

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF BROOKINGS)

STATE OF SOUTH DAKOTA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH A. JONES,)
)
Defendant.)

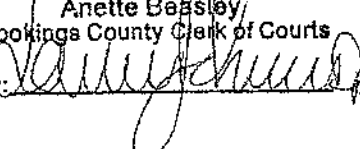
STATE OF SOUTH DAKOTA
Third Judicial Circuit Court
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears on file in my office on this date:

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

AUG 14 2015

Anette Beasley
Brookings County Clerk of Courts

05CRI15-332

By: 

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING DEFENDANT'S
MOTION TO SUPPRESS
EVIDENCE

The above captioned matter having come on for hearing before the Court on the 24th day of July, 2015, the State of South Dakota being represented by Clyde R. Calhoon, the duly elected, qualified and acting States Attorney in and for Brookings County, South Dakota, and Defendant Joseph A. Jones, appearing personally and along with his attorney, D. Sonny Walter, of Sioux Falls, South Dakota; the matter coming before the Court upon Defendant's Motion to Suppress Evidence and Amended Motion to Suppress Evidence and the Court having heard and considered the evidence, and the Court being in all things duly advised, the Court makes and enters the following:

FINDINGS OF FACT

1.

That the Defendant, Joseph A. Jones, stands charged with the offenses of Distribution or Possession with Intent to Distribute Marijuana, a Class 3 Felony, as defined by SDCL 22-42-7; Drug Free Zones Created - Violation as Felony, a Class 4 Felony, as defined by SDCL 22-42-19(1); Unauthorized Possession of Controlled Substance as Felony, a Class 5 Felony, as defined by SDCL 22-42-5; Ingesting Substance, Except Alcoholic Beverages, For the Purpose of Becoming Intoxicated as a Misdemeanor, a Class 1 Misdemeanor, as defined by SDCL 22-42-15; and Possession of Drug Paraphernalia, a Class 2 Misdemeanor, as defined by 22-42A-3.

2.

That Dana Rogers is a certified law enforcement officer with the City of Brookings Police Department in Brookings, South Dakota, trained in the detection and apprehension of individuals using and selling illegal narcotics.

3.

That on January 23, 2015, Detective Rogers received information from DCI Agent Liz Carlson of Huron, South Dakota, provided by an informant, regarding the Defendant, and his involvement in the distribution of large quantities of marijuana.

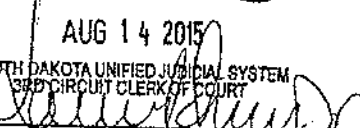
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3RD CIRCUIT CLERK OF COURT

By: 

Appendix B

4.

That Agent Carlson advised Detective Rogers that an individual by the name of Brady Schutt would travel from the Huron area to the Defendant's residence in Brookings to pick up large quantities of marijuana and then would return to Huron to sell the marijuana, driving a red GMC pickup with license 4BT694.

5.

That with this information, a pole camera was installed on a street light across the street from the Defendant's residence to observe the Defendant's trailer and the surrounding area of the trailer park.

6.

That it was Detective Rogers' understanding that a search warrant was not needed for the use of a pole camera.

7.

That a pole camera is a camera inside of a box that runs off of electricity and is placed on a pole where electricity is available.

8.

That this pole camera, owned by the South Dakota Division of Criminal Investigation, was placed on a pole that sits approximately 25 to 30 feet high, with the pole camera located approximately 2 to 4 feet from the top.

9.

That the pole camera was placed on a street light located on a city boulevard, a location accessible to the public.

10.

That the pole camera focuses on images outside the box and sends a live feed to a server that is located in Pierre, South Dakota, and to a computer and telephone accessible by Detective Rogers for monitoring purposes.

11.

That Detective Rogers is able to adjust the camera footage up, down, left, and right, or zoom in and out, from his computer or phone, but that the camera itself did not change locations once placed.

12.

That pole cameras are commonly used by law enforcement as an investigative tool, and Detective Rogers was not aware of any prior uses of pole cameras by law enforcement where a search warrant was required prior to its installation.

13.

That the pole camera was placed on a city boulevard street light across the street and to the north of the Defendant's residence, on the corner of Fourth Street South and Third Avenue South.

14.

That the pole camera was installed by a Brookings Municipal Utilities city employee, as Detective Rogers did not have the certification, capability, or tools to install it.

15.

That once installed on January 23, 2015, the pole camera box, but not the camera itself, was visible to the public.

16.

That the pole camera captured the entrance and exit to Lamplighter Village Trailer Park and the Defendant's trailer at the entrance to the trailer park, as well as a portion of Third Avenue South.

17.

That the Defendant's trailer is observable to the public as it sits parallel to Third Avenue South.

18.

That there was no fence, gate, or other obstruction blocking the view of the Defendant's trailer from anyone passing by on the street, or from the view of the pole camera.

19.

That the pole camera showed the front portion of the Defendant's trailer, the front yard and the north side of the trailer.

20.

That the pole camera did not have night vision or infrared capabilities, and all that could be viewed at nighttime were vehicle lights, vehicles driving under the street light, and shadows of people.

21.

That the pole camera could not see inside of the residence or in the backyard; nor was the pole camera focused on one particular area of the residence.

22.

That the pole camera could observe anything that an individual walking down the street or a parked law enforcement officer performing stationary patrol could observe.

23.

That the pole camera was only zoomed in when manually done so by Detective Rogers, and once zoomed in, the image became distorted and was difficult to see.

24.

That the Defendant was not continually present during the time period that the pole camera was in place and would leave for days at a time.

25.

That there were periods of time when the pole camera was not recording or transmitting due to issues with the server, internet problems or inclement weather.

26.

That the pole camera captured other individuals coming and going from the trailer park.

27.

That the individual and truck described to Detective Rogers by Agent Carlson was observed at the Defendant's trailer on several occasions.

28.

That the pole camera did not track the whereabouts of the Defendant other than the fact that he was either in the trailer or outside the trailer; it did not monitor anything occurring inside the actual residence.

29.

That the Lamplighter Village Trailer Park is part of the Crime Free Housing Program.

30.

That there is a sign posted at the entrance of the trailer park designating that area as part of the Crime Free Housing Program, directly across the driveway from the Defendant's trailer.

31.

That after reviewing footage from the pole camera on March 6, 2015, Detective Rogers observed the Defendant put trash bags into his vehicle, drive a short distance and then return. Following this, Detective Rogers performed a trash pull on the community dumpster for the trailer park and found identifying information for the Defendant along with evidence of drug use.

32.

That after reviewing footage from the pole camera on March 11, 2015, Detective Rogers observed the Defendant put trash bags into his vehicle, drive a short distance and then return. Following this, Detective Rogers performed a trash pull on the community dumpster for the trailer park and found identifying information for the Defendant along with evidence of drug use.

33.

That due to the items found by Detective Rogers during the two trash pulls, he then obtained a search warrant on March 11, 2015, for a GPS tracking device for the Defendant's two vehicles.

34.

That on March 13, 2015, Detective Rogers obtained a search warrant for the residence of the Defendant.

35.

That the majority of the information presented by Detective Rogers in the affidavits in request for search warrants stemmed from information obtained through the use of the pole camera.

36.

That on March 19, 2015, Detective Rogers was conducting surveillance on the Defendant's residence and observed the Defendant and Walter Gaters arrive at the residence.

37.

That Detective Rogers observed the Defendant and Gaters exit a vehicle with a large black duffel bag.

38.

That on March 19, 2015, law enforcement executed the search warrant on the Defendant's residence and the Defendant and Walter Gaters were subsequently arrested.

39.

That the pole camera remained in place from January 23, 2015, until sometime after the Defendant's arrest on March 19, 2015.

40.

That Defendant has filed a Motion to Suppress Evidence and an Amended Motion to Suppress Evidence alleging that the evidence obtained as a result of the execution of the search warrants should be suppressed as the use of the pole camera was in violation of the Defendant's constitutional rights.

Based on the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1.

That the Court has jurisdiction over the parties and the subject matter of this proceeding.

2.

That the Fourth Amendment of the United States Constitution and Article VI, Section 11 of the South Dakota Constitution, both protect citizens from unreasonable searches and seizures. *State v. Deneui*, 2009 S.D. 99, ¶ 12, 775 N.W.2d 221.

3.

That the United States District Court for the District of Arizona has analyzed the Fourth Amendment as it pertains to the use of pole cameras in *United States v. Brooks*, 911 F.Supp.2d 836 (D.Ariz. Nov. 28, 2012), stating:

The Fourth Amendment "embodies 'a particular concern for government trespass,'" and applies "when government officers violate a person's 'reasonable expectation of privacy.'" *Patel v. City of Los Angeles*, 686 F.3d 1085, 1087 (9th Cir. 2012) (citing *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945, 950, 181 L.Ed.2d 911 (2012)). However, "a Fourth Amendment search does *not* occur ... unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" *Kyllo v. United States*, 533 U.S. 27, 33, 121

S.Ct. 2038, 150 L.Ed.2d 94 (2001) (citing *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). Building upon this, the U.S. Supreme Court made clear in *Jones* that, while the reasonable expectation of privacy test is not the exclusive test for evaluating whether a Fourth Amendment search occurred, cases “involving merely the transmission of electronic signals without trespass would *remain* subject to the [reasonable expectation of privacy] analysis.” *Jones*, 132 S.Ct. at 953 (emphasis in original). As such, to determine whether a search was conducted under the Fourth Amendment, this Court must analyze the Fourth Amendment implications of pole camera surveillance under a “reasonable expectation of privacy” test.

Brooks, 911 F.Supp.2d at 840.

4.

That the South Dakota Supreme Court has followed the United States Supreme Court in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in outlining the test for determining whether an individual has a reasonable expectation of privacy in a particular area in *State v. Thunder*, 2010 S.D. 3, 777 N.W.2d 373, stating:

An individual must have a reasonable expectation of privacy in the place searched or the article seized before the Fourth Amendment will apply. A two-part test determines whether an individual has a reasonable expectation of privacy in a particular area. First, we consider whether the defendant exhibited an actual subjective expectation of privacy in the area searched. Second, we consider whether society is prepared to recognize that expectation of privacy as reasonable. Whether a person has a legitimate expectation of privacy in the place to be searched is determined on a case-by-case basis, considering the facts of each particular situation.

Thunder, 2010 S.D. at ¶ 16, 777 N.W.2d at 378-39 (internal citations and quotations omitted).

5.

That what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz*, 389 U.S. at 351, 88 S.Ct. at 511.

6.

That “there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields.” *State v. Vogel*, 428

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N.W.2d 272, 276 (S.D. 1988) (quoting *United States v. Dunn*, 480 U.S. 294, ---, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987)).

7.

That law enforcement may utilize their resources to conduct surveillance where they have a legal right to occupy. *Brooks*, 911 F.Supp.2d at 840. See, e.g., *Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (citing *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)) (“[T]he police may see what may be seen ‘from a public vantage point where [they have] a right to be ...’”); *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978) (“Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities.”)

8.

That the Fourth Amendment does not prevent law enforcement officers “from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford[s] them.” *Brooks*, 911 F.Supp.2d at 840 (quoting *United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).

9.

That there was no physical invasion of the Defendant’s residence or privacy, and the use of physical observation in this case, via a pole camera, was conducted on public property, and without trespassing onto the Defendant’s property, and thus, no Fourth Amendment violation has occurred.

10.

That there is no difference between the use of a pole camera or other technology used to perform a stakeout and that of an officer on a stakeout watching a person’s residence from a public street.

11.

That the Fourth Amendment cannot be read to prevent law enforcement from being more efficient through the use of technology, and law enforcement cannot and should not disregard the use of technology to conduct investigations into possible illegal activities if the same can be accomplished with constitutional means. See *State v. Zahn*, 2012 S.D. 19, ¶ 32, 812 N.W.2d 490, 500 (quoting *State v. Sweedland*, 2006 S.D. 77, ¶ 22, 721 N.W.2d 409, 415).

12.

That cameras have become a public occurrence and individuals are exposed to them at malls, banks, bars, restaurants, casinos, and even driving down the road, as they are being placed on public streets.

13.

That under the reasonable expectation of privacy analysis in *Katz*, the Defendant did not have a reasonable expectation of privacy in the exterior of his home in full view of the public.

14.

That if an officer were sitting in a vehicle or standing on the street, they would have the same view that the pole camera did.

15.

That the pole camera was not directed into or inside the Defendant's home or curtilage.

16.

That the Defendant did not exhibit any subjective expectation of privacy in the property as there was no fence, no security gate, and no other obstruction to prohibit the view of his residence from the public.

17.

That the Fourth Amendment does not prohibit the warrantless use of a pole camera because law enforcement officials are constitutionally permitted to view any location from a publicly accessible location.

18.

That the evidence obtained as a result of the pole camera footage in no way violated the Defendant's constitutional rights.

19.

That the Defendant was further put on notice that he was in a crime free zone and the Defendant signed an agreement to comply with the same. This put him "on notice" that he would be watched to ensure the area would be crime free and further dissipates any alleged reasonable expectation of privacy in the areas viewed as shown via the pole camera.

20.

That many federal district courts have agreed that because the area was visible to the public, usage of video surveillance did not constitute a Fourth Amendment violation. *See United States v. Urbina*, No. 06-CR-336, 2007 U.S. Dist. Lexis 96345, 19 (E.D. Wis. Nov. 6, 2007) (evidence "obtained from a camera and video transmitter installed on a utility pole" in a public area outside the defendant's home does not implicate the Fourth Amendment); *United States v. Aguilera*, No. 06-CR-336, 2008 U.S. Dist. Lexis 10103, 5 (E.D. Wis. Feb. 11, 2008) (a video camera installed on a utility pole for the purposes of

filming and monitoring the traffic into and out of the defendant's driveway does not implicate the Fourth Amendment); *United States v. Brooks*, No. 11-2265-PHX-JAT-003, 2012 U.S. Dist. Lexis 168738 (D. Ariz. Nov. 28, 2012) (a pole camera installed on a utility pole outside an apartment complex to monitor the parking lot of the complex does not implicate the Fourth Amendment); *United States v. Nowka*, No. 5:11-CR-474-VEH-HGD, 2012 U.S. Dist. Lexis 178025, 16 (N.D. Ala. Dec. 17, 2012) (a pole camera installed to observe the defendant's action in plain view of his driveway does not implicate the Fourth Amendment).

21.

That the Defendant has no reasonable expectation of privacy in the garbage he abandoned in the community dumpster that contained other people's garbage. *See State v. Stevens*, 2007 S.D. 54, 734 N.W.2d 344; *State v. Schwartz*, 2004 S.D. 123, 689 N.W.2d 430.

22.

That even if this Court were to find the video surveillance violated the Fourth Amendment, this evidence should not be excluded from the trial based upon the officer's good faith conduct in the use and installation of the pole camera as utilized herein. There was no South Dakota case nor United States Supreme Court case not allowing the use of a pole camera without a search warrant. *See Davis v. United States*, 131 S.Ct. 2419, 2427 (2011). Given the facts and law enforcement conduct herein, the deterrence benefits of suppression do not outweigh the cost to society. Therefore, there would be no reason to apply the exclusionary rule.

23.

That the Court hereby incorporates the Findings of Fact and Conclusions of Law set forth in its oral ruling contained in the transcript of the Motion Hearing held on July 24, 2015, herein.

24.

That any Finding of Fact or Conclusion of Law wrongly so designated is hereby redesignated as the appropriate Finding of Fact or Conclusion of Law.

25.

That there was sufficient probable cause for the issuance of the two search warrants in this matter, and all evidence obtained as a result thereof should not be suppressed.

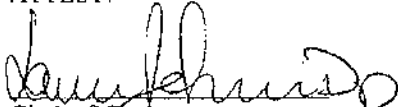
26.

That Defendant's Motion to Suppress Evidence and Amended Motion to Suppress Evidence should be denied and it is hereby

ORDERED that Defendant's Motion to Suppress Evidence and Amended Motion to Suppress Evidence are denied.

Dated this 14th day of August, 2015.

ATTEST:


Clerk of Courts

BY THE COURT:


Gregory J. Stokenburg
Circuit Court Judge



Third Judicial Circuit Court
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears on file in my office on this date:

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF BROOKINGS)

IN CIRCUIT COURT

AUG 14 2015

THIRD JUDICIAL CIRCUIT, Anette Beasley
Brookings County Clerk of Courts

STATE OF SOUTH DAKOTA,)

Plaintiff,)

vs.)

JOSEPH A. JONES,)

Defendant.)

05CRI15-332

ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE

The above captioned matter having come on for hearing before the Court on the 24th day of July, 2015, the State of South Dakota being represented by Clyde R. Calhoun, the duly elected, qualified and acting States Attorney in and for Brookings County, South Dakota, and Defendant Joseph A. Jones, appearing personally and along with his attorney, D. Sonny Walter, of Sioux Falls, South Dakota; the matter coming before the Court upon Defendant's Motion to Suppress Evidence and Amended Motion to Suppress Evidence and the Court having heard and considered the evidence and the Court having made and entered Findings of Fact and Conclusions of Law, and the Court being in all things duly advised, now therefore, it is hereby

ORDERED that Defendant's Motion to Suppress Evidence and Amended Motion to Suppress Evidence be and the same are hereby denied.

Dated this 14th day of August, 2015.

BY THE COURT:



Gregory J. Stoltenburg
Circuit Court Judge

ATTEST:


Clerk of Courts

FILED

AUG 14 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

