Privacy Rights (Search and Seizure)

The New Hampshire Standing Doctrine

In 1960, the Jones Court established the "automatic standing" rule which permitted a movant to challenge a search where in order to show a possessory or proprietary interest sufficient to assert fourth amendment rights, the movant would otherwise be required to admit guilt. Jones v. United States, 362 U.S. 257, 264-65 (1960). New Hampshire quickly adopted the "automatic standing" rule. State v. Crump, 107 N.H. 62, 65 (1966).

Twenty years later, the United State Supreme Court abandoned the Jones "automatic standing" rule in United States v. Salvucci, 448 U.S. 83, 88-89 (1980). The Salvucci Court held that the logic underlying the "automatic standing" rule had changed because testimony given by a movant in support of a motion to suppress could no longer be admitted against him at trial and there were significant development of the privacy interest case law. Id.

But, as with many things, the great New Hampshire State Constitution provides broader protections then the Federal Constitution. Under the New Hampshire State Constitution, a party seeking to challenge a search has two ways to establish standing: (1) automatic standing where the movant is charged with a crime in which possession of an item or thing is an element; or (2) the movant has a legitimate expectation of privacy in the place being search or the item seized.

In State v. Settle, a decision authored by Justice Batchelder, New Hampshire rejected the federal analysis and found that N.H. Const. pt. 1 art. 19 "requires that 'automatic standing' be afforded to all persons within the State of New Hampshire

who are charged with crimes in which possession of any article or thing is an element. Article 19 prohibits all unreasonable searches of all a citizen's possessions. Absent a recognized exception to the warrant requirement, a warrantless search is "per se unreasonable." 122 N.H. 214, 217-18 (1982). New Hampshire still retains the "automatic standing" rule.

> "A preliminary inquiry which any court must make before it will consider a motion to suppress evidence based upon an unreasonable search or seizure is whether the individual filing the motion has standing." State v. Sidebotham, 124 N.H. 682, 686 (1984). "Standing confers upon an individual the right to challenge unreasonable government conduct." Id. "The threshold question as to the determination of a party's standing to challenge the introduction of evidence by means of a motion to suppress is whether any rights of the moving party were violated." State v. Gubitosi, 152 N.H. 673, 680 (2005). A defendant may have standing based upon: (1) being charged with a crime in which possession of an item or thing is an element, which confers automatic standing; or (2) having a legitimate expectation of privacy in the place searched or the item seized. Id. To claim standing based upon a legitimate expectation of privacy, a defendant must establish both: (1) a subjective expectation of privacy in the place searched or the item seized; and (2) that his subjective expectation is legitimate because it is "one that society is prepared to recognize as reasonable." State v. Goss, 150 N.H. 46, 49 (2003) (quotations omitted).

State v. Boyer, 168 N.H. 553, 557 (2016).

New Hampshire also has significant differences in its case law regarding actual and subjective expectations of privacy. While the New Hampshire Supreme Court has adoped the Katz test, it has not been afraid to come to conclusions contrary to the United States Supreme Court when applying it. State v. Goss, 150 N.H. 46, 49

(2003). In Goss, the New Hampshire Supreme Court held contrary to the United State's Supreme Court in California v. Greenwood. 486 U.S. 35, 41 (1988); 150 N.H. 46, 49-50 (2003). Both cases were concerned with a warrantless search of trash left out on the curb for the trash collector. In Greenwood, the United States Supreme Court held that that while the movant might have had an actual expectation of privacy with respect to the trash, it was not an objectively reasonable expectation.

> "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents 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 respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.
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> Furthermore, as we have held, the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public. Hence, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

California v. Greenword, 486 U.S. 35, 40-41 (1988) (internal quotations and citations omitted).

The Goss Court found that the movant's actual expectation of privacy was objectively reasonable.

> We find the first ground persuasively answered by Justice Brennan in his Greenwood dissent: "The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of

> privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home ..."
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> As for the second ground, we do not believe that conveying trash to a trash collector for disposal renders an expectation of privacy in the trash unreasonable. "It should be reasonable to expect that those who are authorized to remove trash will do so in the manner provided by ordinance or private contract." In most cases that expectation would be that "the contents of [the resident's] garbage [would be] intermingled with other refuse in the well of the truck, and ultimately dumped into a central collection place where the forces of nature would destroy them." We conclude that such an expectation of privacy is reasonable.

State v. Goss, 150 N.H. 49-50 (2003) (internal citations omitted).

New Hampshire's wiretap statute, NH RSA 570-A, also utilizes the reasonable expectation of privacy standard. The Court looks to federal case law as NH RSA 570-A resembles Title III of the U.S.C.A. State v. Telles, 139 N.H. 344, 346 (1995). Generally, NH RSA 570-A bars and criminalizes the interception of any telecommunication or oral communication. NH RSA 570-A:2. While a "telecommunication" is fairly well defined in the statute, an "oral communication" is "any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation." NH RSA 570-A:1. RSA 570-A also provides for civil damages for violations of RSA 570-A. RSA 570-A:2; 570-A:11; see Fischer v. Hooper, 143 N.H. 585 (1999) (discussing issues regarding civil damages for violation of RSA).