SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JUN 20 2016
Clerk

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, **Plaintiff and Appellee,** **vs.** **JOSEPH A. JONES,** **Defendant and Appellant.**	**ORDER GRANTING MOTION TO AMEND APPELLEE'S BRIEF** **#27739**

Appellee, State of South Dakota having served and filed a motion to amend appellee's brief permitting Appellee to amend a typographical error contained within Appellee's brief at page 29 in the above-entitled matter, and appellant having no objection thereto, and the Court having considered the motion and being fully advised in the premises, now, therefore, it is

ORDERED that appellee's motion be and it is hereby granted and appellee shall amend the typographical error of appellee's brief to accurately read as follows:

> While there is currently no binding precedent in South Dakota or the United States Supreme Court on this issue, many other courts have held that law enforcement does ***not*** need to obtain a warrant before utilizing pole camera surveillance.

IT IS FURTHER ORDERED that the appellee's amended brief shall be due for service and filing no later than June 30, 2016.

DATED at Pierre, South Dakota this 20th day of June, 2016.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice David Gilbertson, Justices Steven L. Zinter, Glen A. Severson, Lori S. Wilbur and Janine M. Kern.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* *

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee, # 27739

vs. **APPELLANT'S BRIEF**

JOSEPH A. JONES,

Defendant and Appellant.

* *

Appeal from the Circuit Court
Third Judicial Circuit
Brookings County, South Dakota

Hon. Gregory J. Stoltenburg
Circuit Court Judge

Notice of Appeal filed January 29, 2016

ATTORNEYS FOR APPELLEE:

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JURISDICTIONAL STATEMENT

Appellant Joseph Jones appeals from a Judgment and Sentence (R 216) entered on January 20, 2016 by the Hon. Gregory J. Stoltenburg, Third Judicial Circuit Judge, Brookings County, which imposed prison sentences for various drug-related felonies. Notice of Appeal (R 280) was timely filed and served on January 29, 2016. This is an appeal of right under SDCL SDCL 23A-32-2.

"R" denotes the lower court's Record, as numbered in the Clerk's Index. Transcript references from the motion hearing will be "TR". References to any other transcripts will be specifically indicated. Appellee will be called "State", and Appellant will be called "Jones" or Defendant.

LEGAL ISSUE

Should Jones' Motion to Suppress have been granted?

-- The trial court denied the Motion.

Davis v. United States, 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)
State v. Boll, 2002 S.D. 114, 651 N.W.2d 710
State v. Zahn, 2012 S.D. 19, 812 N.W.2d 491
United States v. Herrera, 444 F.3d 1238 (10th Cir. 2006)

STATEMENT OF THE CASE AND FACTS

Statement of the Case. Jones was arrested on March 19, 2015 for various drug felonies, following execution of a search warrant (R 66) on his residence in Brookings, South Dakota. Jones was indicted for three felonies: distribution or possession with intent to distribute marijuana; a drug-free zone violation; and possession of a controlled

substance. (R 20) A habitual offender Information (R 25) was also filed, as were Complaints for other misdemeanor charges (R 9, 13) which were later dismissed (R 214, 215). Jones filed an Amended Motion to Suppress (R 39), which was heard on July 25, 2015 before the Hon. Gregory J. Stoltenburg. Judge Stoltenburg orally denied the motion at the close of the hearing (TR 70-75). Findings and Conclusions (R 163-173) and an Order denying the motion (R 162) were filed on August 14, 2015. Jones attempted to take an intermediate appeal of this ruling, and this Court denied permission to appeal by Order dated September 25, 2015 (#27544).

Jones proceeded to a court trial on stipulated facts on December 15, 2015, and was found guilty. Jones also admitted to the allegations in the Part II Habitual charge. Following preparation of a PSI report, Jones was sentenced by Judge Stoltenburg on January 19, 2016 to three consecutive prison sentences, with a portion of each suspended. The total sentence imposed was 28 years, with 13 years suspended. Judgment (R 216) was filed on January 20, and a timely Notice of Appeal (R 280) was filed on January 29.

Statement of the Facts.

Brookings PD Detective Rogers received a tip from a DCI agent in Huron, that an unnamed informant had said that another person from Huron had been travelling to Brookings to obtain marijuana from Jones, and then transporting it back to Huron for sale. TR 16-17. Detective Rogers was given no information about the informant -- either his basis of knowledge of what he was alleging, or his credibility or track record with the Huron agent (TR 44-45). Rogers consulted with the DCI Agent assigned to Brookings, Agent Hawks (TR 21). It was immediately decided (TR 46) that a pole camera, owned

by the DCI (TR 22), would be installed to surveill Jones' residence and the immediate area around it. TR 21. Both the tip and the camera installation occurred on January 23 (TR 16, 24).

The camera was mounted atop a utility pole across the street from the Lamplighter mobile home park in Brookings (TR 24). Hearing Ex. 5 and 6 are photographs, which show (from street level) the same view that the pole camera would have had (from atop the pole) (TR 26-29, 31). The camera was wired to the power in the utility pole, and was "hidden" inside a box and "not observable to the public" (TR 42).

The camera was aimed at Jones' residence, which was the first trailer nearest the street, as one enters the driveway/street into the mobile home park (TR 25). The camera's angle allowed view of the front yard, the parking area for the trailer, the front door and that entire side of the trailer, and the end of the trailer nearest the street (see Ex. 5 and 6). That trailer end includes the living room window of the home The camera could be remotely adjusted to pan up and down, or side to side, and could zoom in and out (TR 22). The location of the trailer was illuminated at night by two lights, one of which was the pole on which the camera was installed (TR 44). At night, the camera could tell whether the trailer's interior lights were on (TR 32).

The camera recorded continuously (except when there were miscellaneous temporary glitches) for nearly two months, from January 23 to March 19 (TR 32 - 33, 54). Police could watch a live feed on their computers or cell phones (TR 34), and could also review the camera's footage later, since it was stored on a computer server in Pierre. The officer could fast forward the footage, and could get through an entire day's observations in 10-11 minutes (TR 44). The officer noted when Defendant's car was

there, when it left, and when it returned (TR 33); when visitors arrived and where they parked (TR 40); pedestrians walking by and to the trailer (TR 39); and when Jones left with his trash (TR 37-39).

Eventually, police sought and obtained two search warrants -- on March 11 (for installation of GPS tracking units on Jones' vehicle) and March 13 (for a search of Jones' home). TR 17-21; Hrg. Ex. 1 - 4. The officer admitted that most of the information contained in the Affidavits was obtained from pole camera observations (TR 49). The trial court agreed (TR 48, 70-71, also Finding of Fact 35), and ruled that if the pole camera information was excised from the warrant affidavits, there was insufficient probable cause to support either warrant (TR 48, 70-71).

The pole camera footage was not preserved, and could not be turned over to defense counsel (TR 11) or observed by the trial court (TR 51-53).

As a result of the search warrant execution on March 19, Jones was arrested and various drugs were found. These formed the basis of the charges and convictions in this case. Other facts will be set out in the Argument section of this Brief, where necessary.

ARGUMENT

ISSUE: Defendant's Motion to Suppress should have been granted.

(A) Warrantless use of the pole camera violated the Fourth Amendment.

Jones contends that the continuous remote video surveillance of his residence and yard, done without a warrant, violates the Fourth Amendment. This issue is reviewed de novo by this Court. State v. Zahn, 2012 S.D. 19 ¶10, 812 N.W.2d 491.

Zahn involved the warrantless installation of a GPS tracking unit on the defendant's car. "For twenty-six days, [the GPS unit] continuously transmitted the geographic location of Zahn's vehicle, enabling officers to pinpoint his location within five to ten feet, monitor his speed, time, and direction, and detect non-movement. A computer at the Brown County Sheriff's Office recorded the movements of Zahn's vehicle." *Id*. at ¶5. Mr. Zahn claimed that this warrantless use of the GPS unit violated the Fourth Amendment, and this Court agreed. Two independent reasons were relied upon. The first (a physical trespass on defendant's property) is not at issue here. The second, however, is controlling. Zahn ruled that the warrantless long-term continuous monitoring of the vehicle's movements violated Mr. Zahn's reasonable expectation of privacy. *Id*. at ¶¶20-28.

Mr. Zahn's vehicle travelled on public streets, visible to any observer. The State argued that there was no objectively reasonable expectation of privacy, "because [Zahn] voluntarily exposed his movements to the public." This is what this trial court concluded as well -- that a person could personally surveill Jones' residence for 55 days and observe what the camera recorded. This Court disagreed:

> "While a reasonable person understands that his movements on a single journey are conveyed to the public, he expects that those individual movements will remain 'disconnected and anonymous'. [quoting United States v. Maynard, 615 F.3d 544, 563 (D.C. Cir. 2010)]. Indeed, the likelihood that another person would observe the whole of Zahn's movements for nearly a month 'is not just remote, it is essentially nil.' *Id*. at 560. The prolonged use of a GPS device in this case enabled officers to determine Zahn's speed, time, direction, and geographic location within five to ten feet at any time. It also enabled officers to use the sum of the recorded information to discover patterns in the whole of Zahn's movements for twenty-six days. The prolonged GPS surveillance of Zahn's vehicle revealed more than just the movements of the vehicle on public roads; it revealed an intimate picture of Zahn's life and habits. We thus believe that Zahn had a subjective expectation of privacy in the whole of his movements. This

> subjective expectation of privacy was not defeated because Zahn's individual movements were exposed to the public."

Id. at ¶22. Moreover, that expectation of privacy was held to be objectively reasonable. *Id*. at ¶¶ 26-28. "When the use of a GPS device enables police to gather a wealth of highly-detailed information about an individual's life over an extended period of time, its use violates an expectation of privacy that society is prepared to recognize as reasonable." *Id*. at ¶28.

Zahn's holding applies with even more force to this warrantless, continuous video surveillance of Jones and his residence. The GPS unit in Zahn was in place for 26 days. From the unit, police could tell where the car was; its direction of travel; when it stopped and for how long; and (by extrapolation from the location readings) its speed. This information, which was held to constitute a Fourth Amendment search, related only to the car, an "effect" under the Fourth Amendment. The information related only inferentially to Mr. Zahn (who was assumed to be the driver).

In contrast, this warrantless video surveillance lasted over twice as long as the warrantless GPS monitoring condemned in Zahn. This video surveillance monitored Jones' residence and its curtilage[1], and monitored his own movements when he was outside of his home. It allowed the State to see when Jones was home, when he left, how

[1] Fourth Amendment protections apply equally to the curtilage of the residence. State v. Merrill, 82 S.D. 609, 612, 152 N.W.2d 349, 351 (1967); see United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987) (holding that continuous video surveillance of defendant's back yard constituted a Fourth Amendment search). At common law, the curtilage is the area encompassing the intimate activity associated with the sanctity of the home and the privacies of life. California v. Ciraolo, 476 U.S. 207, 212, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986). As a result, "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S. at 212.

long he was gone, who visited him, how long they stayed, and all of Jones' activities outside of his home. This information was "continuously transmitted . . . to a computer" (Zahn, at ¶27), to be viewed, condensed and reviewed. This "enable[d] police to gather a wealth of highly-detailed information about [Jones's] life over an extended period of time". *Id*. at ¶28. The monitoring "enabled officers to use the sum of the recorded information to discover patterns in the whole of [Jones'] movements for [55] days." *Id*. at ¶22. The surveillance "revealed an intimate picture of [Jones'] life and habits." *Id*.

Here, the surveillance observations were of Jones' home and of himself, when he was in its curtilage, rather than merely the movement of his vehicle. The Fourth Amendment's protections are greatest for homes and persons, rather than for "effects" (their vehicles). Payton v. New York, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); State v. Meyer, 1998 S.D. 122 ¶20, 587 N.W.2d 719. Zahn's holding applies, therefore, with even more force in this case.

Other courts have held that video surveillance is subject to the Fourth Amendment. United States v. Koyomejian, 970 F.2d 536, 541 (9th Cir. 1992) (video surveillance inside business premises); United States v. Falls, 34 F.3d 674, 679 (8th Cir. 1994); United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987) (continuous video surveillance of defendant's back yard). This "potentially indiscriminate and most intrusive method of surveillance" (*id*. at 250) "provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian state" (*id*. at 251). "Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its

use be approved only in limited circumstances." United States v. Nerber, 222 F.3d 597, 603 (9th Cir. 2000).

Because of this, courts have required additional showings to satisfy the Fourth Amendment. These additional showings mirror those needed to obtain wiretap warrants -- proof that normal investigative procedures have failed or will not work, and that the surveillance will minimize the videotaping of innocent activities. See Falls, *supra*, 34 F.3d at 680; Koyomejian, *supra*, 970 F.2d at 542. That kind of Fourth Amendment protection is completely lacking where the police bypass any judicial approval at all. It is especially lacking where, as here, the police destroy all evidence of the camera's output, so that even after-the-fact judicial review is hindered.

For all of these reasons, before police may employ continuous video surveillance of a person's home and its curtilage, advance judicial approval is required. What this Court concluded in Zahn, at ¶31, is equally applicable here:

> "Because the unfettered use of surveillance technology could fundamentally alter the relationship between our government and its citizens, we require oversight by a neutral magistrate. . . . Thus, the warrantless attachment and use of the GPS device to monitor Zahn's activities for nearly a month was unlawful, and the evidence obtained through the use of the GPS device should be suppressed."

(B) The Search Warrants are tainted by the pole camera illegality.

Detective Rogers admitted that the majority of the information contained in the two Warrant Affidavits came from pole camera observations (TR 49). The trial court found this to be true as well (Finding of Fact #35). The trial court also ruled that, if the pole camera-acquired evidence was excised from the two warrant Affidavits, there would

be an insufficient showing of probable cause to support issuance of either warrant. TR 48, 70-71. This trial court is the same judicial officer that issued both warrants. See Hrg. Ex 2 and 4, and TR at 18 and 20. Therefore, both warrants are the tainted fruit of the poisonous tree, and the evidence obtained from the warrants must be suppressed. State v. Boll, 2002 S.D. 114 ¶¶ 34-36, 651 N.W.2d 710 (assuming without deciding that this "expanded independent source" doctrine applies in South Dakota, but holding that its requirements were not met there).

Additionally, the precise Boll holding also applies here. In Boll, additional evidence was redacted from the affidavit because its discovery was prompted by the initial illegality by the police, and hence the decision to seek the warrant was itself prompted by the initial illegality. Here, the secret video surveillance had been in place for a month and a half before the police sought warrants. It was the information gained from the video surveillance that prompted the warrant request. Under the Boll holding, this fact by itself is enough to invalidate the warrant. *Id*. at ¶¶ 26-32.

(C) The Good Faith Exception does not apply.

The State filed two pre-hearing responses to Jones' Motions to Suppress (R 37, 42). In neither did the State raise the argument that the Good Faith Doctrine allowed for admission of the challenged evidence, irrespective of any police illegality. Nor was this issue ever raised, by any party or by the trial court, at the Suppression Hearing itself. The trial court did not mention this issue when announcing its decision at the close of the hearing (TR 70-75). The trial court then directed the prosecutor to "prepare appropriate findings of fact, conclusions of law, unless waived and an appropriate order consistent

with this Court's oral decision" (TR 75). The State submitted proposed Findings and Conclusions (R 150), and the trial court signed them (R 163). In them, for the first time (as Conclusion #22 at R 172), the Good Faith Exception is mentioned and relied upon as an additional ground for denying Defendant's Motion.[2] Defendant had no advance notice or opportunity to defend against this issue, and its inclusion in the formal Findings and Conclusions goes beyond the directive of the trial court at the close of the hearing.

If this ruling is procedurally valid, the issue is reviewed de novo by this Court. State v. Running Shield, 2015 S.D. 78 ¶6, 871 N.W.2d 503. Under these facts and the applicable law, the trial court's decision must be reversed.

The applicable facts came from Brookings PD Detective Rogers. He received a tip from a DCI agent in Huron, that one of her informants (not named in the tip) had said that another person from Huron had been travelling to Brookings to obtain marijuana from Jones, and then transporting it back to Huron for sale. TR 16-17. Detective Rogers consulted with the DCI Agent assigned to Brookings, Agent Hawks (TR 21). It was immediately decided (TR 46) that a pole camera, owned by the DCI (TR 22), would be installed to surveill Jones' residence and the immediate area around it. TR 21. Both the tip and the camera installation occurred on January 23 (TR 16, 24). Regarding the legality of such a camera, the sole evidence is the following testimonial exchange:

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[2] Conclusion #22 reads in its entirety: "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."

Q (by Mr. Calhoon): And to your knowledge have such [pole cameras] been used in the past?
A (by Det. Rogers): Yes.
Q: At what locations, do you know?
A: I believe they are used for large events to include most recently Hot Harley Nights down in Sioux Falls, even more recently I believe they are being used in the Western Hills area due to the Sturgis Rally, also several locations down in Sioux Falls during their investigations.
Q: And to your knowledge in any of those instances were search warrants obtained prior to installing the pole cam?
A: Not that I'm aware of.

TR 22. Det. Rogers also testified that he knew, when later seeking to place a GPS tracker on Jones' vehicle, that a warrant was legally required to do that (TR 46).

Both the U.S. Supreme Court and this Court have applied the Good Faith exception in a variety of situations. In every one of those cases, the common factor is that the mistake, which resulted in the Fourth Amendment illegality, was made by someone other than the officer. In each of those cases, the Courts held that the officer did and could, in good faith, place reliance upon the authority or accuracy of others. Hence, applying the Exclusionary Rule would be to punish the officer for someone else's mistake, a result which would not advance the deterrence rationale behind the Exclusionary Rule. See, generally, the summary of the caselaw in Davis v. United States, 564 U.S. 229, ---, 131 S.Ct. 2419, 2427-28, 180 L.Ed.2d 285 (2011).

> "Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. * * * If the police in this case had reasonably relied on a warrant in conducting their search, see *Leon, supra*, or on an erroneous warrant record in a government database, *Herring, supra*, the exclusionary rule would not apply. And if Congress or the Alabama Legislature had enacted a statute codifying the precise holding of the Eleventh Circuit's decision in *Gonzalez*, we would swiftly conclude that " '[p]enalizing the officer for the legislature's error ... cannot logically contribute to the deterrence of Fourth Amendment violations.' " See *Krull*, 480 U.S., at 350, 107 S.Ct. 1160. The same should be true of Davis's attempt here to " '[p]enaliz[e] the officer for the

[appellate judges'] error.' " See *ibid*."

Davis, *supra*, 131 S.Ct. at 2429 (citation and footnote omitted).

In these cases, the officers conducting the search were doing so in reliance on the authority of a warrant, or a controlling statute, or that jurisdiction's controlling appellate caselaw, or the warrant database. In each of these cases, their reliance was objectively reasonable, and hence their actions were taken with a good faith belief that their conduct was legal under the Fourth Amendment. The eventual decision that their conduct was illegal was not caused by the officers' mistake, but rather the mistake of others outside of the officers' control. In such a case, the balance between benefits (deterrence) and costs (loss of evidence) of the Exclusionary Rule, favored allowing the evidence in.

> "Thus, application of *Leon's* good-faith exception to the exclusionary rule turns to a great extent on whose mistake produces the Fourth Amendment violation. And because the purpose underlying this good-faith exception is to deter *police* conduct, logically *Leon's* exception most frequently applies where the mistake was made by someone other than the officer executing the search that violated the Fourth Amendment. The Supreme Court has never extended *Leon's* good-faith exception beyond circumstances where an officer has relied in good faith on a mistake made by someone other than the police; that is, on someone outside the police officer's "often competitive enterprise of ferreting out crime," *Leon,* 468 U.S. at 914, 104 S.Ct. 3405 (quotation omitted)."

United States v. Herrera, 444 F.3d 1238, 1250-51 (10th Cir. 2006). The good faith exception "has not been applied when the mistake resulting in the Fourth Amendment violation is that of the officer conducting the seizure and search, rather than a neutral third party". *Id*. at 1251. "*Leon's* focus on deterring police conduct requires that *Leon's* good-faith exception almost always applies only when there is a determination made by a third party upon which the officer reasonably relied to conduct the challenged seizure or search, such as the magistrate in *Leon,* the legislature in *Krull* and in *Johnson,* and the

court clerk in *Evans.* This third party judgment provides a neutral check on the officer's conduct." *Id*. at 1253. *Accord*, State v. Dickman, 34 N.E.3d 488, 497 {¶26} (Ohio App. 2015).

This Court's caselaw is consistent. The Good Faith Exception has been applied where the officer's conduct was done in reasonable reliance upon a warrant, or upon controlling South Dakota appellate judicial precedent. This Court, like the U.S. Supreme Court, has never "go[ne] further [to] hold that the 'good faith exception' should act as a balancing test in all cases". State v. Dickman, *supra*, 34 N.E.3d at 497 {¶26}.

If this Court is tempted to extend the Good Faith exception to a case of police error, this case would be a poor vehicle to use. There is absolutely nothing about this officer's conduct which indicates good faith. As was pointed out in Davis (131 S.Ct. 2419, at 2427-28, citations omitted):

> "The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue. ... When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. ... But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, ... or when their conduct involves only simple, 'isolated' negligence, ... the 'deterrence rationale loses much of its force', and exclusion cannot 'pay its way.' "

From the very outset, these officers lacked probable cause to authorize the long-term use of this pole camera to surveill Jones' residence. The police took this action based on their receipt of an email from another agent in another town, which relayed a tip from an unnamed informant. TR 16-17, 45. These officers did not know who the tipster was, or what the tipster's basis of knowledge was, or anything at all about the tipster to be able to judge his credibility (TR 45). The tipster didn't even say that he, himself, knew

that Jones was a drug dealer. Although this tip was included in the eventual search warrant affidavits (for the GPS unit), even the judge who issued the warrant (Judge Stoltenburg, who was also the trial judge below) eventually concluded that, without the addition of the pole camera information, probable cause was lacking for the warrant. See TR 48, 70-71. Any reasonably well-trained officer would have known this from the outset, based on this nebulous tip.

Instead of doing any further investigation (other than verifying where Jones lived in Brookings), the police immediately had the pole camera installed, and left it there to continuously monitor and record Jones' home for nearly two months. No judicial approval or oversight was sought or obtained. Once these charges were brought, the police did not preserve the computer file which contained the camera footage, and did not furnish it to counsel or make it available to the court. In other words, law enforcement's actions insured that there would be no judicial oversight while the surveillance was going on, and no meaningful judicial review of the surveillance after it ended.

Regarding the need for a warrant, this officer testified only that he was not "aware" that any warrant had been obtained for any prior use of a pole camera. The officer did not say, however, that no warrant was needed, or whether warrants had ever been sought -- just that he did not know that any warrant had ever been obtained. In other words, as far as this officer knew, the previous times that pole cameras had been used were just like this one: no warrant was sought or obtained. From the officer's testimony, it is clear that the possible need for a warrant was never even considered. It is certainly true that this officer did not rely on anything from any source which would indicate that no warrant was needed.

In light of these facts, this Court would be hard-pressed even to conclude that the police had subjective good faith here. Reasonably well-trained officers would know that probable cause was woefully lacking from this tip. "Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." Davis, *supra*, 131 S.Ct. 2419, 2429 (citation omitted). In this case, Fourth Amendment precedent includes this Court's decision in Zahn, the holding of which this officer was aware of (TR 46). A reasonably well-trained officer, therefore, would be on notice that a warrant is required in South Dakota, before use of long-term electronic surveillance is permitted. But even if, somehow, this officer can be said to have subjective good faith, that is insufficient. *See* Beck v. Ohio, 379 U.S. 89, 97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (citation omitted): " '[G]ood faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

The Fourth Amendment's exclusionary rule is the "principal mode of discouraging lawless police conduct. ... [W]ithout it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words'." James v. Illinois, 493 U.S. 307, 311, 110 S.Ct. 648, 107 L.Ed.2d 676 (1990) (citations omitted). In view of the minimal showing of good faith, objective or otherwise, by the police in this case, there is no justification for extending the Good Faith exception beyond where it has ever been applied by either the U.S. Supreme Court or by this Court. The trial court erred in ruling otherwise, and must be reversed.

CONCLUSION

For the foregoing reasons, these convictions should be reversed, and the case should be remanded with instructions to grant the Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

D. SONNY WALTER, attorney for Appellant herein, certifies that this Appellant's Brief, excluding introductory tables and Appendix contents, contains 4,970 words and 25,211 characters, according to the word processing program (Microsoft Word 2007) used to prepare this brief, complying with the limitations in SDCL 15-26A-66(b).

/s/ D. Sonny Walter
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APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	
Plaintiff,	)	05CRI15-000332
	)	
vs.	)	SENTENCE OF THE COURT
	)	
JOSEPH A. JONES,	)	
	)	
Defendant.	)	

The Brookings County Grand Jury, on the 24th day of April 2015, having returned an Indictment against the Defendant herein, namely JOSEPH A. JONES, charging the public offenses of: Count 1: Distribution or Possession with Intent to Distribute Marijuana, a Class 3 Felony; Count 2: Drug Free Zones Created – Violation as Felony, a Class 4 Felony; and Count 3: Unauthorized Possession of Controlled Substance as Felony, a Class 5 Felony; (offense date: 19 March, 2015), and thereafter on the 11th day of May, 2015, said Defendant was arraigned at which time CLYDE R. CALHOON, Brookings County States Attorney, filed a Separate Information for Habitual Offender, and said Defendant thereupon entered pleas of not guilty and said matter was set for a trial by jury; and thereafter, on the 15th day of December, 2015, pursuant to a stipulated trial to the Court, the Defendant was found guilty, a factual basis was found and the Defendant was found guilty as charged; said Defendant at that time entered an admission to the Separate Information for Habitual Offender, the Defendant was then informed of the nature of the Indictment, and the finding of the Judge; and said Defendant thereupon requesting a Pre-Sentence Investigation and the same having been ordered by the Court, and thereafter, said Pre-Sentence Report having been filed with the Court; and now on the 19th day of January, 2016, said Defendant again appearing in Court, and with his attorney SONNY WALTER; and Defendant having been asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged or shown, the Court on said date pronounced the following Judgment and Sentence:

NOW THEREFORE;

As to Count 1: Distribution or Possession with Intent to Distribute Marijuana, a Class 3 Felony - It is by the Court, CONSIDERED, ORDERED AND ADJUDGED that the Defendant, JOSEPH A. JONES, be imprisoned in the State Penitentiary of the State of South Dakota, at Sioux Falls, Minnehaha County, South Dakota, at hard labor for the full term and period of twelve (12) years, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay a fine in the amount of $396.00 and court costs in the amount of

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JAN 20 2016
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT
By

$104.00; provided however, that five (5) years of said penitentiary sentence is hereby suspended upon the following terms and conditions:

As to Count 2: Drug Free Zones Created – Violation as Felony, a Class 4 Felony - It is by the Court, CONSIDERED, ORDERED AND ADJUDGED that the Defendant, JOSEPH A. JONES, be imprisoned in the State Penitentiary of the State of South Dakota, at Sioux Falls, Minnehaha County, South Dakota, at hard labor for the full term and period of ten (10) years, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay a fine in the amount of $396.00 and court costs in the amount of $104.00; provided however, that three (3) years of said penitentiary sentence is hereby suspended upon the following terms and conditions:

As to Count 3: Unauthorized Possession of Controlled Substance as Felony, a Class 5 Felony - It is by the Court, CONSIDERED, ORDERED AND ADJUDGED that the Defendant, JOSEPH A. JONES, be imprisoned in the State Penitentiary of the State of South Dakota, at Sioux Falls, Minnehaha County, South Dakota, at hard labor for the full term and period of six (6) years, there to be kept, fed and clothed according to the rules and discipline governing the said penitentiary; and in addition thereto, said Defendant shall pay a fine in the amount of $396.00 and court costs in the amount of $104.00; provided however, that five (5) years of said penitentiary sentence is hereby suspended upon the following terms and conditions:

1. That said defendant comply with all rules and regulations imposed by the Board of Pardons and Paroles.

2. That said Defendant remain a law abiding citizen and shall not commit any Federal, State or local crimes.

3. That said Defendant pay the fine and costs imposed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Defendant shall pay to the Brookings County Clerk of Courts (for reimbursement to the South Dakota Drug Control Fund, in c/o Division of Criminal Investigation, E. Highway 34, Pierre, SD 57501) $45.00 for the costs of the urinalysis and $1,590.00 for the drug testing in this case to be joint and several with co-defendants, Walter Gaters and John Seward.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fine, costs, and restitution heretofore ordered paid shall be paid according to a schedule to be determined by the Department of Corrections while said Defendant is incarcerated, and according to a schedule to be determined by the Board of Pardons and Paroles, should said Defendant make parole.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Felony sentences herein shall run consecutive to each other.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Defendant stand committed to the Sheriff in and for Brookings County for transportation to the South Dakota State Penitentiary, Sioux Falls, South Dakota, to commence serving said penitentiary sentence.

Dated this 19th day of January, 2016.

BY THE COURT:

Gregory Stoltenburg
Judge of the Circuit Court

ATTEST:

Emily Mosley, dp
Clerk of Courts

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:
AUG 14 2015
Anette Beasley
Brookings County Clerk of Courts
By:

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	05CRI15-332
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO SUPPRESS EVIDENCE
JOSEPH A. JONES,	)	
	)	
Defendant.	)	

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 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
By:

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF BROOKINGS	)	THIRD JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	
	)	05CRI15-332
Plaintiff,	)	
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
JOSEPH A. JONES,	)	REGARDING DEFENDANT'S
	)	MOTION TO SUPPRESS
Defendant.	)	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.

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 as 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

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.

BY THE COURT:

Gregory J. Stolkenburg
Circuit Court Judge

ATTEST:

Clerk of Courts

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27739

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH A. JONES,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge

APPELLEE'S BRIEF

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ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed January 29, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27739

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH A. JONES,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Joseph A. Jones, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name.

The various transcripts and reports will be cited as follows:

Motion Hearing – July 14, 2015..... MH

Court Trial – December 15, 2015..... CT

Sentencing Hearing – January 19, 2016 .....ST

The settled record in the underlying criminal case, *State of South Dakota v. Joseph A. Jones,* Brookings County Criminal File No. 15-332, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Gregory J. Stoltenburg, Circuit Court Judge, on January 19, 2016, and filed January 20, 2016. SR 216-18. Defendant filed a Notice of Appeal on January 29, 2016. SR 281. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS?

The trial court denied Defendant's Motion to Suppress Evidence abstained from the pole camera footage.

Davis v. United States, 564 U.S. 229, 131 S.Ct. 2914, 180 L.Ed.2d 285 (2011)

State v. Thunder, 2010 S.D. 3, 777 N.W.2d 373

United States v. Houston, 813 F.3d 282 (6th Cir. 2016)

United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)

STATEMENT OF THE CASE

On April 24, 2015, a Brookings County Grand Jury indicted Defendant with: Count 1 – Distribution or Possession with Intent to Distribute Marijuana, in violation of SDCL 22-42-7; Count 2 – Drug Free Zones Created-Violation as Felony, in violation of SDCL 22-42-19(1); and Count 3 – Unauthorized Possession of Controlled Substance as Felony, in violation of SDCL 22-42-5. SR 20-21. An Information was filed on May 11, 2015, charging Defendant as a

habitual offender. SR 25-26. Other Complaints were filed, but were later dismissed by the State. SR 9, 13, 214-15.

On July 6, 2015, Defendant filed an Amended Motion to Suppress Evidence (SR 40-41), which was denied at the July 25, 2015, Motion Hearing. MH 75; SR 146; Findings of Fact (FOF) and Conclusion of Law (COL); SR 163-73. Defendant then filed a Petition for Intermediate Appeal, which was denied by this Court on September 25, 2015. SR 202.

A court trial on stipulated facts was held on December 15, 2015. CT, *generally;* SR 308. The trial court found Defendant guilty of all three counts of the Indictment. CT 7; SR 314. Defendant admitted to the Part II Habitual Offender Information. CT 10; SR 317. On January 19, 2016, the court sentenced Defendant on Count 1 – Distribution or Possession with Intent to Distribute Marijuana, to twelve years incarceration with five years suspended; on Count 2 – Drug Free Zones Created, to ten years incarceration with three years suspended; and on Count 3 – Unauthorized Possession of Controlled Substance as Felony, to six years incarceration with five years suspended. SR 216-17. All sentences were to run consecutively. SR 217. The sentence of the court was entered on January 19, 2016 and filed on January 20, 2016. SR 216-17. Defendant filed a Notice of Appeal on January 29, 2016. SR 280.

STATEMENT OF THE FACTS

On January 23, 2015, DCI Special Agent Liz Carlson informed Brookings Police Detective Dana Rogers of a tip from an informant that large quantities of marijuana were obtained from Defendant in Brookings and brought back to Huron, South Dakota, by B.S., to sell. MH 16-17; SR 336-37. Agent Carlson advised Detective Rogers that B.S. drove a red GMC pickup. MH 17. Detective Rogers corroborated this information by checking B.S.'s license plate registration. MH 17.

That same day, Detective Rogers and DCI Special Agent Scot Hawks placed a recording camera on a public light pole to observe the surroundings of Defendant's trailer at Lamplighter Village Trailer Park, in Brookings, South Dakota. MH 21; SR 341.

The pole camera was located on the public corner of 4th Street and 3rd Avenue (MH 23), which was across the street from Defendant's trailer on 3rd Avenue. 3rd Avenue has public sidewalks. MH 30; State's Exhibit 5; SR 68. One can view from the public sidewalk what the pole camera depicted in its footage. MH 40; SR 360. *See also* Google Maps view of the area, State's Exhibit 6; SR 69. A sign within one hundred feet of Defendant's mobile home designated his trailer park as a crime free zone. MH 35; State's Exhibit 7; SR 70. One can view the sign when driving into the trailer park. MH 35.

The pole camera recorded Defendant and his visitors coming and going from his residence. MH 43; SR 363. Detective Rogers did not

obtain a warrant to install the pole camera. MH 22; SR 342. He believed one was not required because law enforcement used cameras without a warrant in public areas during large events, such as Hot Harley Nights in Sioux Falls, the Sturgis Rally and several other locations during investigations. *Id.*

The camera itself was inside a box and not visible to the public. However, the box was visible. MH 22; SR 342; Defendant's Exhibit A; SR 71. The camera was able to scan up and down, left and right, and had zooming capabilities. *Id.* The camera could not be used to view inside the Defendant's trailer. *Id.* The camera recorded the entrance and exit to the trailer park, Third Avenue street parking, the front yard and north side of Defendant's trailer, and trailers behind Defendant's. MH 24. Defendant did not have a fence, gate, or any other obstruction blocking the view to his trailer. *Id.* The camera did not have night vision, but did pick up if a light was turned on in the trailer, vehicle lights, vehicles driving under the street light, and shadows of people walking outside. MH 31-32.

The camera recorded from January 23, 2015, until approximately March 19, 2015. MH 33. The camera continually recorded except when there were updates to the server, inclement weather, or any internet or computer problems occurred. MH 33; SR 353. There were also times when Defendant was gone for days at a time. MH 33. One

could view the footage live or watch it at a later time. MH 34; SR 354. This footage was not preserved for court. MH 51.

Detective Rogers testified that he observed the car owned by B.S., who was suspected of distributing drugs, parked at Defendant's trailer several times from January 23, 2015 to March 19, 2015. MH 40. He also observed, through the pole camera footage, other vehicles owned by known drug offenders parked at Defendant's trailer. State's Exhibit 3; SR 63.

On the morning of March 6, 2015, Detective Rogers reviewed the camera footage from the night before. MH 37. He observed Defendant, through the pole camera recording, take two black or dark colored trash bags to his car, drive west a short distance, and then very shortly thereafter return to his trailer. MH 37; SR 357. Detective Rogers and Agent Hawks assumed that Defendant had thrown out the trash bags in the trailer park dumpster, which was located at the west side of the trailer park. *Id.* Detective Rogers and Agent Hawks drove to the dumpster and observed an open trash bag. *Id.* On the top of the trash, in the open bag, was a USPS package addressed to Defendant at his trailer address. *Id.* Detective Rogers and Agent Hawks took two trash bags matching what appeared to be the ones Defendant had earlier handled, to the police station. *Id.* They searched the bags. *Id.*

Drugs and paraphernalia were found in the bags. MH 38; SR 358. Two toothpicks with a black substance were found. *Id.* Detective

Rogers explained that the toothpicks were indicative of a person who has used them to clean marijuana out of the smoking devices. *Id.* Detective Rogers and Agent Hawks also found cigar wraps with a small amount of marijuana inside the wrapper. *Id.*

On March 11, 2015, Detective Rogers, again through the pole camera recording, saw Defendant load something in his car, drive west for a short distance, and return. MH 38; SR 358. Detective Rogers and Officer Smith went to the dumpster and found the same kind of trash bags that Defendant used five days before. *Id.* Detective Rogers and Officer Smith took the trash bags and searched them. *Id.* In addition to identifying objects linking the trash bags to Defendant, including receipts and TransUnion paperwork, there were four partial marijuana blunts and two marijuana stems. MH 38-39; SR 359. One of the marijuana stems tested positive for marijuana. *Id.*

After searching Defendant's trash bags and finding marijuana, Detective Rogers applied for and obtained a search warrant for a GPS tracker on Defendant's two cars. MH 17; SR 60-61, 337. Two days later, on March 13, 2015, Detective Rogers applied for and obtained a search warrant for Defendant's residence. MH 19; SR 66-67, 339. Many of the facts contained in the affidavits filed in support of the warrants were obtained through use of the pole camera.

The warrant on Defendant's trailer was executed on March 19, 2015. MH 32; SR 352. Defendant was arrested at this time. *Id.* The

camera remained in place on the light pole until sometime after March 19, 2015, when a city utility employee removed it. *Id.*

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

"A motion to suppress for an alleged violation of a constitutionally protected right raises a question of law requiring de novo review." *State v. Heney*, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561-62 (citation omitted). Though factual findings of the lower court are reviewed under the clearly erroneous standard, once those facts have been determined, the application of a legal standard to those facts is reviewed de novo. *Id.*

A. Warrantless Use of a Pole Camera Did Not Violate the Fourth Amendment.

Defendant argues his Fourth Amendment rights were violated by the placement of a pole camera on a public street light without a warrant. DB 5. However, no warrant was required as Defendant had no reasonable expectation of privacy to the activities captured by the pole camera, because all of his actions were easily viewed by the public. Consequently, Defendant's Fourth Amendment rights were not violated, and the trial court properly denied his Motion to Suppress.

"An individual must have a reasonable expectation of privacy in the place searched or the article seized before the Fourth Amendment will apply." *State v. Thunder*, 2010 S.D. 3, ¶ 16, 777 N.W.2d 373, 378. *See also State v. Zahn*, 2012 S.D. 19, ¶ 20, 812 N.W.2d 490, 496. This

Court applies a two-part test to determine whether a defendant has a reasonable expectation of privacy. *Zahn*, 2012 S.D. 19, at ¶ 20, 812 N.W.2d at 496 (quoting *Thunder*, 2010 S.D. 3, at ¶ 16, 777 N.W.2d at 378) (citations omitted). "First, we consider whether [an individual] exhibited an actual subjective expectation of privacy in the area searched." *Id.* "Second, we consider whether society is prepared to recognize that expectation of privacy as reasonable." *Id.* "Whether [an individual] has a legitimate expectation of privacy in [an area] is determined on a 'case-by case basis, considering the facts of each particular situation.'" *Id.*

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Zahn*, 2012 S.D. 19, at ¶ 21, 812 N.W.2d at 497 (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)) (citations omitted). "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* Here, Defendant did nothing to preserve this area to be considered by anyone as private. Defendant's activity captured on camera well outside his trailer from a public street was all vividly and continuously exposed to the public. Therefore, the information obtained without a warrant from January 23 to March 19, 2015, was not subject to Fourth Amendment protection.

The trial court held that warrantless use of the pole camera did not violate Defendant's Fourth Amendment rights because "law enforcement officials are constitutionally permitted to view any location from a publicly accessible location." COL 9, 17; SR 170-71. Further, "the evidence obtained as a result of the pole camera footage in no way violated the Defendant's constitutional rights." COL 18; SR 171.

As the trial court properly concluded, Defendant did not have a subjective expectation of privacy in the footage recorded by the camera mounted on a public light pole located on a public street. MH 75. The pole camera recorded the same view that anyone could see on the public street. FOF 22. The pole camera captured the entrance and exit of the Lamplighter Village Trailer Park on Third Avenue South. FOF 16. Defendant's trailer was at the very entrance to the trailer park. *Id.* Defendant's trailer was not obstructed by any fence, gate, or anything else that blocked its view from the public street or pole camera. FOF 18. From the camera footage, one could view the front and north side of Defendant's trailer. FOF 19. The camera footage also recorded several other trailers. MH 24. Just like any person standing on the sidewalk (or parked in a vehicle on the public street) at the pole's location, the camera could not see into the trailer or Defendant's backyard. FOF 21. Law enforcement only observed Defendant's activity (of arriving and leaving the trailer), or others coming to and from

Defendant's trailer, which was also vividly exposed to the general public.

"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 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)). The Fourth Amendment "does not 'preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.'" *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). Law enforcement could have observed Defendant's actions that were recorded on the pole camera by stationing themselves outside of his trailer, on the public street, or on the public sidewalk. Instead, law enforcement utilized their limited resources to conduct surveillance with a pole camera. *United States v. Brooks*, 911 F. Supp. 2d 836, 840 (D. Ariz. 2012). Indeed, "the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations." *United States v. Houston*, 813 F.3d 282, 288 (6th Cir. 2016).

Defendant argues his rights were violated because the pole camera footage exposed or showed Defendant himself, his residence, and its curtilage. DB 6. "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 35, 88 S.Ct. at 511. *See also Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835 (1989); *Sherbrook v. City of Pelican Rapid*, 513 F.3d 809, 815 (8th Cir. 2008); *United States v. Stallings*, 28 F.3d 58, 61 (8th Cir. 1994). The pole camera observed only an area that was, at all times, readily observable from multiple vantage points by multiple neighbors in the neighborhood.

The Sixth Circuit Court of Appeals recently issued an opinion in a similar case, *United States v. Houston*, 813 F.3d 282. In that case, local law enforcement informed the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that the defendant, a convicted felon, was in possession of firearms. *Id.* at 285. Because ATF vehicles "[stuck] out like a sore thumb" when attempting to surveil the defendant's property, ATF installed a camera on a public utility pole approximately 200 yards away from the property. *Id.* at 286. The camera "could move left and right and had a zoom function." *Id.* The video footage was sent through an IP address where the agents could view it on their computers remotely. *Id.* An ATF agent testified in court that the recorded footage was identical to what an agent would view if he had driven down the public road. *Id.*

The ATF agents monitored the defendant's farm for ten weeks without a warrant. *Id.* Houston challenged the video surveillance

conducted without a warrant. The Court of Appeals held that there was no Fourth Amendment violation because:

> [the defendant] had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads. The ATF agents only observed what [the defendant] made public to any person travelling on the roads surrounding the farm.

Id. at 287-88. The court noted that while the camera recorded area around the defendant's property is assumed to be curtilage the recordings did not violate the defendant's reasonable expectation of privacy, because an agent could observe that same area from the public road. *Id*. The court also found that the ten-week surveillance did not violate the Fourth Amendment. *Id*.

The present case is very similar to *Houston*. The trial court found that Defendant "can claim no expectation of privacy for what he does outside his home in full view of the public at large." MH 75. The court further found that "if an officer was sitting in a vehicle or standing on the street he could see as much as that camera did." MH 75. The trial court found that the pole camera "was not directed into or inside . . . Defendant's home or curtilage." MH 75.

Defendant ignores the open exposure of his activities and relies on *Zahn* to argue the warrantless use of a pole camera is unconstitutional. DB 4; 2012 S.D. 19, 812 N.W.2d 490. In *Zahn*, law enforcement installed a GPS unit on the defendant's vehicle without a

warrant for a period of twenty-six days. *Zahn*, 2012 S.D. 19, at ¶ 10, 812 N.W.2d at 493. This Court held that Zahn had a subjective and reasonable expectation of privacy in his movements, which triggered the protections of the Fourth Amendment, and a warrant was required. *Id.* at ¶ 31. *Zahn* is distinguishable from the present case. The GPS unit gathered "a wealth of highly-detailed information about an individual's life over an extended period of time." *Id.* at ¶ 28. It tracked "the whole of Zahn's movements for nearly a month." *Id.* at ¶ 22. The GPS device "enabled officers to determine Zahn's speed, time, direction, and geographic location within five to ten feet at any time. It also enabled officers to use the sum of the recorded information to discover patterns in the whole of Zahn's movements for twenty-six days." *Id.* "The prolonged GPS surveillance of Zahn's vehicle revealed more than just the movements of the vehicle on public roads; it revealed an intimate picture of Zahn's life and habits." *Id.*

In the present case, the pole camera merely recorded the Defendant's trailer and its surroundings, an area already exposed to the public. Unlike the monitoring by a GPS, when Defendant left the area of the pole camera, sometimes for days, his whereabouts and activities were unknown and unmonitored. MH 33. The pole camera monitoring did not physically move from its posted location like the GPS device did. It simply did not follow or record Defendant's every move or gather a wealth of highly detailed information about Defendant. The pole

camera system was also down from time to time, due to server issues, weather, or internet problems. In fact, the camera could not even record Defendant driving the short distance allegedly to the dumpster and back. The recorded footage reviewed after the actual event only depicted Defendant leaving his driveway with what law enforcement believed were trash bags. Law enforcement assumed Defendant drove to the dumpster to dump his trash bags, but did not see that action through the camera footage. When the dumpster was checked, they saw an open bag with Defendant's identifying information.[1]

The pole camera footage was not nearly as intrusive as the GPS tracking device in *Zahn* because it only recorded Defendant and his visitor's public movement outside Defendant's trailer in the open fields. The video surveillance reveals nothing beyond what Defendant readily and continuously exposed to the public. The sum of the recorded information did not provide law enforcement with an intimate picture of Defendant's life and habits. In fact, when the camera was zoomed in, the picture would become distorted or blurry. FOF 23. Indeed, law enforcement could have stationed an officer and vehicle on the public road to watch Defendant's activities, but elected to use electronic

[1] "Defendant has no reasonable expectation of privacy in the garbage he abandoned in the community dumpster that contained other people's garbage." COL 21; *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. The marijuana and drug paraphernalia may have eventually been found under the doctrine of inevitable discovery. *See Guthrie v. Weber*, 2009 S.D. 42, 767 N.W.2d 539.

surveillance to obtain the same information. In addition, as set out in the facts, Defendant was put on notice by trailer court signage that the area was declared a crime free zone, with the sign erected directly across from Defendant's driveway. FOF 19; COL 30. Thus, Defendant was warned that crime would not be allowed in this trailer park area. The sign itself implied that the area was being monitored. Defendant even signed an agreement to comply with the same. FOF 19.

"[T]he Fourth Amendment does not require law enforcement to go to such lengths when more efficient methods are available. As the Supreme Court in *United States v. Knotts* explained, law enforcement may use technology to 'augment [] the sensory faculties bestowed upon them at birth' without violating the Fourth Amendment." *Houston*, 813 F.3d at 289 (quoting *United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).

"[I]f law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand. The law cannot be that modern technological advances are off-limits to law enforcement when criminals may use them freely." *Id.* at 290. "Insofar as respondent's complaint appears to be simply that scientific devices . . . enabled the police to be more effective in detecting crime, it simply has no constitutional foundation." *Knotts,* 460 U.S. at 284, 103 S.Ct. at 1086. "Law enforcement may utilize their resources to conduct

surveillance where they have a legal right to occupy." *Brooks*, 911 F. Supp. 2d at 840; COL 7; SR 170.

Defendant cites several federal opinions holding that warrantless video surveillance violates the Fourth Amendment. DB 7. Those cases, however, are distinguishable because they each address recorded footage of private areas that could not be viewed from a public road, such as inside business premises and a defendant's backyard. *United States v. Koyomejian*, 970 F.2d 536, 541 (9th Cir. 1992) (video surveillance inside a business office); *United States v. Falls*, 34 F.3d 674, 679 (8th Cir. 1994) (law enforcement obtained a search warrant for oral and video surveillance of inside the defendant's apartment); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (video surveillance of a defendant's backyard); *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000) (video surveillance of the inside of a hotel room); DB 7. In this case, the footage recorded of Defendant's trailer was of an area open and easily viewed from the public street. As the trial court found the pole camera "was not directed into or inside Defendant's house or curtilage." MH 75.

Several courts have held warrantless pole camera surveillance does not constitute a violation of the Fourth Amendment. *See Houston,* 813 F.3d at 290. ("[A]ll of the pole camera recordings, both those obtained with and without a warrant, were properly admitted during Houston's trial.") *See also Brooks*, 911 F. Supp. 2d at 836 (a pole

camera installed outside of an apartment complex to surveil the parking lot did not violate the Fourth Amendment, and law enforcement did not need a warrant before using the camera). *Id.* at 843. *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" outside of the defendant's house did not violate 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 pole camera surveilling the defendant's home to monitor traffic coming and going is not a violation of 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 camera mounted on a utility pole monitoring defendant's movements in plain view is not a violation of the Fourth Amendment); COL 20.

Defendant lacked a reasonable expectation of privacy outside his trailer because all of his recorded movements could be easily viewed by the public on the street in which he resided. The court found 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." FOF 22; SR 166. Moreover, Defendant did not make any attempt to exhibit a subjective expectation of privacy in the area surrounding his trailer. There was nothing obstructing the view of his trailer, such as a fence or a gate. A police officer could have viewed

Defendant's movements with the same viewpoint as the camera had the officer parked a car along the public street.

The pole camera footage does not constitute a search pursuant to the Fourth Amendment because Defendant does not have a reasonable expectation of privacy in movements outside his trailer open to public viewing. Further, society would not recognize Defendant's act of leaving his trailer as an "unfettered expectation of privacy." MH 74. The continuous monitoring of an area which is left open and exposed to the public does not trigger Fourth Amendment concerns. The fact that the housing program posted a sign for the "public" to continuously see, supports that Defendant had no reasonable expectation of privacy in the area. Every time Defendant motored into the trailer court, the sign warning would have greeted him.

B. The Trial Court Properly Found that Probable Cause Supported the Search Warrants.

Defendant argues that because the affidavits filed in support of the search warrants were comprised of information derived from the pole camera, the warrants are tainted fruit of the poisonous tree. DB 9. To evaluate the sufficiency of the evidence supporting a search warrant, this Court looks "at the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202 (quoting *State v. Helland*, 2005 S.D. 121, ¶ 12, 707 N.W.2d 262, 268) (quotation marks omitted). This Court has stated:

> Our inquiry is limited to determining whether the information provided to the issuing court in the warrant application was sufficient for the judge to make a common sense determination that there was a fair probability that the evidence would be found on the person or at the place to be searched. On review, we are limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, we review the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing.

State v. Gilmore, 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641 (citations omitted) (internal quotation marks omitted). This Court is allowed to conduct an independent review of what remains in the affidavit once the pole camera information is removed (either including or excluding the trash pull), and conclude there was still probable cause for the search warrants under the totality of the circumstances. *See State v. Jackson,* 2000 S.D. 113, ¶¶ 8-9, 616 N.W.2d 412, 416.

"The Fourth Amendment's prohibition against unreasonable searches and seizures requires generally the issuance of a warrant by a neutral judicial officer based on probable cause prior to the execution of a search or seizure of a person." *State v. Mohr*, 2013 S.D. 94, ¶ 13, 841 N.W.2d 440, 444. Usually, "before any search warrant may be issued, there must be a finding of probable cause, supported by an affidavit describing with particularity the place and person to be searched." *Jackson*, 2000 S.D. 113, at ¶ 13, 616 N.W.2d at 417. "The Fourth Amendment requires a 'nexus . . . between the item to be seized and

criminal behavior.'" *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967)).

This Court examines "whether there was a 'sufficient nexus among the criminal activity, the place of the activity, and the persons in the place to establish probable cause.'" *Jackson*, 2000 S.D. 113, at ¶ 15, 616 N.W.2d at 418 (quoting *People v. Johnson*, 805 P.2d 1156, 1159 (Colo. Ct. App. 1990)). Whether probable cause exists "must rise or fall" on the "four corners of the affidavit" itself. *State v. Babcock*, 2006 S.D. 59, ¶ 13, 718 N.W.2d 624, 628.

Here, the affidavits were sufficient to establish probable cause to issue the search warrants. Even if the pole camera information were excised from the four corners of the affidavit, the search warrants should nonetheless be upheld. In addition to the information derived from the pole camera footage, Detective Rogers declared in the affidavits in support of the search warrants that he is a certified law enforcement officer since June 2006 and he is trained and experienced in narcotic investigations, "drug recognition, drug interdiction, narcotics debriefing, and drug search and seizure laws." State's Exhibit 1, 3; SR 54, 63. Detective Rogers also stated he is a Drug Recognition Expert by the Association of Chiefs of Police Board. *Id.* The affidavit also detailed the information Detective Rogers received from DCI Agent Carlson, on January 23, 2015, regarding the informant tip that Defendant was distributing large quantities of marijuana to B.S. State's Exhibit 1, 3;

SR 55, 63. The affidavits explained that B.S., from Huron, who was purchasing drugs from Defendant in Brookings and dealing drugs in Huron, drives a red GMC pickup. *Id.* Detective Rogers verified the registration of the red GMC pickup to show that B.S was its owner. *Id.* Detective Rogers thus corroborated the informant tip received from another law enforcement officer. Detective Rogers further stated that Defendant's residence was a mobile home in the Lamplighter Village Trailer Park, just off of 3rd Avenue South. State's Exhibit 1; SR 55.

The affidavits also noted that on February 6, 2015, Defendant was stopped on Interstate 29 and was in possession of a small amount of marijuana, and also a large amount of cash. State's Exhibit 1, 3; SR 56, 63. Defendant's criminal history was in the affidavits, which included "marijuana possession, marijuana distribution, maintaining a place where drugs are used/sold, controlled substance possession, assault charges, and a conviction for driving under the influence." State's Exhibit 1, 3; SR 57, 65.

The trial court found 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." FOF 35; SR 167. However, when this Court independently reviews these affidavits, it will find sufficient information to uphold the issuance of the two warrants if the pole camera information is excised.

A search warrant is valid if the affidavit contains probable cause after the portion deemed to be tainted by the court has been struck. *Hirning v. Dooley*, 2004 S.D. 52, ¶ 35, 679 N.W.2d 771, 783. Because the affidavits included (1) Detective Rogers training and experience; (2) the corroborated informant tip, which was verified by Detective Rogers, of B.S. purchasing drugs from Defendant; (3) the traffic stop where Defendant was found in possession of marijuana and large amounts of cash (i.e. supporting the inference that Defendant is dealing); and (4) Defendant's criminal history including possession and distribution; the affidavits were sufficient to obtain valid search warrants without the pole camera information.

Defendant cites *State v. Boll*, 2002 S.D. 114, 651 N.W.2d 710, to support his argument that if the evidence gathered from the pole camera surveillance was taken out of the affidavits, law enforcement would have lacked probable cause to obtain the two warrants. Yet *Boll* does not directly apply to the facts of this case. In *Boll*, law enforcement based the affidavit in support of a search warrant on an anonymous tip, an illegal search, and a subsequent search. *Id.* at ¶ 16, 651 N.W.2d at 715. The trial court held that the search warrant was valid because the second search would have been product of inevitable discovery, and not based "exclusively" on the first illegal search. *Id.* The trial also applied a second exception to the exclusionary rule, the independent source exception. *Id.* at ¶ 17, 651 N.W.2d at 716 (citing

People v. Weiss, 20 Cal.4th 1073, 86 Cal.Rptr.2d 337, 978 P.2d 1257 (1999)) (citations omitted). This Court disagreed and held neither exclusionary rule applied. *Id.* at ¶¶ 22, 36, 651 N.W.2d at 717, 720. This Court held that the second search was prompted by the first tainted search, so both searches must be disqualified. *Id.* Without the two searches, the affidavit lacked probable cause to issue a search warrant. *Id.* at ¶ 39, 651 N.W.2d at 721.

Boll is distinguishable from the case at bar, because law enforcement in *Boll* were aware that the first search was illegal, but conducted a second search based on the information derived from the first search. In the present case, law enforcement mounted a camera on a pole to capture activity taking place in a public viewing area. Law enforcement reasonably concluded that mounting a camera on a street light to capture activity readily and continuously exposed to the public did not constitute a search under the Fourth Amendment. Defendant's claim that law enforcement should have known it was inappropriate due to the *Zahn* GPS case is incorrect. The *Zahn* GPS case monitored Defendant driving over a large range of area and over an extended time. Here, the monitoring was continuous but not beyond the public entrance. There was clearly a posted warning sign to the public and Defendant himself. Also Defendant's whereabouts, once he left the trailer park area, was largely unknown for days on end. Furthermore,

the camera would dysfunction from time to time, breaking the continuous monitoring of the area.

Because the evidence from the pole camera was not considered a search under the Fourth Amendment, law enforcement did not need a warrant to surveil Defendant's property. Using all of the information contained in the affidavits to find probable cause to issue the warrants was proper. The content of the affidavits does not constitute fruit of the poisonous tree, and the trial court properly denied Defendant's Motion to Suppress. Even if the court were to excise out the pole camera information, probable cause still existed in the warrant with the remaining information in the affidavits.

C. Good Faith Exception Applies.

Even if the Court concludes that the search and seizure of Defendant's property violated the Fourth Amendment, this Court should deny Defendant's Motion to Suppress under the good faith exception to the exclusionary rule. There was no police misconduct. Thus, the purpose of the exclusionary rule is not fulfilled by suppressing the evidence in this case.

This Court has long recognized the good faith exception to the exclusionary rule, consistent with federal law, when the Fourth Amendment is violated. *State v. Saiz*, 427 N.W.2d 825, 828 (S.D. 1988) ("[W]e find the *Leon* case persuasive and adopt its reasoning under the South Dakota Constitution Art. VI, § 11 as far as that case has been

applied and limited."); *State v. Running Shield,* 2015 S.D. 78, N.W.2d 503. In *United States v. Leon*, the United States Supreme Court outlined the good faith exception to the exclusionary rule. 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Leon*, the court observed that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . ." *Id.* at 906. In fact, the court made explicit that whether evidence should be suppressed is a separate question from whether the Fourth Amendment was violated. *Id.*

In *Herring v. United States*, the United States Supreme Court articulated the "important principles that constrain application of the exclusionary rule." 555 U.S. 135, 140, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009). The Court emphasized that the exclusion of tangible evidence is a remedy that should be used as a "last resort, not [a] first impulse." *Id.* The most important principle the Court articulated was that the exclusionary rule should apply only where it "results in appreciable deterrence" of Fourth Amendment violations by police in the future. *Id.* at 141 (quoting *Leon*, 468 U.S. at 909). Additionally, the benefits of police deterrence must also outweigh the significant costs of "letting guilty and possibly dangerous defendants go free . . . ." *Id.* ("To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs." (quoting *Illinois v. Krull*, 480 U.S. 340, 352-

53, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). "The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Id.* (citation omitted).

Defendant argues that he had no opportunity to argue against the good faith exception because the State first relied on that exception in its Proposed Findings of Facts and Conclusion of Law. COL 22; SR 172, DB 10. Both the State and Defendant each proposed its own Findings of Facts and Conclusions of Law after the hearing was held. SR 149-197. Defendant could have filed written objections to the State's Proposed Conclusion of Law on this issue. COL 22; SR 172. He did not.[2] The court reviewed all of the submitted proposals and chose to sign those proposed by the State.

Defendant next argues that the good faith exception does not apply because the exception should not extend to police error. DB 13. The United States Supreme Court in *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419 (2011), noted that the good faith exception applies "across a range of cases." *Id.* at 238. In *Krull*, 480 U.S. at 340, 107 S.Ct. at 1160, the same Court "extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes." *Id.* "Indeed, in 27 years of practice under *Leon's* good-faith

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[2] Defendant argued against the good faith exception in his Petition for Intermediate Appeal; however, that brief in support for intermediate appeal is not in the settled record and was not before the trial court. It is in the Supreme Court records.

exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Id.* at 240 (quoting *Herring*, supra, at 144, 129 S.Ct. at 695). "[T]he harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Davis*, 564 U.S. at 241, 131 S.Ct. 2429 (quoting *Leon*, 468 U.S. at 919, 104 S.Ct. at 3405). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs." *Herring,* supra, at 144, 129 S.Ct. at 695. "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrent value of suppression is diminished, and exclusion cannot 'pay its way.'" *Davis*, 564 U.S. at 229, 131 S.Ct. at 2419 (2011).

Law enforcement acted in good faith because they reasonably understood that a warrant was not required before they could use pole cameras in public settings. FOF 12, 21, 22, 26-32; COL 6-17, 19-22; SR 165-12; *Davis*, 564 U.S. at 237, 131 S.Ct. at 2427. "[E]vidence should be suppressed 'only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring,* 555 U.S. at 143, 129 S.Ct. at 701 (quoting *Kroll*, 480 U.S. at 348-49, 107 S.Ct. at 1160) (citations omitted).

"[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *United States v. Rodriguez*, 799 F.3d 1222, 1223 (8th Cir. 2015) (quoting *Davis*, 564 U.S. at 231-32, 131 S.Ct. at 2423-24). While there is currently no binding precedent in South Dakota or the United States Supreme Court on this issue, many other courts have held that law enforcement does need to obtain a warrant before utilizing pole camera surveillance. COL 7, 8, 20; SR 170-73.[3]

Defendant implies that law enforcement should have known a pole camera's use would violate the Fourth Amendment because of the South Dakota *Zahn* case. DB 15. However, *Zahn* involved the use of a GPS unit on a mobile vehicle, monitoring his constant whereabouts over a vast area. This is unlike the pole camera, which was on a stationary public pole, intermittently recording the open fields entrance area showing several trailers in a public trailer park including Defendant's. MH 24; FOF 16, 26; SR 165-66. The public trailer park area filmed herein is similar in nature to the surveillance of an apartment complex in *Brooks*, 911 F. Supp. 2d at 836. COL 20; *See also* FOF 12.

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[3] See the district court holding in *United States v. Houston*, 2014 WL 259085 (E.D. Tenn.) ("The ATG Agents acted in good faith in the instant case. They had no prior precedent stating that a search warrant was required, and they sought a search warrant the day that the Sixth Circuit filed the [*United States v.] Anderson-Bagwell* case" discussing the monitoring of a backyard.)

The trial court concluded that "it was Detective Rogers' understanding that a search warrant was not needed for the use of a pole camera." FOF 6; SR 164. It further found that Detective Rogers was not aware of any prior use of pole camera surveillance of a public area that required law enforcement to obtain a search warrant before use. FOF 12; SR 165. The trial court held that "[g]iven 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." COL 22; SR 172.

There is no South Dakota or United States Supreme Court case that requires a search warrant before utilizing a pole camera for surveillance in a public area, as noted by the trial court. COL 22; SR 172. Law enforcement in South Dakota have used pole cameras in other public settings as well, such as at the Sturgis Rally and Hot Harley Nights, without a warrant. MH 22. Because of this, and the general law existing at the time regarding the open fields and a person's conduct that is displayed to all in the general public, it was reasonable for law enforcement to conclude they did not need to obtain a search warrant prior to installing the pole camera on a public street.

Based on the facts and law enforcement conduct herein, the deterrence benefits of suppression do not outweigh the costs to society. Thus, the trial court properly declined to apply the exclusionary rule in this case.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 7,197 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 24th day of May, 2016.

/s/ *Caroline Srstka*
Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of May, 2016, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Joseph A. Jones* was served via electronic mail upon D. Sonny Walter, dwalter@midco.net.

/s/ *Caroline Srstka*
Caroline Srstka
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27739

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH A. JONES,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
BROOKINGS COUNTY, SOUTH DAKOTA

THE HONORABLE GREGORY J. STOLTENBURG
Circuit Court Judge

APPELLEE'S AMENDED BRIEF

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Notice of Appeal filed January 29, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27739

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JOSEPH A. JONES,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Joseph A. Jones, will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name.

The various transcripts and reports will be cited as follows:

Motion Hearing – July 14, 2015..... MH

Court Trial – December 15, 2015..... CT

Sentencing Hearing – January 19, 2016 .....ST

The settled record in the underlying criminal case, *State of South Dakota v. Joseph A. Jones,* Brookings County Criminal File No. 15-332, will be referred to as "SR." Any reference to Defendant's brief will be designated as "DB." All references will be followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment of Conviction and Sentence entered by the Honorable Gregory J. Stoltenburg, Circuit Court Judge, on January 19, 2016, and filed January 20, 2016. SR 216-18. Defendant filed a Notice of Appeal on January 29, 2016. SR 281. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

WHETHER THE CIRCUIT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS?

The trial court denied Defendant's Motion to Suppress Evidence abstained from the pole camera footage.

Davis v. United States, 564 U.S. 229, 131 S.Ct. 2914, 180 L.Ed.2d 285 (2011)

State v. Thunder, 2010 S.D. 3, 777 N.W.2d 373

United States v. Houston, 813 F.3d 282 (6th Cir. 2016)

United States v. Knotts, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)

STATEMENT OF THE CASE

On April 24, 2015, a Brookings County Grand Jury indicted Defendant with: Count 1 – Distribution or Possession with Intent to Distribute Marijuana, in violation of SDCL 22-42-7; Count 2 – Drug Free Zones Created-Violation as Felony, in violation of SDCL 22-42-19(1); and Count 3 – Unauthorized Possession of Controlled Substance as Felony, in violation of SDCL 22-42-5. SR 20-21. An Information was filed on May 11, 2015, charging Defendant as a

habitual offender. SR 25-26. Other Complaints were filed, but were later dismissed by the State. SR 9, 13, 214-15.

On July 6, 2015, Defendant filed an Amended Motion to Suppress Evidence (SR 40-41), which was denied at the July 25, 2015, Motion Hearing. MH 75; SR 146; Findings of Fact (FOF) and Conclusion of Law (COL); SR 163-73. Defendant then filed a Petition for Intermediate Appeal, which was denied by this Court on September 25, 2015. SR 202.

A court trial on stipulated facts was held on December 15, 2015. CT, *generally;* SR 308. The trial court found Defendant guilty of all three counts of the Indictment. CT 7; SR 314. Defendant admitted to the Part II Habitual Offender Information. CT 10; SR 317. On January 19, 2016, the court sentenced Defendant on Count 1 – Distribution or Possession with Intent to Distribute Marijuana, to twelve years incarceration with five years suspended; on Count 2 – Drug Free Zones Created, to ten years incarceration with three years suspended; and on Count 3 – Unauthorized Possession of Controlled Substance as Felony, to six years incarceration with five years suspended. SR 216-17. All sentences were to run consecutively. SR 217. The sentence of the court was entered on January 19, 2016 and filed on January 20, 2016. SR 216-17. Defendant filed a Notice of Appeal on January 29, 2016. SR 280.

STATEMENT OF THE FACTS

On January 23, 2015, DCI Special Agent Liz Carlson informed Brookings Police Detective Dana Rogers of a tip from an informant that large quantities of marijuana were obtained from Defendant in Brookings and brought back to Huron, South Dakota, by B.S., to sell. MH 16-17; SR 336-37. Agent Carlson advised Detective Rogers that B.S. drove a red GMC pickup. MH 17. Detective Rogers corroborated this information by checking B.S.'s license plate registration. MH 17.

That same day, Detective Rogers and DCI Special Agent Scot Hawks placed a recording camera on a public light pole to observe the surroundings of Defendant's trailer at Lamplighter Village Trailer Park, in Brookings, South Dakota. MH 21; SR 341.

The pole camera was located on the public corner of 4th Street and 3rd Avenue (MH 23), which was across the street from Defendant's trailer on 3rd Avenue. 3rd Avenue has public sidewalks. MH 30; State's Exhibit 5; SR 68. One can view from the public sidewalk what the pole camera depicted in its footage. MH 40; SR 360. *See also* Google Maps view of the area, State's Exhibit 6; SR 69. A sign within one hundred feet of Defendant's mobile home designated his trailer park as a crime free zone. MH 35; State's Exhibit 7; SR 70. One can view the sign when driving into the trailer park. MH 35.

The pole camera recorded Defendant and his visitors coming and going from his residence. MH 43; SR 363. Detective Rogers did not

obtain a warrant to install the pole camera. MH 22; SR 342. He believed one was not required because law enforcement used cameras without a warrant in public areas during large events, such as Hot Harley Nights in Sioux Falls, the Sturgis Rally and several other locations during investigations. *Id.*

The camera itself was inside a box and not visible to the public. However, the box was visible. MH 22; SR 342; Defendant's Exhibit A; SR 71. The camera was able to scan up and down, left and right, and had zooming capabilities. *Id.* The camera could not be used to view inside the Defendant's trailer. *Id.* The camera recorded the entrance and exit to the trailer park, Third Avenue street parking, the front yard and north side of Defendant's trailer, and trailers behind Defendant's. MH 24. Defendant did not have a fence, gate, or any other obstruction blocking the view to his trailer. *Id.* The camera did not have night vision, but did pick up if a light was turned on in the trailer, vehicle lights, vehicles driving under the street light, and shadows of people walking outside. MH 31-32.

The camera recorded from January 23, 2015, until approximately March 19, 2015. MH 33. The camera continually recorded except when there were updates to the server, inclement weather, or any internet or computer problems occurred. MH 33; SR 353. There were also times when Defendant was gone for days at a time. MH 33. One

could view the footage live or watch it at a later time. MH 34; SR 354. This footage was not preserved for court. MH 51.

Detective Rogers testified that he observed the car owned by B.S., who was suspected of distributing drugs, parked at Defendant's trailer several times from January 23, 2015 to March 19, 2015. MH 40. He also observed, through the pole camera footage, other vehicles owned by known drug offenders parked at Defendant's trailer. State's Exhibit 3; SR 63.

On the morning of March 6, 2015, Detective Rogers reviewed the camera footage from the night before. MH 37. He observed Defendant, through the pole camera recording, take two black or dark colored trash bags to his car, drive west a short distance, and then very shortly thereafter return to his trailer. MH 37; SR 357. Detective Rogers and Agent Hawks assumed that Defendant had thrown out the trash bags in the trailer park dumpster, which was located at the west side of the trailer park. *Id.* Detective Rogers and Agent Hawks drove to the dumpster and observed an open trash bag. *Id.* On the top of the trash, in the open bag, was a USPS package addressed to Defendant at his trailer address. *Id.* Detective Rogers and Agent Hawks took two trash bags matching what appeared to be the ones Defendant had earlier handled, to the police station. *Id.* They searched the bags. *Id.*

Drugs and paraphernalia were found in the bags. MH 38; SR 358. Two toothpicks with a black substance were found. *Id.* Detective

Rogers explained that the toothpicks were indicative of a person who has used them to clean marijuana out of the smoking devices. *Id.* Detective Rogers and Agent Hawks also found cigar wraps with a small amount of marijuana inside the wrapper. *Id.*

On March 11, 2015, Detective Rogers, again through the pole camera recording, saw Defendant load something in his car, drive west for a short distance, and return. MH 38; SR 358. Detective Rogers and Officer Smith went to the dumpster and found the same kind of trash bags that Defendant used five days before. *Id.* Detective Rogers and Officer Smith took the trash bags and searched them. *Id.* In addition to identifying objects linking the trash bags to Defendant, including receipts and TransUnion paperwork, there were four partial marijuana blunts and two marijuana stems. MH 38-39; SR 359. One of the marijuana stems tested positive for marijuana. *Id.*

After searching Defendant's trash bags and finding marijuana, Detective Rogers applied for and obtained a search warrant for a GPS tracker on Defendant's two cars. MH 17; SR 60-61, 337. Two days later, on March 13, 2015, Detective Rogers applied for and obtained a search warrant for Defendant's residence. MH 19; SR 66-67, 339. Many of the facts contained in the affidavits filed in support of the warrants were obtained through use of the pole camera.

The warrant on Defendant's trailer was executed on March 19, 2015. MH 32; SR 352. Defendant was arrested at this time. *Id.* The

camera remained in place on the light pole until sometime after March 19, 2015, when a city utility employee removed it. *Id.*

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

"A motion to suppress for an alleged violation of a constitutionally protected right raises a question of law requiring de novo review." *State v. Heney*, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561-62 (citation omitted). Though factual findings of the lower court are reviewed under the clearly erroneous standard, once those facts have been determined, the application of a legal standard to those facts is reviewed de novo. *Id.*

A. Warrantless Use of a Pole Camera Did Not Violate the Fourth Amendment.

Defendant argues his Fourth Amendment rights were violated by the placement of a pole camera on a public street light without a warrant. DB 5. However, no warrant was required as Defendant had no reasonable expectation of privacy to the activities captured by the pole camera, because all of his actions were easily viewed by the public. Consequently, Defendant's Fourth Amendment rights were not violated, and the trial court properly denied his Motion to Suppress.

"An individual must have a reasonable expectation of privacy in the place searched or the article seized before the Fourth Amendment will apply." *State v. Thunder*, 2010 S.D. 3, ¶ 16, 777 N.W.2d 373, 378. *See also State v. Zahn*, 2012 S.D. 19, ¶ 20, 812 N.W.2d 490, 496. This

Court applies a two-part test to determine whether a defendant has a reasonable expectation of privacy. *Zahn*, 2012 S.D. 19, at ¶ 20, 812 N.W.2d at 496 (quoting *Thunder*, 2010 S.D. 3, at ¶ 16, 777 N.W.2d at 378) (citations omitted). "First, we consider whether [an individual] exhibited an actual subjective expectation of privacy in the area searched." *Id.* "Second, we consider whether society is prepared to recognize that expectation of privacy as reasonable." *Id.* "Whether [an individual] has a legitimate expectation of privacy in [an area] is determined on a 'case-by case basis, considering the facts of each particular situation.'" *Id.*

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Zahn*, 2012 S.D. 19, at ¶ 21, 812 N.W.2d at 497 (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)) (citations omitted). "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* Here, Defendant did nothing to preserve this area to be considered by anyone as private. Defendant's activity captured on camera well outside his trailer from a public street was all vividly and continuously exposed to the public. Therefore, the information obtained without a warrant from January 23 to March 19, 2015, was not subject to Fourth Amendment protection.

The trial court held that warrantless use of the pole camera did not violate Defendant's Fourth Amendment rights because "law enforcement officials are constitutionally permitted to view any location from a publicly accessible location." COL 9, 17; SR 170-71. Further, "the evidence obtained as a result of the pole camera footage in no way violated the Defendant's constitutional rights." COL 18; SR 171.

As the trial court properly concluded, Defendant did not have a subjective expectation of privacy in the footage recorded by the camera mounted on a public light pole located on a public street. MH 75. The pole camera recorded the same view that anyone could see on the public street. FOF 22. The pole camera captured the entrance and exit of the Lamplighter Village Trailer Park on Third Avenue South. FOF 16. Defendant's trailer was at the very entrance to the trailer park. *Id.* Defendant's trailer was not obstructed by any fence, gate, or anything else that blocked its view from the public street or pole camera. FOF 18. From the camera footage, one could view the front and north side of Defendant's trailer. FOF 19. The camera footage also recorded several other trailers. MH 24. Just like any person standing on the sidewalk (or parked in a vehicle on the public street) at the pole's location, the camera could not see into the trailer or Defendant's backyard. FOF 21. Law enforcement only observed Defendant's activity (of arriving and leaving the trailer), or others coming to and from

Defendant's trailer, which was also vividly exposed to the general public.

"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 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)). The Fourth Amendment "does not 'preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.'" *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). Law enforcement could have observed Defendant's actions that were recorded on the pole camera by stationing themselves outside of his trailer, on the public street, or on the public sidewalk. Instead, law enforcement utilized their limited resources to conduct surveillance with a pole camera. *United States v. Brooks*, 911 F. Supp. 2d 836, 840 (D. Ariz. 2012). Indeed, "the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations." *United States v. Houston*, 813 F.3d 282, 288 (6th Cir. 2016).

Defendant argues his rights were violated because the pole camera footage exposed or showed Defendant himself, his residence, and its curtilage. DB 6. "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 35, 88 S.Ct. at 511. *See also Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835 (1989); *Sherbrook v. City of Pelican Rapid*, 513 F.3d 809, 815 (8th Cir. 2008); *United States v. Stallings*, 28 F.3d 58, 61 (8th Cir. 1994). The pole camera observed only an area that was, at all times, readily observable from multiple vantage points by multiple neighbors in the neighborhood.

The Sixth Circuit Court of Appeals recently issued an opinion in a similar case, *United States v. Houston*, 813 F.3d 282. In that case, local law enforcement informed the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that the defendant, a convicted felon, was in possession of firearms. *Id.* at 285. Because ATF vehicles "[stuck] out like a sore thumb" when attempting to surveil the defendant's property, ATF installed a camera on a public utility pole approximately 200 yards away from the property. *Id.* at 286. The camera "could move left and right and had a zoom function." *Id.* The video footage was sent through an IP address where the agents could view it on their computers remotely. *Id.* An ATF agent testified in court that the recorded footage was identical to what an agent would view if he had driven down the public road. *Id.*

The ATF agents monitored the defendant's farm for ten weeks without a warrant. *Id.* Houston challenged the video surveillance

conducted without a warrant. The Court of Appeals held that there was no Fourth Amendment violation because:

> [the defendant] had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public utility pole and that captured the same views enjoyed by passersby on public roads. The ATF agents only observed what [the defendant] made public to any person travelling on the roads surrounding the farm.

Id. at 287-88. The court noted that while the camera recorded area around the defendant's property is assumed to be curtilage the recordings did not violate the defendant's reasonable expectation of privacy, because an agent could observe that same area from the public road. *Id*. The court also found that the ten-week surveillance did not violate the Fourth Amendment. *Id*.

The present case is very similar to *Houston*. The trial court found that Defendant "can claim no expectation of privacy for what he does outside his home in full view of the public at large." MH 75. The court further found that "if an officer was sitting in a vehicle or standing on the street he could see as much as that camera did." MH 75. The trial court found that the pole camera "was not directed into or inside . . . Defendant's home or curtilage." MH 75.

Defendant ignores the open exposure of his activities and relies on *Zahn* to argue the warrantless use of a pole camera is unconstitutional. DB 4; 2012 S.D. 19, 812 N.W.2d 490. In *Zahn*, law enforcement installed a GPS unit on the defendant's vehicle without a

warrant for a period of twenty-six days. *Zahn*, 2012 S.D. 19, at ¶ 10, 812 N.W.2d at 493. This Court held that Zahn had a subjective and reasonable expectation of privacy in his movements, which triggered the protections of the Fourth Amendment, and a warrant was required. *Id.* at ¶ 31. *Zahn* is distinguishable from the present case. The GPS unit gathered "a wealth of highly-detailed information about an individual's life over an extended period of time." *Id.* at ¶ 28. It tracked "the whole of Zahn's movements for nearly a month." *Id.* at ¶ 22. The GPS device "enabled officers to determine Zahn's speed, time, direction, and geographic location within five to ten feet at any time. It also enabled officers to use the sum of the recorded information to discover patterns in the whole of Zahn's movements for twenty-six days." *Id.* "The prolonged GPS surveillance of Zahn's vehicle revealed more than just the movements of the vehicle on public roads; it revealed an intimate picture of Zahn's life and habits." *Id.*

In the present case, the pole camera merely recorded the Defendant's trailer and its surroundings, an area already exposed to the public. Unlike the monitoring by a GPS, when Defendant left the area of the pole camera, sometimes for days, his whereabouts and activities were unknown and unmonitored. MH 33. The pole camera monitoring did not physically move from its posted location like the GPS device did. It simply did not follow or record Defendant's every move or gather a wealth of highly detailed information about Defendant. The pole

camera system was also down from time to time, due to server issues, weather, or internet problems. In fact, the camera could not even record Defendant driving the short distance allegedly to the dumpster and back. The recorded footage reviewed after the actual event only depicted Defendant leaving his driveway with what law enforcement believed were trash bags. Law enforcement assumed Defendant drove to the dumpster to dump his trash bags, but did not see that action through the camera footage. When the dumpster was checked, they saw an open bag with Defendant's identifying information.[1]

The pole camera footage was not nearly as intrusive as the GPS tracking device in *Zahn* because it only recorded Defendant and his visitor's public movement outside Defendant's trailer in the open fields. The video surveillance reveals nothing beyond what Defendant readily and continuously exposed to the public. The sum of the recorded information did not provide law enforcement with an intimate picture of Defendant's life and habits. In fact, when the camera was zoomed in, the picture would become distorted or blurry. FOF 23. Indeed, law enforcement could have stationed an officer and vehicle on the public road to watch Defendant's activities, but elected to use electronic

[1] "Defendant has no reasonable expectation of privacy in the garbage he abandoned in the community dumpster that contained other people's garbage." COL 21; *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. The marijuana and drug paraphernalia may have eventually been found under the doctrine of inevitable discovery. *See Guthrie v. Weber*, 2009 S.D. 42, 767 N.W.2d 539.

surveillance to obtain the same information. In addition, as set out in the facts, Defendant was put on notice by trailer court signage that the area was declared a crime free zone, with the sign erected directly across from Defendant's driveway. FOF 19; COL 30. Thus, Defendant was warned that crime would not be allowed in this trailer park area. The sign itself implied that the area was being monitored. Defendant even signed an agreement to comply with the same. FOF 19.

"[T]he Fourth Amendment does not require law enforcement to go to such lengths when more efficient methods are available. As the Supreme Court in *United States v. Knotts* explained, law enforcement may use technology to 'augment [] the sensory faculties bestowed upon them at birth' without violating the Fourth Amendment." *Houston*, 813 F.3d at 289 (quoting *United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).

"[I]f law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand. The law cannot be that modern technological advances are off-limits to law enforcement when criminals may use them freely." *Id.* at 290. "Insofar as respondent's complaint appears to be simply that scientific devices . . . enabled the police to be more effective in detecting crime, it simply has no constitutional foundation." *Knotts,* 460 U.S. at 284, 103 S.Ct. at 1086. "Law enforcement may utilize their resources to conduct

surveillance where they have a legal right to occupy." *Brooks*, 911 F. Supp. 2d at 840; COL 7; SR 170.

Defendant cites several federal opinions holding that warrantless video surveillance violates the Fourth Amendment. DB 7. Those cases, however, are distinguishable because they each address recorded footage of private areas that could not be viewed from a public road, such as inside business premises and a defendant's backyard. *United States v. Koyomejian*, 970 F.2d 536, 541 (9th Cir. 1992) (video surveillance inside a business office); *United States v. Falls*, 34 F.3d 674, 679 (8th Cir. 1994) (law enforcement obtained a search warrant for oral and video surveillance of inside the defendant's apartment); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (video surveillance of a defendant's backyard); *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000) (video surveillance of the inside of a hotel room); DB 7. In this case, the footage recorded of Defendant's trailer was of an area open and easily viewed from the public street. As the trial court found the pole camera "was not directed into or inside Defendant's house or curtilage." MH 75.

Several courts have held warrantless pole camera surveillance does not constitute a violation of the Fourth Amendment. *See Houston,* 813 F.3d at 290. ("[A]ll of the pole camera recordings, both those obtained with and without a warrant, were properly admitted during Houston's trial.") *See also Brooks*, 911 F. Supp. 2d at 836 (a pole

camera installed outside of an apartment complex to surveil the parking lot did not violate the Fourth Amendment, and law enforcement did not need a warrant before using the camera). *Id.* at 843. *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" outside of the defendant's house did not violate 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 pole camera surveilling the defendant's home to monitor traffic coming and going is not a violation of 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 camera mounted on a utility pole monitoring defendant's movements in plain view is not a violation of the Fourth Amendment); COL 20.

Defendant lacked a reasonable expectation of privacy outside his trailer because all of his recorded movements could be easily viewed by the public on the street in which he resided. The court found 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." FOF 22; SR 166. Moreover, Defendant did not make any attempt to exhibit a subjective expectation of privacy in the area surrounding his trailer. There was nothing obstructing the view of his trailer, such as a fence or a gate. A police officer could have viewed

Defendant's movements with the same viewpoint as the camera had the officer parked a car along the public street.

The pole camera footage does not constitute a search pursuant to the Fourth Amendment because Defendant does not have a reasonable expectation of privacy in movements outside his trailer open to public viewing. Further, society would not recognize Defendant's act of leaving his trailer as an "unfettered expectation of privacy." MH 74. The continuous monitoring of an area which is left open and exposed to the public does not trigger Fourth Amendment concerns. The fact that the housing program posted a sign for the "public" to continuously see, supports that Defendant had no reasonable expectation of privacy in the area. Every time Defendant motored into the trailer court, the sign warning would have greeted him.

B. The Trial Court Properly Found that Probable Cause Supported the Search Warrants.

Defendant argues that because the affidavits filed in support of the search warrants were comprised of information derived from the pole camera, the warrants are tainted fruit of the poisonous tree. DB 9. To evaluate the sufficiency of the evidence supporting a search warrant, this Court looks "at the totality of the circumstances to decide if there was at least a 'substantial basis' for the issuing judge's finding of probable cause." *State v. Dubois*, 2008 S.D. 15, ¶ 10, 746 N.W.2d 197, 202 (quoting *State v. Helland*, 2005 S.D. 121, ¶ 12, 707 N.W.2d 262, 268) (quotation marks omitted). This Court has stated:

> Our inquiry is limited to determining whether the information provided to the issuing court in the warrant application was sufficient for the judge to make a common sense determination that there was a fair probability that the evidence would be found on the person or at the place to be searched. On review, we are limited to an examination of the facts as contained within the four corners of the affidavit. Furthermore, we review the issuing court's probable cause determination independently of any conclusion reached by the judge in the suppression hearing.

State v. Gilmore, 2009 S.D. 11, ¶ 7, 762 N.W.2d 637, 641 (citations omitted) (internal quotation marks omitted). This Court is allowed to conduct an independent review of what remains in the affidavit once the pole camera information is removed (either including or excluding the trash pull), and conclude there was still probable cause for the search warrants under the totality of the circumstances. *See State v. Jackson,* 2000 S.D. 113, ¶¶ 8-9, 616 N.W.2d 412, 416.

"The Fourth Amendment's prohibition against unreasonable searches and seizures requires generally the issuance of a warrant by a neutral judicial officer based on probable cause prior to the execution of a search or seizure of a person." *State v. Mohr*, 2013 S.D. 94, ¶ 13, 841 N.W.2d 440, 444. Usually, "before any search warrant may be issued, there must be a finding of probable cause, supported by an affidavit describing with particularity the place and person to be searched." *Jackson*, 2000 S.D. 113, at ¶ 13, 616 N.W.2d at 417. "The Fourth Amendment requires a 'nexus . . . between the item to be seized and

criminal behavior.'" *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967)).

This Court examines "whether there was a 'sufficient nexus among the criminal activity, the place of the activity, and the persons in the place to establish probable cause.'" *Jackson*, 2000 S.D. 113, at ¶ 15, 616 N.W.2d at 418 (quoting *People v. Johnson*, 805 P.2d 1156, 1159 (Colo. Ct. App. 1990)). Whether probable cause exists "must rise or fall" on the "four corners of the affidavit" itself. *State v. Babcock*, 2006 S.D. 59, ¶ 13, 718 N.W.2d 624, 628.

Here, the affidavits were sufficient to establish probable cause to issue the search warrants. Even if the pole camera information were excised from the four corners of the affidavit, the search warrants should nonetheless be upheld. In addition to the information derived from the pole camera footage, Detective Rogers declared in the affidavits in support of the search warrants that he is a certified law enforcement officer since June 2006 and he is trained and experienced in narcotic investigations, "drug recognition, drug interdiction, narcotics debriefing, and drug search and seizure laws." State's Exhibit 1, 3; SR 54, 63. Detective Rogers also stated he is a Drug Recognition Expert by the Association of Chiefs of Police Board. *Id.* The affidavit also detailed the information Detective Rogers received from DCI Agent Carlson, on January 23, 2015, regarding the informant tip that Defendant was distributing large quantities of marijuana to B.S. State's Exhibit 1, 3;

SR 55, 63. The affidavits explained that B.S., from Huron, who was purchasing drugs from Defendant in Brookings and dealing drugs in Huron, drives a red GMC pickup. *Id.* Detective Rogers verified the registration of the red GMC pickup to show that B.S was its owner. *Id.* Detective Rogers thus corroborated the informant tip received from another law enforcement officer. Detective Rogers further stated that Defendant's residence was a mobile home in the Lamplighter Village Trailer Park, just off of 3rd Avenue South. State's Exhibit 1; SR 55.

The affidavits also noted that on February 6, 2015, Defendant was stopped on Interstate 29 and was in possession of a small amount of marijuana, and also a large amount of cash. State's Exhibit 1, 3; SR 56, 63. Defendant's criminal history was in the affidavits, which included "marijuana possession, marijuana distribution, maintaining a place where drugs are used/sold, controlled substance possession, assault charges, and a conviction for driving under the influence." State's Exhibit 1, 3; SR 57, 65.

The trial court found 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." FOF 35; SR 167. However, when this Court independently reviews these affidavits, it will find sufficient information to uphold the issuance of the two warrants if the pole camera information is excised.

A search warrant is valid if the affidavit contains probable cause after the portion deemed to be tainted by the court has been struck. *Hirning v. Dooley*, 2004 S.D. 52, ¶ 35, 679 N.W.2d 771, 783. Because the affidavits included (1) Detective Rogers training and experience; (2) the corroborated informant tip, which was verified by Detective Rogers, of B.S. purchasing drugs from Defendant; (3) the traffic stop where Defendant was found in possession of marijuana and large amounts of cash (i.e. supporting the inference that Defendant is dealing); and (4) Defendant's criminal history including possession and distribution; the affidavits were sufficient to obtain valid search warrants without the pole camera information.

Defendant cites *State v. Boll*, 2002 S.D. 114, 651 N.W.2d 710, to support his argument that if the evidence gathered from the pole camera surveillance was taken out of the affidavits, law enforcement would have lacked probable cause to obtain the two warrants. Yet *Boll* does not directly apply to the facts of this case. In *Boll*, law enforcement based the affidavit in support of a search warrant on an anonymous tip, an illegal search, and a subsequent search. *Id.* at ¶ 16, 651 N.W.2d at 715. The trial court held that the search warrant was valid because the second search would have been product of inevitable discovery, and not based "exclusively" on the first illegal search. *Id.* The trial also applied a second exception to the exclusionary rule, the independent source exception. *Id.* at ¶ 17, 651 N.W.2d at 716 (citing

People v. Weiss, 20 Cal.4th 1073, 86 Cal.Rptr.2d 337, 978 P.2d 1257 (1999)) (citations omitted). This Court disagreed and held neither exclusionary rule applied. *Id.* at ¶¶ 22, 36, 651 N.W.2d at 717, 720. This Court held that the second search was prompted by the first tainted search, so both searches must be disqualified. *Id.* Without the two searches, the affidavit lacked probable cause to issue a search warrant. *Id.* at ¶ 39, 651 N.W.2d at 721.

Boll is distinguishable from the case at bar, because law enforcement in *Boll* were aware that the first search was illegal, but conducted a second search based on the information derived from the first search. In the present case, law enforcement mounted a camera on a pole to capture activity taking place in a public viewing area. Law enforcement reasonably concluded that mounting a camera on a street light to capture activity readily and continuously exposed to the public did not constitute a search under the Fourth Amendment. Defendant's claim that law enforcement should have known it was inappropriate due to the *Zahn* GPS case is incorrect. The *Zahn* GPS case monitored Defendant driving over a large range of area and over an extended time. Here, the monitoring was continuous but not beyond the public entrance. There was clearly a posted warning sign to the public and Defendant himself. Also Defendant's whereabouts, once he left the trailer park area, was largely unknown for days on end. Furthermore,

the camera would dysfunction from time to time, breaking the continuous monitoring of the area.

Because the evidence from the pole camera was not considered a search under the Fourth Amendment, law enforcement did not need a warrant to surveil Defendant's property. Using all of the information contained in the affidavits to find probable cause to issue the warrants was proper. The content of the affidavits does not constitute fruit of the poisonous tree, and the trial court properly denied Defendant's Motion to Suppress. Even if the court were to excise out the pole camera information, probable cause still existed in the warrant with the remaining information in the affidavits.

C. Good Faith Exception Applies.

Even if the Court concludes that the search and seizure of Defendant's property violated the Fourth Amendment, this Court should deny Defendant's Motion to Suppress under the good faith exception to the exclusionary rule. There was no police misconduct. Thus, the purpose of the exclusionary rule is not fulfilled by suppressing the evidence in this case.

This Court has long recognized the good faith exception to the exclusionary rule, consistent with federal law, when the Fourth Amendment is violated. *State v. Saiz*, 427 N.W.2d 825, 828 (S.D. 1988) ("[W]e find the *Leon* case persuasive and adopt its reasoning under the South Dakota Constitution Art. VI, § 11 as far as that case has been

applied and limited."); *State v. Running Shield,* 2015 S.D. 78, N.W.2d 503. In *United States v. Leon*, the United States Supreme Court outlined the good faith exception to the exclusionary rule. 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In *Leon*, the court observed that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . ." *Id.* at 906. In fact, the court made explicit that whether evidence should be suppressed is a separate question from whether the Fourth Amendment was violated. *Id.*

In *Herring v. United States*, the United States Supreme Court articulated the "important principles that constrain application of the exclusionary rule." 555 U.S. 135, 140, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009). The Court emphasized that the exclusion of tangible evidence is a remedy that should be used as a "last resort, not [a] first impulse." *Id.* The most important principle the Court articulated was that the exclusionary rule should apply only where it "results in appreciable deterrence" of Fourth Amendment violations by police in the future. *Id.* at 141 (quoting *Leon*, 468 U.S. at 909). Additionally, the benefits of police deterrence must also outweigh the significant costs of "letting guilty and possibly dangerous defendants go free . . . ." *Id.* ("To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against its substantial social costs." (quoting *Illinois v. Krull*, 480 U.S. 340, 352-

53, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)). "The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Id.* (citation omitted).

Defendant argues that he had no opportunity to argue against the good faith exception because the State first relied on that exception in its Proposed Findings of Facts and Conclusion of Law. COL 22; SR 172, DB 10. Both the State and Defendant each proposed its own Findings of Facts and Conclusions of Law after the hearing was held. SR 149-197. Defendant could have filed written objections to the State's Proposed Conclusion of Law on this issue. COL 22; SR 172. He did not.[2] The court reviewed all of the submitted proposals and chose to sign those proposed by the State.

Defendant next argues that the good faith exception does not apply because the exception should not extend to police error. DB 13. The United States Supreme Court in *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419 (2011), noted that the good faith exception applies "across a range of cases." *Id.* at 238. In *Krull*, 480 U.S. at 340, 107 S.Ct. at 1160, the same Court "extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes." *Id.* "Indeed, in 27 years of practice under *Leon's* good-faith

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[2] Defendant argued against the good faith exception in his Petition for Intermediate Appeal; however, that brief in support for intermediate appeal is not in the settled record and was not before the trial court. It is in the Supreme Court records.

exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Id.* at 240 (quoting *Herring*, supra, at 144, 129 S.Ct. at 695). "[T]he harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Davis*, 564 U.S. at 241, 131 S.Ct. 2429 (quoting *Leon*, 468 U.S. at 919, 104 S.Ct. at 3405). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs." *Herring,* supra, at 144, 129 S.Ct. at 695. "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrent value of suppression is diminished, and exclusion cannot 'pay its way.'" *Davis*, 564 U.S. at 229, 131 S.Ct. at 2419 (2011).

Law enforcement acted in good faith because they reasonably understood that a warrant was not required before they could use pole cameras in public settings. FOF 12, 21, 22, 26-32; COL 6-17, 19-22; SR 165-12; *Davis*, 564 U.S. at 237, 131 S.Ct. at 2427. "[E]vidence should be suppressed 'only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring,* 555 U.S. at 143, 129 S.Ct. at 701 (quoting *Kroll*, 480 U.S. at 348-49, 107 S.Ct. at 1160) (citations omitted).

"[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *United States v. Rodriguez*, 799 F.3d 1222, 1223 (8th Cir. 2015) (quoting *Davis*, 564 U.S. at 231-32, 131 S.Ct. at 2423-24). While there is currently no binding precedent in South Dakota or the United States Supreme Court on this issue, many other courts have held that law enforcement does not need to obtain a warrant before utilizing pole camera surveillance. COL 7, 8, 20; SR 170-73.[3]

Defendant implies that law enforcement should have known a pole camera's use would violate the Fourth Amendment because of the South Dakota *Zahn* case. DB 15. However, *Zahn* involved the use of a GPS unit on a mobile vehicle, monitoring his constant whereabouts over a vast area. This is unlike the pole camera, which was on a stationary public pole, intermittently recording the open fields entrance area showing several trailers in a public trailer park including Defendant's. MH 24; FOF 16, 26; SR 165-66. The public trailer park area filmed herein is similar in nature to the surveillance of an apartment complex in *Brooks*, 911 F. Supp. 2d at 836. COL 20; *See also* FOF 12.

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[3] See the district court holding in *United States v. Houston*, 2014 WL 259085 (E.D. Tenn.) ("The ATG Agents acted in good faith in the instant case. They had no prior precedent stating that a search warrant was required, and they sought a search warrant the day that the Sixth Circuit filed the [*United States v.] Anderson-Bagwell* case" discussing the monitoring of a backyard.)

The trial court concluded that "it was Detective Rogers' understanding that a search warrant was not needed for the use of a pole camera." FOF 6; SR 164. It further found that Detective Rogers was not aware of any prior use of pole camera surveillance of a public area that required law enforcement to obtain a search warrant before use. FOF 12; SR 165. The trial court held that "[g]iven 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." COL 22; SR 172.

There is no South Dakota or United States Supreme Court case that requires a search warrant before utilizing a pole camera for surveillance in a public area, as noted by the trial court. COL 22; SR 172. Law enforcement in South Dakota have used pole cameras in other public settings as well, such as at the Sturgis Rally and Hot Harley Nights, without a warrant. MH 22. Because of this, and the general law existing at the time regarding the open fields and a person's conduct that is displayed to all in the general public, it was reasonable for law enforcement to conclude they did not need to obtain a search warrant prior to installing the pole camera on a public street.

Based on the facts and law enforcement conduct herein, the deterrence benefits of suppression do not outweigh the costs to society. Thus, the trial court properly declined to apply the exclusionary rule in this case.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Amended Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Amended Brief contains 7,196 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 29th day of June, 2016.

/s/ *Caroline Srstka*
Caroline Srstka
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of June, 2016, a true and correct copy of Appellee's Amended Brief in the matter of *State of South Dakota v. Joseph A. Jones* was served via electronic mail upon D. Sonny Walter, dwalter@midco.net.

/s/ *Caroline Srstka*
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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* *

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee, # 27739

vs. **APPELLANT'S REPLY BRIEF**

JOSEPH A. JONES,

Defendant and Appellant.

* *

Appeal from the Circuit Court
Third Judicial Circuit
Brookings County, South Dakota

Hon. Gregory J. Stoltenburg
Circuit Court Judge

Notice of Appeal filed January 29, 2016

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ISSUE: Defendant's Motion to Suppress should have been granted.

(A) Warrantless use of the pole camera violated the Fourth Amendment.

The State's primary argument is that the pole camera observed only what was readily observable by anyone standing across the street from Jones' residence. Since those observations were publicly available to anyone, says the State, it follows that the use of the pole camera -- to record the same observations continuously for nearly two months -- is similarly permissible.

The State raised the very same argument in State v. Zahn, 2012 S.D. 19 ¶22, 812 N.W.2d 491, and this Court rejected it. In Zahn, the defendant voluntarily exposed his vehicle's movements to the public when driving. This Court noted that as applied to a single vehicle trip, a person may not be said to have a subjective expectation of privacy in those circumstances. However, in Zahn the State used the GPS unit to monitor the defendant's vehicle's movements for 26 days, and this Court correctly looked to that fact, as opposed to parsing the use into "individual trip" analysis as requested by the State. To the Court, the question was whether the defendant "had a subjective expectation of privacy in the whole of his movements for nearly a month". *Id*. at ¶21.

> "While a reasonable person understands that his movements on a single journey are conveyed to the public, he expects that those individual movements will remain "disconnected and anonymous". . . . Indeed, the likelihood that another person would observe the whole of Zahn's movements for nearly a month "is not just remote, it is essentially nil". ... "

Id. at ¶22 (quoted-from case omitted), holding that the "subjective expectation of privacy was not defeated because Zahn's individual movements were exposed to the public".

Here, the pole camera was in continuous use for twice as long as the GPS unit in Zahn. In Zahn, the technology was used to monitor the movement of the defendant's personal effect -- his vehicle. Here, the surveillance was of the defendant's home and its curtilage, and of his person. The photographic exhibits from the motion hearing show that it continuously monitored the front entry, the front and side yard, and had full view of the two large windows from the main living area of the mobile home. Even at night, the camera could "pick up if a light was turned on in the trailer" and "shadows of people walking outside" (State's Brief at 5). All of Jones' comings and goings for nearly two months were surveilled and stored for later viewing and re-viewing. While the officers testified that they could not see inside the home, despite clear access to the main windows, the State's destruction of the computer memory of any of the surveillance makes any independent judicial verification of this claim impossible.[1]

This Court's rationale in Zahn is, therefore, equally applicable to this type of continuous electronic surveillance. See Jones' initial brief at 6-7. As in Zahn, this type of long-term silent surveillance "is uniquely intrusive in the wealth of highly detailed information it gathers" (*id*. at ¶27), and enabled the police "to use the recorded information to discover patterns in the whole of [defendant's] movements for nearly [two] month[s]." *Id*. Moreover, this long-term surveillance was conducted without any judicial approval, or judicial oversight, or meaningful after-the-fact judicial review. What this Court concluded in Zahn (at ¶31) is equally true here:

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[1] The record is silent as to why none of the surveillance video was in existence at the time of the hearing. However, the surveillance was stored on a server in Pierre (evidently at the DCI) and was remotely accessible by the Brookings police. In this age of redundant backup and remote cloud storage, it is inconceivable that the evidence was simply lost once the arrest was made.

> "Because the unfettered use of surveillance technology could fundamentally alter the relationship between our government and its citizens, we require oversight by a neutral magistrate."

The State makes two other arguments of note. First, it argues that law enforcement should not be denied the ability to use technological advancements to investigate criminal activity (State's Brief at 16). The short answer is that, just as in Zahn, defendant asks for no such thing. Rather, the Fourth Amendment requires judicial oversight before long-term surveillance may be used. Second, the State notes that the mobile home park was a crime-free zone, and a sign at its entrance notified the public (including Jones) of that fact. Be that as it may, the State makes no argument -- nor can it -- that somehow the Fourth Amendment balance between State and individual is altered by a landlord's policies. This is especially true here where the landlord had absolutely no involvement in this investigation at all.

In the end, the outcome of this case is dictated by Zahn. The State should not be allowed to use long-term video surveillance on a person's home without first obtaining judicial approval, so that judicial oversight can occur. The State's failure to do so for nearly two months requires suppression.

(B) The Search Warrants are tainted by the pole camera illegality.

Jones' initial brief points out that the officer, at the motion hearing, admitted that the majority of the information in the search warrant affidavit came from pole camera observations and their fruits. The lower court (who was also the judicial officer who issued the warrant) also found this to be true. Therefore, the warrant is tainted by the

inclusion of illegal observations in the affidavit. Whether the warrant itself can be salvaged, despite this fact, is covered here.

In State v. Boll, 2002 S.D. 114, 651 N.W.2d 710, this Court noted that it is the "independent source exception" (to the exclusionary rule) which is applicable here. The U.S. Supreme Court has made this exception unavailable in two instances. In Murray v. United States, 487 U.S. 533, 542, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), the Court "cautioned that a warrant would not qualify as an independent source "if the agents' decision to seek the warrant *was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.*" Boll, 2002 S.D. 114 ¶26 (emphasis in original).

This record shows that, following their initial receipt of the tip, the police immediately installed the pole camera and did no further investigation of significance. It was some 8 weeks later that the search warrant was sought, and the only intervening facts of significance came as a result of the surveillance. Only then was a warrant sought, and the majority of the affidavit information came from the surveillance. It is clear here that the decision to seek a warrant was "prompted at least in part" (Boll, at ¶27) by the illegal observations, making the "independent source" doctrine inapplicable.

The second Murray factor also applies here. As the Circuit Court judge ruled, the remainder of the affidavit was insufficient to provide probable cause. Since this Judge is the same judicial officer which issued the warrant, it is clear that the illegal surveillance observations "affected his decision to issue the warrant" (Murray, *supra*).

Nevertheless, the State argues that the issuing magistrate/Circuit Judge was wrong, and that this Court should rule that the remainder of the affidavit provides

probable cause. As Boll points out, this argument raises the "expanded independent source" doctrine, which Boll recognized that other courts had adopted, but did not specifically adopt itself. However, Boll's holding applies here as well. This doctrine cannot salvage the warrant, as an exception to the exclusionary rule, where (as here, and as in Boll) the officers were prompted to seek the warrant by the illegally-made observations. Boll, *supra*, at ¶36.

Finally, even if the State's argument is reached, the Circuit Court judge was correct. The balance of the information in the warrant affidavit is insufficient to provide probable cause. The Circuit Court was also the issuing magistrate, and in so ruling, the Court was declaring that had it been presented with a redacted affidavit, the warrant would not have issued.

When deciding a challenge to the issuing magistrate's decision to issue a warrant, this Court will give "great deference" to the magistrate's decision. State v. Dubois, 2008 S.D. 15 ¶11, 746 N.W.2d 197. The same should be true of the decision which this magistrate indicates it would have made, had a correct affidavit been presented to it. Therefore, the Circuit Court's determination is entitled to deference by this Court.

All that a reacted affidavit would have included would be the anonymous tip and this defendant's criminal record and the earlier traffic stop. The tip was contained in an email from another agent in another town, which referenced an unnamed informant. TR 16-17, 45. These officers did not know who the tipster was, or what the tipster's basis of knowledge was, or anything at all about the tipster to be able to judge his credibility (TR 45). The tipster didn't even say that he, himself, knew that Jones was a drug dealer. More to the point, nothing in a corrected affidavit would have indicated any recency to

Jones' alleged misconduct, and nothing would have linked the misconduct to Jones' residence -- the place to be searched under the warrant. That last fact, especially, is fatal to this warrant. The question is whether the issuing magistrate was shown "that the evidence would be found . . . at the place to be searched." State v. Dubois, *supra*, 2008 S.D. 15 at ¶10 (citation omitted).

Not even the police thought that they had sufficient information to seek a search warrant, until after eight weeks of pole camera surveillance. The Circuit Court judge concluded that this assessment was correct, and that absent the illegal information, probable cause was lacking (and that he would not have issued the warrant). This Court should agree.

(C) The Good Faith Exception does not apply.

The State's argument can be boiled down to this: the officers didn't act in bad faith, therefore the good faith doctrine should apply. Jones' initial brief pointed out the fallacy of that argument. Subjective good faith is not enough. Rather, the good faith must be "objectively reasonable". Every one of this Court's cases, and of the U.S. Supreme Court's cases, which approves the doctrine, does so where the police are reasonably reliant upon the authority of others. The doctrine does not apply to mistakes made purely by the officers, and the State cites no judicial decisions which would extend the doctrine to a generic "we didn't know any better" claim.

Jones stands by the analysis of the record in his initial brief. The police testimony indicated only that they knew such cameras had been used in crowd-surveillance matters (the Sturgis Rally and the like). See State's Brief at p. 5. The police did not ever indicate

that such camera use had been judicially authorized -- they just knew that it had been used, in factually dissimilar circumstances. Here, however, the investigation (and camera use) was aimed at a specific individual, a far cry from crowd-scene surveillance in Sturgis.

The best that can be said for the officers' thought process, is that they simply gave the Fourth Amendment no thought at all. Objective good faith analysis utilizes the viewpoint of a reasonably well-trained officer. See Jones' initial brief at p. 15. Such an officer would be cognizant of this Court's recent opinion in Zahn, that long-term surveillance requires a warrant and judicial oversight. Such an officer -- indeed, any law enforcement officer -- would be cognizant that, under the Fourth Amendment, warrantless searches are presumptively unconstitutional. That is the true default position, rather than the "we weren't told we couldn't, so we did" attitude here.

To apply the Good Faith Doctrine here would be to eviscerate the Fourth Amendment due to the willful ignorance of the police. The doctrine is inapplicable, and the lower court erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, these convictions should be reversed, and the case should be remanded with instructions to grant the Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

D. SONNY WALTER, attorney for Appellant herein, certifies that this Appellant's Reply Brief, excluding introductory tables, contains 2,120 words and 10,935 characters, according to the word processing program (Microsoft Word 2007) used to prepare this brief, complying with the limitations in SDCL 15-26A-66(b).

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