, Ls.10-15, p.9, Ls.2-6.) The closed containers were neatly stacked on the ground next to the dumpster, not wantonly scattered about as if discarded. (Prelim. Tr., p.14, Ls.3-4.) Most telling, though, is the fact that the neat stack of containers was left next to the cat in its carrier. (Prelim. Tr., p.5, Ls.1-3.) A reasonable person looking at that the way in which all the property was left would

[8] The prosecutor actually did not present any evidence to this point. (*See generally* R., Tr.) He only proffered the video which starts after the officer had opened all the containers. (*See* State's Exhibit 1, ~0:01.) The only evidence speaking to what the officer knew at the time of the initial warrantless search was his testimony at the preliminary hearing, the transcript of which had been proffered by the defense. (Tr., p.8, Ls.2-4, p.9, Ls.3-5.) As such, the record shows that the State actually made no effort to meet its burden in this regard at all.

[9] It is not clear from the officer's testimony at the preliminary hearing whether he was aware that Ms. Simmons had permission to be staying behind the car wash. (*See* Prelim. Tr., p.9, Ls.2-6 (testifying only that he had been told the situation was "strained").) If he did, in fact, know she had permission to be there, that further reveals that a reasonable person would believe that Ms. Simmons intended to return to that place, such that her property was not truly abandoned.

conclude that the homeless person making efforts to keep the cat they cared for in its own carrier was intending to return for the cat and the property she had left with the cat. Therefore, a reasonable person would have concluded the closed containers in this case, like the property in *Lavan*, *Mooney*, and *Jones*, were left in a manner indicating continuing ownership; that there was no intent to truly abandon them.

As a result, the State failed to carry its burden to prove the warrantless search in this case was justified by the abandonment exception, and the district court's decision on that basis should be reversed. All the fruits of the officer's initial unlawful search of those closed containers should have been suppressed.

CONCLUSION

Ms. Simmons respectfully requests this Court reverse the order denying her motion to suppress and remand it for further proceedings, if any are necessary.

DATED this 12th day of October, 2018.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 2018, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas