

**FOURTH AMENDMENT--SEARCH AND SEIZURE--ARTICLE I, PARAGRAPH 7 OF THE NEW JERSEY CONSTITUTION, UNLIKE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION, PROTECTS INDIVIDUALS AGAINST WARRANTLESS SEARCHES OF THEIR GARBAGE LEFT FOR COLLECTION IN AN AREA ACCESSIBLE TO THE PUBLIC--*State v. Hemepe*, 120 N.J. 182, 576 A.2d 793 (1990).**

The New Jersey Supreme Court, in *State v. Hemepe*, 120 N.J. 182, 576 A.2d 793 (1990), heard two consolidated cases addressing the issue of whether the fourth amendment protects against unreasonable searches and seizures of garbage left for collection in an area accessible to the public. Although the fourth amendment of the United States Constitution does not prohibit unwarranted garbage searches, the court concluded that under article I, paragraph 7 of the New Jersey Constitution, New Jersey residents maintain a reasonable expectation of privacy in their garbage. *Id.* at 223, 576 A.2d at 814. Consequently, the supreme court held that no cause is necessary to seize garbage left for collection at the curbside, but a warrant must be obtained to search it. *Id.*

In *State v. Hemepe*, the state police learned through a confidential source that Conrad and Sharon Hemepe were distributing illegal drugs from their home. *Id.* at 188, 576 A.2d at 796. Six months later, a state police officer, relying on this information, seized the bags of garbage placed in front of the Hemepeles' residence on two separate occasions. *Id.* at 188-89, 576 A.2d at 796. Both times, the officer delivered the bags to the State Police Tri-Man Unit, where, absent a warrant, the police analyzed the contents and discovered traces of cocaine, marijuana, and methamphetamine. *Id.* at 189, 576 A.2d at 796. Consequently, a search warrant was issued for the Hemepeles' home based upon the analysis of the garbage and the information obtained from the confidential source. *Id.* The police uncovered controlled substances and drug paraphernalia during the subsequent investigation. *Id.* Thereafter, a grand jury indicted the Hemepeles for drug offenses. *Id.*

The trial court sustained the Hemepeles' motion to suppress the evidence obtained from the warrantless search of their garbage. *Id.* The court based its decision on the inability of the state to prove either that the defendants had left their garbage for collection or that the police had seized it on public property. *Id.* at 189, 576 A.2d at 797. Thus, the only basis for probable cause to support the search warrant was the confidential informant's tip received six months earlier. *Id.* Because this information was stale at the time the warrant was issued,

the trial court held that the search warrant was invalid. *Id.*

In *State v. Pasanen*, the Boonton police were informed of "drug activity" at the residence of the defendant, James J. Pasanen. *Id.* As a result, the police, on seven occasions and without a warrant, confiscated and searched the contents of the gray plastic garbage bags left for collection in front of Pasanen's home. *Id.* After discovering traces of drugs and related paraphernalia within the bags, a search of the defendant's home, pursuant to a warrant, produced quantities of cocaine, marijuana and heroin. *Id.* Thereafter, Pasanen was indicted for drug offenses. *Id.*

At trial, Pasanen sought to suppress the evidence by challenging the validity of the warrantless garbage inspections and the subsequent search of his home. *Id.* The trial court held that since the defendant possessed "a qualified privacy expectation in his garbage, the police . . . needed only reasonable suspicion, rather than a warrant based on probable cause, for the search." *Id.* at 190, 576 A.2d at 797. Therefore, the trial court denied the defendant's motion to suppress the evidence and concluded that the warrantless garbage searches and the subsequent search of the defendant's home were valid. *Id.*

On appeal, *Hempele* and *Pasanen* were consolidated by the appellate division. *Id.* The appellate court noted that, although the fourth amendment to the United States Constitution does not protect against unreasonable searches and seizures of garbage deposited for collection, article I, paragraph 7 of the New Jersey Constitution does provide such protection. *Id.* The court adopted the reasoning of the trial court in *Pasanen*, holding that an individual maintains only a qualified expectation of privacy in garbage left for collection. *Id.* The police, therefore, need only a reasonable suspicion, rather than a warrant, to search the garbage. *Id.*

Applying the reasonable suspicion standard, the appellate division affirmed the trial court's decision in *Pasanen* and upheld the searches. *Id.* Recognizing that the information implicating Pasanen in "drug activity" was from two reliable sources, the court found reasonable suspicion existed to justify searching Pasanen's garbage. *Id.*

As to *Hempele*, the appellate court affirmed the trial court's suppression order. *Id.* at 190, 576 A.2d at 797. The court reasoned, however, that the information that originally motivated the police searches was "stale," and therefore, the police did not possess reasonable suspicion when they conducted the searches of the Hempeles' trash. *Id.* at 191, 576 A.2d at 797. Thus, the court concluded that the searches had violated the New Jersey Constitution and were invalid. *Id.* Subsequently, the New Jersey Supreme Court granted the state's motion

to appeal in *Hempele* and Pasanen's petition for certification. *Id.*

Justice Clifford, writing for the majority, first addressed the validity of the garbage searches in *Hempele* and *Pasanen* under the fourth amendment of the United States Constitution. *Id.* at 191, 576 A.2d at 798. The court recognized that, under the United States Supreme Court decision in *California v. Greenwood*, 486 U.S. 35 (1988), garbage left in an "area accessible to the public" is not afforded the fourth amendment protection against unreasonable searches and seizures because a "privacy expectation in garbage is not reasonable." *Hempele*, 120 N.J. at 191-92, 576 A.2d at 798. Unable to distinguish *Greenwood* from the present case, the New Jersey Supreme Court held that the fourth amendment did not prohibit the warrantless garbage searches in *Hempele* and *Pasanen*. *Id.* at 193-95, 576 A.2d at 798-99.

The justice next addressed the issue of whether garbage, placed at the curb for collection, is protected from unreasonable searches and seizures under article I, paragraph 7 of the New Jersey Constitution. *Id.* at 195, 576 A.2d at 799. Noting several occasions where the state constitution had afforded broader protection against unreasonable searches and seizures than the fourth amendment, the court recognized that it had an obligation to extend the broader protection of the state constitution to New Jersey citizens. *Id.* at 195-97, 576 A.2d at 799-800. Moreover, the court found this proposition to be consistent with *Greenwood*, where the Supreme Court suggested that states may impose more stringent constraints on law enforcement conduct than would be required under the United States Constitution. *Id.* at 197, 576 A.2d at 801 (quoting *Greenwood*, 486 U.S. at 43).

In its analysis of whether article I, paragraph 7 prohibits warrantless searches of an individual's garbage, the court modified the two-part inquiry utilized by the United States Supreme Court in fourth amendment cases. *Id.* at 198, 576 A.2d at 801 (citing *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring)). The Supreme Court inquiry requires both "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). In contrast, the New Jersey Supreme Court held that under the New Jersey Constitution, only a reasonable expectation of privacy is necessary since the subjective test is irrelevant and would require an arbitrary distinction of facts. *Id.* at 198-200, 576 A.2d at 801-02.

Under the court's "reasonableness" approach, Justice Clifford noted that since garbage may contain intimate secrets that an individual may not wish to disclose, a person's desire to keep his trash private is

reasonable. *Id.* at 202, 576 A.2d at 803. Additionally, the justice illustrated that the fourth amendment and article I, paragraph 7 protect an owner from unreasonable searches of all containers which conceal the contents from plain view. *Id.* at 202-03, 576 A.2d at 803-04 (quoting *United States v. Ross*, 456 U.S. 798 (1982)). Accordingly, the court held that a person possesses a reasonable expectation of privacy in an ordinary opaque garbage bag. *Id.* at 203, 576 A.2d at 803.

The court further noted that a privacy expectation in rubbish left at the curb is reasonable, even though it may be subject to inspection by third parties. *Id.* at 206, 576 A.2d at 805. Justice Clifford analogized garbage in plastic bags left at the curb to mail left in a mailbox and concluded that, although an object is not completely free from intrusion, it may nonetheless be reasonable for an individual to maintain a privacy expectation in that object. *Id.* Therefore, the court held that an individual's privacy expectation in his garbage is reasonable even though the trash collector is entrusted with its removal. *Id.* at 209, 576 A.2d at 807. Justice Clifford unequivocally rejected the argument that if a trash collector could consent to a police search of garbage which he had collected, then the privacy expectation in garbage is unreasonable. *Id.* at 207, 576 A.2d at 806. The court reasoned that since other materials given to third parties, such as mail, are constitutionally protected, an expectation of privacy in an individual's garbage, although left for removal by a collector, would also be reasonable. *Id.* at 208-09, 576 A.2d at 806-07.

Concluding that article I, paragraph 7 protects individuals from searches of their garbage left at the curb for collection, the supreme court distinguished a valid seizure from a valid search of garbage. *Id.* at 215, 576 A.2d at 810. Relying on the reasoning in *United States v. Van Leeuwen*, 397 U.S. 249 (1970), the court emphasized that individuals are protected from unwarranted searches of their garbage, but not from the actual seizure of their trash left out for collection. *Hempele*, 120 N.J. at 216-17, 576 A.2d at 810-11. Therefore, the majority held that an arbitrary seizure of garbage bags without cause would not violate article I, paragraph 7. *Id.* at 217, 576 A.2d at 810-11.

In contrast, the requirement of a warrant based on probable cause for searches of garbage may be waived only where a special state interest outweighs an individual's privacy interest. *Id.* at 219, 576 A.2d at 811. The court rejected the state's argument that the public interest in eliminating drug activity would justify a deviation from the warrant requirement or that the mobility of garbage bags justified a lower standard because trash bags may be seized without cause. *Id.* at 219-20, 576 A.2d at 811-12. Thus, finding that no special state interest

outweighed an individual's privacy interest, the court held that a warrant based on probable cause is required prior to the state conducting a search of garbage bags deposited for collection. *Id.* at 221, 576 A.2d at 813.

The New Jersey Supreme Court recognized that its decision was in direct conflict with "virtually every other court that ha[d] considered this issue." *Id.* at 223-24, 576 A.2d at 814. Nevertheless, the court affirmed the decision in *Hempele*, concluding that no probable cause existed to justify waiving the warrant requirement. *Id.* at 223, 576 A.2d at 814. In addition, the court reversed *Pasanen* and remanded the case to the trial court to determine whether the police had probable cause to search the defendant's garbage, and if so, whether exigent circumstances existed to justify the failure to obtain a search warrant. *Id.*

In a separate opinion filed by Justice O'Hern, concurring in part and dissenting in part, the justice conceded that the United States Supreme Court's decision in *Greenwood* may have "drawn the line a bit too far" in excepting garbage searches from fourth amendment protection. *Id.* at 225-26, 576 A.2d at 815 (O'Hern, J., concurring in part and dissenting in part). Justice O'Hern maintained, however, that this case presented no sound public policy to support departure from federal constitutional law. *Id.* Furthermore, since the justice found no significant danger to private individual rights, Justice O'Hern would abide by the Supreme Court decision in *Greenwood*, where the issue concerning garbage searches was directly addressed. *Id.* at 228, 576 A.2d at 816 (O'Hern, J., concurring in part and dissenting in part).

Justice Garibaldi, dissenting, agreed with Justice O'Hern that no sound public policy could justify departure from federal constitutional law. *Id.* at 229, 576 A.2d at 816 (Garibaldi, J., dissenting). The justice asserted that deviation from *Greenwood* is inappropriate since the fourth amendment and article I, paragraph 7 are virtually identical. *Id.* at 230, 576 A.2d at 817 (Garibaldi, J., dissenting). Finding that "New Jersey garbage is not unique," the justice stated that New Jersey residents have no greater privacy expectation in garbage than citizens of sister states. *Id.* at 230-31, 576 A.2d at 817-18 (Garibaldi, J., dissenting). Additionally, Justice Garibaldi sharply disagreed with the majority's conclusion that an expectation of privacy in garbage left for collection is reasonable. *Id.* at 231-32, 576 A.2d at 818 (Garibaldi, J., dissenting).

The New Jersey Supreme Court's holding in *Hempele*, that the state constitution would afford greater protection against unreasonable searches and seizures than the United States Constitution, is indicative of the majority's opinion that the federal constitutional protection as applied to garbage is inadequate. This is evidenced by the court's

departure from the United States Supreme Court's decision in *Greenwood* despite the similarities between the fourth amendment and article I, paragraph 7. Such a digression seems justified only when the protection afforded by the federal Constitution is insufficient. Unfortunately, protection of garbage does not warrant such a departure.

Although an individual may maintain some minimal expectation of privacy in his garbage left at the curb for collection, the rationale expressed in *Greenwood* may better reflect society's true expectations. After all, it is well recognized that garbage placed in an area accessible to the public is often vulnerable to inspection by neighbors, children, vagrants, trash collectors and the like. Rather than to completely prohibit a warrantless search, the approach suggested by the appellate division calling for a reasonable suspicion standard prior to conducting a garbage search, may more accurately balance the government's interest against an individual's qualified expectation of privacy.

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