

## Cardboard Castles

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### The Homeless and the Fourth Amendment

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With the economy uncertain these days, to say the least, our thoughts might turn to the problem of homelessness in this country. Putting aside for the moment the issues of what causes homelessness<sup>1</sup> and what might be done to stop homelessness or help the homeless, let's zero in on the question on everybody's

mind: "What constitutional rights does a homeless person have?" Specifically, if a homeless person has erected a cardboard box and is living in it, can I search the box without a warrant even though it is his "home?"

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Surprisingly, I was unable to find any North Carolina or 4<sup>th</sup> Circuit decision directly on point here, but having examined two cases from other jurisdictions and applying a little common sense, I will say that a homeless person who is living in a makeshift shelter on public property does not have a reasonable expectation of privacy in that shelter, and therefore, it is not protected by the Fourth Amendment, which means that you may search it without a warrant and even without probable cause.

The first case is State of Connecticut v. Mooney, 588 A.2d 145 (Conn. 1991), a Connecticut state Supreme Court case.<sup>2</sup> Mooney had been arrested for felony murder in Branford, Connecticut. His girlfriend showed police that Mooney had been living under a bridge and when the officer examined these living quarters, he found a blanket used as a mattress, a rolled-up sleeping bag, a closed small cardboard box, a suitcase, a small closed duffel bag, and paper trash. Mooney had used the metal and cement beams for shelving, and all of his belongings were on the shelves except for the duffel bag, blanket, and trash.

The officer opened the duffel bag and the cardboard box and found evidence that was later admitted at Mooney's trial. It is important to note that Mooney was not living in a cardboard box or any other type of actual structure except for the covering and framework of the overpass.

Mooney's first argument on appeal was that the police had violated his rights under the fourth amendment when, without a search warrant, they "invaded his home" under the abutment and seized items found there. The defendant argued that he had a legitimate expectation of privacy in the area where he was living that was protected from a warrantless search. The court punted on this issue, though, and

<sup>1</sup> I know that many of you are thinking – "I already know what causes homelessness. It's caused by people not having a home." Yes, that's very funny. Take your comedy act to the soup kitchen.

<sup>2</sup> Cases from other jurisdictions outside the NC state courts and 4<sup>th</sup> Circuit federal courts do not have precedential authority. This means that courts in this jurisdiction do not have to follow those rulings. They are, however, "persuasive authority," which means that they may be used to try to persuade the court. In other words, a North Carolina court would not be bound by the rule set out in this case, but might very well look to it for some guidance.

ruled that even assuming no Fourth Amendment violation in searching the “home,” the defendant did have a reasonable expectation of privacy in the closed duffel bag and closed cardboard box that was violated and therefore, the evidence was suppressed.

In 1995, the California Court of Appeals<sup>3</sup> decided the case of People of California v. Thomas, 38 Cal. App. 4<sup>th</sup> 1331. From February 1993 through July 1994, Mr. Major Lee Thomas (Thomas), a homeless man, continuously resided in a wood and cardboard box structure which resembled a refrigerator box lying on its side. Thomas placed the box on a public sidewalk in downtown Los Angeles. Thomas built his box to preserve his privacy, and referred to the box as his “home.” When Thomas was inside the closed box, he could not see out, nor could someone on the street see inside it. Thomas kept all of his personal property inside his box.

The box had no locks. Thomas did not pay rent, nor any taxes, nor did he have a permit to build the box. The box was not hooked up to any utilities. The box was located on the sidewalk, possibly obstructing the sidewalk in violation of the City of Los Angeles Municipal Code (LAMC), and city officials had not expressly authorized Thomas to reside at this location.

At the location where Thomas resided, employees of the City of Los Angeles Bureau of Street Maintenance (LABSM) cleaned the streets and sidewalks five days a week. On at least one previous occasion, seven months earlier, LABSM cleared the sidewalks and removed structures, including Thomas's box. Thomas watched as a LABSM truck hauled away “everything belonging to everyone.” Despite having lost his box and the possessions it contained, Thomas built a second identical box at the same location.

On July 17, 1994, at or around 4 a.m., Los Angeles police officers were driving an unmarked police car on patrol when they observed six or seven persons near the location of Thomas's box. The officers saw three or four individuals, including Thomas, examining “neatly folded denim clothing.”<sup>4</sup>

On that same morning between 4:30 and 5:30 a.m., several police officers responded to a burglary call and went to a nearby clothing manufacturing business known as Lucy's Fashions. A witness stated that he had observed three men burglarize Lucy's Fashions.<sup>5</sup> The witness stated that one of the burglars climbed a fire escape, removed boxes and clear plastic bags full of clothes<sup>6</sup> through a second story window, and threw the goods to the two other men waiting on the sidewalk below.

Police officers later returned to the “homeless campsite” to look for suspects, witnesses, and stolen property. The officers approached the particular area where earlier they had seen some people, including Thomas, examining the “neatly folded denim clothing.” At the homeless campsite, the officers observed several dozen people sleeping on the ground. Some were sleeping underneath blankets or some other cover. Others were sleeping in boxes, or in some other makeshift structures.

Without a search warrant, police officers searched several makeshift shelters or boxes on the sidewalk. One officer knocked on Thomas's box and loudly said “police,” but there was no response. The officer lifted the lid or roof of the box six or more inches. The officers looked inside and saw Thomas and

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<sup>3</sup> We are specifically taught in law school to be careful relying on California court decisions. Seems like they do some very weird things from time to time.

<sup>4</sup> This is what we call a clue. Or a suspicious activity. Or a strange sight. Or a typical day in LA.

<sup>5</sup> Lucy's Fashions specialized in “neatly folded denim clothing.”

<sup>6</sup> Guess what kind of clothes. That's right – neatly folded denim clothes. The detectives were about to put the pieces together.

a woman sleeping. On the floor between Thomas and the woman, the officer observed a clear bag containing denim clothing<sup>7</sup> similar to that which the officers had seen at Lucy's Fashions. The officer reached into the box and removed the bag; he then asked Thomas and the woman to exit the box. The officers arrested Thomas and seized the bag of clothes. Thomas was convicted of receiving stolen property.

On appeal, the California Court of Appeal ruled that Thomas did not have a reasonable expectation of privacy in his "box" because although he thought of the box as his home and therefore had a subjectively reasonable expectation of privacy, it was not an expectation that was objectively reasonable.<sup>8</sup> The Thomas court wrote, "in short, a person who occupies a temporary shelter on public property without permission and in violation of an ordinance prohibiting sidewalk blockages is a trespasser subject to immediate ejection and, therefore a person without a reasonable expectation that his shelter will remain undisturbed."

So my advice to you is this, at least until we have a North Carolina precedent on point. A homeless person living in a temporary shelter on public property has no Fourth Amendment rights in the shelter itself. This means you can search regardless of whether you have probable cause or even reasonable suspicion. However, any closed containers belonging to the homeless person or inside the shelter may not be searched without a warrant unless some exception to the warrant requirement applies.

In closing, I feel obligated to wish you a Happy Halloween. I do not particularly like Halloween, and would support the repeal of the entire holiday. I would much rather just buy my children all the candy they wanted and stay at home tonight. But I will be out there trick or treating, because I am a stand up guy who doesn't shirk his parental duties. (And my wife told me I had to.)



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<sup>7</sup> The opinion is silent about whether these clothes were neatly folded.

<sup>8</sup> This is basic reasonable expectation of privacy analysis that would be undertaken by any court faced with this issue. That is why I am confident in advising you to follow this case even though it is not from a N.C. court.