No. COA 14-50 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	From Wake County
v.	)	No. 10 CRS 225, 005855-56
	)	
JASON KEITH WILLIFORD	)	

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DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED

WHETHER THE TRIAL COURT SHOULD HAVE SUPPRESSED MR. WILLIFORD'S CIGARETTE BUTT AND SUBSEQUENT DNA TESTING OF IT WHERE THE STATE SEIZED IT FROM MR. WILLIFORD'S PROPERTY WITHOUT A WARRANT SIMPLY BECAUSE MR. WILLIFORD HAD REFUSED TO VOLUNTARILY PROVIDE A DNA SAMPLE?

WHETHER MR. WILLIFORD'S JUDGMENT AND COMMITMENT CONTAINS CLERICAL ERROR REQUIRING REMAND FOR CORRECTION?

STATEMENT OF THE CASE

Mr. Williford was indicted and tried capitally for first-degree murder, first-degree burglary, and first-degree rape, the Honorable Paul G. Gessner presiding. On 1 June 2012, the jury found him guilty of misdemeanor breaking and entering, first-degree rape, and first-degree murder. On 7 June 2012, they recommended a sentence of life without possibility of parole, which Judge Gessner imposed. On 12 June 2012, Mr. Williford entered notice of appeal. This appeal follows.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over Mr. Williford's appeal pursuant to section 15A-1441 of the North Carolina General Statutes.

STATEMENT OF THE FACTS

Only DNA evidence placed Mr. Williford at the scene of Ms. Kathy Taft's senseless death. Mr. Williford came to the attention of the police when he did not consent to providing a DNA sample. (Tp. 7315) The police seized a cigarette butt that they watched Mr. Williford drop on the ground in front of his apartment. (Tp. 7316-18) Using that cigarette butt, the police created a DNA profile that matched the unknown profile found on Ms. Taft and on her bed. (Tp. 7265)

Prior to trial, the court denied the defense motion to suppress the cigarette butt and related DNA profiles. (Rpp. 19, 40, 92, 113-15) At trial, the court admitted them over the defense's renewed objection. (Tp. 7240, 7262) With this

evidence linking Mr. Williford to the murder, the jury convicted him of all but first-degree burglary, instead finding him guilty of misdemeanor breaking and entering. (Rpp. 153-55).

a. The State's Evidence of the Murder of Kathy Taft.

The State's evidence that Ms. Taft was raped and murdered was largely uncontested. On Friday, 5 March 2010, Ms. Taft was recovering from surgery, and her sister was staying with her. (Tp. 6892)

Sometime during the night, a man broke into the house, likely through back door. (Tp. 6843) He entered Ms. Taft's room. The man struck her head with a blunt object and raped her. (Tpp. 6827, 6951-52) From the time she was struck, she was likely unconscious. (Tp. 6924) The next day, Ms. Taft's sister discovered her and called emergency services. (Tp. 6811)

Her sister thought there were surgical complications. (Tp. 6821) Ms. Taft was transported to WakeMed Hospital. (Tp. 6822) At the hospital, a nurse conducted a sexual assault examination. (Tp. 6827) The examination uncovered evidence of the rape, including bodily fluids that were collected for DNA testing. (Tp. 6828)

The fluids the nurse collected were sent to the State Bureau of Investigation for testing, including to develop a DNA profile. Likewise, fluids collected from Ms. Taft's bed were collected and sent to the SBI for testing. Both sets of fluids

contained a DNA profile matching the DNA profiles collected from Mr. Williford. (Tpp. 7262, 7265) Secondary testing by a technician at Laboratory Corporation of America produced the same results. (Tpp. 7325-26)

Ms. Taft died without regaining consciousness. (Tp. 6923) The injuries to her head were the cause of death. (Tp. 6952)

b. The Investigation of Jason Williford: The Warrantless Search and Seizure and DNA Testing.

Mr. Williford came to the attention of the police during their neighborhood wide request for DNA samples. (Tp. 7306) They were collecting samples because they had "learned that semen had been found in Kathy Taft's sexual assault kit" and did not know who the contributor was. (Tp. 7306) An SBI agent tested the samples as the Raleigh Police Department collected them. (Tp. 7308)

Mr. Williford lived near the scene of the crime. On 1 April 2010, Raleigh Police Detective Zeke Morris spoke with Mr. Williford at his residence. (Tp. 7309) Mr. Williford did not invite the detective inside his home, which made the detective suspicious of Mr. Williford. (Tp. 7310) On 1 April, Detective Morris did not ask Mr. Williford for a DNA sample. He testified about why he chose not to ask:

> People are generally very protective of their DNA. It requires some comfort level between myself and that person who I'm collecting DNA from. You know, what is it used for, who are you, what are you going to do with it, that type stuff. . . . I

> didn't feel like I got to that point with Jason, so I did not ask for that DNA sample.

(Tp. 7309) On 12 April, Detective Morris went to Mr. Williford's home, but Mr. Williford was not there. (Tp. 7311) Detective Morris left his business card with Mr. Williford's wife and asked for Mr. Williford to call. The next day, on 13 April, when Mr. Williford had not yet called, Detective Morris called Mr. Williford's cell phone. He reached Mr. Williford, and the two agreed to meet at Mr. Williford's home. (Tp. 7311-12)

At Mr. Williford's home, Morris was "[v]ery blunt with Jason, told him that [he] did not collect a DNA sample from him on [the] previous visit and that [he] was here . . . to collect a DNA sample." (Tp. 7313) Mr. Williford declined to provide a sample. He noted his concerns. His parents had advised him not to give the sample and he believed it was his Fourth Amendment right not to provide his DNA. (Tpp. 7192, 7313) Detective Morris's efforts to persuade Mr. Williford failed. (Tp. 7313-14)

Based on Mr. Williford's decision not to consent to having his DNA collected, the police decided to have their "Fugitive Unit follow him and get a DNA sample." (Tp. 7315) On 11 March 2010, the same unit had followed Cornelius Sands, a person from the neighborhood who the Unit decided they need DNA from. (Tpp. 6986) On that day, they collected a cigarette butt Mr. Sands

threw on the ground outside a McDonald's restaurant. (Tp. 6968) Because his DNA did not match, Mr. Sands was ultimately eliminated as a suspect.

On 15 April, the Fugitive Unit covertly surveilled Mr. Williford. (Tp. 7316) As a result of that surveillance, the police collected a cigarette butt Mr. Williford dropped. The police provided that cigarette to the SBI for testing. (Tp. 7316-18)

On 16 April, the police got the results back from SBI. The DNA profile from the cigarette butt matched Mr. Williford. Around 4:00 p.m. that day, based on the test results, Mr. Williford was arrested. (Tp. 7318)

Subsequent to his arrest, the police took a swab of Mr. Williford's saliva from his cheek. That swab was used to again create his DNA profile. (Tp. 7267) That profile matched the profile developed from the cigarette butt and the murder. (Tp. 7269)

c. The Trial Court's Ruling on Mr. Williford's Motion to Suppress.

Prior to trial, counsel for Mr. Williford moved to suppress the cigarette butt and the DNA testing. The motion was "pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United State Constitution, and Articles 18, 19 and 23 of the Constitution of North Carolina and other applicable law." (Rp. 19) It requested that the trial court "suppress all reports, results, and findings regarding DNA testing resulting from the unconstitutional search and seizure of the cigarette butt . . . that purportedly contained Mr. Williford's DNA." (Rp. 19) The motion

was supported by an affidavit. (Rp. 40) The prosecution filed a response (Rp. 82) and Mr. Williford filed a brief in support of his position. (Rp. 92)

The trial court conducted a hearing on the motion to suppress. Subsequent to the hearing, the trial court entered an order listing its findings of fact. Mr. Williford lives in Unit D of a four-unit building at 2812 Wayland Drive. The units share a common parking lot. (Rp. 114) "With the exception of the driveway, the area between the curb of Wayland Drive and the parking lot is heavily wooded." (Rp. 114) The building is seventy-nine feet from the curb. (Rp. 115) The undisputed evidence also showed that the police could not see Mr. Williford's parking lot from the street. (Tp. 162)

When a member of the Fugitive Unit learned that Mr. Williford was in route to his apartment, that officer "repositioned himself and his covert unmarked vehicle in the parking lot of 2812 Wayland Drive." (Rp. 115) Returning from the grocery store, Mr. Williford arrived at his residence. He got out of his car while smoking a cigarette. According to the officer from the Fugitive Unit, it looked like Mr. Williford was "finishing the cigarette before going into the residence." (Rp. 115)

The officer saw Mr. Williford "throw the cigarette butt down in the parking lot." (Rp. 115) He then carried in his groceries from the car. Mr. Williford took a total of three trips to carry in his groceries. (Rp. 115)

An officer approached Mr. Williford's apartment. He spoke with Mr. Williford, distracting him, while another officer picked up the cigarette butt. (Rp. 115) Having obtained the cigarette butt, the officers left Mr. Williford's apartment and parking lot. (Rp. 115) It was undisputed that "there was no emergency situation at all" at the time the officers seized the cigarette. (Tp. 170) It was also undisputed that the cigarette butt was found seventy-nine feet from the curb on Wayland Drive. (Tp. 204) Finally, it was undisputed that the cigarette was found within twenty-seven feet of Mr. Williford's apartment. (Tp. 204)

The trial court's order listed three conclusions of law. First, the "cigarette was recovered [in an area that] is not within the curtilage" of Mr. Williford's apartment. (Rp. 116) Second, Mr. Williford lacked "a reasonable expectation of privacy in the area that he discarded the cigarette butt." (Rp. 116) Third, Mr. Williford "relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it." (Tp. 116) Based "upon the finding of fact and conclusion of law set forth" in its order, the trial court denied Mr. Williford's motion to suppress. (Rp. 116)

d. The Defense Argument at Trial.

Having lost its motion to suppress, at trial the defense focused on Mr. Williford's lack of premeditation and deliberation. (Tpp. 6793-6802) Other than to object to the inadmissible cigarette butt evidence, it did not contest Mr.

Williford's presence at the scene of the crime. (Tp. 6800) The jury sided with the defense by finding that when he entered the house where Ms. Taft was, he had no intention to commit a felony inside it. (Rp. 154) They otherwise convicted him on all counts.

ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED MR. WILLIFORD'S CIGARETTE BUTT AND SUBSEQUENT DNA TESTING OF IT WHERE THE STATE SEIZED IT FROM MR. WILLIFORD'S PROPERTY WITHOUT A WARRANT SIMPLY BECAUSE MR. WILLIFORD HAD REFUSED TO VOLUNTARILY PROVIDE A DNA SAMPLE.

This case presents an important question: when can the police seize a person's DNA and enter it in a government database where their only basis for suspicion is that person's assertion of her Fourth Amendment rights? Two old, well-established Fourth Amendment doctrines apply to this question: curtilage and abandonment of a privacy or possessory interest. Although DNA identification and broad-based domestic surveillance and data collection are relatively recent phenomena, these two doctrines remain relevant. Both protect an un-accused individual from having the police take their garbage from their property and use it to obtain their DNA without a warrant or probable cause.

a. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009)

appeal dismissed and disc. rev. denied 363 N.C. 857, 694 S.E.2d 766 (2010). "On appeal from denial of a motion to suppress, the trial court's findings of fact are binding when supported by competent evidence, while conclusions of law are 'fully reviewable' by the appellate court." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (quoting *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994)).

b. Covertly Surveilling Mr. Williford on His Private Property and Retrieving His Cigarette from His Property Violated His State and Federal Rights, and the Cigarette Butt and Evidence Acquired from It Should Have Been Suppressed.

Mr. Williford exercised his Fourth Amendment right not to provide the police with a DNA sample. Based on that and on his choice not to invite the police into his home, the police began covertly tracking Mr. Williford. During this surveillance, the police saw Mr. Williford drop a cigarette butt in the parking space in front of his apartment while he was carrying his groceries in from his car. Without a warrant, the police seized the cigarette butt. DNA recovered from that cigarette provided the only link between Mr. Williford and Ms. Taft and the scene of the crime.

The Fourth Amendment protects a person's privacy and property:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

> shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Our state constitution provides the same (and sometimes greater) protection. *See* N.C. Const. art. I, § 20; *State v. Mills*, 104 N.C. App. 724, 731, 411 S.E.2d 193, 197 (1991) (explaining that although North Carolina courts do not recognize a good faith exception to the exclusionary rule, section 20 and the Fourth Amendment are generally construed the same).

Here, there was a search and a seizure. Both occurred in the parking lot of Mr. Williford's four-unit apartment complex. The search involved the police sitting in an unmarked car in a parking spot outside his apartment and watching Mr. Williford drop a cigarette while taking his groceries in from the car. The parking lot was not visible from the street. The seizure occurred when the police collected the cigarette butt he dropped on his property.

There are two central questions to address whether the warrantless search and seizure violated Mr. Williford's privacy and property rights under the state and federal constitutions. *See* U.S. Const. amends. IV, XIV; N.C. Const. art. I, § 20; *Wolf v. Colorado*, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949) ("The security of one's privacy . . . at the core of the Fourth Amendment[ ] is basic to a free society . . . [and] therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States."). First, whether the cigarette butt was

within the curtilage of Mr. Williford's home. If it was, then a warrant was required to search or seize it. *See State v. Grice*, __ N.C. App. __, __, 735 S.E.2d 354, 357 (2012). If the cigarette was not within the curtilage, the second question becomes relevant: whether Mr. Williford retained an interest in the cigarette butt when he dropped it on is property, such that the police required a warrant to seize it. *See State v. Nance*, 149 N.C. App. 734, 742, 562 S.E.2d 557, 563 (2002) ("The fact that defendant's property included open fields [as opposed to curtilage] does not transform private property into public land."). Because the answer to both questions is yes, and because no relevant exception applies, the court below should have suppressed the cigarette butt and the DNA testing related to it. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691 (1961) ("all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.").

i. The Search of Mr. Williford's Parking Space Occurred Within the Curtilage of His Home.

The search was unreasonable, and the product of it should have been suppressed. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

United States v. Knights, 534 U.S. 112, 118-19, 122 S.Ct. 587, 591, 151 L.Ed.2d 497 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408 (1999)). "'Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *State v. Rhodes*, 151 N.C. App. 208, 213, 565 S.E.2d 266, 269 (2002) *disc. review denied* 356 N.C. 173, 569 S.E.2d 273 (2002) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 513, 19 L.Ed.2d 576, 585 (1967)). The warrant requirement is the "bulwark of Fourth Amendment protection." *Franks v. Delaware*, 438 U.S. 154, 164, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978).

"A search occurs when there is an infringement upon a person's expectation of privacy that society recognizes as reasonable." *Nance*, 149 N.C. App. at 738-39, 562 S.E.2d at 561 (citing *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)). If an item is within the curtilage of the owner's home, absent some exception, the courts are clear: there is a reasonable expectation of privacy. The item can be neither searched nor seized. *See Grice*, __ N.C. App. at __, 735 S.E.2d at 357 ("Our courts have long recognized that this heightened expectation of privacy [inside the home] extends not only to the home itself, but also to the home's 'curtilage.'").

"[C]urtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)). To decide whether an area is part of the curtilage of a property, this Court considers whether the homeowners have made efforts to keep the area private. *See State v. Pasour*, __ N.C. App. __, __, 741 S.E.2d 323, 325-26 (2012) (Beasley, J.).

"[C]urtilage of the home will normally be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).[1] It also extends to the parking lot of a gas station where a car is parked. *See State v. Reid*, 286 N.C. 323, 325, 210 S.E.2d 422, 423 (1974). It extends to a shed connected to a house by a thirty-foot sidewalk. *See State v. Trapper*, 48 N.C. App. 481, 487, 269 S.E.2d 680, 684 (1980) *appeal dismissed* 301 N.C. 405, 273 S.E.2d 450 (1980) *cert. denied* 451 U.S. 997, 101 S.Ct. 2338, 68 L.Ed.2d 856 (1981). It extends to a car parked on the street in front of a house that "projected six or seven inches into the yard." *State v. Courtright*, 60 N.C. App. 247, 250-51, 298 S.E.2d 740, 742-43 (1983). It extends to the area next to a backyard shed

[1] This Court has never differentiated "curtilage" in the context of the state justifying the scope of its search based on a warrant and the context of warrantless searches and seizures challenged by a defendant. There is no reason to do so here.

where a defendant was growing marijuana. *See Grice*, __ N.C. App. at __, 735 S.E.2d at 357; *State v. Burch*, 70 N.C. App. 444, 448, 320 S.E.2d 28, 30 (1984). And it extends to the driveway where a car is parked. *See State v. Logan*, 27 N.C. App. 150, 151, 218 S.E.2d 213, 214-15 (1975).

The Supreme Court has established four factors to assess to decide whether an area is within the curtilage of a home: the proximity of the area to the home, the "nature of the uses to which the area is put," how protected the area is from observation, and whether the area is enclosed. *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). Each of these factors demonstrates that Mr. Williford was within the curtilage of his home when he dropped his cigarette butt.

First, the area was proximate to Mr. Williford's home. The cigarette was found within twenty-seven feet of his home, which is ninety-two feet from the curb. (Tp. 204; Rp. 114) By another measure, the cigarette butt was seventy-nine feet from the curb of the property. (Tp. 204) This proximity to Mr. Williford's home—and distance from the perimeter of the property—suggests the cigarette was within the home's curtilage. *See Trapper*, 48 N.C. App. at 487, 269 S.E.2d at 684.

Mr. Williford used the area similar to a driveway, garage, or courtyard. Mr. Williford left his car in the driveway. On the day the cigarette butt was collected,

he left the car in the drive while he unloaded his groceries. He treated it like a driveway at a single family dwelling, a use associated with curtilage. *See Logan*, 27 N.C. App. at 151, 218 S.E.2d at 214-15. Thus, the "nature of the uses" of the area suggests it is curtilage. *Dunn*, 480 U.S. at 301, 107 S.Ct. at 1139.

It is no answer that other cars from his building also parked there. The same is true of a driveway and the street in front of a house, two areas this Court has found to be within a home's curtilage. *See Logan*, 27 N.C. App. at 151, 218 S.E.2d at 214-15; *Courtright*, 60 N.C. App. at 250-51, 298 S.E.2d at 742-43l; *see also Georgia v. Randolph*, 547 U.S. 103, 113, 126 S.Ct. 1515, 1522, 164 L.Ed.2d 208 (2006) (stating that if a houseguest has an expectation of privacy, "it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out . . . has an even stronger claim."). It is also no answer that members of the public could park there. This Court has held that a public parking lot is part of the curtilage of a commercial building. *See Reid*, 286 N.C. at 325, 210 S.E.2d at 423. This factor strongly suggests the cigarette was within the curtilage of his home.

The latter two *Dunn* factors also suggest that the area was within the curtilage of Mr. Williford's home, although to a lesser degree than the first two. The property was surrounded by a thick hedge, and the parking lot was not visible from the street. Thus, it is apparent that the owners and occupants were seeking

privacy in the parking lot. These two factors also support a finding that the area was within the curtilage of Mr. Williford's home. *See Dunn*, 480 U.S. at 301, 107 S.Ct. at 1139.

The undisputed facts show that Mr. Williford was in the curtilage of his home when the police were watching him. Thus, the trial court's conclusion to the contrary was erroneous. (Rp. 116 ("The area that the cigarette was recovered [in] is not within the curtilage of 2812-D Wayland Drive.")) For this reason, the trial court erred in concluding, "The defendant did not have a reasonable expectation of privacy in the area that he discarded the cigarette butt." (Rp. 116). Although the police could have come and knocked on Mr. Williford's door, as any other member of the public could, their covertly parking in his parking lot and spying on him, within the curtilage of his home, violated his privacy rights. *See State v. Marcoplos*, 154 N.C. App. 581, 583 n.1, 572 S.E.2d 820, 822 n.1 (2002) ("We further note that other examples of conduct that may void implied consent [to be present on private property held open to the public] include loitering.").

The covert surveillance of Mr. Williford violated his right to be free from unreasonable searches. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20.

ii. Regardless of Whether the Cigarette Butt Was Within the Curtilage of His Home, Mr. Williford Had Not Relinquished His Privacy Interest in It.

The police seized Mr. Williford's cigarette butt without a warrant. Seizures, like searches, require a warrant supported by probable cause. U.S. Const. amend. IV; N.C. Const. art. I, § 20. The same holds for items left outside the curtilage of a home, but on private property. *See Nance*, 149 N.C. App. at 742, 562 S.E.2d at 563 (recognizing validity of "knock and talk" inquiries within curtilage of home, but holding that the line of cases authorizing such inquiries do not "stand[] for the proposition that law enforcement officers may enter private property without a warrant and seize evidence of a crime."). Put another way,

> If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, 'plain view' seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, 'plain view' seizures have been scrupulously subjected to Fourth Amendment inquiry.

Sodal v. Cook County, 506 U.S. 56, 66, 113 S.Ct. 538, 546, 121 L.Ed.2d 451 (1992). The Fourth Amendment protects both privacy rights and any possessory interest in property. *Id.* To hold otherwise is "fraught with danger and would sanction the very intrusions into the lives of private citizens against which the Fourth Amendment was intended to protect." *State v. Bemery*, 33 N.C. App. 31,

33, 234 S.E.2d 33, 35 (1977) *disc. rev. denied* 293 N.C. 160, 236 S.E.2d 704 (1977) (warrantless seizure of contraband permitted).

As discussed *supra*, the officers did not lawfully conduct their search. Thus, even if the seizure of the cigarette butt would otherwise be permissible, the seizure was illegal because they were not "lawfully located in a place where the object could be seen." *Horton v. California*, 496 U.S. 128, 137, 110 S.Ct. 2301, 2308, 11 L.Ed.2d 112 (1990); *see also State v. Worsley*, 336 N.C. 268, 282, 443 S.E.2d 68, 75 (1994) (affirming that seizure of suspicious items in plain view inside a dwelling is lawful only if the officer possesses the legal authority to be on the premises).

The seizure was also illegal because Mr. Williford had not taken the actions necessary to demonstrate his intent to abandon his cigarette butt. The courts have set clear standards for when garbage, such as the cigarette butt in question here, has been abandoned. In *California v. Greenwood*, the United States Supreme Court held that a person retains no reasonable expectation of privacy in "trash placed on the street for collection at a fixed time, was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others, and deposit at the garbage dump." 486 U.S. 35, 40, 108 S.Ct. 1625, 1628, 100 L.Ed.2d 30 (1988).

For the Court, it was critical that the defendants had "placed their refuse at the curb *for the express purpose of conveying it* to a third party, the trash collector, who might himself have sorted through [defendants'] trash or permitted others, such as the police, to do so." *Id.* at 40, 108 S.Ct. at 1629 (emphasis added). North Carolina courts have "jealously and carefully" focused on the intent of the party owning the garbage in construing this exception to the warrant requirement. *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958). If the clear intention is to convey the garbage to a third party, then the expectation of privacy is relinquished. *See, e.g., State v. Washington*, 134 N.C. App. 479, 484, 518 S.E.2d 14, 16-17 (1999) (placing item in communal garbage dumpster relinquishes privacy and possessory interest in it). Absent a clear intent to convey, the privacy right is maintained. *See, e.g.*, *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271 . The location of the garbage is relevant insofar as it demonstrates the owner's intent.

In *State v. Hauser*, the North Carolina Supreme Court explained that a defendant retains "some expectation of privacy in garbage placed in his back yard out of the public's view, so as to bar search and seizure by the police themselves entering his property." 342 N.C. 382, 388, 464 S.E.2d 443, 447 (1995). The court differentiated trash in the backyard from the situation where "the garbage is [placed out and] collected in its routine manner." *Id.* In the latter situation, there

is a "clear intent to convey the garbage to a third party . . . a factor which merits substantial weight in considering any expectation of privacy." *Id.* Thus, even though the garbage in *Hauser* was placed within the curtilage of the home, the defendant relinquished any expectation of privacy in the garbage when he put it in the spot from which it was usually collected. *Id.* The key was the defendant's clear intent to convey the garbage to a third party.

Thus, in *State v. Rhodes*, when the defendant put his trash in the can outside his door, he retained a possessory interest in it because the can was not "placed there for collection in the usual and routine manner." 151 N.C. App. at 215, 565 S.E.2d at 271. Likewise, throwing a cigarette butt into a pile of cigarette butts did not relinquish the defendant's interest in it where the pile was not where the trash was usually collected by a third party. *See State v. Reed*, 182 N.C. App. 109, 113, 641 S.E.2d 320, 322 (2007). In both cases, there was no clear intent to convey the trash to a third party. Thus, each defendant retained a possessory and privacy interest in the garbage.

Because Mr. Williford's flicking the cigarette in the parking lot did not convey a clear intent to convey the property to a third party, he, too, retained a possessory interest in it. Nothing in the record shows that he disposed of the cigarette in a place "for collection in the usual and routine manner." *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. If anything, the record suggests that Mr.

Williford was smoking in the privacy of the area immediately outside his home, an increasingly common custom in light of the growing knowledge of the harmful effects of tobacco smoke. Because the abandoned garbage exception does not apply, the trial court erred by concluding, "Defendant did not have a reasonable expectation of privacy in the cigarette butt once he discarded it[, and he]. . . . relinquished his interest in the property in question." (Rp. 116)

More broadly, most reasonable people do not expect that throwing something away permits the government to collect and analyze their DNA. As the surveilling officer observed, turning one's DNA over to the government requires ones trust in the government. (Tp. 7309) The Fourth Amendment is one source of our right to distrust the government. In this era of surveillance, our constitutional protections must be "jealously and carefully" enforced. *Jones*, 357 U.S. at 499, 78 S.Ct. at 1257. The state and federal warrant requirement must be "scrupulously" upheld to protect our privacy and property. *Sodal*, 506 U.S. at 66, 113 S.Ct. at 546. Surely it is an infringement on our state and federal privacy rights for the government to catalog every person's DNA by covertly surveilling them and rifling through their trash. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20.

This Court, however, can avoid these larger questions. This Court should rule narrowly, and uphold Mr. Williford's Fourth Amendment rights within the framework it has always applied to "garbage" cases. Because Mr. Williford did not

place the garbage in a place "for collection in the usual and routine manner," the State was not free to seize it without a warrant. *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. Its seizure violated his state and federal rights. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20.

iii. Individuals Have a Reasonable Expectation of Privacy in Their DNA, Such that Government Collection of It, Absent Probable Cause, Violates Their Privacy Rights.

Determining whether a search or seizure is unreasonable requires balancing the extent of an intrusion on an individual's privacy against the intrusion's promotion of "legitimate governmental interests." *Knights*, 534 U.S. at 118-19, 122 S.Ct. at 591. Both interests are considered in "the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 (1985).

The Supreme Court has addressed the propriety of collecting the DNA of arrestees. *See Maryland v. King*, __ U.S. __, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013). The Court identified a single "legitimate governmental interest" to support the practice: "the need for law enforcement officers in a safe and accurate way to process and identity the persons and possessions they must take into custody." *Id.* at __, 133 S.Ct. at 1970. This interest is greatly diminished when considering the general public, rather than arrestees.

The Court specifically distinguished the "routine administrative procedures at a police station house incident to booking and jailing the suspect" from dealing with the general public. *Id.* (alteration and quotation omitted). When arrested and booked, "'the law is in the act of subjecting the body of the accused to its physical dominion. '" *Id.* (quoting *People v. Chiagles*, 237 N.Y. 193, 197, 142 N.E. 583, 584 (1923) (Cardozo, J.)). DNA collection in the context of "remov[ing] an individual from the normal channels of society and hold[ing] him in legal custody . . . plays a critical role" in identifying the person held. *Id.*

Knowing the identity of the arrestee, including their DNA, allows law enforcement to learn whether they have been perpetrators of other crimes, solved and unsolved. *Id.* In the case of solved crimes, this information allows law enforcement to better assess the risk posed to law enforcement and other inmates and to set appropriate bail. *Id.* at __, 133 S.Ct. at 1972-74. Having the arrestee's DNA also reduces the risks associated with an inmate fleeing, by providing a very accurate means for tracking him. *Id.*

Only one of these interests even applies to collecting DNA from the general public absent any probable cause: solving unsolved crimes. This interest, however, would apply to any law enforcement intrusion, and has never been enough, standing alone, to justify a search or seizure absent some suspicion. *Id.* at __, 133 S.Ct. at 1977 ("a significant government interest does not alone suffice to justify a

search."); *see City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 121 S.Ct. 447, 451-52, 148 L.E.2d 333 (2000) ("general interest in crime control" insufficient to warrant stop absent reasonable suspicion). The government interest in collecting the DNA from the public, by surreptitiously gathering their trash, is weak.

On the other side of the balance, a member of the public has a strong interest in keeping her DNA a private matter. Unlike an arrestee, when the police collect DNA from a member of the public, there is no "necessary predicate of a valid arrest," a "fundamental" aspect of the context in *King*. *King*, __ U.S. at __, 133 S.Ct. at 1977-78. Although obtaining a discarded piece of garbage is a "minimal intrusion," a member of the public has no "diminished expectation of privacy." *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 949, 148 L.Ed.2d 838 (2001). Asserting a person's privacy rights, as Mr. Williford did, should encourage the police to "scrupulously honor" those rights, not circumvent them. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). At bottom, no one expects that throwing away her trash will permit the government to collect her DNA. Thus, obtaining DNA this way, absent consent or probable cause, is unreasonable and violates our constitutional protections. U.S. Const. amend. IV; N.C. Const. art. I, § 20.

iv. Because the Cigarette Butt and the DNA Testing Were Illegally Obtained, They, Along with the Fruits from Them, Should Have Been Suppressed.

Because the cigarette butt was illegally obtained, the cigarette butt and the DNA testing results related to it should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963); *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) ("When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." (quoting *id.*)). Excluding this evidence is required "to make effective the fundamental constitutional guarantees of the sanctity of the home and inviolability of the person." *Wong Sun*, 371 U.S. at 484, 83 S.Ct. at 416. Here, the evidence was not suppressed. It was admitted at trial over objection. It was the only evidence tying Mr. Williford to Ms. Taft and the crime.

Here, there is no "independent" source of the DNA. *Silverthorn Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed 319 (1920). The cheek swab from Mr. Williford and DNA testing subsequent to obtaining a warrant, were not "independent sources" of the DNA (or cigarette) because the warrant would not have been supported by probable cause absent the illegal search and seizure. *See State v. Wooding*, 117 N.C. App. 109, 112-13, 449 S.E.2d 760, 762

(1994) (defendant's consent search after unlawful arrest not independent source sufficient to purge taint of the unlawful arrest); *see also Murray v. United States*, 487 U.S. 533, 537-38, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 472 (1988) (explaining independent source doctrine). Thus, the second DNA test is not "independent" of the illegality and is inadmissible for the same reasons that the first DNA test was. The cigarette butt and the results of all DNA testing should have been suppressed.

v. Admitting the Illegally Obtained Cigarette Butt and DNA Testing Was Not Harmless Beyond a Reasonable Doubt.

Both the state and federal constitutional violations are preserved, and therefore, reviewed for they are harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b); *State v. Jennings*, 333 N.C. 579, 605, 430 S.E.2d 188, 200 (1993). Before trial, counsel for Mr. Williford moved to suppress the cigarette butt and DNA testing. Counsel made it clear that the objection was based on the state and federal constitutions. (Rp. 19) Prior to admitting the cigarette butt and DNA testing at trial, counsel objected again, citing the same reasons it raised before trial. (Tp. 7240) Thus, this error is reviewed for whether it is harmless beyond a reasonable doubt.

It is not harmless. In opening, the prosecution described the DNA evidence as "fateful" to its case. (Tp. 6763) In closing, the prosecution argued that the jury can't "Get past the DNA." (Tp. 8385) This emphasis was no surprise, as it was

the only evidence in its case in chief linking Mr. Williford, Ms. Taft, and the crime. Without it, the prosecution may have been vulnerable to a motion to dismiss for insufficient evidence. Thus, there can be little doubt that erroneously admitting the cigarette butt and DNA testing results was not harmless. Thus, Mr. Williford is entitled to a new trial.

2. MR. WILLIFORD'S JUDGMENT AND COMMITMENT CONTAINS CLERICAL ERROR REQUIRING REMAND FOR CORRECTION.

a. Standard of Review

This Court reviews sentences to determine whether they are supported by the evidence. *State v. Noles*, 12 N.C. App. 676, 679, 184 S.E.2d 409, 411 (1979). It reviews clerical errors in the judgment *de novo*. *See State v. McIlwaine*, 169 N.C. App. 397, 402, 610 S.E.2d 399, 402 (2005) (remand for correction of clerical error in judgment); *State v. Brooks*, 148 N.C. App. 191, 194-95, 557 S.E.2d 195, 197-98 (2001) (same).

b. Mr. Williford's Judgment and Commitment Fails to Note Why the Court Sentenced Him to Life Without Parole.

A person convicted of first-degree murder is guilty of a Class A felony and subject to a sentence of life without parole. N.C. Gen. Stat. § 14-17(a). Form AOC-CR-601, Judgment and Commitment, Active Punishment – Felony, requires the trial court to note the reason it imposes a sentence of life without parole. This form reflects the permissible bases for a sentence of life without parole. A failure to properly complete the sentencing form requires remand for correction. *McIlwaine*, 169 N.C. App. at 402, 610 S.E.2d at 402; *Brooks*, 148 N.C. App. at 194-95, 557 S.E.2d at 197-98.

Here, the trial court sentenced Mr. Williford to life without parole. (Rp. 165; Tpp. 9103, 9127-28) It, however, neglected to note the reason at the bottom of Form AOC-CR-601. (Rp. 165) The trial court should have noted that Mr. Williford was being sentenced to life without parole for a Class A felony. N.C. Gen. Stat. § 14-17(a). Mr. Williford's case, therefore, should be remanded to the trial court with instructions to correct this error. *See McIlwaine*, 169 N.C. App. at 402, 610 S.E.2d at 402 (remand for correction of clerical error in judgment); *Brooks*, 148 N.C. App. at 194-95, 557 S.E.2d at 197-98 (same).

CONCLUSION

For the foregoing reasons and based on the foregoing authorities, Jason Keith Williford respectfully requests this Court to reverse his convictions and sentence and remand for retrial. In the alternative, he requests that this Court remand for correction of a clerical error.

Respectfully submitted, this the 19th day of March 2014.

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CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(j)(2)

Undersigned counsel hereby certifies that this brief is in compliance with N.C. R. App. P. 28(j)(2) in that it is printed in 14-point Times New Roman font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

This is the 19th day of March 2014.

Electronically submitted
John R. Mills

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellant Brief has been duly served upon the Attorney General's Office, electronically and by deposit in the U.S. mail, first-class and postage prepaid to the following address:

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This the 19th day of March 2014.

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