IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. DUSTIN LEWIS, Respondent.	Case No. 85158

APPELLANT'S REPLY BRIEF

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

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ARGUMENT

I. THE STATE'S STANDING ARGUMENT IS NOT WAIVED

Lewis claims that the State is barred from pointing out Lewis's failure to establish standing to challenge the search of the tent, based upon the State not raising this argument in its pleadings below. Respondent's Answering Brief ("RAB"), at 11. Lewis fails to offer any authority to support his contention that the State was required to raise this issue *in its pleadings* in order to raise this issue on appeal. The State actually addressed the issue of standing during a hearing before the district court. II AA 262. Furthermore, alleging in responsive pleadings that Lewis had failed to establish standing would have made little sense, as these pleadings were filed prior

to the evidentiary hearing in this case, at which Lewis had the opportunity to present such evidence. The State could hardly argue a failure to establish standing until the evidentiary hearing was concluded, and it became clear Lewis would not be presenting any evidence. Further, the failure of Lewis to demonstrate standing was a plain error, and thus is reviewable by this Court. NRS 178.602.

It was not the State's responsibility to inform Lewis of his responsibility to demonstrate standing to challenge the search. It was Lewis's responsibility to demonstrate standing. The State pointing out on appeal that Lewis failed to meet this burden is akin to a criminal defendant alleging in an appeal of his judgment of conviction that the prosecution failed to present sufficient evidence of guilt. Such an allegation does not require the defendant to first object to the sufficiency of the evidence before the trial court; such a claim is always available for appeal.

Lewis also misstates the record by claiming that the State conceded the issue of standing below. RAB, at 12. The State did not concede that Lewis' ownership interest in the tent was "presumed" by the parties, but that Lewis' Motion to Suppress presumed such interest, without providing any evidence in support. In fact, during argument the State pointed out that neither Ornelas nor Lewis had provided any evidence showing an ownership interest in the tent:

> Number one, is there a subjective expectation of privacy by the defendants? Now *there's nothing before this Court that's claiming as evidence that these two defendants have an ownership interest in the tent itself*. It's presumed under the facts, but it's not sworn testimony in

> any way, shape or form. *There's no affidavit attached to any of the pleadings,* and so it may be inferred under the facts of the case that that tent was theirs in whole or in part, but there are several other questions and facts that I think are relevant, at least potentially, to this Court's assessment.

II AA 262 (emphasis added).

Thus, from the beginning of the litigation of the Motion to Suppress, the State has argued that the defendants had the burden to demonstrate an ownership or possessory interest in the tent. In the passage quoted above, the prosecutor was pointing out that Lewis had failed to present any evidence, such as an affidavit, to support his claim that he was living in the tent. When the prosecutor stated "it may be inferred under the facts of the case that that tent was theirs in whole or in part," he was pointing out that at most Lewis had offered an inference of such an interest, due to the lack of an affidavit. The State has never conceded that Ornelas or Lewis had an ownership or possessory interest in the tent.

As Lewis points out, the district court found that Lewis had a privacy interest in the tent. RAB, at 11. This erroneous factual finding can be reviewed by this Court. See Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) (noting that this Court reviews the district court's factual findings for sufficient evidence), *overruled on other grounds by* Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). A district court's factual findings should be supported by substantial evidence. State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) ("Once written factual findings are

entered, they will be entitled to deference on appeal and will not be overturned by this court if supported by substantial evidence.").

The record in this case is entirely devoid of any evidence that Lewis had an ownership or privacy interest in the tent. Accordingly, this was a clearly erroneous factual finding by the district court, that was not supported by substantial evidence. Thus, it is not entitled to deference.

Lewis repeatedly emphasizes that the district court found that the tent was Lewis' home, but unsurprisingly is unable to cite any facts or evidence that support such a finding. The only basis for the district court's finding were the arguments of Lewis' counsel. Lewis faults the State for citing Phillips v. State, 105 Nev. 631, P.2d 381 (1989) for the general proposition that counsel's arguments are not evidence. RAB, at 12-13. That in Phillips the Court was discussing arguments made in appellate briefs, rather than before the district court, is irrelevant. It is a longstanding legal principle that "[a]rguments of counsel are not evidence and do not establish the facts of the case." Jain v. McFarland, 109 Nev. 465, 475–76, 851 P.2d 450, 457 (1993). There are absolutely no facts in the record to support the district court's finding that the tent was Lewis's home. Accordingly, this was an erroneous finding entitled to no deference, and the district court's ruling should be overturned.

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II. THE DISTRICT COURT ERRED IN FINDING LEWIS HAD A LEGITIMATE EXPECTATION OF PRIVACY IN THE TENT

The issue of standing aside, the district court clearly erred in finding Lewis had a legitimate expectation of privacy in the tent and the surrounding area. Contrary to Lewis' assertion, zipping the tent closed was insufficient to establish a subjective expectation of privacy. Lewis also ignores the fact that the district court also ordered suppression of evidence, such as the wheelchair, that was seized from the area *outside of the tent*. II AA 324. Obviously, the zipping of the tent did nothing to conceal items that were outside of it. Accordingly, Lewis could not possibly have had a subjective expectation of privacy in items located outside of the tent.

Lewis refers to a non-binding and irrelevant Colorado case in an attempt to argue Lewis possessed a subjective expectation of privacy in the tent. RAB, at 15. But the tent at issue in that case was on a *campsite*, not an open commercial area as in this case. People v. Schafer, 946 P.2d 938, 944 (Colo. 1997). A person may have a subjective expectation of privacy in a tent lawfully placed on a campground, as such an individual is similarly situated to a guest in a hotel, who has a privacy interest a hotel room. But those are not the facts of this case.

In contrast here, while the tent was zipped, it was also located on private property with "no trespassing" signs posted. II AA 284-86. At the rightful owner's request, law enforcement had removed trespassers from the property. II AA 292. If

Lewis were actually residing in the tent, then he would have been aware of these occurrences. Thus, he would have had little reason to believe that zipping the tent would cause it to remain undisturbed. Thus, the circumstances do not support a finding that Lewis had a subjective expectation of privacy in the tent or its contents.

Lewis disputes that individuals were removed from the property prior to the search of the tent. It is undisputed that the search of the tent occurred on December 11, 2018. II AA 192. The owner's testimony at the evidentiary hearing established that in *November* of 2018, after being informed that homeless individuals were erecting tents on the lot, the owner had a fence installed on the property and had "no trespassing signs" placed on the property. II AA 285-86. In response to a question from defense counsel concerning *December 8th*, 2018—three days before the search—the owner indicated that around that time he received a letter from the police department indicating that homeless individuals had been removed from the property. II AA 292.

But regardless of whether Lewis was aware of the actions the owner had taken to prevent individuals from placing tents on the property, it is highly unlikely that Lewis had any subjective expectation of privacy in a tent that had been erected in defiance of "no trespassing" signs, in an open commercial area. Importantly, the reason the record is unclear as to whether or not Lewis had a subjective expectation of privacy is due to Lewis' failure to present any evidence whatsoever concerning

any such expectation of privacy. It was *Lewis'* burden to demonstrate he had such expectation; it was not the State's responsibility to prove a negative. See, e.g., Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S. Ct. 2556, 2561 (1980). Lewis could have provided information about when he supposedly placed the tent on this property and when he supposedly resided in it. He has never done so.

Furthermore, even if Lewis had a subjective expectation of privacy, he did not have a privacy expectation that was objectively reasonable. Lewis criticizes the State for citing United States v. Schram, 901 F.3d 1042, 1044 (9th Cir. 2018) for its holding that trespassers do not have an objectively reasonable privacy expectation. RAB, at 17-19. Lewis claims Schram is inapplicable because in that case the defendant had received notice in the form of a no-contact order that he was prohibited from entering the residence. RAB at 18; Schram, 901 F.3d at 1044. But the holding in Schram was not premised on the fact that the defendant had been *notified* that he was prohibited from the premises; it was based on the fact that the defendant *had no right to be on the premises*: "a defendant still may lack Fourth Amendment rights to challenge the search of a residence *when the law prevents him from being there in the first place*." Id. at 1045 (emphasis added).

Whether or not an individual has received official notice that he is not allowed to be in a particular location is obviously irrelevant to whether or not such an individual has an *objective* expectation of privacy. An objective expectation of

privacy is one that *society* recognizes as reasonable; neither the state of mind of the individual or his knowledge are relevant. Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967) (Harlan, concurring); Young v. State, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993) ("An objective expectation of privacy, i.e., one which society recognizes as reasonable, must also exist."). Under Lewis' interpretation of the law, a burglar or squatter who has unlawfully entered the home of another, unbeknownst to the homeowner, would have an objection expectation of privacy simply due to not yet having been ordered to leave the premises. Such a view violates common sense and the prevailing case law.

Contrary to Lewis' contention, the State has not argued that an individual lacks an objective expectation of privacy simply due to engaging in criminal activity. That is obviously not the law. But whether or not a person is legitimately on the premises is highly relevant to whether that person has an objective expectation of privacy—one that society is prepared to recognize as reasonable. See Rakas v. Illinois, 439 U.S. 128, 148, 99 S.Ct. 421, 433 (1978) (noting that an individual's legitimate presence on the premises is not controlling for Fourth Amendment purposes but is also not irrelevant). "[W]hile a defendant does not lose his Fourth Amendment rights simply by engaging in illegal acts, a defendant still may lack Fourth Amendment rights to challenge the search of a residence *when the law*

prevents him from being there in the first place." United States v. Schram, 901 F.3d 1042, 1045 (9th Cir. 2018) (emphasis added).

Lewis would have this Court dismiss the relevance of all cases related to privacy expectations of trespassers, and instead rely solely on cases concerning searches of tents. But such a view ignores the fact that the Fourth Amendment "protects people, not places." Katz, 389 U.S. at 350, 88 S.Ct. at 511. The central issue in this case is not the type of structure searched, but whether Lewis had both a subjective and objective expectation of privacy in the area that was searched. Lewis declined to make a factual record before the lower court concerning any connection he may have had regarding the tent. This deficiency alone is sufficient to overrule the district court's ruling below.

Lewis mistakenly relies on United States v. Sandoval, 200 F.3d 659 (9th Cir. 2000) to support his claim of privacy. It is true that in Sandoval the Court stated that "we do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land." Sandoval, 200 F.3d at 661. However, the Court also found that the *location* of the tent—a public campground—was key to the analysis:

> camping on public land, even without permission, is far different from squatting in a private residence. A private residence is easily identifiable and clearly off-limits, whereas *public land is often unmarked and may appear to be open to camping*. Thus, 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). Thus, in Sandoval the defendant had an objectively reasonable expectation of privacy due to being a camper on public land which could reasonably be believed to be open for camping. Such a privacy expectation is one society is prepared to recognize as reasonable. Lewis, if he was in fact residing in the tent, was not so situated. The tent was located in a private lot with no trespassing signs posted, in a commercial area. I AA 86, II AA 286, 289. LVMPD had removed trespassers from the property. II AA 294. The circumstances are dramatically different from those in Sandoval, where "whether Sandoval was legally permitted to be on the land was a matter in dispute." Id.

Importantly, Lewis ignores the fact that in all of the tent-related cases he cites, it was undisputed that the defendant was residing, at least temporarily, in the tent that was searched. See Sandoval, 200 F.3d at 660-61 (discussing the fact that Sandoval was camping on federal land); United States v. Gooch, 6 F.3d 673, 676 (9th Cir. 1993) (noting that Gooch was asleep in the tent when officers arrived, and that Gooch had been camping in the tent for several days and had no other residence); Alward v. State, 112 Nev. 141, 144-45, 912 P.2d 243, 246 (1996) (noting that Alward informed law enforcement that he and his girlfriend were camping in the tent).

Here, there is a genuine factual dispute whether or not Lewis was in fact residing in the tent. Lewis was not present when law enforcement discovered the tent; the tent was unoccupied. Other than the arguments of his counsel, there is nothing in the record indicating that Lewis was using the tent as a residence. Accordingly, he is not similarly situated to the defendants in Gooch, Alward, or Sandoval, and these decisions do not apply to him.

Lewis attempts to dismiss the fact that were he using the tent as a residence, then he was a trespasser with no right to reside on these premises. Accordingly, the entry into the tent was not an intrusion into a location where Lewis had a reasonable expectation of privacy, and thus the Fourth Amendment was not implicated. See State v. McNichols, 106 Nev. 651, 652, 799 P.2d 550, 551 (1990). If Lewis were in fact trespassing on the premises, then he did not possess a privacy interest which society is prepared to recognize as reasonable. Accordingly, he cannot allege a violation of the Fourth Amendment.

III. THE DISTRICT COURT WRONGLY FOCUSED ON THE SUBJECTIVE STATE OF MIND OF THE POLICE

Lewis claims that the State mischaracterized the district court's findings by stating that the Court focused on the state of mind of the police at the time of the search. RAB, at 24. In granting the Motion to Suppress, the district court dismissed the State's argument that Ornelas and Lewis were trespassers by making the following analysis of the testifying officer's motivations:

> 37. The State argues that this distinction [between public and private land] shows that the tent in question here evidenced the ongoing crime of trespass whereas tents on public land could be lawfully present for such things as camping.
> a. As noted elsewhere, Sgt. Shark did not recall ever seeing any posted signage warning trespassers away from the property.
> b. Neither did Sgt. Shark attempt to contact the property owner to determine whether the campsite was permitted.

II AA 321-22.

Based on the above findings, clearly the court was focused on whether or not the police officers were actually investigating the crime of trespass. The court completely ignored that the relevant inquiry was whether or not Lewis and Ornelas were in fact using the tent as a residence, and if by doing so they were trespassing on private property. The testimony from David Inman clearly established that, if Ornelas and Lewis were using the tent as a residence, then they were trespassing on Inman's property. II AA 286, 289.

Contrary to Lewis' assertion, discussion of the officers' motivations was not necessary in order to consider all the facts and circumstances of the case. His contention that this discussion was necessary to consider arguments the State made in its pleadings, well before the evidentiary hearing occurred, is obviously specious. The question before the Court was not whether there was support for arguments the State made in opposing the Motion to Suppress. It was *Lewis'* responsibility to support his arguments in favor of suppression.

Further, the fact that the district court decided to organize its findings as refutations against random arguments made by the State well before the evidentiary hearing is deeply troubling. The district court should have addressed the threshold Fourth Amendment questions: 1) whether the proponents had standing to challenge the search; 2) whether the proponents had subjectively reasonable expectations of privacy; 3) whether such expectations were of the kind society is prepared to recognize as reasonable. Then, the court should have referred to the evidence from the evidentiary hearing to determine the answers to those questions. Instead, the district court simply concluded that warrantless searches of tents violate the Fourth Amendment, and that the evidentiary hearing testimony did not support previous arguments made by the State. This faulty reasoning ignored the actual questions before the court. Accordingly, the district court' decision must be overturned.

Lewis also accuses the State of falsely accusing the district court of finding that tents have blanket Fourth Amendment protection. RAB, at 25. In its Findings, the district court stated "[w]arrantless searches of tents, therefore, violate the Fourth Amendment." II AA 320. The court cited this Court's holding in Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996) as support for this sweeping statement. Thus, the district court literally concluded that warrantless searches of tents violate the Fourth Amendment. The State cannot imagine a clearer conclusion that tents have blanket Fourth Amendment protection, and cannot be searched without a warrant under any

circumstances. The district court's conclusion was contrary to law, and therefore should be overturned.

IV. THE DISTRICT COURT ERRED BY SUPPRESSING ALL INCRIMINATING EVIDENCE AS "FRUIT OF THE POISONOUS TREE" AND BY SUPPRESSING EVIDENCE FROM THE TENT'S SURROUNDING AREA

The district court found, with no supporting evidence, that all incriminating evidence in this case must be suppressed "[u]nder the Fruit of the Poisonous Tree doctrine." II AA 324. Lewis' attempt to support this finding highlights the lack of a legal basis for this ruling. Lewis claims that "but for" the search, this incriminating evidence would not have been recovered. RAB, at 29. This is not the appropriate inquiry. In fact, "*exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence*." Hudson v. Michigan, 547 U.S. 586, 592, 126 S. Ct. 2159, 2164 (2006) (emphasis added). See also Segura v. United States, 468 U.S. 796, 815, 104 S.Ct. 3380, 3391 (1984) ("The Court has never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'") (quoting Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417-18 (1963)).

Suppression of all incriminating evidence was not warranted in this case because none of this evidence was the product of constitutional violations. See Segura, 468 U.S. at 815, 104 S.Ct. at 3391. As the State detailed in its Opening Brief, all of this suppressed evidence was either collected prior to the search of the tent,

seized pursuant to a search warrant not based upon the search of the tent, was attenuated from the search of the tent, or was subject to the doctrines of independent source and inevitable discovery. State's Opening Brief, at 36-44. Lewis offers no meaningful response to this argument, other than a mere conclusory assertion that this information would not have been obtained had it not been for the constitutional violation.

Lewis also fails to defend the district court's finding that the evidence from the area surrounding the tent—the wheelchair located 25 feet away from the tent—was seized in violation of the Fourth Amendment.[1] Lewis' contention that the police "connected" the wheelchair to the tent as a consequence of the illegal search is not supported by the record, nor did the district court make such a finding. Shortly after the burglaries, the police were aware that a wheelchair was involved due to viewing surveillance video depicting a suspect pushing a wheelchair. I AA 38, 84-85. There simply was no legal basis for the suppression of all incriminating evidence in this case. Accordingly, the district court's ruling must be overturned.

CONCLUSION

Lewis failed to establish that he had a legitimate expectation of privacy in the area that was searched. There was no legal basis for the district court's suppression

[1]The district court did not suppress this evidence as fruits of the poisonous tree; the district court found that this evidence itself was seized in violation of the Fourth Amendment. II AA 324.

of all evidence recovered from the tent and the surrounding area, or for the court's finding that all incriminating evidence must be suppressed as fruit of the poisonous tree. Therefore, the State respectfully requests that this Court reverse the district court's suppression order.

Dated this 2nd day of May, 2023.

Respectfully submitted,

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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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 3,799 words.
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 2nd day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 2nd day of May, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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