IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. DUSTIN LEWIS, Respondent.	No. 85158
THE STATE OF NEVADA, Appellant, vs. MARGAUX ORNELAS, Respondent.	No. 85159

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from a district court order granting respondents' motion to suppress. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

Respondents Dustin Lewis and Margaux Ornelas were indicted on seven charges related to burglaries of a storage unit. While canvassing an undeveloped, private, fenced lot near the burglary site, officers observed a transient camp. An investigating officer approached a tent, identified himself, and challenged the tent. After no response, the officer unzipped the tent revealing items connected to the storage unit burglaries. Officers also discovered a wheelchair sitting out in the open nearby that appeared to be the same wheelchair seen in surveillance video being utilized by the burglary suspects. Based on these facts, officers applied for a search warrant of the tent. Thereafter, a subsequent burglary occurred at the storage unit site which led to further investigation and collection of evidence. The State charged respondents with two counts of conspiracy to commit burglary, four counts of burglary, and grand larceny after connecting them to various items of evidence, including evidence recovered

from the burglarized storage units and items seized from the tent. Lewis filed a motion to suppress, and Ornelas joined. The district court suppressed all tangible and physical evidence recovered from the tent and the surrounding area, stating the items were seized in violation of the Fourth Amendment, and also suppressed all other incriminating evidence under the fruit of the poisonous tree doctrine. The State appealed and this court vacated and remanded because the district court order lacked factual findings. *State v. Lewis*, Nos. 82750 & 82751, 2022 WL 831633 (Nev. Mar. 18, 2022) (Order Vacating and Remanding). On remand, the district court suppressed the same evidence following an evidentiary hearing. The State now appeals from that order.

Lewis and Ornelas do not have standing to challenge the search of the tent or the surrounding area

The State argues that respondents did not demonstrate standing to challenge the search of the tent or its surrounding area because the tent was unoccupied, no one was present during the search, and no evidence was presented that anyone was using the tent as a residence. Respondents argue that the State's argument on standing is waived because this is the first time the State has raised this issue.[1] Respondents contend

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[1]The United States Supreme Court has held that standing cannot be waived in Fourth Amendment challenges because it is intertwined with the proponent's reasonable expectation of privacy. *See Combs v. United States*, 408 U.S. 224, 227-28 (1972) (vacating and remanding for further factual development on standing). In *Rakas v. Illinois*, the Supreme Court recognized that because the Fourth Amendment is a personal right, standing is better recognized as "the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." 439 U.S. 128, 132-34 (1978). In essence, a person's standing to challenge the legality of a search or seizure is necessarily considered

that the district court found that the tent was their home and that the State conceded this point by presuming the tent belonged to them.

A district court's resolution of a motion to suppress evidence is a mixed question of law and fact. *State v. Beckman*, 129 Nev. 481, 485-86, 305 P.3d 912, 916 (2013). On appeal, the district court's findings of fact are reviewed for clear error, but the legal consequences of those factual findings are reviewed de novo. *Id.* at 486, 305 P.3d at 916.

The United States Supreme Court has consistently held that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Brown v. United States*, 411 U.S. 223, 230 (1973) (internal quotation marks omitted). A person has standing to challenge the legality of a search as a basis for suppressing evidence if they are the "victim" of the search or seizure. *Jones v. United States*, 362 U.S. 257, 261 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 85 (1980). A person can establish standing by "claim[ing] either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Id.* at 261. Moreover, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978) (citing *Simmons v. United States*, 390 U.S. 377, 389-90 (1968)).

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alongside their Fourth Amendment expectation of privacy. Thus, standing cannot be waived.

The district court found that the tent was respondents' home without making sufficient factual findings and the record does not support the district court's conclusion on this issue. *See State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (holding that factual findings are entitled to deference on appeal if supported by substantial evidence); *cf. United States v. Sandoval*, 200 F.3d 659, 660 (9th Cir. 2000) (concluding that a defendant "had a subjective expectation of privacy" in his tent where the tent was closed on all sides, "located in an area that was heavily covered by vegetation and virtually impenetrable," contained a prescription medicine bottle with his name on it which linked him to the tent as a place of residence). Neither respondent testified that the tent was their home, the record does not reveal any evidence that the search turned up any personal items belonging to either respondent nor any items indicative of someone's home, and neither respondent provided evidence that the tent was being used as their home. Officer Sharp testified that no one was present for the search, and the police report does not identify any items in the tent as belonging to respondents. The district court appears to have incorrectly relied on counsel discussing the tent as Lewis and Ornelas's home as conclusive evidence of such a fact. *See Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993) ("Arguments of counsel are not evidence and do not establish the facts of the case."). The district court then authored the conclusory sentence that respondents "absolutely had an expectation of privacy in the home they maintained during this case, the tent." The record below is devoid of any evidence supporting respondents' standing. Thus, we conclude that the district court's order is not supported by substantial evidence.

Lewis and Ornelas did not have a subjective or objective expectation of privacy in the tent and surrounding area

We next address whether respondents, regardless of their standing, are protected by the Fourth Amendment. *See Byrd v. United States*, ___ U.S. ___, ___, 138 S. Ct. 1518, 1530 (2018) ("Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim."). The Fourth Amendment analysis is a two-part inquiry. *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring). First, the individual must have a subjective expectation of privacy in the challenged search. *Id.* Second, society must be willing to recognize that expectation of privacy as reasonable. *Id.*

Lewis and Ornelas did not show their subjective expectation of privacy

The State contends Lewis and Ornelas do not have a subjective expectation of privacy in the tent and the surrounding area of the tent, specifically the wheelchair, because it was in an area readily visible by the public and easily accessible. Moreover, the State contends that any belief that they were permitted to stay on the property was irrational because it was a privately owned lot within a fenced area with "No Trespassing" signs posted. Lewis and Ornelas argue that they had an expectation of privacy in the tent because it was their home, zipped up, and hidden down a trail path.

The proponent of a motion to suppress bears the burden to show their subjective intent and desire to maintain "privacy in the object of the challenged search." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). In *Ciraolo*, the Supreme Court held that by putting up a 10-foot fence to conceal street-level views of his marijuana crop, the defendant had taken "normal precautions to maintain his privacy." *Id.* (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980)). In *Rawlings*, the Supreme Court held

that the defendant did not have a subjective expectation of privacy even by admission of his own testimony. 448 U.S. at 104-05. The defendant in *Rawlings* testified at the suppression hearing that he had no subjective expectation that the searched purse "would remain free from governmental intrusion." *Id.* at 105.

The only evidence suggesting *someone* had a subjective expectation of privacy is that the tent was zipped because the act of zipping up the tent suggests that someone wanted to keep the contents private. However, since neither Lewis nor Ornelas provided any evidence of *their* subjective expectation of privacy, we agree with the State that they failed to meet their burden of proof. The record below is devoid of any evidence suggesting that the tent was respondents' residence, nor that respondents had any sort of ownership of the tent, let alone the open surrounding area. While it is true that the tent was zipped up and the contents inside were not visible, neither Lewis nor Ornelas testified to their belief and nothing in the tent suggests that they were using it as their home. Contrary to the district court's conclusory findings, the police report shows that the tent was on a desert lot visible to the officers walking along the bicycle/jogging path without any attempt to conceal the tent. Thus, neither Lewis nor Ornelas showed that they had a subjective expectation of privacy in the tent.

Likewise, as the State points out, the wheelchair was located in a commercial area in an open desert near other businesses and outside of the tent. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring) (explaining that objects a person "exposes to the plain view of outsiders are not protected because no intention to keep them to himself has been exhibited" (internal quotation marks omitted)). There is no argument that Lewis or Ornelas attempted to conceal the wheelchair or maintain it within the curtilage of

the tent as their home. *See Oliver v. United States*, 466 U.S. 170, 178-80 (1984) (distinguishing "open fields" from "curtilage" and concluding "that no expectation of privacy legitimately attaches to open fields"). Instead, the wheelchair was seen from outside the fence, outside the tent, in plain view from the street. *See Ciraolo*, 476 U.S. at 212 (discussing the government's ability to view "activity from any vantage point" being "motivated by a law enforcement purpose" versus "a casual, accidental observation"); *see also Dow Chem. Co. v. United States*, 476 U.S. 227, 237-38 (1986) (explaining "that the Government has 'greater latitude to conduct warrantless inspections of commercial property' because 'the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home'" (quoting *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981))). Thus, there is no evidence on the record to support the district court's finding that respondents had a subjective expectation of privacy in both the tent and the surrounding area where the wheelchair was found.

Lewis and Ornelas do not have an objectively reasonable expectation of privacy

The State argues that even if Lewis and Ornelas did have a subjective expectation of privacy, that expectation is not objectively reasonable because there is no reasonable expectation of privacy where the individual is not legally permitted to be on the premises. The State points out that the lot was privately owned property, and it was surrounded by a chain link fence with "No Trespassing" signs posted by the owner in the month preceding the first burglary. Lewis and Ornelas argue that they were not trespassing because Officer Sharp did not see a "No Trespassing" sign, so objectively no one would know they were trespassing. Respondents contend that they maintained a reasonable expectation of privacy under

Rakas even if they were engaging in criminal activity. They argue that because the tent is their home, they have a recognizable privacy interest. Lewis and Ornelas argue that a trespasser's right to privacy is objectively reasonable because otherwise it would deny Fourth Amendment rights to all homeless people. Lewis and Ornelas contend that the purpose of the district court's broad suppression order is to sanction the State for the bad faith conduct of its officers.

The Supreme Court has held in multiple cases that a person wrongfully on a premise cannot move to suppress evidence because society is not prepared to recognize a legitimate expectation of privacy in such a situation. *See Jones*, 362 U.S. at 267 (providing that persons, "by virtue of their wrongful presence, cannot invoke the privacy of the premises searched"); *Rakas*, 439 U.S. at 141-43. In *Rakas*, the Supreme Court recognized that the phrase "legitimately on premises" as stated in *Jones*, was too broad and vague, and clarified that *Jones* "merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home." 439 U.S. at 142-43 (internal quotation marks omitted). The Court, however, emphasized that wrongful presence is still wrongful and does "not enable a defendant to object to the legality of the search." *Id.* at 141 n.9. The Court also suggested that persons present in stolen automobiles do not have a reasonable expectation of privacy. *Id.* ("Despite this clear statement in *Jones*, several lower courts inexplicably have held that a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile."). This court has also found that a trespasser does not have a reasonable expectation of privacy in the property they trespass on. *See State v. McNichols*, 106 Nev. 651, 652, 799 P.2d 550, 551 (1990) (concluding

that a trespassing former homeowner lost his reasonable expectation of privacy in his property when it was foreclosed upon and he was evicted).

We agree that Lewis and Ornelas did not have an objectively reasonable expectation of privacy. Lewis and Ornelas were trespassers and their expectation, if any, would not be one that society is prepared to recognize. The lawful owner testified to his ownership of the lot and the actions he took to both fence off the lot and remove homeless camps that had been there. The majority of the fence was still up when officers found the tent, despite a portion of it having been broken down.[2] This alone is enough evidence to show that Lewis and Ornelas had a wrongful presence on the lot and any expectation of privacy they had was unreasonable. *See Rakas*, 439 U.S. at 141 n.9.

The district court attempts to rely on various cases that hold that searches of tents require a warrant. *See Alward v. State*, 112 Nev. 141, 912 P.2d 243 (1996), *overruled on other grounds by Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005); *see also Sandoval*, 200 F.3d 659; *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985); *People v. Schafer*, 946 P.2d 938 (Colo. 1997). However, these cases discuss situations where the defendant was on public property or where the defendant had permission to be on the premises. Moreover, the facts for those cases support that the defendant's in those cases had a belief that the tent was their home–which is not present here. Respondents fail to cite any case that suggests a person who has trespassed has an objective expectation of privacy in the area they have

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[2]Respondents, in their own argument for their subjective expectation of privacy, acknowledge that the fence surrounding the property was up. Yet respondents also argue that the fence was broken down so they did not know it was meant to keep trespassers out.

trespassed upon. Courts have consistently held that a wrongful presence means there was no reasonable expectation of privacy. *See, e.g.*, *Schafer*, 946 P.2d at 944 ("[A] person who occupies land as a trespasser, or a person who should anticipate under the circumstances that privacy cannot reasonably be expected, does not justifiably rely upon the Fourth Amendment."). Indeed, in both *Jones* and *Rakas*, the Supreme Court emphasized that *wrongful* presence defeats any Fourth Amendment expectation of privacy. *Rakas*, 439 U.S. at 141 n.9; *Jones*, 362 U.S. at 267. This is precisely what has happened here.

Respondents suggest they could not have known they were trespassing on the property and never received notice that they could not be on the lot. To begin, under the facts of this case, this claim that they were unaware they were trespassing, even if true, cannot turn their wrongful presence on the property into lawful presence. Moreover, such a claim is starkly contrasted with the evidence on the record. The lot was without question privately owned and the lot's owner testified that there was fencing put up surrounding the lot. Even if there was a portion of the fencing that was damaged, this alone does not mean the owner was inviting people to stay on the lot. Regardless of whether there were "No Trespassing" signs present, the nature of the property, being located near other commercial areas and fenced off, clearly indicates that the lot was privately owned. Moreover, a critical point the district court overlooked is that there was no evidence supporting respondents' argument that the tent was their home. Thus, while it is true that a person has a reasonable expectation of privacy in their home, including a tent used as a home, nothing on the record here suggests that this tent was respondents' home. We conclude that the district court erred in determining that there was a

reasonable expectation of privacy where the respondents were trespassing on the property.

The district court erred by applying the fruit of the poisonous tree doctrine to exclude all of the remaining evidence collected

The State argues that the district court erred by suppressing all evidence collected as fruit of the poisonous tree and its order was overly broad using the "but for" reasoning. The State contends that none of the additional evidence excluded were products of the tent search. Respondents argue that all the evidence was properly suppressed as fruit of the poisonous tree because the investigation used respondents' prints from the items in the tent to match against all the other evidence obtained, including the prints on the outside of the storage units and the Lincoln Navigator.

The exclusionary rule bars statements, verbal evidence, testimony, and "physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *Wong Sun v. United* States, 371 U.S. 471, 485 (1963). Evidence is properly barred as "fruit of the poisonous tree" where it "has been come at by exploitation of" illegal police actions. *Id.* at 487-88 (internal quotation marks omitted). The Supreme Court has since clarified that there are three exceptions to the exclusionary rule where evidence need not be excluded because there are "means sufficiently distinguishable to be purged of the primary taint" of illegal police conduct. *Id.* at 488 (internal quotation marks omitted). The first is attenuation where "the causal connection is remote." *Hudson v. Michigan*, 547 U.S. 586, 593 (2006) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)). Attenuation can occur based on the time elapsed, intervening circumstances, and "the purpose and flagrancy of the . . . misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Second is the independent source doctrine, where there is a genuinely independent source of

information which did not contribute to the issuance of a warrant or to discovery of the challenged] evidence. *Murray v. United States*, 487 U.S. 533, 542-43 (1988). Finally, the last exception to the exclusionary rule is the inevitable discovery doctrine where the government can establish that the evidence unlawfully obtained would have been inevitably discovered by lawful means. *See Nix v. Williams*, 467 U.S. 431, 440-44 (1984). Importantly, the Supreme Court has clarified that suppressing evidence "has always been our last resort, not our first impulse." *Hudson*, 547 U.S. at 591.

We conclude that the district court failed to make sufficient findings on each piece of evidence and suppression was improperly its "first impulse." *Id.* at 592 (explaining that "but-for cause . . . can be too attenuated to justify exclusion"); *see also Rincon*, 122 Nev. at 1177, 147 P.3d at 238 (finding that the record was insufficient for this court to review the district court's suppression order). The district court's order broadly excludes the following:

> "All tangible property and physical evidence recovered from the tent...and the surrounding area...the hand print of Mr. Lewis; the interviews of Mr. Lewis and Ms. Ornelas; any statements attributed to Mr. Lewis and Ms. Ornelas; all documents, statements, and any other tangible or physical evidence relating to the identity of Mr. Lewis and Ms. Ornelas; any evidence derived from the Lincoln Navigator...and any evidence derived from the Fun City Motel."

However, the district court fails to consider that both respondents' prints were in AFIS *prior* to the events of this case, the timeline of when the prints were collected, when respondents gave their statements, how respondents were identified, or whether the second burglary was an intervening event. Instead, the order only focuses on how the investigation shifted from two

misidentified individuals to the respondents because the first fingerprints processed were those obtained from the items in the tent. The district court failed to consider each piece of evidence separately and whether they would meet one of the exceptions to the exclusionary rule. As the State correctly points out, *Hudson* rejects such overly broad suppression based upon the "but-for" analysis. 547 U.S. at 592.

Turning to each individual piece of evidence, we agree with the State that the challenged evidence should not have been excluded because an exception to the exclusionary rule applies to each. First, both respondents' prints were found on the exterior of the first burglarized unit three days before Officer Sharp searched the tent. The first print evidence *obtained* (which was subsequently identified as respondents') was the print evidence from the storage unit itself. Although the police report states that investigators asked for forensic analysis to compare the prints on items in the tent to the prints found on the storage unit, it also very importantly notes that the prints from the items in the tent returned AFIS hits. Thus, both Lewis and Ornelas's prints were already in the AFIS system prior to the events of this case. Therefore, whenever the officers would have ultimately processed the storage unit prints, it would have *inevitably* been linked back to respondents, even without considering the tent item prints. The district court concluded that the only way to link the storage unit prints to the burglary was through the evidence from the tent. However, the storage unit prints were from the exterior of units that were actually burglarized and those prints matched respondents. *See Segura v. United States*, 468 U.S. 796, 805 (1984) (discussing where a separate event "is 'so attenuated as to dissipate the taint'" of the illegal police conduct (quoting

Nardone, 308 U.S. at 341)). Thus, suppression of the prints on the exterior of the burglarized unit was unwarranted.

Given that respondents would have been identified through their prints on the exterior of the storage units and additional surveillance video footage, evidence of their identity and statements to police should not have been suppressed. The district court's only provided reasoning was inadequate, as it simply discussed how the investigation switched its focus to respondents after the tent search. Even without the fingerprints recovered from the tent items, officers would have conducted analysis on the fingerprints recovered from the storage units, respondents would have been identified by those fingerprints because their prints were already in AFIS, and officers would have followed the same steps to arrest them. We also conclude that evidence from the Fun City Motel and Lewis's statement had independent sources and would have inevitably been discovered. Thus, the district court incorrectly suppressed identity evidence, evidence from the Fun City Motel, and Lewis's statement.

Lastly, evidence from the Lincoln Navigator would also fall under the attenuation exception to the exclusionary rule. In addition to the first burglary, a completely separate burglary happened. *See Brown*, 422 U.S. at 603-04. Even though officers were on the desert lot, they only returned because Officer Sharp lost his phone and went back to look for it later that night. Officers just happened to be on the lot when they heard the alarm from the second burglary. Moreover, officers would have been called to respond to the new burglary. The second burglary was an intervening event where officers searched and seized the Lincoln Navigator and the evidence obtained was sufficiently distinguishable from any perceived taint from the search of the tent. Therefore, we conclude that the

district court erred by granting respondents' motion to suppress in its entirety.

Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Herndon

_____, J.
Lee

_____, J.
Parraguirre

cc: Hon. Erika D. Ballou, District Judge
Attorney General/Carson City
Clark County District Attorney
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Eighth District Court Clerk