4-12-2017

State v. Snapp Appellant's Brief Dckt. 44642

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44642**
Plaintiff-Respondent,	)	
	)	**CANYON COUNTY NO. CR 2015-24528**
v.	)	
	)	
JAMES EDWARD SNAPP, JR.,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

HONORABLE THOMAS J. RYAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Following the denial of his motion to suppress, and pursuant to a conditional plea agreement, James Edward Snapp, Jr., entered a guilty plea to felony trafficking in methamphetamine and/or amphetamine. On appeal, Mr. Snapp asserts the district court erred when it denied his motion to suppress.

Statement of the Facts and Course of Proceedings

According to the district court's findings of fact in its Memorandum Decision and Order upon Defendant's Motion to Suppress, Corporal Jones of the Nampa Police Department was out on patrol one evening. (*See* R., p.55; *see also* Tr., p.22, Ls.11-18 (testimony of Corporal Jones).)[1] Around 11:40 PM, Corporal Jones saw a car he estimated was traveling about 40 mph in a 20 mph zone. (R., p.55.) The officer followed the car to determine its actual speed, and the car turned right without using a turn signal. (R., p.56.) Corporal Jones testified the car did not use its turn signal on private property, but at the time he believed it was on public property. (*See* R., p.56.) While the car was on a driveway but before the driveway turned from pavement to dirt, the officer determined the car was traveling at 37 mph. (R., p.56.)

Corporal Jones testified he activated his patrol vehicle's overhead lights when the car turned onto the dirt driveway. (R., p.56.) Rather than stop, the car continued up the driveway, rounded an outbuilding, and pulled into the driveway area of a residence. (R., p.56.) As Corporal Jones stopped in front of the residence, he saw the car's

[1] All citations to "Tr." refer to the transcript of the June 27, 2016 motion to suppress hearing.

driver's side door open. (R., p.56.) The officer testified that the car was still moving when the door opened. (R., p.56.) Corporal Jones believed the driver was going to flee, so he sped up to place his vehicle behind the car. (*See* R., p.56.) However, the driver did not flee, but instead allegedly tossed a "dark-colored item" towards the residence.[2] (*See* R., p.56.)

Corporal Jones contacted the driver of the car, Mr. Snapp. (R., p.56.) Seconds or minutes after the initial contact, a female came out of the residence, and Corporal Jones told her to go back inside. (R., p.56.) Mr. Snapp, in response to the officer's questions, asserted he did not throw anything towards the residence, and could not have because his window was rolled up the entire time. (R., p.56.) Corporal Jones then handcuffed Mr. Snapp, placed Mr. Snapp in his patrol vehicle, "and proceeded to search the area surrounding the residence where he believed Snapp tossed the dark-colored item."[3] (R., pp.56-57.)

When backup officers arrived at the scene soon afterwards, Corporal Jones told them Mr. Snapp threw something in the yard and he did not believe it was a beer can. (R., p.57.) The district court found, "Corporal Jones and the other officers searched for

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[2] On direct examination during the motion to suppress hearing, Corporal Jones testified, "I could just see it was a dark-colored squarish-type object." (Tr., p.30, Ls.1-4.) On cross-examination, Corporal Jones testified that at the time the driver threw the item, "I don't know what it was. I just saw him throw something." (Tr., p.37, L.17 – p.38, L.4.) The officer also testified, "[m]ost of the time when people have thrown things on me, it's been contraband or evidence of a crime." (Tr., p.31, Ls.10-14.)

[3] On cross-examination, Corporal Jones testified the female came out of the residence again while he was looking around in the yard, and he spoke with her. (*See* Tr., p.42, L.23 – p.43, L.10.) Mr. Snapp's wife testified she came out and saw the officers "digging through" the yard. (*See* Tr., p.16, L.9 –p.17, L.2.)

about five to 10 minutes before Jones found the item up next to the residence, behind some weeds, about three feet from the pathway." (R., p.57.)[4]

Corporal Jones testified the item was clean and dry, while the other objects in the cluttered yard were covered with dirt or debris and the area was wet with what appeared to be urine from the animals around the yard. (R., p.57.) The item was a black bag about the size of a football, with a gallon-size Ziploc baggy inside. (R., p.57.) The Ziploc baggy contained a white, crystal shard substance. (R., p.57.) The officers took the black bag and Mr. Snapp to the police department. (R., p.57.) There, Corporal Calderon, a narcotics investigator, tested the white substance. (R., p.57.) The substance tested presumptively positive for methamphetamine. (R., p.57.) The total weight of the substance and its packaging was 119.5 grams. (R., p.57.)

The State charged Mr. Snapp by Information with one count of trafficking in methamphetamine and/or amphetamine, felony, I.C. § 37-2732B(a)(4). (R., pp.24-25.) Mr. Snapp entered a not guilty plea. (R., pp.28-29.)

Mr. Snapp subsequently filed a Motion to Suppress the evidence "obtained as the result of the unlawful traffic stop." (R., pp.33-34.) The motion asserted the officers "violated Mr. Snapp's rights guaranteed by the Fourth Amendment to the United States Constitution and Article I, Sections 13 and 17 of the Idaho Constitution." (R., pp.33-34.)

In his memorandum in support of the motion to suppress (R., pp.37-42), Mr. Snapp asserted the officers did not have a warrant before entering his private

[4] Corporal Jones specifically testified the item was about three feet from the pathway leading to the residence's front door, and about a foot away from the residence. (*See* Tr., p.33, Ls.4-25.) On cross examination, Corporal Jones indicated it was dark during the search, and he and the other officers used flashlights. (*See* Tr., p.46, Ls.16-18.)

property, and he had standing to challenge the search because it was his personal residence (R., p.39).[5]

Mr. Snapp further asserted Corporal Jones "not only extended his inquires beyond the purpose of the stop, he entirely abandoned the purpose of the stop." (R., p.40). He asserted that, "[w]hile believing he observed the Defendant throw an item out of his vehicle onto his own private front yard . . . would admittedly give the officer some leeway for additional inquiry . . . it does not in and of itself provide the right to conduct a warrantless search of the Defendant's private property." (R., p.40.) If the officer "believed that he had sufficient information supporting probable-cause for a search of the Defendant's private property, proper channels would be to secure the area and seek a warrant from a detached magistrate." (R., p.40.) Mr. Snapp asserted the drugs alleged to have been found on his private property "were obtained as a direct result of the illegal search," and requested the district court "suppress the evidence seized as a result of the warrantless search." (R., p.41.)

The State filed a Brief in Support of Objection to Motion to Suppress Evidence. (R., pp.43-48.) The State disputed whether Mr. Snapp had standing to challenge the search. (*See* R., p.45.) However, if Mr. Snapp could establish he had standing, the

[5] "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 (2008) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *State v. Cowen*, 104 Idaho 649, 651 (1983)). "That involves a two-part inquiry: (1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable?" *Id.* (citing *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *State v. Donato*, 135 Idaho 469, 473 (2001)). As shorthand for this inquiry, courts often refer to whether a defendant has *standing* to challenge a search. *See, e.g.*, *State v. Haworth*, 106 Idaho 405, 407 n.2 (1984).

State would "proceed with this brief giving the Defendant the benefit of the doubt, and operating under the assumption that the black bag containing the methamphetamine was located within the curtilage of the residence." (R., pp.45-46.) The State argued that "because [Corporal] Jones observed highly suspicious behavior from a place he was entitled to be, he was justified in searching the immediate area for the discarded item." (R., p.47.)

At the motion to suppress hearing, after Mr. Snapp and his wife testified they lived at the residence (*see* Tr., p.6, L;.16 – p.7, L.11, p.15, L.15 – p.16, L.8), the district court ruled Mr. Snapp had standing to challenge the search (*see* Tr., p.19, Ls.1-10). Corporal Jones then testified on behalf of the State. (*See generally* Tr., p.20, L.5 – p.50, L.10.)

Mr. Snapp, through counsel, asserted the search was illegal and the officer did not know what had been thrown. (Tr., p.50, L.20 – p.51, L.14.) Mr. Snapp's counsel asserted, "this isn't where we're standing in the curtilage and we get something in plain view. They're digging through the yard. He and other officers, for five minutes . . . ." (Tr., p.51, Ls.17-20.) Defense counsel also asserted, "I don't know any case that allows you to just start searching." (Tr., p.52, Ls.20-21.) Additionally, Mr. Snapp's counsel suggested the officers had no objectively reasonable basis to believe the thrown item was evidence of a crime or contraband. (*See* Tr., p.53, Ls.12-18.) Defense counsel did not challenge the basis for the initial traffic stop. (Tr., p.54, Ls.7-8.) On rebuttal, counsel asserted "there was no testimony they were standing on the path when they found the item." (Tr., p.62, Ls.16-18.)

The district court later issued a Memorandum Decision and Order upon Defendant's Motion to Suppress. (R., pp.55-64.) The district court determined Corporal Jones lawfully stopped Mr. Snapp, because he saw Mr. Snapp speeding. (R., pp.58-59.) The district court also determined Corporal Jones acted lawfully when he abandoned the initial purpose of the stop to conduct a new investigation regarding possible criminal activity, namely concealment of evidence. (R., pp.59-60.)

The district court then determined, "Corporal Jones was in his vehicle when he observed Snapp toss an object that he reasonably believed to be incriminating evidence; he was occupying an area which would normally be occupied by ordinary visitors. Thus, he was allowed, under the plain view exception, to find and seize the black bag." (R., pp.61-62.) The district court further determined that, "because Snapp denied tossing the bag out of the door, he thereby denied ownership of the bag. By doing so, Snapp relinquished any reasonable expectation of privacy regarding the contents of the bag. Therefore, Corporal Jones was proper in searching the bag." (R., pp.62-63.) The district court denied the motion to suppress. (R., p.63.)

On the day of trial, Mr. Snapp agreed to plead guilty to the charge, pursuant to a conditional plea agreement reserving his right to appeal the denial of his motion to suppress. (R., pp.71-83, 86-88.) The district court imposed a unified sentence of seven years, with three years fixed. (R., pp.98-99.)

Mr. Snapp filed a Notice of Appeal timely from the district court's Judgment and Commitment. (R., pp.100-03.)

ISSUE

Did the district court err when it denied Mr. Snapp's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Snapp's Motion To Suppress

A. Introduction

Mr. Snapp asserts the district court erred when it denied his motion to suppress, because the search of the curtilage of his residence, and the seizure (and resulting search) of the black bag, were unlawful. The open view doctrine did not cover the officers' warrantless search of the curtilage of Mr. Snapp's residence, because the officers did not restrict their movements to places where ordinary visitors could be expected to go. The plain view exception to the warrant requirement did not justify the seizure of the black bag, because it was not immediately apparent the black bag was contraband or evidence of a particular crime. Mr. Snapp did not abandon the black bag, because he threw it onto his own private property and did not disclaim ownership. Thus, the warrantless searches and seizure here were unlawful, and the evidence obtained thereby should have been suppressed.

B. Standard Of Review And Applicable Law

The standard of review for a motion to suppress is bifurcated. An appellate court defers to the trial court's findings of fact unless the findings are clearly erroneous, and freely reviews the trial court's application of constitutional principles to the facts as found. *State v. Hankey*, 134 Idaho 844, 846 (2000).

The Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution preserve the right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures.

U.S. Const. amend. IV; Idaho Const. art. I, § 17. Their purpose "is to protect Idaho citizens' reasonable expectation of privacy against arbitrary governmental intrusion." *State v. Christensen*, 131 Idaho 143, 146 (1998). Evidence obtained in violation of these constitutional protections generally may not be used as evidence against the victim of the illegal government action. *See State v. Bishop*, 146 Idaho 804, 810-11 (2009) (discussing the Fourth Amendment). This exclusionary rule "applies to evidence obtained directly from the illegal government action and to evidence discovered through the exploitation of the original illegality, or the fruit of the poisonous tree." *Id.* at 811.

Warrantless searches or seizures are presumptively unreasonable under both the federal and Idaho constitutions unless they come within one of the established exceptions to the warrant requirement. *California v. Acevedo*, 500 U.S. 565, 580 (1991); *State v. Henderson*, 114 Idaho 293, 295 (1988). "When a warrantless search or seizure is challenged by the defendant, the State bears the burden to show that a recognized exception to the warrant requirement is applicable." *Halen v. State*, 136 Idaho 829, 833 (2002).

C. The Open View Doctrine Did Not Cover The Search Of The Curtilage, Because The Officers Did Not Restrict Their Movements To Places Where Ordinary Visitors Could Be Expected To Go

Mr. Snapp asserts the open view doctrine did not cover the officer's warrantless search of the curtilage of his residence, because the officers did not restrict their movements to places where ordinary visitors could be expected to go. Because no exception to the warrant exception applied, the warrantless search of the curtilage was unlawful.

The State, provided Mr. Snapp could establish he had standing to challenge the search, operated "under the assumption that the black bag containing the methamphetamine was located within the curtilage of the residence." (*See* R., pp.45-46.) The district court found the item was located "up next to the residence, behind some weeds, about three feet from the pathway." (R., p.57.)

Mr. Snapp submits the State's assumption and the district court's finding show Corporal Jones located the black bag within the curtilage of his residence. The Idaho Supreme Court has defined "curtilage" as "that area immediately surrounding and associated with a residence in which a person has a reasonable expectation of privacy." *Christensen*, 131 Idaho at 147 (citing *State v. Webb*, 130 Idaho 462 (1997)). Curtilage "warrants the Fourth Amendment protections that attach to the home." *Webb*, 130 Idaho at 465 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)) (internal quotation marks omitted). More recently, the United States Supreme Court emphasized the right to retreat into one's own home and there be free from unreasonable governmental intrusion, which stands at the core of the Fourth Amendment, "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity . . . ." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). The *Jardines* Court therefore regarded "the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" *Id.* (quoting *Oliver*, 466 U.S. at 180).

Idaho's appellate courts "have interpreted 'curtilage' under Article I, Section 17, of the Idaho Constitution to include outbuildings and drives within the areas protected from unreasonable searches, affording more protection than does the United States

Supreme Court's narrower interpretation of 'curtilage' under the Fourth Amendment." *State v. Hiebert*, 156 Idaho 637, 643 (Ct. App. 2014) (citing *Webb*, 130 Idaho at 467; *State v. Cada*, 129 Idaho 224, 230-32 (Ct. App. 1996)). Based on the above, under both the Fourth Amendment and Article I, Section 17, the officer located the black bag in the curtilage of Mr. Snapp's residence.

The warrantless search of the curtilage was not covered by the open view doctrine. The Idaho Supreme Court has noted, "[u]nder the open view doctrine, a police officer's observations made from a location open to the public do not constitute a search. This is because one cannot have a reasonable expectation of privacy in what is knowingly exposed to public view." *Christensen*, 131 Idaho at 146-47 (citing *Katz v. United States*, 389 U.S. 347 (1967); *State v. Clark*, 124 Idaho 308 (Ct. App. 1993)). In other words, "[u]nder the open view doctrine, when the police come onto private property to conduct an investigation (or for some other legitimate purpose) and restrict their movements to places ordinary visitors could be expected to go, observations made from such vantage points do not implicate the Fourth Amendment." *Hiebert*, 156 Idaho at 643.

Thus, the presence "of a police officer within the curtilage does not, *ipso facto*, result in an unconstitutional instruction." *Christensen*, 131 Idaho at 147 (quoting *Clark*, 124 Idaho at 313). "There is an implied invitation for the public to use access routes to the house, such as parking areas, driveways, sidewalks, or pathways to the entry, and there can be no reasonable expectation of privacy as to observations which can be made from such areas." *Id.* (quoting *Clark*, 124 Idaho at 313). "Like other citizens,

police with legitimate business are entitled to enter areas of the curtilage that are impliedly open to public use." *Id.* (quoting *Clark*, 124 Idaho at 313).

However, the Idaho Supreme Court in *Christensen* also held "[t]he ability of police to move within the curtilage . . . is not unlimited." *Id.* "Police officers without a warrant are permitted the same intrusion and the same level of observation as one would expect from a 'reasonably respectful citizen.'" *Id.* (quoting *Clark*, 124 Idaho at 313.) The Idaho Court of Appeals has held, "[o]nly a substantial and unreasonable departure from the normal access routes will exceed the scope of the implied invitation and intrude upon constitutionally protected privacy interests." *Hiebert*, 156 Idaho at 644 (citing *Clark*, 124 Idaho at 314).

In this case, the open view doctrine did not cover the officers' search of the curtilage of Mr. Snapp's residence, because the officers did not restrict their movements to places ordinary visitors could be expected to go. After discussing the open view doctrine, the district court determined "Corporal Jones was in his vehicle when he observed Snapp toss an object that he reasonably believed to be incriminating evidence; he was occupying an area which would normally be occupied by ordinary visitors." (*See* R., p.62.) However, Corporal Jones did not actually find the black bag next to Mr. Snapp's residence until he and the other officers had searched Mr. Snapp's yard for five to ten minutes. (*See* R., pp.56-57.) Additionally, the search of the curtilage occurred around midnight. (*See* R., pp.55-57.)

Mr. Snapp submits the search of the curtilage of his residence late at night by several officers, where they located an item one foot from the residence, was a substantial and unreasonable departure from the normal access routes. *See Hiebert*,

156 Idaho at 644. Simply put, the officers did not restrict their movements to places ordinary visitors could be expected to go. It cannot be said the area where Corporal Jones located the black bag, one foot from the residence and off the pathway to the residence's front door, was impliedly open to public use. *See Christensen*, 131 Idaho at 147. Also, a group of reasonably respectful citizens would not be expected to spend five to ten minutes, around midnight, trawling for evidence right next to a private residence. *See id*.; *see also Jardines*, 133 S. Ct. at 1414 & 1416 n.4 ("[N]o one is impliedly invited to enter the protected premises of the home to do nothing but conduct a search.")

That the search occurred late at night strongly suggests the officers impermissibly intruded into the curtilage of Mr. Snapp's residence. The Idaho Court of Appeals, when examining the "clandestine intrusion of" law enforcement agents onto a defendant's "driveway under cover of darkness in the dead of night," held "the timing and manner of the two nighttime searches involved in this case place them outside the scope of the open view doctrine . . . ." *Cada*, 129 Idaho at 233. The *Cada* Court discussed the Idaho Supreme Court's observation that historically, there has been a strong aversion to nighttime searches. *Id.* (citing *State v. Lindner*, 100 Idaho 37, 42 (1979)). The *Cada* Court concluded that "[i]f a search pursuant to a warrant, with the safeguard of a prior showing of probable cause to a detached magistrate, may not be undertaken at night absent special justification . . . a late night government intrusion onto the driveway of a home without a warrant may also be prohibited although a similar approach in the daytime would not be." *Id.*; *see also* I.C. § 19-4411 (requiring service of

search warrants in the daytime unless an elevated showing has been made to justify authorization for nighttime execution); I.C.R. 41 (same).

The covert, late night intrusion onto the curtilage of the defendant's home in *Cada* "exceeded the scope of any implied invitation to ordinary visitors and was not conduct to be expected of a reasonably respectful citizen." *Cada*, 129 Idaho at 233. While the search here was not covert, it took place late at night like the searches in *Cada*. (*See* R., pp.55-57.) Combined with the presence of several officers for five to ten minutes, the sweep of the search extending to within one foot of Mr. Snapp's residence and that the search occurred late at night, indicates the officers' conduct was a substantial and unreasonable departure from the normal access routes.[6]

Because the officers did not restrict their movements to places ordinary visitors could be expected to go, the open view doctrine did not cover their search of the curtilage of Mr. Snapp's residence. *See Christensen*, 131 Idaho at 147; *Hiebert*, 156 Idaho at 643. Thus, the officers' intrusion implicated Mr. Snapp's constitutional privacy protections. *See Webb*, 130 Idaho at 465. Because no exception to the warrant exception applied, the warrantless search of the curtilage was unlawful. *See Acevedo*, 500 U.S. at 580; *Henderson*, 114 Idaho at 295.

[6] Additional details from the testimony at the motion to suppress hearing, while not the subject of the district court's express factual findings, further indicate the search was a substantial and unreasonable departure. Corporal Jones testified he started his search about ten feet from the residence, and then kept getting closer as he looked for the item. (*See* Tr., p.32, L.19 – p.33, L.3.) Corporal Jones also indicated the officers used flashlights during the search. (*See* Tr., p.46, Ls.16-18.) Although Corporal Jones on cross-examination testified he "was looking visually. I wasn't manipulating things," (Tr., p.42, Ls.4-5), Mr. Snapp's wife testified the officers were "digging through" the yard, "moving things out of the way . . . moving the [fire]wood, moving the weeds." (*See* Tr., p.16, L.20 – p.17, L.18.)

D. The Plain View Exception Did Not Justify The Seizure Of The Black Bag, Because It Was Not Immediately Apparent The Black Bag Was Contraband Or Evidence Of A Particular Crime

Even if the open view doctrine covered the search of the curtilage, Mr. Snapp asserts the plain view exception to the warrant requirement did not justify the seizure of the black bag, because it was not immediately apparent the black bag was contraband or evidence of a particular crime.

1. Mr. Snapp Did Not Abandon The Black Bag

As a preliminary matter, Mr. Snapp asserts he has standing to challenge the seizure (and resulting search) of the black bag, because he did not abandon it. On the question of whether Corporal Jones was reasonable in searching the black bag, the district court determined that "because Snapp denied tossing the bag out of the door, he thereby denied ownership of the bag. By doing so, Snapp relinquished any reasonable expectation of privacy regarding the contents of the bag." (R., p.63.) However, Mr. Snapp did not abandon the black bag, because he did not disclaim ownership, and he threw it onto his own private property.

A court may not exclude evidence unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights, meaning the challenged conduct invaded the defendant's own legitimate expectation of privacy. *See United States v. Payner*, 447 U.S. 727, 732 (1980). One does not have a reasonable expectation of privacy if one has voluntarily abandoned property prior to its search. *See Abel v. United States*, 362 U.S. 217, 241 (1960). In the Fourth Amendment context, abandonment happens "through words, acts, and other objective facts indicating that the defendant voluntarily discarded, left behind, or otherwise relinquished his interest in

the property." *State v. Melling*, 160 Idaho 209, 211-12 (Ct. App. 2016). The *Melling* Court further noted, "Idaho courts have held that disclaimer of ownership or possession constitutes abandonment." *Id.* at 212 (citing *State v. Zaitseva*, 135 Idaho 11 (2000); *State v. Harwood*, 133 Idaho 50 (Ct. App. 1999)).

In contrast to the defendants in *Melling*, *Zaitseva*, and *Harwood*, Mr. Snapp never disclaimed ownership in the item searched by law enforcement. The parties in *Melling* stipulated the defendant told the officer he had never seen the lockbox at issue and had no idea who it belonged to; the defendant's nervousness was attributed to the presence of the lockbox; the defendant told the officer nothing in the box was his; and the defendant denied knowledge of the contents of the box. *Melling*, 160 Idaho at 212. The Idaho Court of Appeals held the defendant's "words, actions, and the objective facts indicate that Melling voluntarily abandoned his privacy interest in the lockbox." *Id.*

Similarly, in *Zaitseva*, the defendant denied ownership of the bag in question. *Zaitseva*, 135 Idaho at 12. The Idaho Supreme Court held that "by denying ownership of the bag in response to the officer's inquiry prior to the search, Zaitseva essentially relinquished or abandoned any privacy interest in the contents of the bag." *Id.* at 13. The defendant in *Harwood*, with respect to the fanny pack searched in that case, likewise stated "something to the effect of, 'That's not mine.'" *Harwood*, 133 Idaho at 51. The *Harwood* defendant did not contest the district court's conclusion that his disclaimer of ownership of the fanny pack amounted to an abandonment, but asserted on appeal his statements to police disassociating himself from the fanny pack were the result of unlawful police activity. *Id.* at 52.

Unlike the defendants in the above three cases, Mr. Snapp never told Corporal Jones or the other officers that the black bag did not belong to him. (*See* R., pp.55-57.) Indeed, on recross-examination, Corporal Jones indicated he opened the black bag without asking Mr. Snapp if it belonged to him. (*See* Tr., p.49, Ls.11-18.) The district court's determination that Mr. Snapp denied ownership of the bag because he denied tossing the bag out of the door (*see* R, p.63), does not logically follow. Just because one denies throwing an item does not mean one necessarily also denies ownership of that item. If Corporal Jones had instead believed Mr. Snapp threw some firewood out of the car, that would not have meant Mr. Snapp, by denying he threw anything, denied ownership of any of the firewood found in the yard. Unlike the defendants in *Melling*, *Zaitseva*, and *Harwood*, Mr. Snapp never disclaimed ownership in the black bag.

Further, Mr. Snapp threw the black bag into his own private property, namely the curtilage of his residence. As opposed to public property, Mr. Snapp had a reasonable expectation of privacy in the curtilage of his residence. *See, e.g.*, *Webb*, 130 Idaho at 465.

In *State v. McCall*, 135 Idaho 885 (2001), the Idaho Supreme Court declined to address whether the garbage cans at issue were within the curtilage of the defendant's property, because the defendant had obviously waived his expectation of privacy when he placed his garbage out for collection, no matter whether the garbage cans were technically within the curtilage or not. *McCall*, 135 Idaho at 887.

However, in situations where the expectation of privacy was not so obviously waived, courts in some other jurisdictions have indicated one cannot abandon an item on one's own private property. *See Work v. United States*, 243 F.2d 660, 662-63 (D.C.

Cir. 1957) ("[T]he [trash] receptacle was under the stone porch or stoop constituting a part of the house itself. . . . The placing of the phial in this receptacle, so situated and used, is not to be construed as an abandonment of the phial unless to persons impliedly or expressly authorized to remove the receptacle contents, such as the trashmen, for purposes of destruction. In the alleged circumstances of this case there could not be said to be an abandonment even to those persons; there was, rather, a hiding."); *State v. Reed*, 641 S.E.2d 320, 323 (N.C. Ct. App. 2007) ("[F]or abandonment to occur, the discarding of property must occur in a public place; one simply cannot abandon property within the curtilage of one's own home."); *Brown v. State*, 540 A.2d 143, 150 (Md. Ct. Spec. App. 1988) ("The foil packets were recovered within Brown's curtilage which is, by definition, an area in which he had asserted a reasonable legitimate expectation of privacy. We have a conceptual difficulty in accepting the State's argument that Brown 'abandoned' his property, no matter how bizarre his behavior may have been, when the property alleged to have been abandoned remained physically located in an area where he not only retained dominion but also had a reasonable expectation of privacy.").

In the instant case, Mr. Snapp did not obviously waive his reasonable expectation of privacy in the black bag. Unlike the defendant in *McCall*, Mr. Snapp did not leave the black bag out for collection by a third party. *Cf. McCall*, 135 Idaho at 887. Rather, he threw the black bag into the curtilage of his residence, where he had a reasonable expectation of privacy. Instead of an abandonment, there was an attempt to hide the black bag. *See Work*, 243 F.2d at 662-63.

Mr. Snapp did not abandon the black bag, because he did not disclaim ownership, and he threw it onto his own private property. Thus, he has standing to challenge the seizure, and the resulting search, of the black bag.

2. The Plain View Exception Did Not Justify The Seizure Of The Black Bag

Mr. Snapp asserts the plain view exception to the warrant requirement did not justify the seizure of the black bag, because it was not immediately apparent the black bag was contraband or evidence of a particular crime. The district court determined Corporal Jones "was allowed, under the plain view exception, to find and seize the black bag." (R., p.62.) The district court stated, "[t]he plain view exception allows police officers to make warrantless seizures of evidence viewed from a location where the officer has a right to be." (R., p.62 (quoting *Christensen*, 131 Idaho at 146-47) (internal quotation marks omitted).)

However, the district court did not address the full plain view exception. The plain view doctrine, as articulated by the United States Supreme Court, provides that "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The *Dickerson* Court continued: "If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.*, if its incriminating character is not immediately apparent—the plain view doctrine cannot justify its seizure." *Id.* (internal quotation marks, citations, and alterations omitted).

The Idaho Supreme Court has similarly explained the plain view exception "permits warrantless seizure where certain conditions are met. First, the officer must lawfully make an initial intrusion or otherwise properly be in a position from which she or he can view a particular area. Second, it must be immediately apparent to the police that the items they observe may be evidence of crime, contraband, or otherwise subject to seizure." *Baldwin v. State*, 145 Idaho 148, 155 (2008) (citation omitted). The *Baldwin* Court discussed how "[t]he second requirement is met when an officer has probable cause to believe the item in question was associated with criminal activity." *Id.* at 155-56.

The Idaho Supreme Court later noted, "[t]he [United States] Supreme Court has stated that 'in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.'" *State v. Ruck*, 155 Idaho 475, 482 (2013) (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)).

Here, the district court did not determine Corporal Jones had probable cause to believe the black bag was associated with criminal activity. (*See* R., pp.61-62.) Nor could the district court have made such a determination. Corporal Jones testified, "I could just see it was a dark-colored squarish-type object." (Tr., p.30, Ls.1-4.) On cross-examination, the officer testified that at the time the driver threw the item, "I don't know what it was. I just saw him throw something." (Tr., p.37, L.17 – p.38, L.4.) Because Corporal Jones did not know what the black bag was, beyond it being a dark-colored item, it cannot be said the black bag's incriminating character was immediately apparent. *See Dickerson*, 508 U.S. at 375; *Baldwin*, 145 Idaho at 155-56.

While the district court determined "Corporal Jones was in his vehicle when he observed Snapp toss an object that he reasonably believed to be incriminating evidence" (R., p.62), that determination is insufficient for the probable cause requirement of the plain view exception. In the context of the plain view doctrine, probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *Ruck*, 155 Idaho at 482.

Here, Corporal Jones never articulated the black bag would be evidence of a particular crime. Rather, he testified, "[m]ost of the time when people have thrown things on me, it's been contraband or evidence of a crime." (Tr., p.31, Ls.10-14.) On cross examination, the officer similarly testified, "[b]ased on my experience, when people throw things, it's contraband, illegal or evidentiary." (Tr., p.46, L.23 – p.47, L.4.) During redirect examination, Corporal Jones testified the thrown object could have been a gun or some other weapon. (Tr., p.47, Ls.21-24.) On recross examination, he testified he did not know what was in the black bag before he opened it. (*See* Tr., p.50, Ls.1-3.) Thus, Corporal Jones never articulated he had cause to believe that the black bag would aid in a particular apprehension or conviction. *See Ruck*, 155 Idaho at 482. The district court's determination is insufficient for the probable cause requirement of the plain view exception.

Because it was not immediately apparent the black bag was contraband or evidence of a particular crime, the plain view exception to the warrant requirement did not justify the seizure of the black bag. *See Dickerson*, 508 U.S. at 375; *Baldwin*, 145 Idaho at 155-56. Because no exception to the warrant requirement applied, the

warrantless seizure of the black bag, and the resulting warrantless search of it, were unlawful. *See Acevedo*, 500 U.S. at 580; *Henderson*, 114 Idaho at 295.

The district court erred when it denied Mr. Snapp's motion to suppress, because the search of the curtilage of his residence, and the seizure (and resulting search) of the black bag, were unlawful. The district court should have suppressed the evidence obtained from the warrantless searches and seizure.

CONCLUSION

For the above reasons, Mr. Snapp respectfully requests that this Court reverse the district court's order denying his motion to suppress, vacate the district court's judgment and commitment, and remand the case to the district court for further proceedings.

DATED this 12th day of April, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of April, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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_____/s/_____
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BPM/eas