

ORIGINAL

NO. 2013-2023

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 99538

STATE OF OHIO
Plaintiff-Appellant

-vs-

LAUREN JONES
Defendant-Appellee

FILED
AUG 18 2014
CLERK OF COURT
SUPREME COURT OF OHIO

REPLY BRIEF OF APPELLANT

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LAW AND ARGUMENT

PROPOSITION OF LAW: A SINGLE TRASH PULL CONDUCTED JUST PRIOR TO THE ISSUANCE OF THE WARRANT CORROBORATING TIPS AND BACKGROUND INFORMATION INVOLVING DRUG ACTIVITY WILL BE SUFFICIENT TO ESTABLISH PROBABLE CAUSE

Based on Appellee's agreement, as well as agreement of its amicus, that the sufficiency of the search warrant must be viewed under the totality of the circumstances, this Court must reverse the decision of the Eighth District in *State v. Jones*, 8th Dist. Cuyahoga No. 99538, 2013-Ohio-4915. In this case, when looking at all of the facts, under the totality of the circumstances the only conclusion to be reached is that the Cleveland Police Department had probable cause to search the home on Rowley Avenue for evidence related to methamphetamine production.

I. DESPITE ARGUMENTS MADE BY APPELLEE AND ITS AMICUS, THE EIGHTH DISTRICT DID NOT VIEW THE EVIDENCE UNDER THE TOTALITY OF THE CIRCUMSTANCE AND THIS APPEAL SHOULD NOT BE DISMISSED AS IMPROVIDENTLY ALLOWED.

Appellee and its amicus maintain that the Eighth District applied the correctly law. Appellee claims that, "the Trial Court, and, subsequently, the Appellate Court, clearly reviewed the facts underlying the search warrant by considering the totality of the circumstances." Appellee's Merit Brief, pg. 5. But the trial court in its journal entry indicated it was viewing the trash pull in isolation. In conducting its "common sense" review, the Eighth District has created a bright line rule that permits criminals to essentially outsmart the courts. This appeal is not so much to establish a bright line rule that a trash pull will always provide probable cause, but more to invalidate the bright line rules set forth by the Eighth District. Because this Court, from the undersigned's research, has not

addressed the circumstances in which a trash pull provides probable cause for issuance of a search warrant, this case serves as a backdrop, will produce precedential value and guide courts, litigants and law enforcement officers in future cases.

Appellee and its amicus argue that a “bright line rule” should not be established and that because the Eighth District purported to apply a “totality of the circumstance” test that the State’s appeal should be dismissed. However, under a fair reading of *Jones*, prosecutors and defense attorneys read *Jones* as establishing a bright line rule that a trash pull will not be enough to establish probable cause. As noted in the State’s memorandum in support of jurisdiction, one local Cleveland area commentator stated, the bright line rule in Cuyahoga County is that, “a single trash pull is not sufficient to provide probable cause for a warrant. There has to be something else: multiple trash pulls, surveillance and observations of heavy pedestrian traffic, or controlled buys.” Russ Bensing, *Briefcase Commentary and Analysis of Ohio Law, What’s Up In the 8th*, <http://www.briefcase8.com/2013/11/whats-up-in-the-8th-53.html> (last accessed August 14, 2014). One attorney, summarizing notable cases for the Ohio Prosecuting Attorney Association offered the following analysis, regarding the Eighth District’s holding:

This conclusion contradicts basic standards for probable cause. The United States Supreme Court has “rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.” *Florida v. Harris*, 133 S.Ct. 1050, 1055, 185 L.Ed.2d 61 (2013). Given the absence of rigid rules, there should be no “single trash pull” limitation. What should matter is what is found in the trash pull, and here the police found several items indicating ongoing methamphetamine manufacturing.

Given the common-sense inference that such manufacturing would be a continuing enterprise, and given the likelihood that other evidence would remain inside the residence, including probably some of the manufactured

methamphetamine itself, it seems rather easy to conclude that the single trash pull here did support probable cause.

The focus on whether Jones herself was cooking the methamphetamine, or whether Chappell was involved, was beside the point. There was probable cause to believe *the residence* contained some evidence related to methamphetamine. It did not matter who was cooking it for purposes of probable cause to search.

Steve Taylor, *Ohio Prosecuting Attorneys Association, January 2014 Case Digest*, <http://www.ohiopa.org/casedigests/january2014casedigest.pdf> (last accessed August 14, 2014).

To reinforce the notion that a bright line rule exists in Cuyahoga County, Ohio, one can look at *State v. Williams*, 8th Dist. Cuyahoga No. 98100, 2013-Ohio-368 and *State v. Weimer*, 8th Dist. Cuyahoga No. 92094, 2009-Ohio-4983.

In *Williams*, the Eighth District held that police lacked probable cause for issuance of a warrant where police conducted a single trash pull at 719 E. 162nd Street in Cleveland, Ohio. In suppressing the evidence, the Eighth District reiterated its now familiar dictate that:

While the single trash pull did reveal various drug paraphernalia that tested positive for drug residue and a four-month-old letter, with only Williams's name on it and without an address, the discovery of this evidence must be viewed in isolation.

Williams, at ¶18.

The *Williams* analysis also strongly suggests that there is a bright line rule that the target of the investigation must be sufficiently linked to the home in which a warrant is obtained. See *Williams*, ¶17 (noting that “we cannot say the four-month-old letter, without an address, and a previous undated drug buy [at E. 162nd residence] sufficiently linked Williams to the East 162nd Street residence.”) The court went on to criticize police for failing to connect Williams to the Cleveland residence and reiterated its now familiar

dictate that police should have conducted a controlled buy, connect that target to the home or conduct any sort of surveillance that would establish drug activity. *Id.* at ¶24. But this dictate begs the question, if police could have conducted a controlled buy, would they have jumped excitedly at the opportunity to conduct a trash pull and sort through Carlos Williams' garbage?

Despite the Eighth District's disagreement that there was probable cause to believe that evidence of drug activity would be found in the Cleveland residence, the Euclid Police Department's suspicions regarding drug activity at 719 E. 162nd Street proved to be correct when they arrived with a warrant, and Williams jumped off a second floor porch, throwing a duffle bag from the porch into a neighbor's yard. Drugs were found in both the duffle bag and within the 719 E. 162nd Street home. *Id.* at ¶8-10.

The Eighth District in reaching its opinion in this case and relied upon *Weimer* and *Williams*. Likewise the trial court relied on *Weimer* for the propositions that the trash pull must be viewed in isolation and the police must take further action. While each case contain their own sets up facts, the precedential value of *Jones*, *Williams*, and *Weimer* make it necessary to address this case on its merit as it affects the issuance and analysis of search warrants for anyone seeking search warrants in Cuyahoga County, including those officers from outside jurisdictions.

II. A CONFLICT OF LAW EXISTS AMONG OHIO'S APPELLATE DISTRICT WITH RESPECT TO THE APPLICATION OF THE "TOTALITY OF THE CIRCUMSTANCE" TEST.

Appellee argues that no conflict exists among the appellate district and distinguishes a limited number of cases.¹ Appellee does not discuss how the Eighth District is not in conflict with the Twelfth District opinions in *State v. Quinn*, 12th Dist. Butler No. CA2011-06-116, 2012-Ohio-3123 and *State v. Akers*, 12th Dist. Butler No. CA2007-07-163, 2008-Ohio-4164. The impact of *Jones*, *Williams*, and *Weimer* make it questionable whether the Eighth District if faced with the facts in *Quinn* and *Aker*, would have reached the same conclusion. Other cases, including ones in Ohio, conclude a "single trash pull" may provide sufficient probable cause for issuance of a warrant, without necessity of a controlled purchase, surveillance, or confirmation as to whether any specific person resides where the warrant is executed.

In *State v. McGorty*, 5th Dist. Stark No. 2007CA00257, 2008-Ohio-2643, the Fifth District upheld the issuance of a search warrant where numerous informants' statements were corroborated when marijuana residue (stems) were found in McGorty's trash. *McGorty*, ¶16.

In *State v. Kidd*, 11th Dist. Lake No. 2006-L-193, 2007-Ohio-4113, Fairport Harbor police were aware of drug activity in the defendant's apartment and police received a tip from an informant of drug activity. A trash pull was conducted revealing evidence of drug activity and the four corners of the affidavit explained the discovery of certain items used in drug trafficking as well as the informant's information. The Eleventh District noted, "[f]or

¹ The Eighth District also declined to find that a *certified conflict* exists in this case.

the sake of argument, even if [the affiant] did intentionally misrepresent the informant's statement [...] the search warrant would remain valid. The trash pull from Kidd's apartment established sufficient probable cause of both drug use and trafficking...." *Kidd*, ¶49.

In consideration of other appellate decisions throughout Ohio on the issue of trash pulls, it is clear that there is a disconnect between the Eighth District decisions and other decisions in Ohio.

III. PROBABLE CAUSE EXISTED IN THIS CASE.

Probable cause only requires a fair probability of criminal activity, not a showing by a preponderance of the evidence or beyond a reasonable doubt. *George*, 45 Ohio St.3d at 329. Probable cause does not require a prima facie showing of criminal activity. *Gates*, 462 U.S. at 235. "[T]he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (internal quotations and citations omitted).

"[T]he central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception." *Gates*, 426 U.S. at 231. Affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same - and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Gates, 462 U.S. at 231-32 (quoting another case).

“[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules.” *Id.* at 232. “Rigid legal rules are ill-suited to an area of such diversity.” *Id.* at 232. A search warrant affidavit is not to be analyzed under a “complex superstructure of evidentiary and analytical rules.” *Id.* at 235. Probable cause does not and should not require police to have definitive knowledge regarding contraband in a specific place.

Although Appellee and its amicus urges this Court not to adopt a bright line rule regarding the viability of “single trash pulls”, it is worth noting that courts have indeed upheld search warrants based on the contents of trash pulls standing alone. *Humes v. City of Blue Ash*, S.D. Ohio No. 1:12-CV-960, 2013 WL 2318538 (May 28, 2013) at *4 citing *United States v. Lawrence*, 308 F.3d 623, 626 (6th Cir. 2002); see also *United States v. Patton*, No. 09-5887, 2011 WL 13911, at *2 (6th Cir. Jan. 4, 2011) and *United States v. Briscoe*, 317 F.3d 906, 908-09 (8th Cir. 2003). As one federal district court went on to note:

These decisions, and those like them, have led district courts to conclude that, ‘[e]vidence from a trash pull, standing alone, can provide sufficient probable cause for issuance of a search warrant.’

Humes, at *5 citing *United States v. Lemons*, No. 4:11-CR-002, 2011 WL 5979401, at *2 (W.D.Ky. Nov. 29, 2011);

Courts have upheld warrants where the alleged criminal offense is possession of drugs (as opposed to trafficking). See *United States v. Thurmond*, N.D. Iowa No. 13-CR-80-LRR, 2013 WL 6729660 (upholding search warrant after a trash pull where officers discovered suspected marijuana roaches with green plant material, blunt material and paper, baggie knots, cigarillo wrappers and a mail document addressed to defendant) and *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) (holding drugs or drug paraphernalia are 'sufficient *standalone* evidence to establish probable cause').

The crux of Appellee's and its amicus argument that probable cause lacked focuses on three general points: (1) that certain information standing alone is insufficient or is capable of innocent explanation; (2) a lack of proof that Lauren Jones resided at the home on Rowley Avenue; and (3) what police could have done. This much is evident in its reliance on the trial courts written opinion that indicated:

There was no evidence that Chappelle was ever seen at the 1116 Rowley address, that controlled buys were made, that any sustained surveillance resulted in any unusual activity associated with a drug house, that the house was in a high drug crime area or that numerous people were entering and leaving the house for short periods.

In the end, additional investigation including, multiple trash pulls over a period of time; surveillance, the details of which are set forth in the affidavit that gives facts of usage, trafficking and other circumstances giving rise of drug activity, controlled buys, observations of CRI from inside the house, etc., **was necessary for probable cause to be established – one trash pull is not necessarily sufficient...**

Opinion of the Court of Common Pleas.

As the Ohio Attorney General argued in its amicus brief there should be no requirement that Lauren Jones be tied to the home on Rowley Avenue for issuance of a warrant. A search warrant designates a "place" to be searched and the "things to be seized". "The critical element in a reasonable search is not that the owner of the property

is suspected of crime but there is reasonable cause to believe that specific “things” to be searched for and seized are located on the property to which entry is sought.” *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). Therefore, any notion that police had to confirm that Lauren Jones resided at 1116 Rowley Avenue when the warrant was executed in March 2012, beyond the fact that she was a reported victim of a burglary at the same house in December 2011, to establish probable cause for issuance of a warrant is unfounded.

As the State argued in its merit brief, probable cause must look at every piece of the puzzle to determine whether the place to be searched contains evidence of a criminal offense. In determining probable cause, one should not focus solely on any one piece of the puzzle because that one piece of the puzzle does not illuminate the entire picture. Furthermore, in assessing probable cause, “[t]he affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.” *United States v. Thomas*, 605 F.3d 300, 309 (6th Cir. 2010) citing *United States v. Allen*, 211 F.3d 970 (6th Cir. 2000). In *Thomas* the Sixth Circuit described a “line-by-line scrutiny” as not applying a totality review of the affidavit. *Id.* “When scrutinizing each line of an affidavit, one could always find some question left unanswered or some issue unresolved.” *Id.* By scrutinizing each line of the affidavit, appellee amicus does exactly what the court in *Thomas* determined was not a totality of the circumstances analysis. Some criticisms such as questions as to who put out the trash and inferring that someone else could have planted the methamphetamine evidence in Lauren Jones’ trash, yet fails to account for the mail in Jones’ name inside the trash. If Appellee and its amicus arguments are accepted, then analysis of a search warrant would become a matter of

conjuring hypothetical scenarios to provide innocent explanations for every single piece of incriminating evidence. Further criticisms of the affidavit such as a lack of information of how many residences are on Rowley Avenue chips away at the notion that a warrant must be viewed under the lens of a non-lawyer police officers (rather than the lens of how a lawyer could attack the affidavit). See *Ventresca*, 380 U.S. 102, 108.

Finally, as noted above, asking what could have been done, is not the appropriate analysis to determine probable cause. In arguing that controlled purchases and surveillance are not required for issuance of a search warrant where a trash pull is involved, is to not say that it is not encouraged. Such evidence would tip the scale from probable cause towards proof beyond a reasonable doubt. At the same instance, it needs to be kept in mind that if Cleveland Police were able to make a controlled buy from Lauren Jones, then a trash pull may have been unnecessary. Imposing controlled buy or surveillance requirements would permit criminals to evade police efforts. Criminals could simply reside in locations other than where they store their drugs, and can sell in locations other than their residences.

When considering what has constituted probable cause for issuance of a search warrant in other cases involving a trash pull, the State would argue that when reviewing all of the evidence, there was probable cause for issuance of a warrant. Here police knew through tips that Jennifer Chappell was selling methamphetamine. They also knew through tips that "Lauren" was selling methamphetamine. They knew through a tip that Jennifer was cooking methamphetamine on Rowley Avenue. Lauren Jones was a victim of a burglary at 1116 Rowley Avenue in December 2011 and she was observed in the Cuyahoga County Justice Center with Jennifer Chappell. Police found coupled with the

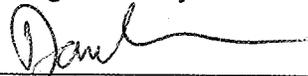
a piece of mail with her name was in the garbage from 1116 Rowley Avenue with evidence of methamphetamine production. Whether Lauren Jones lived at 1116 Rowley Avenue is beside the point. During the course of the investigation, pieces of information led police to pull the trash from 1116 Rowley Avenue. Police found evidence of methamphetamine production in the trash and mail in the trash provided a nexus to 1116 Rowley Avenue. Police knew they were sitting on a ticking time bomb and acted appropriately in securing a search warrant at that time.

CONCLUSION

The State urges this Court to address this case on its merits as to the question of whether probable cause existed for issuance of a search warrant and to invalidate any bright line rule established by the Eighth District. Probable cause existed for issuance of a search warrant in this case. The State would ask this Court to reverse the decision of the Eighth District and to reverse the trial court's suppression of the evidence in this case and to remand this matter for prosecution.

Respectfully Submitted,

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Cuyahoga County Prosecutor

By: 

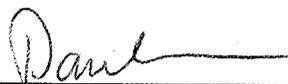
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CERTIFICATE OF SERVICE

A copy of the State's Merit Brief has been sent this 15th day of August, 2014 via U.S. Mail to counsel for Appellee-Lauren Jones: Reuben Sheperd (#0065615), 11510 Buckeye Road, Cleveland, Ohio 44104 and via electronic service to reubensheperd@hotmail.com and to Eric E. Murphy (#0083284), eric.murphy@ohioattorneygeneral.gov and to John T. Martin, 310 Lakeside Avenue, Cleveland, Ohio 44113



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