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**IN THE  
COURT OF APPEALS OF INDIANA**

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STATE OF INDIANA, )  
 )  
 Appellant-Plaintiff, )  
 )  
 vs. ) No. 59A01-0704-CR-189  
 )  
 DOUGLAS E. SHIPMAN, )  
 )  
 Appellee-Defendant. )

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APPEAL FROM THE ORANGE CIRCUIT COURT  
The Honorable Larry R. Blanton, Judge  
Cause No. 59C01-0403-FA-31

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**August 30, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

The State appeals the trial court order granting Defendant-Appellee Douglas E. Shipman's ("Shipman") motion to suppress evidence. We reverse and remand.

## **Issue**

The State raises the issue of whether the trial court erred in granting Shipman's motion to suppress evidence obtained pursuant to a warrant founded upon items discovered in a trash search.

## **Facts and Procedural History**

In February of 2004, the Indiana State Police received information from a confidential informant that Shipman was dealing marijuana and methamphetamine from his residence in French Lick, Indiana. The confidential informant indicated that he purchased drugs at Shipman's residence earlier in the month. The Indiana State Police had used the particular confidential informant in a prior controlled buy as well as the basis for other warrants.

On the morning of March 15, 2004, Trooper Kirby Stailey ("Trooper Stailey") was in French Lick performing a pick up of trash from another residence in an unrelated investigation when he observed two trash bags placed out for collection at Shipman's residence. Aware that Shipman was suspected of dealing drugs from his home, Trooper Stailey contacted Trooper Greg Ashby ("Trooper Ashby") so that he could perform a trash pull at Shipman's residence.

At approximately 8:45 a.m. that same morning, the French Lick Street Commissioner ("Street Commissioner") drove Trooper Ashby to Shipman's residence in a pick-up truck

owned by the Street Department to seize the trash bags. When they arrived, Trooper Ashby testified that he observed two trash bags, one partially in the roadway and the other on the edge of a gravel cut. Contrary to Trooper Ashby's testimony, Street Commissioner, Timothy Mills, testified that the bags were five feet up the bank of Shipman's yard in their usual location for collection. Trooper Ashby, wearing plain clothes, exited the truck, seized the trash bags and placed them in the back of the pick-up truck.

After arriving at the French Lick Police Station, the two trash bags were searched. In the larger of the two trash bags, the troopers discovered a large gallon-size freezer bag with remnants of marijuana. The large trash bag also contained mail addressed to Shipman. Trooper Ashby used this information to apply for and obtain a search warrant for Shipman's residence. Based on the evidence obtained in the execution of the search warrant, the State charged Shipman with Dealing in Methamphetamine, as a Class A felony,<sup>1</sup> Possession of Methamphetamine, as a Class C felony,<sup>2</sup> Receiving Stolen Property, as a Class D felony,<sup>3</sup> Maintaining a Common Nuisance, a Class D felony,<sup>4</sup> Possession of a Controlled Substance, as a Class D felony,<sup>5</sup> Unlawful Possession or Use of a Legend Drug, as a Class D felony,<sup>6</sup>

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<sup>1</sup> Ind. Code § 35-48-4-1(b).

<sup>2</sup> Ind. Code § 35-48-4-6(b)(1)(A).

<sup>3</sup> Ind. Code § 35-43-4-2(b).

<sup>4</sup> Ind. Code § 35-48-4-13(b).

<sup>5</sup> Ind. Code § 35-48-4-7(a).

<sup>6</sup> Ind. Code § 16-42-19-27(a).

and Possession of Marijuana, as a Class A misdemeanor.<sup>7</sup>

On September 19, 2006, Shipman filed a motion to suppress the evidence resulting from the search of Shipman's residence, alleging that the warrant was founded upon information gathered from an illegal trash search. After a hearing on the motion, the trial court granted the motion. The order read in part as follows:

1. The Indiana State Police received a tip that the Defendant was dealing marijuana from his home. The information provided by the informant was several days if not weeks old;
2. The state police kept a casual observation on the residence of the Defendant waiting for him to place his trash out for collection;  
. . . .
5. The police noticed the Defendant's trash placed for collection in March 2004. They collected trash in the same manner that it is usually collected, causing no public disturbance and no undue community notice. . . .  
. . . .
7. Absent any further investigation surveillance, fresh information or other independent facts which could be used to substantiate their informants [sic] tip, the police had a mere suspicion of criminal activity, such suspicion would have been good reason to instigate further investigations or gather additional information that would have been more current. The tip provided to the police was from a confidential informant whose information was stale when passed to the investigating officers. Probable cause must be buttressed by more than old information and general suspicion. . . .
8. The arguments heard by the court at the suppression hearing dealt with the gathering of trash, the method of trash collection and the interpretation of the rulings issued in the Litchfield cases. Whereby by [sic] definition the search of ones trash is described as a warrantless search.

“ . . . because the issuance of the search warrant was premised on the warrantless search of Litchfield's trash, the burden remained with the State to show that the trash search was reasonable under a totality of the circumstance” *Litchfield v. State* 808 NE 2<sup>nd</sup> 713 In App 2004 citing *State v. Stamper*, 788 NE 2<sup>nd</sup> 862, 865 (In Ct App 2003)

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<sup>7</sup> Ind. Code § 35-48-4-11.

9. The warrantless search of the Defendant's trash was not timely; and not supported by the totality of the circumstances.

Appendix at 30-33. Subsequent to the trial court's order, the State filed a motion to dismiss, which was granted, in order to pursue this appeal.

## **Discussion and Decision**

### I. Standard of Review

On appeal, the State argues that the trial court erred in granting Shipman's motion to suppress because the trial court applied the incorrect standard, the trash pull met the correct standard, and alternatively, the officers who executed the search warrant relied in good faith on the approved warrant. On appeal from the grant of a motion to suppress, the State appeals a negative judgment and must show the trial court's ruling on the suppression motion was contrary to law. State v. Cook, 853 N.E.2d 483, 485 (Ind. Ct. App. 2006). We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. Id. We do not reweigh the evidence or judge the credibility of the witnesses; rather, we consider only the evidence most favorable to the judgment. Id.

### II. Analysis

#### A. Constitutionality of the Trash Search Under Litchfield

On appeal, the State argues that the trial court erred when it granted Shipman's motion to suppress evidence because the police did not violate his rights under Article I, Section 11 of the Indiana Constitution by searching his trash. Article I, Section 11 provides, in relevant

part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated.”

The State argues that the trial court utilized the incorrect standard of probable cause in evaluating whether the search violated Shipman’s constitutional rights rather than the appropriate standard of reasonable suspicion. We agree.

The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. Litchfield v. State, 824 N.E.2d 356, 358 (Ind. 2005). In Litchfield, our Supreme Court recognized that evaluating the totality of the circumstances requires consideration of both the degree of intrusion into the subject’s ordinary activities and the basis upon which the officer selected the subject of the search or seizure. Id. The reasonableness of a search or seizure turns on a balance of: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion that the method of the search or seizure imposes on the citizen’s ordinary activities; and (3) the extent of law enforcement needs. Id. at 361.

Two requirements must be met for a search of trash to be reasonable. First, the trash must be retrieved in substantially the same manner as the trash collector would use. Id. at 363. Second, the officer must possess a reasonable, articulable suspicion, i.e., the same as that required for a Terry stop of an automobile, for seizing the trash. Id. at 364.

The trial court concluded and Shipman does not contest that Trooper Ashby collected the trash in the same manner that it is usually collected, causing no public disturbance. Therefore, the legality of the trash search turns on whether Trooper Ashby had the requisite

reasonable suspicion that Shipman was involved in criminal activity.

The reasonable suspicion requirement is satisfied where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. Lyons v. State, 735 N.E.2d 1179, 1183-1184 (Ind. Ct. App. 2000), trans. denied. Reasonable suspicion entails something more than an inchoate and unparticularized suspicion or hunch, but considerably less than proof of wrongdoing by a preponderance of the evidence. Id. at 1184.

Here, any basis for reasonable suspicion that Trooper Ashby may have had that Shipman was involved in criminal activity would have originated with the information provided to Trooper Stailey by the confidential informant. In Johnson v. State, 659 N.E.2d 116 (Ind. 1995), our Supreme Court addressed whether a tip from a confidential informant was enough to form reasonable suspicion, permitting the police to make an investigatory stop of an automobile.

In Johnson, the Evansville police had received a tip from a confidential informant that Johnson would be transporting narcotics in his brown Jaguar in a particular area of town. Id. at 119. The Court noted that the tip did not provide any specifics that could be confirmed and the information provided was easily knowable by the general public. Id. Additionally, the record did not provide any evidence that the informant was reliable. Id. Given that the informant was not a victim of a crime requesting the assistance of police, did not provide credible information on a specific impending crime, and the reliability of the informant was

not established, the Court concluded that the tip lacked any indicia of reliability and was inadequate to support an investigatory stop. Id.

In the case at hand, the information provided by the confidential informant and the reliability of the informant is even less than that in Johnson. The record only reveals that the tip alleged that Shipman was dealing marijuana and methamphetamine from his home.<sup>8</sup> The tip did not provide that Shipman was going to commit a specific, impending crime or provide information that could be corroborated by police. Moreover, the police did not conduct any observation of Shipman and his residence or attempt a controlled buy. See Coleman v. State, 847 N.E.2d 259, 264 (Ind. Ct. App. 2006), reh'g denied, trans. denied (“[O]ur evaluation of the facts in other cases involving confidential informants assisting in the arrests of drug dealers shows that the police typically arrange more than one meeting, and typically observe an actual drug transaction before instigating a stop of the suspect.”). Accordingly, under the Litchfield test, the items found in the trash were not properly discovered evidence because the police did not have reasonable suspicion.

#### B. Good Faith Exception

Alternatively, the State argues that the exclusionary rule should not apply in this case. If applicable, the exclusionary rule would exclude the evidence discovered pursuant to the execution of the search warrant that was issued based on the marijuana discovered in the search of Shipman’s trash. The State contends that the warrant was executed in good faith

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<sup>8</sup> Trooper Stailey also testified that in addition to the confidential informant, local police informed him that Shipman was dealing drugs from his residence. However, the testimony provides no detail as to which officer provided this information, its basis, or timing. Furthermore, Trooper Ashby did not include this source of information as the basis for the trash search in his testimony at the search warrant hearing.



and consistent with the then prevailing case law. Based on this premise, the State argues that the evidence may not be excluded pursuant to the codification of the good faith exception at Indiana Code Section 35-37-4-5, which provides:

- (a) In a prosecution for a crime or a proceeding to enforce an ordinance or a statute defining an infraction, the court may not grant a motion to exclude evidence on the grounds that the search or seizure by which the evidence was obtained was unlawful if the evidence was obtained by a law enforcement officer in good faith.
- (b) For purposes of this section, evidence is obtained by a law enforcement officer in good faith if:
  - (1) it is obtained pursuant to:
    - (A) a search warrant that was properly issued upon a determination of probable cause by a neutral and detached magistrate, that is free from obvious defects other than nondeliberate errors made in its preparation, and that was reasonably believed by the law enforcement officer to be valid; or
    - (B) a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated; and
  - (2) the law enforcement officer, at the time he obtains the evidence, has satisfied applicable minimum basic training requirements established by rules adopted by the law enforcement training board under IC 5-2-1-9.

The State contends that the good faith exception applies, because the analysis for trash searches has changed since the search was conducted.

Litchfield, requiring reasonable suspicion to conduct a warrantless trash search, had not been decided at the time Shipman's trash had been searched. Litchfield invalidated the prior analysis originally announced in Moran v. State, 644 N.E.2d 536 (Ind. 1994). Prior to Litchfield, trash pulls were evaluated under our Supreme Court's decision in Moran v. State, which held that the constitutionality of a trash search should be based upon the reasonableness of the search looking at the totality of the circumstances. Moran, 644 N.E.2d

536. The focus of the review of the constitutionality of the trash search in Moran was the manner in which the trash was seized. The Court noted that the officers did not trespass on the premises to get the trash bags, but collected them from an area left for pickup by the trash collector. Id. at 538, 541. Additionally, the Moran Court observed that the officers did not cause a disturbance because they collected the trash early in the morning and conducted themselves in a similar manner as those whose duty it was to collect the trash. Id. at 541.

In Edwards v. State and Richardson v. State, we addressed the fact that at the time the police searched the defendant's trash, the prevailing case law was not the Litchfield test. Edwards v. State, 832 N.E.2d 1072, 1075 (Ind. Ct. App. 2005); Richardson v. State, 848 N.E.2d 1097, 1104 (Ind. Ct. App. 2006), trans. denied. In both cases, despite the circumstances failing to meet the then new requirements announced in Litchfield, the trash searches were held to be reasonable under the then prevailing law at the time of the search and the evidence obtained from the searches was admissible because the officers acted in good faith, as defined by I.C. 35-37-4-5, in executing the trash search. Edwards, 832 N.E.2d at 1077; Richardson, 848 N.E.2d at 1105. Here, we are presented with similar circumstances.

The State contends that the good faith statute applies in this case because the trash search was conducted within the constraints of the Moran analysis that was subsequently invalidated by Litchfield. The State argues that the trash pull in this case was reasonable under the circumstances because the trash was set out on the appropriate day and in its usual location for trash collection, Trooper Ashby was escorted by the Street Commissioner in a municipal truck, the pull was performed in the morning, and there is no evidence that the

actions of Trooper Ashby created any disturbance. Shipman argues that the trash pull was not reasonable because Trooper Ashby stepped onto his property.

At the time of the incident, the law regarding the appropriate procedures for trash searches was in flux.<sup>9</sup> However, our Supreme Court in Moran, requiring the trash search to be reasonable, provided the prevailing analysis. Here, we find the trash pull to be reasonable under the circumstances. Although Trooper Ashby did step into Shipman's yard to retrieve the bags, the trash was located in its usual place for collection from which Shipman expected it to be taken away. Furthermore, the removal of the trash was performed in the morning, in the company of the Street Commissioner, in a municipally owned vehicle, and without any disturbance.

In addition to refuting the State's arguments that the trash search was reasonable, Shipman also argues that the grant of the motion to suppress be upheld because the State did not present evidence that Trooper Ashby has satisfied the applicable minimum basic training requirements for law enforcement. Trooper Ashby testified that at the time of the hearing he had been employed as a State Trooper for ten years and had been promoted to detective since the trash pull. He also testified as a State Trooper he was required to attend annual legal updates "to discuss the new laws that come down from the Appellate Courts and the Supreme Courts of both Indiana and federal." Trial Transcript at 46. This is sufficient evidence to fulfill the requirement of Section (b) of the good faith exception statute.

Based on the foregoing analysis, we conclude that the evidence from the trash search

could not have been properly excluded under Indiana Code Section 35-37-4-5 and, thus, could provide support for the finding of probable cause to issue the warrant to search Shipman's residence.

For the foregoing reasons, we reverse the trial court's order, granting Shipman's motion to suppress evidence, and remand for further proceedings.

### **Conclusion**

We conclude that the trial court applied the standard of probable cause rather than reasonable suspicion in evaluating the constitutionality of the trash search. Under the Litchfield test requiring reasonable suspicion to conduct a trash search, the facts of the case are not sufficient to fulfill the reasonable suspicion requirement. However, the good faith exception, codified in Indiana Code Section 35-37-4-5, applies in this case, prohibiting the exclusion of the evidence recovered pursuant to the search warrant supported by the items found during the trash search. The trial court erred in granting Shipman's motion to suppress.

Reversed and remanded.

BAKER, C.J., and VAIDIK, J., concur.

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<sup>9</sup> Our Supreme Court eventually clarified the uncertainty of the appropriate standard with the new test announced in Litchfield. It noted that since its decision in Moran "the Court of Appeals has grappled with several cases arising from the searches of trash." Litchfield, 824 at 362.