

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO, )  
 ) No. 45891  
 Plaintiff-Respondent, )  
 ) Ada County Case No.  
 v. ) CR01-2017-16292  
 )  
 TERRI LEE SIMMONS, )  
 )  
 Defendant-Appellant. )  
 )  
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**BRIEF OF RESPONDENT**

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

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**HONORABLE NANCY A. BASKIN  
District Judge**

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## TABLE OF CONTENTS

|   | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES .....  | ii          |
| STATEMENT OF THE CASE.....  | 1           |
| Nature Of The Case.....   | 1           |
| Statement Of The Facts And Course Of The Proceedings.....   | 1           |
| ISSUE .....   | 7           |
| ARGUMENT .....  | 8           |
| The District Court Did Not Err When It Denied Simmons’<br>Motion To Suppress .....  | 8           |
| A.    Introduction.....   | 8           |
| B.    Standard Of Review .....  | 8           |
| C.    Simmons Failed To Establish That She Had A<br>Reasonable Expectation Of Privacy In Containers<br>Left Unattended In A Public Alley Next To A<br>Dumpster..... | 9           |
| CONCLUSION.....   | 15          |
| CERTIFICATE OF SERVICE .....  | 15          |

## TABLE OF AUTHORITIES

| <u>CASES</u>   | <u>PAGE</u> |
|--|-------------|
| <u>Bond v. United States</u> , 77 F.3d 1009 (7th Cir. 1996) .....                            | 10          |
| <u>California v. Ciraolo</u> , 476 U.S. 207 (1986).....                                      | 9           |
| <u>Lavan v. City of Los Angeles (Lavan I)</u> , 797 F. Supp.2d 1005<br>(C.D. Cal. 2011)..... | 12, 13, 14  |
| <u>Lavan v. City of Los Angeles (Lavan II)</u> , 693 F.3d 1022 (9th Cir. 2012) .....         | 12, 13, 14  |
| <u>Miller v. United States</u> , 357 U.S. 301 (1958) .....                                   | 12          |
| <u>Miranda v. Arizona</u> , 384 U.S. 436 (1966) .....  | 2           |
| <u>Rawlings v. Kentucky</u> , 448 U.S. 98 (1980) .....                                       | 9           |
| <u>State v. Beck</u> , 157 Idaho 402, 336 P.3d 809 (Ct. App. 2014).....                      | 12          |
| <u>State v. Cowen</u> , 104 Idaho 649, 662 P.2d 230 (1983) .....                             | 9           |
| <u>State v. Donato</u> , 135 Idaho 469, 20 P.3d 5 (2001).....                                | 9           |
| <u>State v. Fees</u> , 140 Idaho 81, 90 P.3d 306 (2004) .....                                | 9           |
| <u>State v. Jaborra</u> , 143 Idaho 94, 137 P.3d 481 (Ct. App. 2006) .....                   | 9           |
| <u>State v. Johnson</u> , 126 Idaho 859, 893 P.2d 806 (Ct. App. 1995).....                   | 4, 9        |
| <u>State v. Melling</u> , 160 Idaho 209, 370 P.3d 412 (Ct. App. 2016), .....                 | 9           |
| <u>State v. Mooney</u> , 218 Conn. 85, 588 A.2d 145 (Conn. 1991) .....                       | 12          |
| <u>State v. Pruss</u> , 145 Idaho 623, 181 P.3d 1231 (2008).....                             | 9, 11, 12   |
| <u>State v. Stewart</u> , 145 Idaho 641, 181 P.3d 1249 (Ct. App. 2008).....                  | 9           |
| <u>State v. Willoughby</u> , 147 Idaho 482, 211 P.3d 91 (2009).....                          | 8           |
| <u>United States v. McDonald</u> , 100 F.3d 1320 (7th Cir. 1996).....                        | 10          |
| <u>United States v. Ramos</u> , 12 F.3d 1019 (11th Cir. 1994).....                           | 10          |

## STATEMENT OF THE CASE

### Nature Of The Case

Terri Lee Simmons appeals from the judgment of the district court entered upon her conditional guilty plea to possession of methamphetamine. On appeal Simmons argues the district court erred when it denied her motion to suppress.

### Statement Of The Facts And Course Of The Proceedings

Dispatch received a call regarding a suspicious individual in the alley behind the Like Nu Car Wash. (6/8/17 Tr., p. 3, L. 23 – p. 5, L. 24, p. 8, L. 21 – p. 9, L. 25; see also Ex. A at 6:20 to 7:25.) An individual had been next to the dumpster and left some property behind, including a box with a picture of a gun on it. (Id.) The staff of the car wash called dispatch because they were concerned about the box with the picture of the gun. (Id.)

When Officer Janicek responded to the scene, there was nobody around the dumpster in the alley. (6/8/17 Tr., p. 6, Ls. 8-16, p. 10, L. 21 – p. 12, L. 10.) Next to the dumpster, Officer Janicek saw a small “cat tote,” with a cat inside, and a pile of items, including a Tupperware, a box and two books. (See 6/8/17 Tr., p. 4, L. 19 – p. 5, L. 16; see also Ex. A at 10:35 to 10:50 (Officer Janicek recreates how the pile of items were stacked next to the dumpster).) In the stack was a box with a picture of a gun on it. (6/8/17 Tr., p. 4, L. 19 – p. 5, L. 16.) Officer Janicek was concerned there could be a gun inside, so he opened it. (Id.) Inside Officer Janicek found syringes and a plastic spoon with a clear white substance that appeared to be methamphetamine. (6/8/17 Tr., p. 5, Ls. 17-24; see also Ex. A at 0:00 to 0:26.) The white substance later tested presumptive

positive for the presence of methamphetamine. (6/8/17 Tr., p. 5, L. 25 – p. 6, L. 7.) In the Tupperware container Officer Janicek found a green leafy substance and a makeshift pipe. (See R., p. 120.)

When Officer Janicek was collecting the items for disposal, Simmons walked around the corner. (See 6/8/17 Tr., p. 6, Ls. 8-16, p. 10, L. 21 – p. 12, L. 10; See Ex. A at 0:27 to 2:48.) Simmons claimed ownership of some of the boxes, but she told Officer Janicek that the box with the picture of the gun on it was not hers. (See Ex. A at 1:20 to 2:48.)

Shortly thereafter, a car wash employee arrived on scene and explained that he gave Simmons permission to leave her cat “over there” but that they became concerned because she left more than the cat, including a box with a picture of a gun on it. (See Ex. A at 2:56 to 3:40.) The state charged Simmons with possession of methamphetamine, possession of marijuana and possession of drug paraphernalia. (R., pp. 28-29.)

Simmons filed a motion to suppress claiming that Officer Janicek’s warrantless search of items piled next to the dumpster was unconstitutional (R., pp. 39-40, 67-76.) Simmons also claimed that her statements to police were obtained in violation of *Miranda*<sup>1</sup> and were the “fruit of the poisonous tree.” (See *id.*) The state objected. (R., pp. 53-54, 83-88.)

At the suppression hearing Officer Janicek’s body camera recording was admitted as evidence, and, pursuant to the request of the parties, the district court also relied upon the preliminary hearing transcript. (11/27/17 Tr., p. 8, L. 2 – p. 11, L. 4; Ex. A.)

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Simmons testified that she did not remember having a box with a picture of a gun on it. (11/27/17 Tr., p. 24, Ls. 7-16.)

The district court entered an oral ruling on the record and denied Simmons' motion to suppress, but also reserved the right to further explain its ruling in a written decision. (11/27/17 Tr., p. 41, L. 15 – p. 57, L. 5.) In the oral ruling, the district court applied the two-part test to determine whether Simmons possessed a legitimate expectation of privacy in the box. (See Id.)

As to the first question of the property, the question becomes for the Court does the defendant in this case have an expectation of privacy such that the search of the property should be suppressed?

The Court notes that there is no automatic standing to contest the legality of a search and seizure for a defendant charged with a crime of possession. The defendant must show that his or her Constitutional rights have been infringed. They can't assert another person's Constitutional rights.

So that in this case, if there was another owner of the box with a picture of the gun on it, and that wasn't the defendant's, she can't assert the right of the rightful owner of that box.

So the question is, did the defendant have a legitimate expectation of privacy in the area searched or the article seized? And the Court cites, *Rakas v Illinois*, 439 US 128, 1978.

The US Supreme Court enunciated a two-step process to determine whether a defendant has possessed a legitimate expectation of privacy in *Smith v Maryland*, 442 US 735, 1979. First, a court must ascertain whether the defendant had a subjective expectation of privacy and second, it must determine whether the court's [sic] subjective expectation viewed objectively was reasonable.

(11/27/17 Tr., p. 45, L. 2 – p. 46, L. 5.) The district court noted that this United States Supreme Court case law is consistent with Idaho law. (11/27/17 Tr., p. 46, Ls. 6-12)

(citing State v. Johnson, 126 Idaho 859, 893 P.2d 806 (Ct. App. 1995)<sup>2</sup>.) The district court applied the factors and determined that, while Simmons subjectively believed she had an expectation of privacy in the containers, she did not have an objectively reasonable expectation of privacy in those items left next to a dumpster in an alley:

As to one, in viewing the light the most favorable to the defendant's testimony and the body cam, the Court finds that the defendant believed she had some subjective expectation of privacy when she asked permission of the car wash employee to leave certain property next to the dumpster.

So then the Court will go to the second prong of the test, is society willing to accept this subjective expectation of privacy as objectively reasonable? And this is where the State of Idaho has set forth a number of factors that can be considered by the Court in determining whether that subjective expectation of privacy is objectively reasonable.

Use of the property. At the time that the officers were called to the alley location, to the car wash and went to the alley location next to the dumpster, the defendant was not using the property. No one was using the property. The property was sitting there with no one around it.

Did the defendant have the ability to control and regulate the area? The Court finds that the defendant did not have the ability to control and regulate the area. She did not own the property. It was a public alley next to a dumpster, she had left the location. And while it is true she returned to the location, the Court finds at the time the property was searched by the officer that the defendant did not have the ability to control and regulate the area.

The Court can consider the totality of the surrounding circumstances. The Court notes that simply having permission to legitimately leave something in an alley does not equal legitimate expectation of privacy. Defendant had no ownership of the land where the items were left. She left them in open public view to a public access alley next to a dumpster.

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<sup>2</sup> In its oral ruling the district court referenced "*State v Jackson*, 126 Idaho 859, Court of Appeals 1995," however the correct name of the case is State v. Johnson, 126 Idaho 859, 893 P.2d 806 (Ct. App. 1995), and thus that is the citation that will be used on appeal.

This is not like a situation where a person is staying in a guest room at a friend's apartment. They normally wouldn't have an expectation of privacy since it is not their apartment. But since they are staying in a guest room they have that expectation.

This is more like the facts in *State v Donato*, 135 Idaho 469, 2000, wherein there is no expectation of privacy where you knowingly expose your property to the public.

I talked about defendant not being present to maintain control over the property. The defendant was not using the property when found. The fact that this dumpster location and this public alley was within close proximity to a school, the school is located across the street. The Court acknowledges the defense argument that it was a Sunday, however, it was a Sunday afternoon and based on community safety and the fact that no one was around the property and the box had a picture of a gun on it and the items were located next to a trash can, the Court finds that that supports that the property -- that the defendant's subjective expectation of privacy is not objectively reasonable.

Additionally, the defendant in this case denied ownership of the box with the gun on it. A person does not possess a reasonable expectation of privacy to which he or she has no possessory or ownership interest. This comes from *US v Thomas*, 447, F 3rd, 1191, Ninth Circuit, 2006. And also flows from *Rakas, R-A-K-A-S, v Illinois*, 439 US 128, 1978. And disclaimer of ownership constitutes abandonment pursuant to *State v Melling, M-E-L-L-I-N-G*, 160 Idaho, 209, Court of Appeals 2016.

Therefore, the Court finds in viewing the factors set forth by -- in *State v [Johnson]* as well as the totality of the surrounding circumstances of this particular case that the defendant had no objectively reasonable expectation of privacy so the threshold Fourth Amendment question presents further inquiry as to an improper search of these items in the alley.

When the officer came across the items there was no privacy interest of any person when he examined those items. And further investigation by inquiring of the defendant also produced that she denied ownership of certain of the items, at least the box with the gun on it.

So for these reasons the Court finds that the two -- that the defendant has not established or carried her burden to establish that she not only had subjective expectation but also that that expectation was objectively reasonable and that portion of the motion to suppress is denied.

(11/27/17 Tr., p. 46, L. 13 – p. 50, L. 8; see also 11/27/17 Tr., p. 55, L. 11 – p. 57, L. 5.) The district court also entered a Memorandum Decision and Order to further explain its ruling. (See R., pp. 119-132.) Simmons entered a conditional guilty plea and reserved the right to appeal the denial of her motion to suppress. (R., pp. 112-114; 11/29/17 Tr., p. 60, L. 4 – p. 72, L. 8.) The district court entered judgment and sentenced Simmons to five years with two years fixed. (R., pp. 139-146.) The district court suspended the sentence and placed Simmons on probation for five years. (Id.) Simmons timely appealed. (R., pp. 149-152.)

## ISSUE

Simmons states the issue on appeal as:

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.

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has Simmons failed to show the district court erred when it denied her motion to suppress the evidence obtained pursuant to a warrantless search of a pile of items left in an alley next to a dumpster?

## ARGUMENT

### The District Court Did Not Err When It Denied Simmons' Motion To Suppress

#### A. Introduction

The district court determined that Simmons failed to establish a reasonable expectation of privacy in a pile of items left in a public alleyway next to a dumpster. (11/27/17 Tr., p. 41, L. 15 – p. 57, L. 5; R., pp. 119-127.) On appeal, Simmons argues the district court erred because she claims, as a homeless person, she has a reasonable expectation of privacy in items left out in public. (See Appellant's brief, pp. 6-16.) Simmons' argument is not supported by the record or the law.

The record refutes Simmons' argument because, at the time Officer Janicek searched the pile of items, he was responding to a call from the manager of a business that a woman had left some concerning items by a dumpster in the alley. The cases relied upon by Simmons to establish an objectively reasonable expectation of privacy in items left in public by homeless individuals are all distinguishable. Most of the cases revolve around establishing an expectation of privacy in a temporary shelter or housing – not in piles of items left next to dumpsters. Simmons failed to establish a reasonable expectation of privacy and has failed to show the district court erred.

#### B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court defers to the trial court's findings of fact unless clearly erroneous, but exercises free review of the trial court's determination as to whether constitutional standards have been satisfied in light of the facts. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009); State

v. Fees, 140 Idaho 81, 84, 90 P.3d 306, 309 (2004). If findings are supported by substantial evidence in the record, those “[f]indings will not be deemed clearly erroneous.” State v. Stewart, 145 Idaho 641, 648, 181 P.3d 1249, 1256 (Ct. App. 2008) (quoting State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App. 2006)).

C. Simmons Failed To Establish That She Had A Reasonable Expectation Of Privacy In Containers Left Unattended In A Public Alley Next To A Dumpster

“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.” State v. Pruss, 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008) (citing Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); State v. Cowen, 104 Idaho 649, 651, 662 P.2d 230, 232 (1983)). Whether a person has a legitimate expectation of privacy 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?” Id. (citing California v. Ciraolo, 476 U.S. 207, 211 (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.” Id. “The second inquiry is an issue of law.” Id. Factors that have been considered part of this analysis include ownership, possession, control, ability to regulate access to the evidence, historical use of the item seized, and the totality of the surrounding circumstances. State v. Johnson, 126 Idaho 859, 862, 893 P.2d 806, 809 (Ct. App. 1995) (citation omitted).

“Abandonment, in the Fourth Amendment context, occurs through words, acts, and other objective facts indicating that the defendant voluntarily discarded, left behind, or otherwise relinquished his interest in his property.” State v. Melling, 160 Idaho 209, 211-212, 370 P.3d 412, 414-15 (Ct. App. 2016), *review denied* (May 24, 2016) (citing

Bond v. United States, 77 F.3d 1009, 1013 (7th Cir. 1996); United States v. McDonald, 100 F.3d 1320, 1327 (7th Cir. 1996) (overruled on other grounds); United States v. Ramos, 12 F.3d 1019, 1023-24 (11th Cir. 1994)).

Under the first part of the test, the district court found that Simmons “exhibited a subjective expectation of privacy in the property that she asked to leave near the dumpster.” (R., p. 125; see also 11/27/17 Tr., p. 46, Ls. 13-19 (“As to one, in viewing the light the most favorable to the defendant’s testimony and the body cam, the Court finds that the defendant believed she had some subjective expectation of privacy when she asked permission of the car wash employee to leave certain property next to the dumpster.”).) The district court also found, however, that Simmons abandoned any interest in the box with the gun picture. (11/27/17 Tr., p. 49, Ls. 2-12.)

For the second part of the test, the district court found that Simmons’ expectation of privacy in the items placed next to the dumpster was not an expectation of privacy that society is willing to recognize as objectively reasonable. (See R., pp. 125-126; see also 11/27/17 Tr., p. 46, L. 20 – p. 49, L. 1.) On appeal, Simmons argues that the district court erred in finding no objective expectation of privacy in the closed containers because she is homeless. (See Appellant’s brief, pp. 7-16.) Simmons argues that she had an objectively reasonable expectation of privacy in the closed containers she stacked by the dumpster, because she is homeless and has no other place to store her possessions. (See Appellant’s brief, pp. 7-12.) Simmons’ argument is refuted by case law and the record.

The record refutes her argument because her argument is based upon her status as a homeless individual. Specifically, society would not recognize as reasonable an expectation that property left by a dumpster in an alley was not abandoned under the facts

of this case. Officer Janicek “responded to a dispatch call to investigate a potential suspicious subject at the Like Nu Car Wash[.]” (R., p. 120.) “When Officer Janicek arrived, a car wash employee told him that an older women had been sitting in the alley behind the car wash, and although she had since left the area, some personal items were left next to the dumpster[.]” (Id.) “When Officer Janicek arrived at the alley, [Simmons] was not using the property. In fact, no one was using the property, no one was present near it, and no one was supervising it.” (R., p. 125.)

Thus, the information available to Officer Janicek, at the time he opened the containers, was that a woman had left some items in the alleyway next to the dumpster, no one was around, and the employees of the car wash were concerned about one of the unattended boxes and called the police. There was no indication that these items belonged to a homeless individual and had not been abandoned. Officer Janicek learned of information regarding Simmons and her permission to leave her cat in the alley only after the search. (See Ex. A at 1:20 to 3:40.) Even this information would not have shown the belief that the other property was not abandoned to be unreasonable. Thus, the information available to Officer Janicek was simply that some containers had been left and abandoned by a dumpster in an alley. Any subjective expectation of privacy Simmons may have had in the items she left by the dumpster in a public alley was not objectively reasonable.

The cases cited by Simmons also do not support her argument. The cases relied upon by Simmons involved the police searching a shelter or temporary dwelling place. See State v. Pruss, 145 Idaho 623, 627, 181 P.3d 1231, 1235 (2008) (holding that defendant had a reasonable expectation of privacy in a temporary shelter or “hooch” on

public lands); State v. Mooney, 218 Conn. 85, 111, 588 A.2d 145, 160 (Conn. 1991) (the “containers were located in a place that, as the police knew when they searched them, the defendant regarded as his home, and that he maintained as such, however roughly”) Homes and shelters, even temporary ones, are granted a high degree of privacy. See Pruss, 145 Idaho at 626, 181 P.3d at 1234. The Idaho Supreme Court has made clear that “[t]he 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.” Pruss, 145 Idaho at 626, 181 P.3d at 1234.

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!””

Id. (quoting Miller v. United States, 357 U.S. 301, 307 (1958)). However, this expectation of privacy does not extend outside the temporary shelter. See State v. Beck, 157 Idaho 402, 407, 336 P.3d 809, 814 (Ct. App. 2014). (“Therefore, we hold that there was no expectation of privacy in the campsite, and that the area outside of the tent in these circumstances is not curtilage.”). Here there was no cottage, no temporary shelter and no hooch. Here, there was a pile of containers stacked in alley next to a dumpster. Thus, the expectation of privacy that extends to temporary shelters is not applicable.

Simmons’ reliance on the two Lavan cases is likewise misplaced because the Ninth Circuit did not address the privacy issue and, in those cases, the homeless individuals personal items were placed in distinctive “mobile shelters” and containers provided by service organizations. (See Appellant’s brief, pp. 8-16 (citing Lavan v. City of Los Angeles (Lavan I), 797 F. Supp.2d 1005, 114 (C.D. Cal. 2011); Lavan v. City of

Los Angeles (Lavan II), 693 F.3d 1022, 1025 (9th Cir. 2012).) In a civil suit, “nine homeless individuals living in the ‘Skid Row’ district of Los Angeles, charged that the City of Los Angeles (the “City”) violated their Fourth and Fourteenth Amendment rights by seizing and immediately destroying their abandoned personal possessions, temporarily left on public sidewalks while [they] attended to necessary tasks such as eating, showering, and using restrooms.” Lavan II, 693 F.3d at 1023-1024. The City had a policy and practice of seizing and destroying homeless persons’ possessions. See Id. The nine homeless individuals stored their personal possessions in distinctive mobile containers or distinctive “mobile shelters” provided by social service organizations. Id. at 1025. The Ninth Circuit explained:

Like many of Skid Row’s homeless residents, Appellees stored their personal possessions—including personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets—in mobile containers provided to homeless persons by social service organizations. Appellees Tony Lavan, Caterius Smith, Willie Vassie, Shamal Ballantine, and Reginald Wilson packed their possessions in EDAR mobile shelters. Appellees Ernest Seymore, Lamoen Hall, and Byron Reese kept their possessions in distinctive carts provided by the “Hippie Kitchen,” a soup kitchen run by the Los Angeles Catholic Worker.

Lavan II, at 1025 (footnotes omitted). EDAR mobile shelters “are small, collapsible mobile shelters provided to homeless persons by Everyone Deserves a Roof, a nonprofit organization.” Id. at 1022 n. 4.

The district court found that the City knew the seized property was not abandoned. Lavan I, 797 F. Supp.2d at 1014 (The evidence “clearly shows that the City did in fact know that at least some of the property seized was not abandoned.”). The carts were “neatly packed” and suggested ownership. Id. The district court determined that

the plaintiffs showed a strong likelihood they would succeed on the merits and issued a preliminary injunction. Id. at 1020. The City appealed to the Ninth Circuit, which affirmed. Lavan II, at 1027-1028. However, the Ninth Circuit did not affirm on a basis that the City performed an unreasonable *search*, but rather on the basis that the City performed an unreasonable *seizure* of the homeless individuals' neatly packed carts. See id. (“[The nine homeless individuals] need not show a reasonable expectation of privacy to enjoy the protection of the Fourth Amendment against *seizures* of their unabandoned property.”). The Ninth Circuit explicitly did not decide whether the nine homeless individuals had a reasonable expectation of privacy in the carts and mobile shelters. Id. at 1028 (“Although the district court determined that [nine homeless individuals] had a reasonable expectation of privacy in their EDARs and carts, we need not decide that question[.]”).

The Lavan cases are distinguishable, first, because the Ninth Circuit explicitly did not address the “privacy” or search question, which is the issue here. And, more importantly, the City of Los Angeles knew that these distinctive mobile shelters and carts were being used by homeless people to store their personal effects. Here, there is no distinctive mobile shelter or cart, or even any indication of continued ownership. Officer Janicek received a call that a woman had left things in an alleyway next to a dumpster. This is a far cry from a city policy of seizing and destroying personal effects that are clearly being used by homeless persons.

Here, the district court applied the proper factors and correctly determined that Simmons failed to establish an objective expectation of privacy in the pile of items placed next to a dumpster in a public alley.

CONCLUSION

The state respectfully requests this Court affirm the judgment of the district court.

DATED this 3rd day of January, 2019.

/s/ Ted S. Tollefson  
TED S. TOLLEFSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of January, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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/s/ Ted S. Tollefson  
TED S. TOLLEFSON  
Deputy Attorney General

TST/dd