IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

MARGAUX ORNELAS, A/K/A MARGAUX SHANNON ORNELAS,

Respondent.

CASE NO: 82751

APPELLANT'S REPLY BRIEF

Appeal From Grant of Motion to Suppress
Eighth Judicial District Court, Clark County

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar No. 007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

MICHAEL A. TROIANO, ESQ.
Nevada Bar #011300
The Law Office of Michael A. Troiano
601 South 7th Street
Las Vegas, Nevada 89101
(702) 843-5500

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE DISTRICT COURT ERRED BY NOT ISSUING FACTUAL FINDINGS IN RULING ON THE SUPPRESSION MOTION 1

II. ORNELAS DID NOT POSSESS A LEGITIMATE EXPECTATION OF PRIVACY MERELY BECAUSE THE OBJECT OF THE SEARCH WAS A TENT 4

III. ORNELAS' ARGUMENT THAT THE DISTRICT COURT WAS SANCTIONING THE STATE FOR BAD FAITH OR A DISCOVERY VIOLATION HAS NO BASIS IN LAW OR THE RECORD 9

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Page Number:

Cases

Alward v. State,
112 Nev. 141, 912 P.2d 243 (1996) 4

California. v. Greenwood,
486 U.S. 35, 40-41, 108 S.Ct. 1625, 1628-29 (1988) 8

Carroll v. State,
132 Nev. 269, 281, 371 P.3d 1023, 1032 (2016) 2

Haley v. State,
696 N.E.2d 98, 102 (Ind. Ct. App. 1998) 6

Hewitt v. State,
113 Nev. 387, 392, 936 P.2d 330, 333 (1997) 11

In re G.O.,
191 Ill.2d 37, 50, 727 N.E. 2d 1003, 1010 (2000) 3

Katz v. United States,
389 U.S. at 350, 88 S.Ct. at 511 (1967) 5

Mapp v. Ohio,
367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961) 11

Martinez v. State,
115 Nev. 9, 974 P.2d 133 (1999) 11

McNelton v. State,
115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999) 11

People v. Schafer,
946 P.2d 938, 941 (Colo. 1997) 5

Rakas v. Illinois,
439 U.S. 128, 151, 99 S. Ct. 421, 434, (1978) 8

Rosky v. State,
121 Nev. 184, 191, 111 P.3d 690, 695 (2005).....2
State v. Pulse,
83 Haw. 229, 245, 925 P.2d 797, 813, as amended (Sept. 23, 1996), amended on reconsideration in part, 83 Haw. 545, 928 P.2d 39 (1996).....6
State v. Rincon,
122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006).....2
United States v. Hernandez-Gonzalez,
608 F.2d 1240, 1246 (9th Cir. 1979).....7
United States v. Sandoval,
200 F.3d 659 (9th Cir. 2000).....7
United States v. Schram,
901 F.3d 1042, 1044 (9th Cir. 2018).....7
Ybarra v. State,
247 P.3d 269, 276, 247 P.3d 269, 276 (2011).....4
Young v. State,
109 Nev. 205, 213–14, 849 P.2d 336, 342 (1993).....8
Zimmerman v. Bishop Est.,
25 F.3d 784, 788 (9th Cir. 1994).....7

Statutes

NRS 174.295.....12

Other Authorities

Colo. Rev. State § 18—6—116(1) (1986).....6

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. MARGAUX ORNELAS, A/K/A MARGAUX SHANNON ORNELAS, Respondent.	CASE NO: 82751

APPELLANT'S REPLY BRIEF

Appeal From Grant of Motion to Suppress
Eighth Judicial District Court, Clark County

ARGUMENT

I. THE DISTRICT COURT ERRED BY NOT ISSUING FACTUAL FINDINGS IN RULING ON THE SUPPRESSION MOTION

Ornelas claims that the district court made sufficient factual findings by adopting the factual allegations contained in Lewis' Motion to Suppress. This claim is not supported by the record, nor would such a procedure be adequate even if it had occurred.

The district court never stated, either during argument or in its Order, that it was adopting by reference the recitation of the facts contained in Lewis' Motion to Suppress. The Order simply lists the evidence being suppressed, and states that the evidence was either seized in violation of the Fourth Amendment, or was fruit of the

poisonous tree. I AA 112-13. The record is simply devoid of the district court making any factual findings. Ornelas asks that this Court speculate that the district court adopted the factual statements offered by Ornelas, but this Court does not speculate as to what factual findings were made by the district court. State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) ("We decline to speculate about the factual inferences drawn by the district court.").

Furthermore, this Court has repeatedly instructed district courts to conduct suppression hearings and explicitly state factual findings on the record. The leading case of Rincon sets forth the procedures this Court mandates district court's follow in ruling on suppression motions, and throws into stark relief the errors made by the district court here. In Rincon, this Court found the district court's suppression order inadequate because it did not include express findings of fact, but merely summarized the parties' arguments and concluded that probable cause did not exist to support the challenged traffic stop. Id. at 1176-77, 147 P.3d at 237. More recently, this Court emphasized this obligation of the district court: "We again remind the district courts of their duty to enter a proper order with factual findings and legal conclusions when ruling on motions to suppress in order to facilitate appellate review." Carroll v. State, 132 Nev. 269, 281, 371 P.3d 1023, 1032 (2016). See also Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) ("'trial courts must exercise their responsibility to make factual findings when ruling on motions to

suppress'…we advise district courts to clearly set forth the factual findings relied upon in suppression motions.") (quoting *In re* G.O., 191 Ill.2d 37, 50, 727 N.E. 2d 1003, 1010 (2000)).

This Court has consistently noted the need for district courts to issue factual findings when ruling on suppression motions, and has never indicated a district court may simply adopt by reference the findings contained within a party's motion. Nor is that what happened in this case, as the district court made no indication it was adopting the assertions contained in the Motion as factual findings.

The State requests this matter be remanded to the district court for an evidentiary hearing and the issuance of explicit factual findings. The district court will be unable to make adequate factual findings without conducting an evidentiary hearing and hearing testimony. It is concerning that neither Ornelas nor Lewis was ever required to testify that they were in fact occupants of the tent; there is nothing in the record establishing that either was using the tent as a temporary residence. In her Answering Brief, Ornelas asserted for the first time that she was a co-occupant of the tent. Answering Brief, at 10. Ornelas chides the State for there not being anything in the record to support the State's allegation that if Ornelas and Lewis were residing in the tent, then they were trespassing on private property. The State was deprived of the opportunity to establish such facts on the record, because the district court declined to hold an evidentiary hearing. The State informed the district

court that at an evidentiary hearing, the owners would testify that neither Ornelas nor Lewis had permission to store items or reside in a tent on the property. I AA 109.

It is undoubtedly the district court's role to make credibility determinations and evaluate the evidence. See, e.g., Ybarra v. State, 247 P.3d 269, 276, 247 P.3d 269, 276 (2011). But the district court cannot do so when it declines to hear testimony from witnesses and evaluate all of the relevant evidence. To determine if Ornelas possessed a legitimate expectation of privacy in the tent and its contents, testimony must be taken to determine if and to what extent she was using or residing in the tent, as well as whether or not she was trespassing. The district court clearly erred by not conducting an evidentiary hearing regarding these relevant factors. Accordingly, this matter must be remanded for an evidentiary hearing.

II. ORNELAS DID NOT POSSESS A LEGITIMATE EXPECTATION OF PRIVACY MERELY BECAUSE THE OBJECT OF THE SEARCH WAS A TENT

Ornelas' assertion that warrantless searches of tents automatically violate the Fourth Amendment is without legal support. Answering Brief, at 10-11. Ornelas misrepresents this Court's holding in Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996). Answering Brief, at 10. In Alward, this Court found that Alward possessed a legitimate expectation of privacy not simply because the object of the search was a tent, but because Alward, as a camper on a public campground, had an objectively

reasonable expectation of privacy because he was similarly situated to a person staying at a hotel. Alward, 112 Nev. at 150, 912 P.2d at 249.

Under some circumstances, an individual may have a reasonable expectation of privacy in a tent. However, that will not be the case in all circumstances. Because "the Fourth Amendment protects people, not places" the central question is not what type of structure was searched, but whether the individual had a sufficient connection to the area searched such that a privacy expectation was objectively reasonable. Katz v. United States, 389 U.S. at 350, 88 S.Ct. at 511 (1967).

Ornelas cites three cases outside of the jurisdiction in an attempt to support his claim that warrantless searches of tents are unconstitutional in all circumstances. In addition to not being binding authority, these cases do not support Ornelas' position. In each case, it was uncontroverted that the structure searched was either the defendant's residence a tent on a public campground in which the defendant was permissibly camping. These circumstances do not exist here.

In People v. Schafer, 946 P.2d 938, 941 (Colo. 1997), the court found "a person camping in Colorado on unimproved and apparently unused land *that is not fenced or posted against trespassing*, and in the absence of personal notice against trespass, has a reasonable expectation of privacy in a tent used for habitation and personal effects therein." Id. (emphasis added). Furthermore, the court reached this conclusion because, by Colorado statute, "one who enters or remains upon

unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege in the absence of personal or posted notice." Id. at 942 (*citing* Colo. Rev. State § 18—6—116(1) (1986)). Here, the land on which Ornelas was supposedly residing was both fenced in and had "no trespassing" signs posted. I AA 22, 37, 109. Thus, even under the reasoning in Schafer, Ornelas would lack any reasonable expectation of privacy in the tent in this case.

In Pulse, the Supreme Court of Hawaii reached the unremarkable conclusion that the defendant had a legitimate expectation of privacy in the boat on which he was residing. State v. Pulse, 83 Haw. 229, 245, 925 P.2d 797, 813, as amended (Sept. 23, 1996), amended on reconsideration in part, 83 Haw. 545, 928 P.2d 39 (1996). Unlike here, it was not disputed that Pulse was using the boat as his permanent residence, and there was no allegation that he was trespassing. Id.

In Haley, the court found that occupants of a tent on public campground were entitled to constitutional protection against warrantless searches and seizures of the premises if they exhibited a subjective and reasonable expectation of privacy therein. Haley v. State, 696 N.E.2d 98, 102 (Ind. Ct. App. 1998). Again, this case involved individuals camping in a tent on a public campground, which differs substantially from the facts in this case. Further, the legitimacy of any privacy expectation is not

automatic; the court found that campers had to exhibit a subjective and reasonable expectation of privacy in order to receive Fourth Amendment protection.

Ornelas' reliance on the Ninth Circuit case of United States v. Sandoval, 200 F.3d 659 (9th Cir. 2000) is misplaced. Ornelas ignores the fact that the Ninth Circuit has stated in numerous other cases, as well as in Sandoval, that trespassers on private property do not have objectively reasonable expectations of privacy. "[A] defendant may not invoke the Fourth Amendment to challenge a search of land upon which he trespasses." United States v. Schram, 901 F.3d 1042, 1044 (9th Cir. 2018) (*citing* United States v. Hernandez-Gonzalez, 608 F.2d 1240, 1246 (9th Cir. 1979)). See also Zimmerman v. Bishop Est., 25 F.3d 784, 788 (9th Cir. 1994) (finding squatters on private property had not reasonable expectation of privacy because they had no legal right to occupy the land).

In Sandoval, the Court based its decision largely on the fact that the defendant was undisputedly camping in a tent on public land which was unmarked and could easily be mistaken for a public campground. Id. at 661. The court found a distinction between an individual present on public land versus an individual intruding on private property, stating that "we think it much more likely that society would recognize an expectation of privacy for the camper on public land than for the squatter in a *private residence*." Id. (emphasis added). The court explicitly found that it was not overruling its previous decision that a squatter on private property

lacks a legitimate expectation of privacy due to having no right to occupy the property. Id. Thus, Sandoval does not apply here, because it is undisputed that Ornelas was not a camper on public land. If she was in fact occupying the tent, then she was an intruder on private property, with no legitimate expectation of privacy.

Ornelas criticizes the State's analysis as to whether or not Ornelas had a subjective expectation of privacy by pointing out that the Fourth Amendment is designed to protect individuals from government action. Appellant's Brief, at 13. Ornelas ignores the fact that a subjective expectation of privacy that is objectively reasonable must be present for an individual to receive Fourth Amendment protection. Katz, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring); Rakas v. Illinois, 439 U.S. 128, 151, 99 S. Ct. 421, 434, (1978). This rule has been followed for so long that expectations—indeed, entire fields of law—have been built upon it.

Further, it is black letter law that there is no subjective expectation of privacy in what is exposed to the public. Katz, 389 U.S. at 351, 88 S.Ct. at 511 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of [4th] Amendment protection. See also California. v. Greenwood, 486 U.S. 35, 40-41, 108 S.Ct. 1625, 1628-29 (1988) (no legitimate expectation of privacy in garbage left at curb outside home); Young v. State, 109 Nev. 205, 213–14, 849 P.2d 336, 342 (1993) (finding no objective expectation of privacy for persons engaging in sexual activity in public restroom stalls).

Ornelas argues that by following the longstanding principle that an individual has no legitimate expectation of privacy in what is exposed to the public will unfairly penalize the homeless. Answering Brief, at 14. The State is in no way arguing that individuals experiencing homelessness, or those residing in tents, will never have a legitimate expectation of privacy in their tents or makeshift residences. The State's argument is based on well-established law—that an individual challenging a search as violative of the Fourth Amendment must have a legitimate expectation of privacy in the area or item searched. The instant case must be decided upon the facts of this case, not concern for hypothetical individuals.

The relevant law makes clear that an individual does not have a legitimate expectation of privacy in an area in which she is trespassing, even if she uses that area as a temporary residence. The district court declined to make factual findings that would support a finding that Ornelas possessed a legitimate expectation of privacy, and ignored the State's arguments that it could present evidence of trespass at an evidentiary hearing. Accordingly, the district court's decision must be overruled.

III. ORNELAS' ARGUMENT THAT THE DISTRICT COURT WAS SANCTIONING THE STATE FOR BAD FAITH OR A DISCOVERY VIOLATION HAS NO BASIS IN LAW OR THE RECORD

Shockingly, Ornelas argues that the district court suppressed the evidence in this case not because the evidence was seized in violation of the Fourth Amendment,

but as a sanction against the State due to the police acting in bad faith. Answering Brief, at 15. This argument is disingenuous at best, as it is directly contradicted by the record. The district court's Order explicitly states that the evidence is suppressed due to being seized in violation of the Fourth Amendment of the United States Constitution. I AA 112. No mention is made of the police acting in bad faith, nor did the district court make such a statement during argument on the Motion to Suppress. Ornelas cites to the portion of the transcript in which the district court complained that the police needed to write better reports, but fails to explain how such a comment amounts to a finding that the police acted in bad faith. It is unclear how the district court could have even concluded that the police acted in bad faith, as no evidentiary hearing was held and the district court did not hear any testimony from any police officer involved in the case.

Ornelas' claim that the district court's granting of the motion to suppress was a sanction against the State due to bad faith on the part of the police is at best speculation, as there is nothing in the record to support this claim. Again, this Court will not speculate regarding the factual conclusions reached by the district court. Rincon, 122 Nev. at 1176–77, 147 P.d at 237–38.

Importantly, neither Ornelas nor Lewis ever argued to the district court that suppression was warranted based upon the police acting in bad faith. The full title of the Motion to Suppress was Defendant Dustin Lewis Motion to Suppress Evidence

Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine. I AA 06. The phrase "bad faith" appears nowhere in the Motion. Nor does it appear in Ornelas' joinder or Lewis' Reply. This "bad faith" claim cannot be considered because it was not raised below. The instant appeal is confined to issues actually raised before the district court. McNelton v. State, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999); Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997), overruled on other grounds by Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999).

Ornelas also fails to provide any relevant legal support for his assertion that a district court could suppress evidence due to a simple finding of "bad faith." He accuses the State of misrepresenting the holding of Mapp v. Ohio, when the State merely cited it as the seminal case finding that the exclusionary rule, as a remedy for a Fourth Amendment violation, applies in state proceedings. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."). The State is aware that the exclusionary rule can be used as a remedy for violations of other constitutional provisions, such as the Fifth or Sixth Amendments, but that is not relevant here because Ornelas and Lewis alleged suppression was warranted due to a violation of the Fourth Amendment. Thus, the only question before the district court was whether or not such a violation occurred.

Ornelas offers no legal support for his "bad faith" claim other than a citation to NRS 174.295. This statute concerns remedies for discovery violations and is clearly not relevant here because suppression was not requested based on an alleged discovery violation. No discovery violation was alleged in the Motion to Suppress or at any other point in this case.

CONCLUSION

In granting the Motion to Suppress, the district court failed to make specific factual findings to support its conclusion that the evidence was seized in violation of the Fourth Amendment or was fruit of the poisonous tree. The district court failed to recognize that whether or not Lewis and Ornelas were trespassing on private property was pivotal in determining whether or not they possessed a legitimate expectation of privacy. An evidentiary hearing is necessary so that evidence can be presented regarding this issue. Therefore, the State respectfully requests this Court reverse the district Court's Order, and remand this matter to the district court for an evidentiary hearing.

/ / /

/ / /

/ / /

/ / /

/ / /

Dated this 22nd day of September, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 2,871 words and does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of September, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*

KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 22, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

MICHAEL A. TROIANO, ESQ.
Counsel for Respondent

KAREN MISHLER
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

KM//ed