

ORIGINAL

IN THE SUPREME COURT OF OHIO  
Case Nos. 2013-2023

STATE OF OHIO	:	
Appellee	:	On Appeal from the
-vs-	:	Cuyahoga County Court
LAUREN JONES	:	of Appeals, Eighth
Appellant	:	Appellate District
		CA: 99538

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BRIEF OF AMICUS CURIAE  
OFFICE OF THE CUYAHOGA COUNTY PUBLIC DEFENDER  
IN SUPPORT OF APPELLEE

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## INTEREST OF AMICUSI CURIAE

The Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such this Office is the largest single source of legal representation of criminal defendants in Ohio's largest county, Cuyahoga.

### STATEMENT OF THE CASE AND FACTS

Amicus Cuyahoga County Public Defender defers to the factual statement set forth in Ms. Jones' Merit Brief of Appellee.

### ARGUMENT

*In opposition to the State of Ohio's Proposition of Law (as stated verbatim by the State):*

**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.**

#### **Fourth Amendment Concerns Attendant to Trash Pulls**

When one puts his or her trash on the curb, that trash is fair game for the world: sometimes items are taken by others ("one man's trash is another man's treasure"); sometimes items are added to it (as many a dog owner would confess); and sometimes police search it. The bottom line is that we lose control when the trash reaches the curb – control over what's removed, control over what's added, and control over who sticks their nose in our business.

The inability to monitor what's added to one's trash makes all of us susceptible to being incorrectly associated with the contents of our garbage. For example, a person who doesn't chew tobacco might be suspected of having done so because a passerby threw his wad in the open trash can. And a person who does not want his family to know of his tobacco chewing might look for a neighboring trash can to dispose of evidence of his habit.

None of these insights are particularly profound – everyone knows this. Including criminals. As a result, drug distributors, knowing their trash might be observed and inspected,

have every reason to dispose of their used contraband in ways other than through their own trash. Landfills, bodies of water, and other people's trash are a way to dispose of the evidence without incriminating the perpetrator.

The Fourth Amendment has always demanded accountability as part of the process by which the government can intrude upon our privacy. For example, an officer making a warrantless arrest must be able to present articulable facts to a judicial officer when justifying that arrest at a suppression hearing. Search warrant affiants must present facts, not simply conclusions, to justify their belief that probable cause exists for a search warrant to issue.<sup>1</sup> It is a lack of accountability that causes an anonymous tip to not even rise to the lesser level of reasonable suspicion – because the anonymous tipster can “lie with impunity.” *Florida v. J.L.* 529 U.S. 266, 270, 275 120 S . Ct. 1375, 146 L.Ed.2d 254 (2000) (Kennedy, J., concurring). Similarly, a trash can's availability to the anonymous passer-by undermines accountability.

Accordingly, it should take more than an isolated trash pull to justify obtaining a search warrant for a person's home – the trash cannot pull itself up by its own bootstraps. That the trial judge and the Eighth District Court of Appeals demanded more is consistent with Fourth Amendment jurisprudence.

#### **The Affidavit Was Insufficient**

It is axiomatic that a warrant will not issue except upon a showing of probable cause, made to a neutral and detached judicial officer. U.S. Const. Amend. IV. “The protections of personal privacy and property embodied in the amendment require that probable cause ‘be drawn by a neutral and detached magistrate instatead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime’” *United State v. Weaver*, 99 F.3d 1372, 1377 (6<sup>th</sup>

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<sup>1</sup> *See, infra*, subsection entitled “The Affidavit was Insufficient,” setting forth relevant authority.

Cir. 1998), quoting *Johnson v. United States*, 333 U.S. 10, 14 (1947). “In order for a magistrate to be able to perform his official function, the affidavit must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant.” *United States v. Smith*, 182 F.3d 473, 477 (6<sup>th</sup> Cir. 1999).

the officer must present to a neutral magistrate sufficient facts to permit the magistrate to make *his own independent* judgment that there is probable cause.

*United States v. Gaston*, 16 Fed. Appx. 375 (6<sup>th</sup> Cir. 2001) (emphasis added). While deference must be given to the issuing magistrate’s decision to issue a warrant, that deference “is not boundless.” *Weaver*, at 1376-77, quoting *United States v. Leon*, 468 U.S. 897 (1984).

Stripped of its innuendo, the search warrant application in this case did not sufficiently provide enough to elevate the trash to the level of probable cause. The search warrant applicant stated “that he has probable cause to believe and does believe that Lauren Jones and Jennifer Chappell are creating and selling methamphetamine at [1116 Rowley Avenue].” But, in fact, this is what was known:

- Within the 72 hours preceding the search warrant application, the police conducted surveillance of the residence at 1116 Rowley. The only piece of relevant information that this surveillance produced was the number of the address and the description of the home – there was no evidence of drug trafficking reported. (Affidavit, at ¶20).
- On December 4, 2011, more than 3 months prior to the search warrant application, Lauren Jones called the police to have Ilya Shipman removed from her home, the Rowley residence. The police arrived at her home and arrested Shipman, who had a coffee filter and methamphetamine on his person; Shipman has been reported by several persons in other methamphetamine cases as being a methamphetamine user.

(Affidavit at ¶¶ 12-13). **Tellingly, the affidavit makes no mention of any drug activity being observed in the home.**

- Lauren Jones is an overweight African-American woman. A confidential informant with past reliability reported to the affiant in late February or March, 2013, that, somewhere in Greater Cleveland, there was an overweight African American woman named “Lauren,” who cooks and sells methamphetamine. No further particulars were reported regarding the age of this methamphetamine producer named “Lauren.”
- Within a week of the application, Lauren Jones who lives at 1116 Rowley was in the Justice Center in downtown Cleveland (not surprisingly in light of the prior incident at her home in December where she was a crime victim). She was observed sitting next to Jennifer Chappell; the two left the Justice Center at the same time. (Affidavit, ¶ 10).
- Six persons of undetermined reliability other than to know they were arrested and charged at some time in history with the production of methamphetamine, have “given information” that a white female named Jennifer (Jen Jen) Chappell cooks methamphetamine. Two of the six persons of undetermined reliability also said that Chappell has moved her operation to Rowley Avenue in Cleveland. (Affidavit, at ¶¶ 6, 9). But nowhere is the reviewing judicial officer given information upon which to determine answers to the following:
  - **When did police receive this information? For example, were these persons of undetermined reliability speaking of events that occurred prior to December 4, 2011, when police were in the residence at 1116 Rowley and observed no evidence of criminal activity?**

- How did these persons of undetermined reliability know this information, i.e., through first-hand observation, word-of-mouth, innuendo, etc.?
- There were items associated with methamphetamine manufacturing, including suspected residue, in the trash at 1116 Rowley that was pulled the day before the search warrant application was made. Despite there having been police surveillance in the preceding 72 hours, no information was provided about how long the trash had been on the treelawn, who had taken the trash out, whether others had come by, etc.

While the above information may have been enough to raise police suspicion, it was not enough to establish probable cause to believe that a methamphetamine manufacturing operation was ongoing in the residence at 1116 Rowley.

The trial judge, in granting the motion to suppress, noted in his written opinion that:

there was no evidence that Chappelle was ever seen at the 1116 Rowley address, that any 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 an affidavit that gives facts of usage, trafficking and other circumstances giving rise of drug activity, controlled buys, observation of CRI from inside the house, etc., was necessary for probable cause to be established – one trash pull is not necessarily sufficient. The detectives should have taken additional steps, instead of cutting off the investigation prematurely.

Opinion of Court of Common Pleas.

### **The Trial Court and the Eighth District Applied the Correct Legal Standard**

The State's proposition of law is confusing and attempts to establish a bright-line rule where one should not be imposed. It is well-established that Fourth Amendment "probable

cause” is determined under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Contrary to the State’s argument, neither the trial court nor the Eighth District applied any other test. While the trial court stated that the trash pull must be viewed in “isolation,” it is clear that the trial court was not establishing a legal rule that would cause it to ignore the totality of the circumstances. To the contrary, the trial court reviewed all the evidence in the affidavit and simply concluded that it was not sufficient to establish probable cause. Otherwise, the trial court would not have gone on to explain what types of corroborating information would have made the application legally sufficient.

Similarly, the Eighth District’s opinion did not confine its analysis to the trash pull “in isolation.” The Eighth District looked at the surrounding circumstances, noted the paucity of other evidence, and simply concluded that the totality of the circumstances was not enough to establish probable cause. While the Eighth District noted another case that used the term “isolation,” Opinion Below at ¶15, the Eighth District did not view the trash pull in isolation and was not establishing a rule of law different from that in *Gates*. To the contrary, the Eighth District discussed evidence other than the trash pull. Opinion Below, at ¶17.

#### **The State’s Proposed Rule of Law is Incorrect**

The State would have this Court adopt a proposition of law that states:

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.

The State’s proposition departs from the totality of the circumstances test. Under the State’s proposition, as it is worded, any time a trash pull corroborates tips and background information – regardless of how old, unreliable or vague those tips and background information might be – probable cause exists. Thus, an anonymous tip that drugs are being sold at an address, coupled

with the presence of drug residue or even drug paraphernalia (including something as innocuous as the plastic baggies used by both drug traffickers and parents making sandwiches for their children's lunches), will be enough to invade the privacy of one's home. This is not a correct statement of the law. *See, Florida v. J.L.*

Despite the wording of its bright-line proposition, the State's argument seems to really be one that advocates for traditional totality-of-the-circumstances review. But this creates a problem for the State -- to the extent that the State wants this Court to adopt the *Gates* standard, the State is asking this Court to add nothing to well-established Fourth Amendment jurisprudence.

**This Case Should Be Dismissed as Improvidently Allowed**

This is a case of error correction where no error occurred. No new rule of law will be developed from this case. Neither the trial court nor the court of appeals deviated from the traditional totality of the circumstances test. And the State's proposition of law, as written, is incorrect.

Finally, the suggestion by the State Attorney General, as amicus curiae, that this Court should now consider the issue of the good faith exception when it has never been presented thus far is an invitation this Court should decline.

In light of these facts, this Court should not expend further resources on this case.

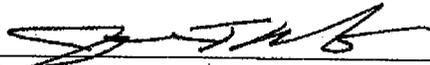
Alternatively, this Court should affirm the Eighth District without a syllabus, as there is nothing this Court can add to the well-established totality of the circumstances test.

**CONCLUSION**

For these reasons, this Court should dismiss this appeal as improvidently allowed or else affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,

OFFICE OF THE CUYAHOGA COUNTY  
PUBLIC DEFENDER, AMICUS CURIAE

  
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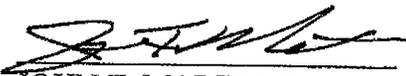
**SERVICE**

A copy of the foregoing was served via U.S. mail, first-class, postage prepaid, upon the following individuals on this 29<sup>th</sup> day of July, 2014.

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