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**Federal Bureau of Investigation
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Washington, D.C. 20535**

William H. Webster, Director

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Katz in the Trash Barrel

Seizure of Abandoned Personal Property

(Conclusion)

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Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Part I of this article examined Federal court decisions dealing with trash seizures. The conclusion will consider the approach of State courts to this constitutional problem.

State Cases

With the exception of a celebrated California decision to be discussed below, State courts generally follow the Federal pattern. Of course, the peculiar facts of the case will affect the conclusion. And while the reasoning of State courts may vary, the result is the same. Trash and garbage placed out for collection, in an area accessible to the public or in a refuse container used in common, are not cloaked with fourth amendment protection. No privacy interest remains in the discarded property. Two State decisions are illustrative.

In a 1976 Illinois case, a police officer observed a person suspected of five residential burglaries place two

plastic bags containing trash at curbside in front of his residence. While the bags were awaiting pickup by the trash collector, the officer seized them without warrant. They were brought to the police station for examination. Two prescription bottles bearing the name of a burglary victim, together with other damaging evidence, were found.

Based in part on the evidence disclosed from the trash seizure, the officer obtained and executed a search warrant against the defendant's residence, which yielded additional incriminating evidence. The defendant's motion to suppress the trash and fruits of the warrant search was denied and he was convicted. On appeal, he argued that the warrantless seizure of his trash violated his fourth amendment right.

An Illinois appellate court held that the defendant had abandoned his property, and thereby relinquished any reasonable expectation of privacy in it. Having done so, he had no standing to object to its seizure and later use at trial. *People v. Huddleston*, 347 N.E. 2d 76 (Ill. App. 1976). The court declared:

"When defendant placed the trash at curbside for collection, he relinquished control and possession and abandoned it in the sense that he demonstrated an unequivocal intention to part with it forever." Under these

circumstances, defendant must be held to have assumed the risk that the rubbish collector may permit the police to examine the trash . . . or that the police themselves may seize the trash. . . ." Id. at 81.

In *Smith v. State*, 510 P. 2d 793 (Alas. 1973), cert. denied 414 U.S. 1086 (1973), the Alaska Supreme Court considered a case in which trash was seized by State troopers from a dumpster located outside an apartment building and jointly used by the tenants. The dumpster was situated adjacent to a corner of the building and was sheltered slightly by a roof overhang. Municipal refuse collections were made from the dumpster.

The defendant, suspected of involvement in "narcotics activities," was observed placing garbage bags in the dumpster. Before collection, a trooper seized the bags, which contained evidence of narcotics violations. Based upon these discoveries, a search warrant for the defendant's apartment was issued. The apartment search uncovered additional evidence. Following conviction for unlawful possession of heroin, the defendant appealed, claiming the trash seizure was unlawful and the evidence obtained in

the subsequent apartment search therefore was tainted. The claim was rejected.

The Alaska Supreme Court, while carefully noting that its decision was limited to the facts of the case, held that the protection of the fourth amendment does not extend to abandoned property, and that property is abandoned when the possessor gives up a reasonable expectation of privacy therein. Whether or not the privacy expectation has been forsaken depends on four factors: (1) Where the trash is located; (2) whether the dwelling is a multiple or single unit; (3) who removed the trash; and (4) where the search of the trash takes place. The court characterized the search in *Smith* as "an on-premises search by police officers of a multiple-dwelling trash receptacle from which municipal collections were made," and concluded that the defendant, in placing the bags in the dumpster, relinquished any privacy expectation he had in their contents. See also *State v. Fassler*, 503 P. 2d 807 (Ariz. 1972); *People v. Sirhan*, 497 P. 2d 1121 (Cal. 1972), cert. denied 410 U.S. 947 (1973); *People v. Popely*, 345 N.E. 2d 125 (Ill. App. 1976); *State v. Purvis*, 438 P. 2d 1002 (Ore. 1968); *Willis v. State*, 518 S.W. 2d 247 (Tex. Crim. App. 1975); *Croker v. State*, 477 P. 2d 122 (Wyo. 1970).

Where the facts do not lend themselves to the usual analysis involving abandonment, privacy, and standing, State courts are quite prepared to find a trash seizure violative of the fourth amendment or a parallel provision of the State constitution.

In *Everhart v. State*, 337 A. 2d 100 (Md. 1975), for example, police were investigating narcotics violations, among which was the theft of restricted drugs from a medical center. The day following the theft, and acting on a tip from an informant, officers went to the defendant's tenant house on a Maryland farm. They drove their car to "the side of the house" where they noticed in a trash heap a bluish green plastic bag commonly used by medical

people. The officers inspected the contents of the bag, and found three separate boxes, containing controlled substances, addressed to different physicians. In addition, syringes and needles were found. The evidence thus discovered was used to establish probable cause for a search warrant directed against the defendant's house.

One of the questions before the Maryland Court of Appeals was whether the bag found in the trash pile next to the house was abandoned as a matter of law. The court recognized

"Criminals who dispose of contraband and other evidence of criminal offenses in their trash cans... assume the risk that their discards will be seized by, or turned over to, law enforcement officers for use against them."

that abandoned property is not afforded constitutional protection, but was not prepared to say that the defendant-possessor had given up his expectation of privacy in the plastic bag, at least under the facts disclosed in the record of the case. See also *Bolen v. State*, 544 S.W. 2d 918 (Tenn. Crim. App. 1976) (large enclosed container on defendant's private property, adjacent to private driveway, not subject to unfettered exploration of police); *Ball v. State*, 205 N.W. 2d 353 (Wis. 1973) (articles in trash barrel at rear of house, within curtilage, are not abandoned; reasonable expectation of privacy retained in such property).

The Maryland court pointed out another problem in *Everhart*, whether a trespassory entry into an area protected by the fourth amendment vitiates

the seizure of evidence found within, even that in plain view. The court, based on the record presented, was unable to decide either the abandonment or trespass issues, but seemed persuaded by the defendant's arguments. The conviction of the defendant was reversed on other procedural grounds, and the case remanded.

The California Rule

Perhaps the most restrictive rule pertaining to trash searches was adopted by the Supreme Court of California in 1971. Los Angeles officers received a report from an anonymous informant that the defendant and others were engaging in narcotics activities at a specific residence in the city. The officers located the premises, a single-family dwelling, and through records checks, identified one Judy Krivda as a resident thereof. Records also disclosed her husband had been arrested previously for narcotics violations.

The officers observed trash barrels in front of the house "on a parkway adjacent to the sidewalk." They also became aware that refuse collectors were approaching the house. The officers intercepted the collectors about a half-block from the house, and requested them to empty the well of their trash truck and to pick up the trash from the cans in front of the Krivda residence. The officers had no search warrant.

The refuse collectors did as requested. They emptied the Krivda trash into the well of the truck and permitted the police to examine it after having proceeded a block from the house. The officers found marijuana and other evidence among the trash. Thereafter, they observed an individual come out of the Krivda residence, retrieve the trash cans, and carry them to the front porch of the house.

Prior to trial for unlawful possession of marijuana, the defendant moved to suppress the narcotics as the product of an unreasonable search and seizure. The trial court granted the motion to suppress and ordered the

action dismissed. The State appealed the order. The substantive issue before the California Supreme Court was whether a householder who puts contraband in trash barrels and places such containers adjacent to the street for pickup by the rubbish collector may be deemed to have abandoned the trash and thereby given up any reasonable expectation of privacy therein.

In a 4-3 decision, the California court held that placement of the trash barrels at the sidewalk for collection did not constitute abandonment, and accordingly, *Krivda's* reasonable expectation of privacy remained in the trash. What is more, the privacy right continued until the trash lost its identity by being commingled with other refuse previously placed in the truck. The warrantless examination of the trash was unconstitutional. *People v. Krivda*, 486 P. 2d 1262, 1268 (Cal. 1971).

The State appealed to the U.S. Supreme Court. The Supreme Court, however, being unable to determine if the California decision was based on Federal or State constitutional grounds, vacated the judgment, remanded the case, and directed the California court to identify the constitutional grounds—Federal or State—for its decision. *California v. Krivda*, 409 U.S. 33 (1972). On remand, the California court held that its prior judgment was based on both the fourth amendment and the comparable section of the California constitution. *People v. Krivda*, 504 P. 2d 457 (1973). There being an independent State ground for the decision, the rule of *Krivda* became final.

Krivda comes close to banning the seizure of trash. Since it is not abandoned until mixed with the trash of others, and at that point becomes unidentifiable with the suspect, the evidentiary value of trash disappears. *Krivda* does not rule out the seizure of trash. Clearly, it may be taken with a properly issued and executed search warrant. In addition, if the possessor casts his trash "onto the sidewalk for anyone to pick over and cart away," the California Supreme Court would

have no difficulty in finding his reasonable expectation of privacy has been forsaken. *People v. Krivda*, 486 P. 2d at 1268.

The *Krivda* decision generally has not been followed in other jurisdictions. Indeed, some courts are critical of the ruling as having extended too far the reach of the fourth amendment. See, e.g., *United States v. Shelby*, 573 F. 2d 971 (7th Cir. 1978); *State v. Fassler*, *supra*.

"Warrantless entry by police or their agents to a constitutionally protected area, such as the yard or garage, in order to gain access to trash, may taint the search or seizure."

A Separate Problem—Entry

Suppose an occupant of a single-family residence is engaged in an illegal gambling enterprise. Further suppose he places betting slips, receipts, or other such evidentiary materials in his garbage can. The can is located immediately adjacent to the rear entrance of the house. The house is situated in the middle of a quarter-acre lot. The suspect has every intention of permanently discarding the gambling records.

Investigating officers enter the yard and seize, without warrant, the contents of the garbage can. When the lawfulness of this seizure is challenged, the officers claim the property was abandoned and therefore the former possessor gave up his privacy

interest. He has no standing to complain. The gambler responds by asserting a continuing privacy expectation in the contents of his garbage can. Who prevails?

Both Federal and State courts are apt to look beyond the arguments of the parties and consider as controlling a separate and distinct fourth amendment issue. The question involves the manner of gaining access to the trash. Is the officer required to invade a protected area to get at the discarded property? If this is answered affirmatively, the problem of whether the trash has been abandoned need not be decided. In short, a resident has an expectation of privacy that extends beyond the house and garbage can to the area immediately surrounding the dwelling. Traditionally, this space has been called curtilage, but the label is not significant. What is important is the concern of the courts about a warrantless intrusion to an area afforded protection under the fourth amendment.

The cases disclose that courts have little difficulty with the seizure of trash placed at the curb or sidewalk for collection. Nor do they find it hard to conclude that trash placed in a common receptacle or jointly used refuse pile has lost its constitutional protection. But the entry problem is of a different order. It is this factor that undergirded the decisions in *Everhart* and *Ball* and in the earlier California case of *People v. Edwards*, 458 P. 2d 713 (Cal. 1969) (examination of trash can located a few feet from back door of house required trespass). It is also apparent that in many of the other cases, had the seizure required a warrantless entry to a protected area, the recovery of trash and its later use as evidence would have been invalidated.

The language of *People v. Huddleston*, *supra*, best represents the judicial awareness of this problem:

"In our view, the location of the trash is a significant factor in determining whether defendant has abandoned the trash or whether defendant has a 'reasonable expectation of privacy,' because any analysis of that expectation is inextricably bound up in the physical location of the trash." 347 N.E. 2d at 80.

Conclusion

Criminals who dispose of contraband and other evidence of criminal offenses in their trash cans are unskilled practitioners. They assume the risk that their discards will be seized by, or turned over to, law enforcement officers for use against them. Such items can be used directly as evidence in a criminal prosecution, or indirectly by forming the basis for issuance of a search warrant.

The following conclusions also can be drawn from an analysis of the Federal and State trash search decisions:

1. A search warrant is the best assurance that evidence seized from a trash container will not be challenged successfully on constitutional grounds.

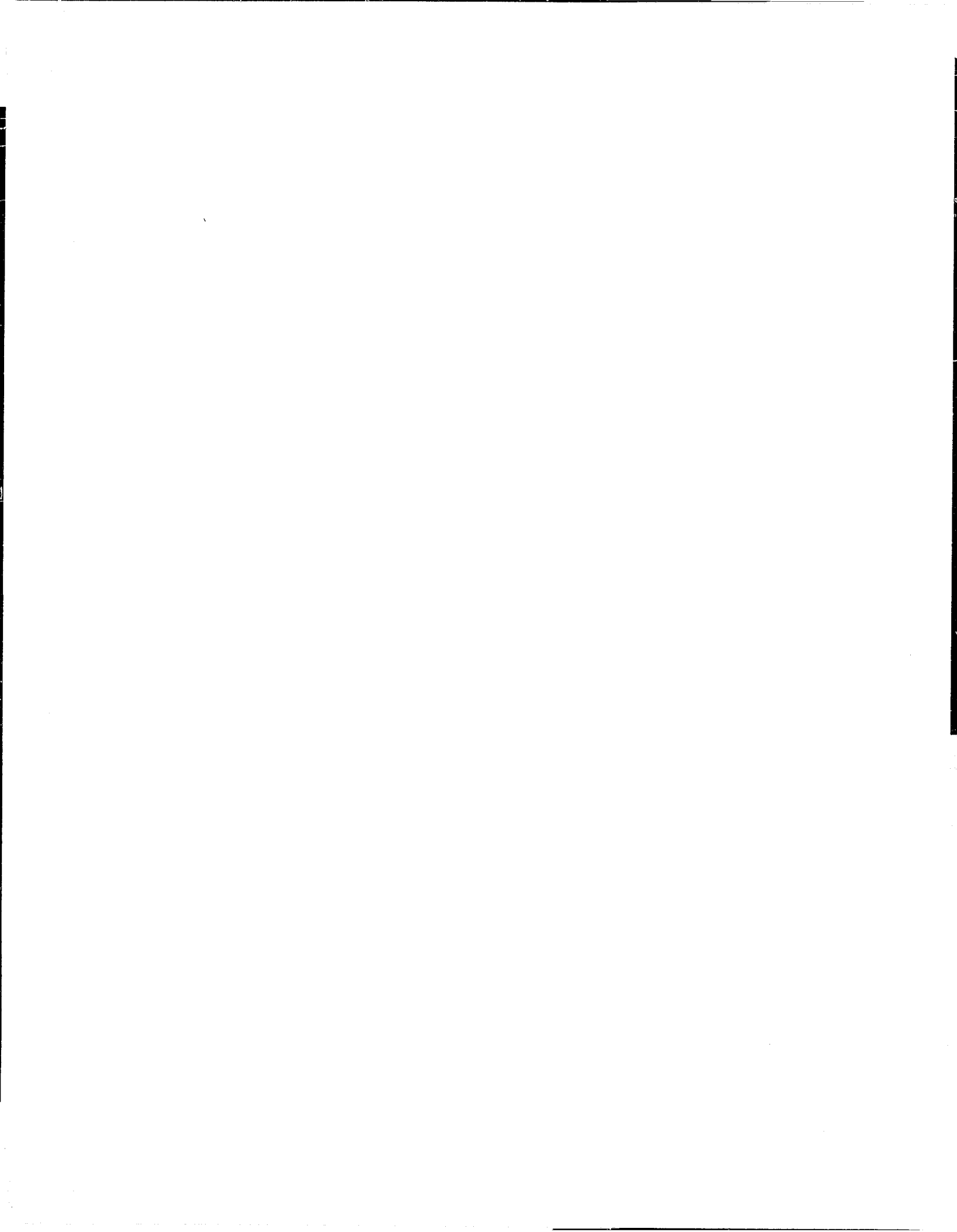
2. One who disposes of personal property in a trash receptacle placed at curbside for collection, or in a commonly used receptacle, or in a refuse pile accessible to the public, generally is held to have abandoned the property.

3. A former possessor retains no reasonable expectation of privacy in abandoned property, and thus has no standing to object to its seizure or inspection.

4. Warrantless entry by police or their agents to a constitutionally protected area, such as the yard or garage, in order to gain access to trash, may taint the search or seizure, regardless of the intent of the possessor to abandon; and

5. Officers contemplating a warrantless trash inspection should be thoroughly familiar with State as well as Federal principles governing the search or seizure of trash, since State courts may impose under State constitutions more restrictive rules than those announced by Federal courts.

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