[Cite as *State v. Adkins*, 2015-Ohio-1698.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
		CASE NOS. CA2014-02-036
Plaintiff-Appellee,	:	CA2014-06-141
	:	O P I N I O N
- vs -		5/4/2015
	:	
TIMOTHY R. ADKINS, et al.,	:	
Defendants-Appellants.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-03-0467

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M. POWELL, J.

{¶ 1} In this consolidated appeal, defendants-appellants, Timothy R. Adkins and Robert French, appeal their respective convictions in the Butler County Court of Common Pleas for illegal cultivation of marihuana. For the reasons detailed below, we affirm.

I. FACTS

{¶ 2} The instant appeals emanate from the trial court's denial of appellants' respective motions to suppress evidence collected following the execution of search warrants obtained after trash pulls revealed nominal amounts of marihuana and marihuana residue. Appellants both appeal their convictions challenging the denial of their respective motions to suppress on constitutional grounds.[1] This court has consolidated the two cases on appeal as they involve the same legal issues and raise the same four assignments of error. *State v. Adkins, et al.*, 12th Dist. Butler Nos. CA2014-02-036 and CA2014-06-141 (Aug. 14, 2014) (Entry of Consolidation).

A. Appellant Adkins

{¶ 3} The Special Operations Unit of the Middletown Division of Police received complaints from concerned citizens that Adkins was involved in "drug activity/trafficking" at his residence located at 1007 Lafayette Avenue, Middletown, Ohio. The Special Operations Unit also received the same information from "[r]eliable confidential informant(s)." In addition, Detective James Wilcox, also with the Special Operations Unit, received an anonymous letter stating that Adkins was trafficking marihuana at the residence. As a result of these complaints, Wilcox and other members of the Special Operations Unit conducted a trash pull of garbage "discarded at the curb in front of the residence." Inside the trash, officers found five one-gallon zip-lock baggies containing a substance which field-tested positive for marihuana, and a document which contained the name of Adkins' live-in girlfriend. Within 72 hours of the trash pull, Wilcox sought a search warrant for the residence. The search warrant for Adkins' residence was issued on February 1, 2013, and on February 5, 2013, the search warrant was executed. During the search, officers found

1. In Case No. CA2014-02-036, Adkins challenges the trial court's decision denying his motion to suppress evidence, and French appeals the trial court's decision on his motion to suppress in Case No. CA2014-06-141.

marihuana and paraphernalia consistent with a grow operation.

{¶ 4} On May 22, 2103, Adkins was indicted by the Butler County Grand Jury on one count of illegal cultivation of marihuana in violation of R.C. 2925.04, a fifth-degree felony; one count of possession of marihuana in violation of R.C. 2925.11, a fifth-degree felony; and one count of illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor. Adkins moved to suppress the evidence seized as a result of the search of his home. Adkins asserted that the trash pull was unconstitutional under both the Ohio and United States Constitutions and that the search warrant was not supported by probable cause.

{¶ 5} On October 11, 2013, the trial court held a hearing on Adkins' motion to suppress. During the hearing, Detective Wilcox testified and the search warrant was entered into evidence. In addition, Adkins stipulated that "the trash was pulled outside the curtilage of the home on a trash night." After considering the search warrant and evidence presented at the hearing, the trial court denied Adkins' motion to suppress.

{¶ 6} Adkins subsequently entered a no contest plea to the two felony counts and the state nolled the misdemeanor count for possession of drug paraphernalia. The trial court merged the possession of marihuana charge into the illegal cultivation of marihuana charge and sentenced Adkins to five years of community control.

B. Appellant French

{¶ 7} In September 2013, Detective Gary Crouch with the city of Hamilton Police Department was conducting an investigation of Robert French. According to Detective Crouch, French resided at 525 Fairhaven Drive, Hamilton, Ohio. During the investigation, the Hamilton Police Department received a complaint that marihuana plants were being grown at 525 Fairhaven Drive. As a result, the police conducted a trash pull and "recovered bags of trash [which] had been discarded in front of 525 Fairhaven Drive." Inside the trash bags, the

police found "a marijuana leaf that field[-]tested positive" for marihuana and a piece of mail addressed to 525 Fairhaven Drive. Officers also requested an electric usage report from the City of Hamilton. This report indicated that the electric consumption of 525 Fairhaven Drive was approximately three times that of neighboring houses. Based on this information, Detective Crouch sought a search warrant. On September 5, 2013, the officers obtained a search warrant and subsequently searched French's residence. During the search, a grow operation was found in the basement and officers seized marihuana and paraphernalia related to the grow operation.

{¶ 8} On November 13, 2013, the Butler County Grand Jury indicted French on one count of illegal cultivation of marihuana in violation of R.C. 2925.04, a third-degree felony, and one count of possession of marihuana in violation of R.C. 2925.11, a third-degree felony. French moved to suppress the fruits of the search, challenging the constitutionality of the trash pull and the lawfulness of the search warrant executed at his home.

{¶ 9} The trial court held a hearing on French's motion on January 14, 2014. At the hearing, the search warrant was entered into evidence and Detective Crouch was the sole witness to testify. The trial court denied French's motion to suppress. Subsequently, French pled no contest to both charges in the indictment. The trial court merged the possession of marihuana charge into the illegal cultivation charge and sentenced French to five years of community control.

{¶ 10} Appellants each appeal their convictions challenging the trial court's judgments denying their respective motions to suppress.

II. LAW AND ANALYSIS

A. Standard of Review

{¶ 11} Appellate review of a trial court's ruling on a motion to suppress presents a

mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8; *State v. Johnson*, 12th Dist. Butler No. CA2012-11-235, 2013-Ohio-4865, ¶ 14. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Johnson* at ¶ 14. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038, ¶ 10. The appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Lange*, 12th Dist. Butler No. CA2007-09-232, 2008-Ohio-3595, ¶ 4.

B. Constitutionality of Trash Pull

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRASH PULLS WERE UNCONSTITUTIONAL SEARCHES.

{¶ 14} In the first assignment of error, appellants assert their Fourth Amendment rights were violated by the warrantless search of their trash, and therefore the evidence obtained from these trash pulls should have been suppressed. We find no merit to appellants' arguments.

{¶ 15} The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Initially, the Supreme Court construed the Fourth Amendment to protect against searches and seizures of the person and trespasses against private property. *See Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886). "The text of the Fourth Amendment reflects its close connection to property" and therefore, the Supreme Court's Fourth Amendment jurisprudence was largely tied to common-law trespass. *United States v. Jones*, __ U.S. __, 132 S.Ct. 945, 949 (2012).

{¶ 16} However, in the latter half of the 20th Century, the Supreme Court began deviating from the exclusively property-based approach. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), the Supreme Court determined that "the Fourth Amendment protects people, not places." *Id*. at 351. Accordingly, the Court delineated a two-part inquiry to determine whether Fourth Amendment protections apply in a given circumstance: (1) whether the individual exhibited a subjective expectation of privacy, and (2) whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable. *See United States v. Knotts*, 460 U.S. 276, 280-281, 103 S.Ct. 1081 (1983) (discussing *Katz*). After *Katz*, the touchstone of a Fourth Amendment analysis was whether a person had a "constitutionally protected reasonable expectation of privacy." *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735 (1984), quoting *Katz* at 360; *see also Jones* at 951.

{¶ 17} As to the search of trash specifically, the United States Supreme Court has found that the protections of the Fourth Amendment do not extend to garbage that is voluntarily left for trash collection outside the curtilage of a home. *California v. Greenwood*, 486 U.S. 35, 37, 108, S.Ct. 1625 (1988). In reaching this decision, the Court concluded that there is no reasonable expectation of privacy in garbage voluntarily left for trash collection in an area which is susceptible to open inspections and "[a]ccessible to animals, children, scavengers, snoops, and to other members of the public." (Footnotes omitted.) *Id.* at 40.

{¶ 18} Appellants, acknowledging *Greenwood*, do not claim a reasonable expectation of privacy in the contents of the trash seized by law enforcement. Accordingly, we do not analyze appellants' Fourth Amendment claims under *Katz's* reasonable-expectation-of-privacy test. Appellants assert that the issue of whether the trash pulls are protected by the Fourth Amendment must also be examined in light of the United States Supreme Court's recent decision in *United States v. Jones*, __ U.S. __, 132 S.Ct. 945 (2012). Appellants

maintain that the trash pulls in this case constitute a "search" subject to Fourth Amendment protection pursuant to the historic trespass theory recognized in *Jones* to be of continued efficacy.

{¶ 19} In *Jones*, the United States Supreme Court held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" (Footnote omitted.) *Jones* at 949. In so holding, the court reasoned that by placing a GPS on the suspect's car, "[t]he Government physically occupied private property for the purpose of obtaining information." *Id.* The court went on to state that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.*

{¶ 20} In reaching its decision, the Court did not apply the *Katz* standard and consider whether the government's conduct violated the suspect's reasonable expectation of privacy. *Jones* at 950-952; *see also State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, ¶ 39. Rather, the Court returned to the earlier Fourth Amendment jurisprudence focused on property law, stating that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate that understanding." (Footnote omitted.) *Jones* at 950; *see also Johnson* at ¶ 39. "Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Jones* at 950, quoting *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038 (2001). The *Katz* reasonable-expectation-of-privacy test only augmented and did not displace the common-law trespassory test which preceded it. *Jones* at 952.

{¶ 21} Accordingly, with the decision in *Jones*, the Court made clear that a search

within the meaning of the Fourth Amendment occurs "[w]here * * * the Government obtains information by physically intruding into a constitutionally protected area." *Jones* at 950, fn. 3. Under such circumstances, it is unnecessary to inquire about the suspect's expectation of privacy to determine if a Fourth Amendment search had occurred. *See Grady v. North Carolina*, ___ U.S. ___, 135 S.Ct. 1368, 1370 (2015).

{¶ 22} Appellants contend that the officers' intrusion into their trash was a "trespass to a person's papers or effects." In arguing a trespass occurred, appellants rely on the tort law definition of trespass, i.e., a trespass occurs when an actor has physical contact with a chattel in possession of another. In *Jones*, the Court rejected the notion that it was applying "18th-century tort law" and stated that the Fourth Amendment is not concerned with "*any* technical trespass that led to the gathering of evidence." (Emphasis sic.) *Jones* at 953, fn. 8. Rather, the Fourth Amendment protects against trespassory searches only with regard to "persons, houses, papers, and effects." *Id*. Consequently, we find appellants' reliance on the tort law definition of trespass alone to be unpersuasive.

{¶ 23} In *Jones*, it was the trespassory nature of the officer's conduct of physically occupying private, constitutionally protected property for the purpose of obtaining information which led to the conclusion that a "search" had occurred. *Jones* involved a vehicle which "is an 'effect' as that term is used in the Amendment." *Jones* at 949, citing *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476 (1977). Accordingly, the question before this court is whether the officers committed a physical intrusion of any of the areas protected by Fourth Amendment when they conducted the trash pulls at Adkins' and French's residences.

{¶ 24} Appellants claim that the trash searched by the officers included "papers" and "effects" under the Fourth Amendment. Accordingly, appellants assert the officers committed a trespass when they "intermeddled with the paper and effects" in order to conduct the trash pulls. French additionally asserts, for the first time on appeal, that the officers searched his

trash within the protected curtilage of his home. Despite appellants' arguments to the contrary, we do not find that the holding of *Jones* extends the definition of a "search" under the Fourth Amendment to include the trash pulls at issue here. Because law enforcement did not physically intrude upon appellants' respective house or curtilage or on any of appellants' constitutionally protected papers or effects when conducting the searches, we find there has been no violation of the Fourth Amendment as contemplated by the *Jones* trespassory test.

1. The Curtilage of the Home

{¶ 25} The Fourth Amendment's protection against warrantless home entries extends to the "curtilage" of an individual's home. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134 (1987); *State v. Williamson*, 12th Dist. Butler No. CA2003-02-047, 2004-Ohio-2209, ¶ 16. The curtilage is the "area 'immediately surrounding and associated with the home'" and is a part of the home itself for Fourth Amendment purposes. *Florida v. Jardines*, __ U.S. __, 133 S.Ct. 1409, 1414 (2013), quoting *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735 (1984). If an area does not fall within the curtilage, then no warrant is required to conduct a search. *State v. Payne*, 104 Ohio App.3d 364, 368 (12th Dist.1995). Searches within the curtilage have always required a warrant; *Jones* did not change this. *See Jardines* at 1414-1417.

a. Adkins

{¶ 26} At the suppression hearing, Adkins' counsel, stipulated that the trash pull occurred outside of the curtilage. Specifically, it was stipulated that "the trash was pulled outside the curtilage of the home on a trash night." Because it is clear that the officers removed the trash from an area outside of the curtilage of Adkins' home, we find that there was no physical intrusion of the home or curtilage in order to obtain the inculpatory evidence against Adkins. Quite simply, the area outside the curtilage is not one of those protected areas enumerated by the Fourth Amendment. The government's physical intrusion in such

an area is of no Fourth Amendment significance.

b. French

{¶ 27} In French's case, there was no stipulation regarding the location of the trash. In fact, there was no testimony presented during the suppression hearing regarding the location of the trash when it was picked up by the officers.[2] French asserts on appeal that it was the state's burden to prove the trash pull occurred outside of the curtilage. French claims that the state was required to obtain a search warrant to search the "trash can within the curtilage" and the failure to do so violated his Fourth Amendment rights.

{¶ 28} After a review of the record, we find that French waived any challenge to whether the trash pull was within the curtilage. A defendant is required to clearly state the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure. *Xenia v. Wallace*, 37 Ohio St.3d 216, 218 (1988); *see also* Crim.R. 47; *State v. Landis*, 12th Dist. Butler No. CA2005-10-428, 2006-Ohio-3538, ¶ 31-34. The burden shifts to the state to show an exception to the warrant requirement for the search or seizure only once the defendant "has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is lack of probable cause." *Wallace* at paragraph two of the syllabus. The failure to adequately raise the basis for the challenge to a search waives the issue on appeal. *Wallace* at 218.

{¶ 29} In his written motion, French did not challenge the trash pull as unconstitutional based on the location of the trash when it was picked up by law enforcement.[3] Accordingly,

2. The only evidence as to the location of the trash was the reference in the search warrant affidavit which provided that the "bags of trash * * * had been discarded in front of 525 Fairhaven Dr."

3. We note that at the outset of his motion to suppress, French states that the trash was on the "curb." Moreover, from a reading of the motion to suppress, it is clear that French's challenge to the trash pull was based on the application of *Jones* to trespassory searches of papers and effects that occur beyond the curtilage. If French was challenging the search as having occurred within the curtilage, his challenge would not have been focused solely upon "papers and effects" but would have included "houses" as the curtilage is the "area 'immediately surrounding and associated with the home'" and is a part of the home itself for Fourth Amendment

the testimony elicited at the motion to suppress hearing did not address whether the trash was removed from within or outside of the curtilage of French's home. The first time the location of the trash pull was mentioned was during closing arguments, when French's counsel stated the following: "We'd also point out that there's no information in the affidavit as to whether or not the trash pull occurred inside the curtilage or not. And curtilage would be [a] protected area." On this record, we find that French did not sufficiently raise the issue of whether the search occurred within or outside of the curtilage. Therefore, his argument has been waived for purposes of this appeal.

2. Papers or Effects

{¶ 30} Appellants also assert that the Fourth Amendment protects against trash pulls, even those that occur beyond the curtilage, because in order to search the trash, law enforcement committed a trespass of their papers and effects.

{¶ 31} Within the meaning of the Fourth Amendment, effects include personal property, rather than real property. *Oliver v. United States*, 466 U.S. 170, 177, 104 S.Ct. 1735 (1984), fn. 7 ("the term 'effects' is less inclusive than 'property,' and cannot be said to encompass open fields"). As to papers, under the Fourth Amendment there is no distinction from other forms of property; if a person's property may lawfully be seized under the circumstances, than so too shall the person's papers. *Andresen v. Maryland*, 427 U.S. 463, 474, 96 S.Ct. 2737 (1976) ("There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized").

{¶ 32} The search and seizure of property that has been voluntarily abandoned does

purposes. *Florida v. Jardines*, __ U.S. __, 133 S.Ct. 1409, 1414 (2013), quoting *Oliver v. United States*, 466 U.S. 170, 176, 104 S.Ct. 1735 (1984). *See also State v. Young*, Warren App. No. CA2014-05-074, 2015-Ohio-1347.

not violate the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683 (1960); *see also State v. Freeman*, 64 Ohio St.2d 291, 296-297 (1980); *United States v. Jones*, 406 Fed.Appx. 953, 954 (6th Cir.2011). In *Abel*, the Supreme Court found that the warrantless search of a hotel room and the seizure of discarded items in a wastebasket by FBI agents after a suspect had vacated the room was lawful. *Abel* at 241. At the time of the search, the suspect had vacated the room and the hotel had exclusive right to its possession. *Id.* Moreover, "[s]o far as the record shows, petitioner had abandoned these articles [in the wastebasket]. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property." *Id.*[4]

{¶ 33} While the aim of the Fourth Amendment is to protect people from the physical intrusion of the government into their "private property," the Fourth Amendment does not extend this protection of property into perpetuity. *See Jones* at 949-950; *see also Abel* at 217. Where individuals abandon their property or voluntarily discard it, they have relinquished any property interest they once had in the property. *See Doughman v. Long*, 42 Ohio App.3d 17, 21 (12th Dist.1987); *Freeman* at 296. Simply put, abandoned property is ownerless and therefore is incapable of being trespassed as it does not constitute "property of another."[5] Accordingly, we find that the Fourth Amendment does not protect personal property, including papers, which has been voluntarily discarded and left for trash collection.[6]

4. Bona vacantia is a Latin phrase meaning "ownerless property." *Black's Law Dictionary* (10th Ed. 2014).

5. To establish a trespass, one of the elements is that the property belongs to another. *See Chance v. BP Chemicals Inc.*, 77 Ohio St.3d 17, 24 (1996); *see also Black's Law Dictionary* (10th Ed. 2014).

6. This conclusion finds further support when considering the reasonable expectation of privacy in abandoned property. "The United States Supreme Court has long held that the Fourth Amendment prohibition against unreasonable searches does not apply to property that has been voluntarily abandoned, because society does not recognize an expectation of privacy in abandoned property as being objectively reasonable." *State v. Gould*, 131 Ohio St.3d 179, 2012-Ohio-71, ¶ 131.

Such articles are bona vacantia, or "ownerless goods," and there is nothing unlawful in law enforcement's intrusion into such abandoned property. *See Abel* at 241; *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445 (1924).

{¶ 34} As the "papers" and "effects" found in Adkins' and French's trash were discarded and abandoned, we find that they do not fall within the protection of the Fourth Amendment.

a. Adkins

{¶ 35} As indicated above, the record demonstrates the trash seized by law enforcement "was pulled outside the curtilage of the home on a trash night." Adkins actions of leaving the trash on the day and in an area designated for trash collection, indicates his intent to abandon the contents of the trash and relinquish any interest he may have had in the trash. There was nothing unlawful in law enforcement's intrusion into such abandoned property. Accordingly, we find the trash collected by the officers was not protected by the Fourth Amendment.

b. French

{¶ 36} Although the record is less precise regarding the exact placement of French's trash, the affidavit demonstrates that the trash was placed in such a manner indicating it was discarded and left for collection. Specifically, the affidavit states, officers "recovered bags of trash that had been discarded in front of 525 Fairhaven Dr." We have previously found that a similar affidavit was sufficient to establish the constitutionality of the trash pull. *State v. Akers*, 12th Dist. Butler No. CA2007-07-163, 2008-Ohio-4164, ¶ 11. In *Akers*, the affidavit stated: "Officers examined trash that had been discarded from 1101 Noyes Avenue." *Id.* at ¶ 19. This court found that the affidavit was sufficient to establish that the trash the police seized and then searched had been set out for collection, and therefore officers did not need to establish probable cause to permit them to make the trash pull. *Id.* at ¶ 11. Similarly, in

the instant case, the affidavit makes clear that the trash bags had been discarded and set out for collection. Accordingly, on the record before us, we find that French's actions demonstrate his intent to abandon and relinquish any interest he may have had in the contents of the trash bag. As the trash was abandoned property, law enforcement was free to physically obtain the contents of the trash without violating the Fourth Amendment.

{¶ 37} Based on the foregoing, we find law enforcement did not physically intrude into any of the areas protected by the Fourth Amendment. *See Jones* at 949. Accordingly, the trash collected from Adkins' and French's residences was not protected by the Fourth Amendment. We therefore conclude that the trash pulls were constitutional as they did not constitute a trespass to appellants' "papers" and "effects." In so holding, we do not announce a bright line rule that a trash pull beyond the curtilage may never constitute a trespass to protected "papers" and "effects." Different circumstances may dictate a different result from that we reach here. Appellants' first assignment of error is overruled.

C. Constitutionality of the Trash Pull under the Ohio Constitution

{¶ 38} Assignment of Error No. 2:

{¶ 39} THE OHIO CONSTITUTION REQUIRES THAT OFFICERS POSSESS EITHER A SEARCH WARRANT OR REASONABLE SUSPICION BEFORE A TRASH PULL IS LAWFUL.

{¶ 40} Appellants argue in their second assignment of error that the Ohio Constitution requires the police possess either a search warrant or reasonable suspicion before a trash pull is lawful. Essentially, appellants contend that Article I, Section 14 of the Ohio Constitution provides greater protection than the Fourth Amendment.

{¶ 41} We previously considered and rejected these same arguments in *State v. Quinn*, 12th Dist. Butler No. CA2011-06-116, 2012-Ohio-3123, ¶ 13-18. Appellants acknowledge our holding in *Quinn* yet assert that *Quinn* should be revisited in light of the

Supreme Court's decision in *Jones.* Appellants once again contend that *Jones* expanded the definition of a search and that under this "expanded" definition, a trash pull is considered a search.

{¶ 42} We find no reason to revisit our holding in *Quinn*. The Supreme Court of Ohio recently reiterated that Article I, Section 14 of the Ohio Constitution affords the same protection as the Fourth Amendment in felony cases. *State v. Jones*, Slip Opinion No. 2015-Ohio-483, ¶ 12. For the reasons set forth in our resolution of appellants' first assignment of error, we find that the holding of *Jones* does not extend to trash pulls, such as here, where the trash was abandoned and there was no trespass to an area enumerated by the Fourth Amendment. Appellants' trash was not protected under Article I, Section 14 of Ohio's Constitution. The police were free to conduct the trash pull without a search warrant or reasonable suspicion. Appellants' second assignment of error is overruled.

D. Lawfulness of Warrant

{¶ 43} Assignment of Error No. 3:

{¶ 44} A TRASH PULL YIELDING NON-CRIMINAL AMOUNTS OF MARIHUANA IS INSUFFICIENT TO SUPPORT A RESIDENTIAL SEARCH WARRANT**.**

{¶ 45} Assignment of Error No. 4:

{¶ 46} BOTH SEARCH WARRANTS WERE UNCONSTITUTIONAL AND TRIGGERED THE EXCLUSIONARY RULE.

{¶ 47} In appellants' third and fourth assignments of error, they challenge the lawfulness of the search warrants. Appellants contend (1) the searches were not based on probable cause because the amount of marihuana discovered in their trash would have only constituted a minor-misdemeanor offense, (2) the search warrants lacked a substantial basis for probable cause, (3) the search warrants should be invalidated because the scope of the

warrants was not tailored to focus on "marihuana possession and marihuana paraphernalia," and (4) the search warrants do not fall within the "good faith exception."

{¶ 48} The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Generally, evidence obtained as a result of an unconstitutional search or seizure will be excluded under the exclusionary rule. *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, ¶ 40, citing *Weeks v. United States*, 232 U.S. 383, 394, 34 S.Ct. 341 (1914); and *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684 (1961). The sole purpose of the exclusionary rule is to deter future violations of the Fourth Amendment. *Johnson* at ¶ 40, citing *Davis v. United States*, __ U.S. __, 131 S.Ct. 2419, 2426 (2011). However, under the good-faith exception to the exclusionary rule, where police act objectively and in a "reasonable-good faith belief" that their conduct is lawful, the evidence from these searches will not be excluded. *Johnson* at ¶ 40-42; *United States v. Leon*, 468 U.S. 897, 909, 104 S.Ct. 3405 (1984).

1. Amount of Marihuana

{¶ 49} In their third assignment of error, appellants assert that because the trash pulls only yielded a minor-misdemeanor amount of marihuana, the trash pulls were insufficient to support probable cause for the issuance of the search warrants. We find no merit to this argument.

{¶ 50} The Supreme Court of Ohio recently held that "'[t]otality of the circumstances' is the proper standard of review to determine whether probable cause exists to issue a search warrant if the supporting affidavit relies in part on evidence seized from a 'trash pull.'" *State v. Jones*, 2015-Ohio-483, ¶ 1. In reaching this decision, the court specifically declined to adopt a rule requiring trash pulls to be viewed in isolation when determining whether probable cause exists to issue a warrant. *Id.* at ¶ 19. We decline appellants' invitation to view in

isolation the trash pulls and the amount of marihuana discovered.

{¶ 51} Rather, this court is required to consider the product of the trash pulls as part of the totality of the circumstances, along with all the other information presented in the affidavits accompanying the request for the search warrants, and determine whether the circumstances were sufficient to establish probable cause. *See Jones* at ¶ 15. In considering the marihuana found in the trash pulls as part of the totality of the circumstances, we note that seldom, if ever, will a trash pull yield more than an insignificant amount of marihuana for the simple reason that a drug user/trafficker is unlikely to discard more than an insignificant amount. As our discussion of appellants' fourth assignment of error makes clear, rather than the amount, it is the presence of the marihuana and its nature that is significant for purposes of establishing probable cause for the issuance of a search warrant. For instance, here, while the amount of marihuana was minimal, the marihuana in Adkins' trash pull was found in five one-gallon baggies (indicative of involvement with more than an amount for personal use) and the marihuana found in French's trash pull was in the form of a leaf (indicative of a marihuana grow).

{¶ 52} We overrule appellants' third assignment of error and turn now to whether the totality of the circumstances, including the marihuana found in the trash pulls, supported probable cause for the issuance of the warrants.

2. Probable Cause for Search Warrant

{¶ 53} In the fourth assignment of error, appellants argue the evidence found at their individual residences should have been suppressed because the warrant was unconstitutional.

{¶ 54} As stated above, the Fourth Amendment requires all warrants to be issued based on probable cause. The duty of the judge or magistrate issuing a warrant is to simply make a "practical, common-sense decision whether, given all the circumstances set forth in

the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317 (1983); *see also Jones* at ¶ 13. A finding of probable cause may be "based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." Crim.R. 41(C)(2); *see also State v. Akers*, 12th Dist. Butler No. CA2007-07-163, 2008-Ohio-4164, ¶ 16. The issuing judge or magistrate is confined to the averments contained in the affidavit supporting the issuance of the search warrant. *State v. Swift*, 12th Dist. Butler No. CA2013-08-161, 2014-Ohio-2004, ¶ 16. The affidavit in support of a search warrant must also "name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located." Crim.R. 41(C)(1).

{¶ 55} In reviewing whether a search warrant was issued upon a proper showing of probable cause, reviewing courts must examine the totality of the circumstances. *Jone*s, 2015-Ohio-483 at ¶ 13, citing *Gates* at 238. The duty of reviewing courts is limited to ensuring the judge or magistrate had a substantial basis for concluding that probable cause existed based on the four corners of the affidavit filed in support of the warrant. *Id*.; *State v. Quinn*, 12th Dist. Butler No. CA2011-06-116, 2012-Ohio-3123, ¶ 21. Accordingly, this court does not determine de novo whether the affidavit provided sufficient probable cause. Rather, "[i]n conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, * * * courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of

upholding the warrant." *Jones* at ¶ 14, quoting *George* at paragraph two of the syllabus.

a. Adkins

{¶ 56} In support of Detective Wilcox's claim that there was probable cause to search Adkins home, the affidavit stated the following:

> Affiant and other members of the Special Operations Unit have received complaints from concerned citizens that Tim Adkins is involved in drug activity/trafficking at 1007 Lafayette Ave. Affiant and other members of the Special Operations Unit have received the same information from Reliable [C]onfidential Informant(s) that Tim Adkins is involved in trafficking of marijuana at 1007 Lafayette Ave. Affiant has also received information from an anonymous letter * * * stating that Tim Adkins is trafficking [m]arijuana at 1007 Lafayette Ave. * * *
>
> * * *
>
> Affiant and other members of the Special Operations Unit collected the trash discarded at the curb in front of the residence of 1007 Lafayette Ave. This occurred within the past 72 h[ou]rs. As a result of the searching the trash, Affiant found 5 one gallon zip lock baggies with marijuana residue. The marijuana residue collected field tested [sic] positive. Affiant recognizes these baggies to be consistent with baggies used to contain or package appox. [sic] one pound of marijuana. A document was found with the name of * * * the live in girlfriend of Tim Adkins. * * *

{¶ 57} The affidavit also stated that Adkins had been previously arrested for several drug offenses, including (1) drug abuse in November 2004, (2) trafficking in drugs in May 2006 and again in August 2007, (3) possession of drugs in July 2008, and (4) drug abuse in February 2010. Finally, Detective Wilcox stated that he "recognizes Tim Adkins to be the same that has been the focus of previous search warrants."

{¶ 58} Adkins asserts that the search warrant affidavit did not contain sufficient information to support a finding of probable cause. In particular, Adkins claims that the affidavit was deficient because it failed to state the identity of the sources providing information to law enforcement, the veracity or the basis of the source's information, or the timeliness of the information. Adkins also argues that information regarding his prior arrests

and the fact that he had been the subject of prior search warrants were insufficient to establish probable cause.

{¶ 59} An affidavit for a search warrant must present timely information. *State v. Young*, 12th Dist. Clermont No. CA2005-08-074, 2006-Ohio-1784, ¶ 23. Furthermore, although probable cause may be based on hearsay, the affidavit must provide a substantial basis for believing that the source is credible and that there is a factual basis for the information furnished. Crim.R. 41(C); *State v. Quinn*, 12th Dist. Butler No. CA2011-06-116, 2012-Ohio-3123, ¶ 22.

{¶ 60} In the instant case, either because the officers were incapable of providing this information or because they simply failed to include it, the affidavit does not state the basis of knowledge for the information from these sources or describe the veracity or credibility of the "confidential informant" or "concerned citizens."[7] The affidavit also fails to indicate *when* the officers received the information from these three sources. "It is imperative that the affidavit establish that the information coming from the anonymous source was timely." *Quinn* at ¶ 22. The affidavit also provided stale information relating to Adkins' prior arrests and the fact that he had been the subject of prior search warrants. The most recent arrest occurred in 2010, three years prior to the request for the search warrant in this case. Such information is certainly not timely.

{¶ 61} However, an affidavit may include stale information which is not necessarily relevant to the determination of probable cause. *See Swift*, 2014-Ohio-2004 at ¶ 25. The inclusion of this information, although stale, does not render the affidavit fatally defective. Moreover, the failure to include the basis of knowledge and the timing of the information that Adkins was involved in trafficking marihuana dilutes its value for purposes of establishing

7. It would have been impossible for the officers to state the veracity or reliability of the anonymous letter, as by virtue of its anonymity, the officers were unaware of the identity of its author.

probable cause. However, this does not render the information valueless or indicate that it should not have been included in the affidavit. We are mindful that when taken separately, these individual facts provided in the affidavit may not be sufficient to establish probable cause. However, "[p]robable cause is the sum total of layers of information * * *. We weigh not individual layers but the 'laminated' total." *Young* at ¶ 26. Thus, the information relating to Adkin's stale arrests and prior search warrants and the complaints that Adkins was trafficking in marihuana provided pertinent background information as to what led the officers to conduct a trash pull at 1007 Lafayette Avenue. The information further explained how the officers identified Adkins. Finally, the collective import of the information lends veracity to its individual components that Adkins may be involved in illegal drug activity and is additionally corroborated by the results of the trash pull discussed below.

{¶ 62} After a constitutional trash pull, the police found five one-gallon baggies which contained marihuana residue.[8] Detective Wilcox averred in the affidavit that in his experience these baggies are typically used to contain or package approximately one pound of marihuana, thus indicating that more than a personal use amount of marihuana was involved. The contents of the trash were also linked to 1007 Lafayette Avenue as it contained a document with the name of Adkins' known live-in girlfriend. The fact that the trash pull revealed the existence of marihuana provided strong evidence, in itself, that probable cause existed. *See Swift* at ¶ 19. This court as well as several other courts have found that the existence of illegal drug residue is sufficient, standing alone, to establish probable cause. *See e.g. Akers* at ¶ 22-24; *People v. Keller*, 479 Mich. 467, 477 (2007); *Humes v. City of Blue Ash*, S.D. Ohio No. 1:12-cv-960, 2013 WL 2318538, *4-5 (May 28, 2013); *United States v. Lawrence*, 308 F.3d 623, 626 (6th Cir.2002) (finding information

8. As discussed in the resolution of appellants' first assignment of error, the officer's conduct of conducting a trash pull without probable cause did not violate Adkins' Fourth Amendment rights.

obtained from a trash pull can be sufficient to establish probable cause for a search warrant).

{¶ 63} We therefore find that based on the totality of the circumstances, Detective Wilcox's affidavit provided the issuing judge with a substantial basis for concluding that probable cause existed. Adkins' arguments to the contrary are without merit. Accordingly, probable cause supported the judge's issuance of a search warrant to search Adkins' residence.

b. French

{¶ 64} The affidavit submitted by Detective Crouch in support of the search warrant for French's residence stated in pertinent part:

> The Hamilton Police Department received a complaint of marijuana plants being grown at 525 Fairhaven Dr. Within the past few days the Hamilton Police Department recovered bags of trash that had been discarded in front of 525 Fairhaven Dr. A marijuana leaf that field[-] tested positive was found in the trash along with mail addressed to 525 Fairhaven Dr. An electric usage report from the City of Hamilton found that the electric consumption at 525 Fairhaven is approximately three times higher than neighboring houses. In the affiant[']s experience and training, very high electric consumption is common in houses where marijuana grows are found.

{¶ 65} Similar to Adkins, French also challenges the source of the original tip that marihuana was being grown in his home. French asserts that the affidavit was deficient and failed to establish probable cause as it did not indicate the basis of the source's information, the reliability of the complainant, and did not state the timing of this complaint. French also asserts the police failed to conduct an independent investigation to corroborate the information provided by the complainant. We find no merit to French's arguments.

{¶ 66} After reviewing the affidavit, we find there was a lack of particularity as to the reliability of the complainant, the source or basis of the complainant's information, and the freshness of this tip. *See Young*, 2006-Ohio-1784 at ¶ 23. Similar to Adkins, it is unclear whether the officers were incapable of providing this information or if they simply failed to

include it. Nevertheless, due to these deficiencies in the tip, the tip alone did not establish probable cause. *See Quinn*, 2012-Ohio-3123 at ¶ 22. However, we are unconcerned with whether individual facts supply probable cause. Rather, it is the totality of the circumstances which control. We find the information about the complaint provided pertinent background information as to what led the officers to conduct a trash pull at 525 Fairhaven Drive. According to the affidavit, as a result of the complaint, Hamilton police officers performed a constitutional trash pull and searched the contents of trash which had been discarded in front of 525 Fair Haven Drive.[9] The contents of the trash bags revealed a single marihuana leaf which field-tested positive for marihuana. The contents of the trash were also tied to the residence as it contained mail which was addressed to "525 Fairhaven Dr." The fact that officers recovered an actual marihuana leaf as opposed to marihuana residue provided further support that a marihuana grow operation was taking place at 525 Fairhaven Drive. This also provided further corroboration of the information provided by the complainant. Accordingly, the fact the marihuana was found, in of itself, provides sufficient evidence to provide probable cause to issue the search warrant. *Swift*, 2014-Ohio-2004 at ¶ 19.

{¶ 67} The affidavit also included additional corroborating information in the form of electric usage records from the city of Hamilton obtained by Detective Crouch. This court has previously found that evidence of a suspect's high electric use is relevant in determining probable cause. *Swift* at ¶ 20-26; *see also State v. Thomas*, 10th Dist. Franklin No. 12AP-928, 2014-Ohio-1489, ¶ 14. According to the usage report, Crouch stated that "the electric consumption at 525 Fairhaven is approximately three times higher than neighboring houses."

{¶ 68} French contends that the electric usage information in the affidavit was "conclusory and undeveloped" and therefore did not support a finding of probable cause. It is

9. As discussed in the resolution of appellants' first assignment of error, the officers' action of conducting a trash pull without probable cause did not violate French's Fourth Amendment rights.

true that the affidavit lacks certain details such as specific kilowatt figures, the timeframe in which Crouch analyzed French's electric usage, the location of the "neighboring" houses that were used for comparison, and whether these "neighboring" houses represented a fair comparison. However, in providing the electric usage information, Crouch also indicated that in his experience and training, "very high electric consumption is common in houses where marijuana grows are found." As previously mentioned, we must consider the totality of the circumstances and will not consider whether individual facts are sufficient to establish probable cause. Although French's "high electric consumption" alone may not have been sufficient to establish probable cause, it did provide some corroboration for the complaint and the evidence obtained by the trash pull.

{¶ 69} Moreover, in issuing the search warrant, the judge found Detective Crouch to be credible. As a reviewing court, we must accord great deference to a determination of probable cause and even doubtful or marginal cases should be resolved in favor of upholding that warrant. Here, the affidavit contained the bare minimum of details as to the facts which formed Crouch's belief that there was a fair probability that contraband or evidence of marihuana cultivation would be found at 525 Fairhaven Drive. Additional information and details such as when the complaint was received and how the investigation into French's electric consumption occurred would have strengthened the probable cause finding in this case. However, in light of the deference we must afford to the issuing judge and the totality of the facts provided in the affidavit, we find the search warrant was valid.

{¶ 70} When the facts set forth in the affidavit are considered as a whole, the affidavit provided the issuing judge with a substantial basis to conclude there was a fair probability that the residence at 525 Fairhaven Drive was the site of marihuana cultivation. Hamilton police received information linking the address to a marihuana grow operation, and this information was corroborated by the trash pull as well as the information regarding the

home's electric consumption. Accordingly, probable cause supported the judge's issuance of a search warrant to search French's residence.

3. Scope of Search Warrant

{¶ 71} Within the fourth assignment of error, appellants also challenge the validity of the search warrants on the basis that the areas to be searched and the items to be seized were not properly tailored. After a review of the record, we find appellants failed to challenge the scope of the search warrants at the trial level.

{¶ 72} As mentioned previously, a defendant is required to clearly state the grounds upon which he challenges the submission of evidence pursuant to a warrantless search or seizure. *Xenia v. Wallace*, 37 Ohio St.3d 216, 218 (1988); *see also* Crim.R. 47; *State v. Landis*, 12th Dist. Butler No. CA2005-10-428, 2006-Ohio-3538, ¶ 31-34. The failure to adequately raise the basis for the challenge to a search waives the issue on appeal. *Wallace* at 218.

{¶ 73} Appellants' written motions to suppress only challenged the constitutionality of the trash pulls under the United States and Ohio Constitutions and the issuance of the warrants on the basis that they were not supported by probable cause. Appellants did not assert in their respective motions or at their hearings on said motions, that the warrant was invalid for being overbroad in its scope of the people, places, and items to be searched and seized. Accordingly, we find appellants may not challenge the warrants on this basis for the first time on appeal. *Wallace* at 218.

4. Good-Faith Exception

{¶ 74} Lastly, appellants argue within their fourth assignment of error that the good faith exception to the exclusionary rule is inapplicable in the cases at bar. Appellants maintain that the exclusion of the evidence recovered at their homes is an appropriate sanction as no reasonably informed and trained officer could believe that probable cause

arose from the facts averred in the search warrant affidavits. *See Davis v. United States*, __ U.S. __, 131 S.Ct. 2419 (2011); *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984); *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, ¶ 40-42. As we have found that probable cause supported the issuance of the search warrants in this case, appellants' argument that the search warrants did not fall into the good faith exception is rendered moot. *See* App.R. 12(A)(1)(c).

{¶ 75} Based on the foregoing, we find that the warrants executed at Adkins' and French's respective residences were supported by probable cause and therefore constitutional.

{¶ 76} Appellants' fourth and final assignment of error is overruled.

III. CONCLUSION

{¶ 77} In conclusion, we find the trial court did not err in denying Adkins' and French's motions to suppress. The trash pulls conducted by law enforcement did not violate appellants' Fourth Amendment rights or their rights under the Ohio Constitution. Moreover, based on the totality of the circumstances, the search warrants were supported by probable cause.

{¶ 78} Judgments affirmed.

PIPER, P.J., and RINGLAND, J., concur.