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Constitutional Law: Warrantless Search and Seizure of Trash Placed Outside the Home for Collection Permitted (California v. Greenwood, 486 U.S. 35 (1988))

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CASE COMMENTS

CONSTITUTIONAL LAW: WARRANTLESS SEARCH AND SEIZURE OF TRASH PLACED OUTSIDE THE HOME FOR COLLECTION PERMITTED

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

Petitioner relied upon evidence obtained during a warranted search of respondent's home to charge respondent with a felony narcotics offense.¹ The Laguna Beach Police Department obtained the warrant based on information discovered in a search of respondent's trash.² The police recovered respondent's trash from the neighborhood trash collector, who had removed it from the street in front of respondent's home.³ The trial court dismissed the charges.⁴ The court of appeal affirmed.⁵ Petitioner appealed to the California Supreme Court, which refused to grant review.⁶ The United States Supreme Court granted certiorari, and HELD, the fourth amendment permits warrantless searches and seizures of trash placed outside the home for collection.⁷

The United States Constitution affords protection from unreasonable searches and seizures.⁸ Historically, courts have defined a fourth amendment violation as "physical penetration" of a "constitutionally protected area."⁹ In *Katz v. United States*,¹⁰ the Supreme Court estab-

1. 486 U.S. 35 (1988).

2. *Id.*

3. *Id.*

4. *Id.*

5. 182 Cal. App. 3d 729, 227 Cal. Rptr. 539 (1986).

6. 486 U.S. at 35.

7. *Id.*

8. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

9. *Katz v. United States*, 389 U.S. 347, 353 (1967). Physical penetration was thought to violate fourth amendment rights because these rights were premised upon an invasion of property interests. *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 457, 464, 466 (1927); *Goldman*

lished a two-pronged test for fourth amendment claims.¹¹ First, a person must have an actual expectation of privacy, based on a subjective standard.¹² Second, society must recognize the expectation as reasonable.¹³

The Supreme Court has repeatedly followed the *Katz* analysis for fourth amendment claims.¹⁴ Yet, lower courts inconsistently apply the *Katz* test to unwarranted search and seizure of trash. Theories applied by the courts include the abandonment theory, the curtilage theory, the plain view doctrine, and the consent exception.¹⁵ In examining warrantless trash searches, federal courts apply *Katz's* two-pronged test.¹⁶ However, federal courts generally rely on an abandonment

v. United States, 316 U.S. 129, 134-36 (1941)). However, "the premise that property interests control the right of the government to search and seize has been discredited." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1966).

10. 389 U.S. at 350. *Katz* refuted the notion that certain physical areas are constitutionally protected and that unauthorized governmental intrusion into these areas constitutes a fourth amendment violation. *Id.*

11. *Id.* at 347.

12. *Id.* at 361.

13. *Id.*

14. See *O'Connor v. Ortega*, 480 U.S. 709 (1987) (public employee has reasonable expectation of privacy in his office); *California v. Ciraolo*, 476 U.S. 207 (1986) (reasonable expectation of privacy found in fenced-in backyard); *Oliver v. United States*, 466 U.S. 170 (1984) (reasonable expectation of privacy in fenced-in field with "no trespassing" sign); *Smith v. Maryland*, 442 U.S. 735 (1979) (reasonable expectation of privacy in home telephone).

15. For a discussion of these theories, see *infra* note 16.

16. *Bush & Bly, Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after Katz v. United States*, 23 ARIZ. L. REV. 283, 289 (1981).

The treatment of trash cases by the federal courts has been grouped into several categories of analysis: the abandonment theory, the curtilage theory, the plain view of doctrine, the consent exception, and explicit applications of *Katz*.

Curtilage theory distinguishes between trash placed for collection within the "curtilage of the home" and trash placed beyond the curtilage, in the "open fields." The Supreme Court first recognized this distinction in *Hester v. United States*, 265 U.S. 57, 59 (1924). The theory states that by placing trash outside the curtilage of the home, the homeowner relinquishes any expectation of privacy in the trash. See, e.g., *Bush & Bly, supra* at 289. The curtilage open fields distinctions are subject to strong criticism under a *Katz* analysis since "the Fourth Amendment protects people, not places." 389 U.S. at 351.

The plain view doctrine holds that trash placed in public for disposal is not subject to fourth amendment protection. *Bush & Bly, supra* at 306. This doctrine is consistent with the *Katz* holding that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351.

The consent exception is based upon the notion that people can knowingly and voluntarily waive their fourth amendment rights. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The theory states that once trash is put out for collection, the owner effectively waives fourth amendment protection and impliedly consents to a warrantless search and seizure of the trash. See *Bush & Bly, supra* at 305 n.174 (citing the following

theory to renounce defendants' reasonable expectations of privacy in the trash.¹⁷ Under the abandonment theory, placing trash out for collection signifies an end to owner expectation of privacy in the trash.¹⁸

The California Supreme Court conducted the most frequently cited pure *Katz* analysis of a warrantless trash search in *People v. Krivda*.¹⁹ The *Krivda* defendant placed her trash next to the street for pickup.²⁰ Police searched the trash and used evidence obtained from the search as probable cause for entering the defendant's home.²¹ Evidence obtained during the unwarranted search of defendant's house provided grounds for her arrest.²²

Local ordinances played a large role in the *Krivda* court's analysis. The ordinances restricted the manner in which the defendant could dispose of her trash. One ordinance required the defendant to place her trash at the curb in front of her home for collection.²³ Another ordinance prevented the removal of trash by anyone other than an authorized collector.²⁴

The California Supreme Court found that these ordinances contradicted the notion that the defendant abandoned her trash by placing it at the curb for collection.²⁵ Since the ordinances limited the number of persons who could legally retrieve the defendant's trash, the court found that the defendant retained a reasonable expectation of privacy in her trash.²⁶ Accordingly, the court held that the warrantless search

cases as using the consent theory: *Crocker v. State*, 477 P.2d 122, 125 (Wyo. 1970); *State v. Purvis*, 249 Or. 404, 410, 438 P.2d 1002, 1005 (1968), *habeas corpus hearing ordered sub nom.*, *Purvis v. Wiseman*, 298 F. Supp. 761, 768 (D. Or. 1969)).

17. Cases relying on the abandonment theory to validate warrantless trash searches are: *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); *United States v. Terry*, 702 F.2d 299 (2d Cir.), *cert. denied sub. nom.* *Williams v. United States*, 461 U.S. 931 (1983); *United States v. Reicherter*, 647 F.2d 397 (3d Cir. 1981); *United States v. Vahalik*, 606 F.2d 99 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); *United States v. Crowell*, 586 F.2d 1020 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *United States v. Shelby*, 573 F.2d 971 (7th Cir. 1978); *Magda v. Benson*, 536 F.2d 111 (6th Cir. 1976).

18. *Bush & Bly*, *supra* note 16, at 300 (referring to Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399, 400 (1970)).

19. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated* 409 U.S. 33 (1972), *aff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1972), *cert. denied*, 412 U.S. 919 (1973).

20. 5 Cal. 3d at 361, 486 P.2d at 1263, 96 Cal. Rptr. at 63.

21. *Id.* at 361, 486 P.2d at 1263-64, 96 Cal. Rptr. at 64.

22. *Id.* at 361, 486 P.2d at 1264, 96 Cal. Rptr. at 64.

23. *Id.* at 366 n.7, 486 P.2d at 1268 n.7, 96 Cal. Rptr. at 68 n.7.

24. *Id.* at 366, 486 P.2d at 1268, 96 Cal. Rptr. at 68.

25. *Id.*

26. *Id.*

and seizure of defendant's trash violated the defendant's rights under the fourth amendment and the California Constitution.²⁷

The United States Supreme Court also applied the two-pronged test in the instant case.²⁸ The instant Court, however, ignored the *Krivda* reasoning and refused to declare warrantless trash searches unconstitutional.²⁹ The Court reasoned that constitutional protection only attached to the warrantless search and seizure of respondent's trash if both prongs of the *Katz* test were satisfied.³⁰ The Court held that respondent must actually maintain an expectation of privacy in the trash placed out for collection.³¹ Further, the Court did not find respondent's expectation of privacy in the garbage reasonable.³²

The Court weighed several factors to determine that respondent's expectation of privacy in his trash was not reasonable.³³ The Court reasoned that "animals, children, scavengers, snoops, and other members of the public" commonly retrieve trash left on a street for collection.³⁴ The Court also observed that when homeowners place their trash on the street for collection, they expressly intend that a third party, the trash collector, remove the trash.³⁵ These factors support the Court's conclusion that respondent could not reasonably maintain an expectation of privacy in his trash.

Consequently, the Court held that trash placed in a public area is not subject to fourth amendment protection under *Katz*.³⁶ Moreover, the Court stated that the police are not required to ignore evidence observable by the general public.³⁷ Thus, the Court supported its decision by reasoning that trash placed out for collection constitutes evidence observable by the general public. Finally, the Court noted concurring opinions in both federal and state courts upholding warrantless trash searches under the abandonment theory.³⁸ In light of these

27. *Id.* at 5 Cal. 3d 367, 486 P.2d at 1269, 96 Cal. Rptr. at 69.

28. 486 U.S. at 39.

29. *Id.* at 37.

30. *Id.* at 39.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 40.

35. *Id.*

36. *Id.*

37. *Id.* at 41.

38. *Id.* at 41-43. The Court cited *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986) (defendant abandoned garbage on curb for collection, therefore warrantless search does not violate fourth amendment); *United States v. O'Bryant*, 775 F.2d 1528, 1532-34 (11th Cir. 1985) (defendant has no reasonable expectation of privacy in stolen briefcase found next to

factors, the Supreme Court refused to declare warrantless trash searches unconstitutional.³⁹

Justice Brennan, joined by Justice Marshall, dissented.⁴⁰ The dissent maintained that warrantless trash searches fall within the plain view doctrine, under which the fourth amendment protects the contents of closed packages, regardless of their location.⁴¹ The dissent reasoned that respondent's disposal of his trash in opaque, sealed bags mandated a holding that respondent maintained a reasonable expectation of privacy in his trash.⁴² The dissent noted that the fourth amendment protects many different types of containers⁴³ and reasoned that opaque, sealed trash bags likewise should be afforded constitutional protection.⁴⁴ Furthermore, as in *Krivda*, the dissent reasoned that since municipal ordinances restrict lawful means of trash disposal,

dumpster); *United States v. Michaels*, 726 F.2d 1307, 1312-13 (8th Cir.) (defendant has no reasonable expectation of privacy in trash bin on apartment complex grounds), *cert. denied*, 469 U.S. 820 (1984); *United States v. Kramer*, 711 F.2d 789, 791-94 (7th Cir.) (drug sale records placed in curbside garbage by defendant admissible evidence), *cert. denied*, 464 U.S. 962 (1983); *United States v. Terry*, 702 F.2d 299, 308-09 (2d Cir.) (drug enforcement agents' six-month search of defendant's curbside garbage permissible), *cert. denied sub nom. Williams v. United States*, 461 U.S. 931 (1983); *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981) (defendant has no reasonable expectation of privacy in trash placed in public area for collection); *United States v. Vahalik*, 606 F.2d 99, 100-01 (5th Cir. 1979) (defendant has no reasonable expectation of privacy in closed garbage bags even though local ordinance prohibits tampering with bags absent special permission), *cert. denied*, 444 U.S. 1081 (1980); *United States v. Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978) (defendant has no reasonable expectation of privacy in garbage when no special arrangements were made for collection and the search occurred off of defendant's premises), *cert. denied*, 440 U.S. 959 (1979); *Magda v. Benson*, 536 F.2d 111, 112-13 (6th Cir. 1976) (per curiam) (defendant's garbage placed on street adjacent to defendant's apartment complex not within curtilage and, therefore, was abandoned); *United States v. Mustone*, 469 F.2d 970, 972-74 (1st Cir. 1972) (garbage bags placed next to garbage cans off of defendant's premises renounced defendant's expectation of privacy). *Id.*

39. *Id.* at 44.

40. *Id.* at 45.

41. *Id.* " 'Unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment.' " *Id.* at 46 (citing *Robbins v. California*, 453 U.S. 420, 427 (1981)); *see also* *United States v. Ross*, 456 U.S. 798 (1982) (police who have legitimately stopped automobile and who have probable cause to believe contraband is concealed may conduct a warrantless search of the automobile); *New York v. Belton*, 453 U.S. 454 (1981) (reasonable expectation of privacy does not attach to envelope of marijuana left on floor of car); *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (no reasonable expectation of privacy in packages of illegally imported coins sent through public mail system).

42. *Id.* at 45.

43. *See supra* note 41.

44. 486 U.S. at 54.

homeowners may reasonably expect privacy in trash placed out for collection.⁴⁵

The policy implications of the majority opinion are troubling. In upholding the constitutionality of warrantless searches of trash left out for collection, the Court narrows the fourth amendment protection of containers. The Court previously recognized reasonable expectations of privacy in footlockers,⁴⁶ suitcases,⁴⁷ totebags,⁴⁸ and even packages wrapped in opaque green plastic.⁴⁹ By analogy, if the respondent in the instant case carried personal effects in the same opaque, sealed bags in which he disposed of his trash, the fourth amendment would protect the bags from warrantless searches. Bags containing trash should be legally indistinguishable from bags containing other kinds of items. As in *Krivda*, courts should closely examine the degree of the disposer's expectation of privacy in the trash bags' contents when deciding warrantless search and seizure of trash claims.⁵⁰

The majority in the instant case held that society is not prepared to accept respondent's claim to an expectation of privacy in the trash he left out for collection as reasonable.⁵¹ This reasoning is suspect. Trash searches reveal the most intimate details of private lives.⁵² Society recognizes an expectation of privacy in personal contents of trash. A trash search may reveal information concerning financial status, social life, eating habits, political beliefs, sexual practices, and

45. *Id.* at 55. The dissent notes that if the defendant was transporting his personal effects in the same trash bags, he would be afforded fourth amendment protection over the contents of those bags. *Id.* Furthermore, the dissent asserts that distinctions should not be made between different types of containers, as long as the container in question is one which can support a reasonable expectation of privacy. See *United States v. Jacobsen*, 466 U.S. 109, 120 (1984) (wrapped cardboard box supported reasonable expectation of privacy); *United States v. Ross*, 456 U.S. 798 (1982) (sealed paper bag and zipped leather pouch afforded fourth amendment protection); *Robbins v. California*, 453 U.S. 420 (1981) (reasonable expectation of privacy in contents of closed luggage).

46. *United States v. Chadwick*, 433 U.S. 1, 11 (1977).

47. *Arkansas v. Sanders*, 442 U.S. 753, 762 n.9 (1979).

48. *Robbins v. California*, 453 U.S. 420, 422 (1981).

49. *Id.*

50. 486 P.2d at 1269.

51. 486 U.S. at 41.

52. *Id.* at 50. "[R]enowned archaeologist Emil Haury once said, 'If you want to know what is really going on in a community, look at its garbage,' quoted by W. RATHJE, *ARCHAEOLOGICAL ETHNOGRAPHY . . . BECAUSE SOMETIMES IT IS BETTER TO GIVE THAN TO RECEIVE, IN EXPLORATIONS IN ETHNOARCHAEOLOGY* 49, 54 (R. Gould ed. 1978)." *Id.*; see also Weberman, *The Art of Garbage Analysis: You Are What You Throw Away*, 76 *ESQUIRE* 113 (1971). Weberman conducted searches of various celebrities' trash and published conclusions about their private lives drawn from evidence obtained in the searches.

other personal characteristics.⁵³ As Justice Brennan noted in his dissent, "most of us . . . would be incensed to discover a meddler — whether a neighbor, a reporter, or a detective — scrutinizing our sealed trash containers to discover some detail of our personal lives."⁵⁴

Furthermore, the majority failed to consider that trash disposal is locally regulated and that local ordinances may limit the ways in which a homeowner may dispose of trash.⁵⁵ Ordinances that regulate who may collect trash or that prohibit tampering with trash by unauthorized persons may lead a homeowner to believe that only authorized collectors have legal access to trash placed out for collection. This belief may include a reasonable expectation that police will not engage in warrantless searches of trash placed out for collection.⁵⁶

The holding in the instant case broadens the scope of permissible searches and seizures and narrows trash disposers' fourth amendment rights. The police may now search trash left on the street for collection and use evidence discovered from the search to obtain search warrants, or as an independent basis for an arrest. Further, the instant Court limits the range of privacy expectations recognized by society by excluding trash placed out for collection.

In its holding, the instant Court gives local authorities large amounts of power. The Court acknowledges that local authorities may exclusively dictate the manner of trash disposal.⁵⁷ Additionally, the Court allows the same local authorities to search through trash, gaining information concerning the private life of the disposer.⁵⁸ Consequently,

53. 486 U.S. at 50.

54. *Id.* at 51 (citing *State v. Schultz*, 388 So. 2d 1326, 1331 (Fla. 4th D.C.A. 1980) (Anstead, J., dissenting)).

55. *Id.* at 52 (citing *United States v. Vahalik*, 606 F.2d 99, 100 (5th Cir. 1979)) (City of Austin Municipal Code § 28-3 prohibits anyone but authorized collectors from tampering with garbage); *Magda v. Benson*, 536 F.2d 111, 112 (6th Cir. 1976) (city ordinance prohibits unauthorized persons from rummaging through garbage of another); *United States v. Dzialak*, 441 F.2d 212, 215 (2d Cir. 1971) (town ordinance allows only authorized town employees to rummage through trash placed out for collection); *People v. Rooney*, 175 Cal. App. 3d 634, 645, 221 Cal. Rptr. 49, 56 (1985) (municipal ordinances restrict right to collect garbage), *cert. dismissed*, 483 U.S. 307 (1987); *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 1268 (1971) (municipal ordinances restrict access to deposited trash set out for collection); *State v. Brown*, 20 Ohio App. 3d 36, 38 n.3, 484 N.E.2d 215, 218 n.3 (1984) (local ordinance limits access to trash to facilitate the removal of trash).

56. *Bush & Bly*, *supra* note 16, at 308 n.201 (citing *People v. Krivda*, 5 Cal. 3d 357, 486 P.2d 1262, 1269 (1971); *accord State v. Shultz*, 388 So. 2d 1326, 1330 (Fla. 4th D.C.A. 1980) (Anstead, J., dissenting)).

57. 486 U.S. at 55.

58. *Id.* at 46.

the information discovered in the trash search may be used against the homeowner, who had no alternative means of disposing the trash.⁵⁹

The troubling policy implications of the instant case should be critically reconsidered. In upholding the constitutionality of warrantless searches of trash placed outside the home, the Court narrows the area of fourth amendment protection. The holding may also serve as precedent to narrow the definition of reasonable expectation of privacy in containers. Furthermore, searches may be conducted arbitrarily, without a warrant, and without need to establish probable cause. The instant case discards the two-pronged test mandated in *Katz* by allowing unwarranted searches of trash placed outside the home without an initial examination into the homeowner's expectation of privacy in the trash, restricting the protection that the fourth amendment affords criminal defendants.

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59. *Id.* at 35.