

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,) Case No. 2007-1232
)
Plaintiff-Appellee,)
)
v.) On Appeal from the
) Lake County Court of Appeals,
) Eleventh Appellate District
)
DEMOND C. DUNCAN)
)
Defendant-Appellant.) Court of Appeals Case No. 2006-L-154CA

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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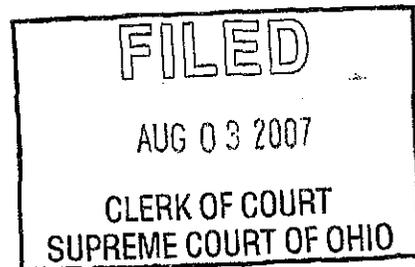


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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

No new law has been created by this case. Mr. Duncan's car was impounded for two valid reasons, i.e. unsafe vehicle impounded pursuant to police policy and to arrest. Appellant's reliance on *State v. Taylor* (1996), 114 Ohio App.3d 416, 683 N.E.2d 367, ignores the factual differences that distinguish this case. The statute relied upon in *Taylor* did not authorize impoundment, nor was there evidence of a police policy authorizing impoundment. Furthermore, Appellant ignores constitutional law in the area of inventory searches which authorize the conduct in this case. Therefore this case is not of public or great general interest and this Court should not hear it.

STATEMENT OF THE CASE AND FACTS

At approximately 1:10 a.m., a police officer on routine patrol heard a loud thumping noise which drew his attention to a car traveling on the roadway with left front-end body damage, a blown-out front tire and a cracked front windshield. The officer initiated a traffic stop for unsafe vehicle, a violation of Willoughby Hills Municipal Traffic Code Section 337.01. The crack in the windshield started on the right passenger side up halfway through the windshield and across all the way to the other end. The officer obtained the operator's license of the driver and identified him as Demond Duncan. He was alone in the car. Then he radioed to inquire if other agencies were investigating a hit-skip in the area. Mr. Duncan told the officer that there was no spare tire and that the tire had been flat for almost five miles that he had just traveled. This is a commercial district with numerous places where Mr. Duncan could have pulled his car off the side of the road. The officer determined that the car was unsafe to operate due to the numerous equipment violations, and advised Mr. Duncan that his car would be impounded.

When Mr. Duncan was asked to step out of the vehicle, he began arguing with the officer and a back-up officer who arrived on scene. Mr. Duncan refused to exit his car. So, he was physically removed from the vehicle by the officers and advised that he was being charged with Obstructing Official Business, Operating an Unsafe Motor Vehicle, and Failure to Wear a Seatbelt.

The routine inventory search of Mr. Duncan's car revealed a loaded, black, 9mm handgun under the front passenger seat. Consequently, Mr. Duncan was indicted by a Lake County Grand Jury with one count of Carrying a Concealed Weapon, one count of Having a Weapon Under Disability, and Receiving Stolen Property. Mr. Duncan filed a

motion to suppress, but after a hearing, it was denied and he pled no contest to Carrying a Concealed Weapon and Receiving Stolen Property.

This case was appealed to the Eleventh District Court of Appeals and that unanimous decision was issued on May 29, 2007 affirming the decision of the trial court. The State now responds to Appellant's Memorandum in Support of Jurisdiction.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. 1

A vehicle is properly impounded by the police when 1) the vehicle is deemed unsafe pursuant to local ordinance and police policy authorizes the towing or 2) incident to lawful arrest.

Mr. Duncan's car was impounded and inventoried pursuant to not one, but two valid reasons. First, the police were authorized to do so because of its unsafe condition and pursuant to police policy and second, because Mr. Duncan was arrested for obstructing official business.

Appellant concedes that the officer properly stopped Mr. Duncan. His vehicle was producing a loud thumping noise as the officer observed Mr. Duncan maneuvering down a main road, with left front-end body damage, a blown-out front tire and a severely cracked windshield which obstructed his vision. Willoughby Hills Municipal Traffic Code Section 337.01(a) provides: "No person shall drive or move *** on any street any vehicle *** which is in such unsafe condition as to endanger any person or property."

But Appellant argues that even if the car was unsafe, the above referenced ordinance does not authorize the police department to impound it, and he cites *State v. Taylor* (1996), 114 Ohio App.3d 416, 683 N.E.2d 367, for that proposition. In *Taylor*, the court held "A car may be impounded when impoundment is authorized by statute or municipal ordinance." *Id* at 422. There was no testimony at the suppression hearing in *Taylor* concerning any police policy or regulations regarding impoundment. Instead, the State in that case relied on R.C. 4513.02(E) as authority to impound the vehicle. That statute provides: "When any motor vehicle is found to be unsafe ***, the inspecting officer

may order it removed from the highway ***." R.C. 4513.02(E). The *Taylor* court found that because the statute did not expressly authorize impoundment, the police did not have the authority to impound the car.

However, in *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000, the court held that inventories of cars pursuant to standard police procedures are reasonable. *Id.* at 376. Additionally as the appeals court pointed out in this case, other Ohio courts have held that impoundment may be authorized by a police regulation, order, or policy. See *State v. Cook* (2001), 143 Ohio App.3d 386, 758 N.E.2d 213, *State v. Gordon* (1994), 95 Ohio App.3d 334, 642 N.E.2d 440, *State v. Robinson* (Oct. 25, 2000), Summit App. No. 19905.

The evidence adduced at Mr. Duncan's suppression hearing demonstrated that the Willoughby Hills Police Policy, Section IV, F6, provides: "Officers may cause the impoundment of a vehicle in other circumstances as follows: *** 6. When a vehicle, because of faulty equipment, is determined to be a hazard if operated ***." Therefore there was probable cause to believe that Mr. Duncan's car was in violation of the Willoughby Hills ordinance regarding unsafe vehicles and the Willoughby Hills police department had a written policy expressly authorizing impoundment.

Secondly, the impoundment was authorized by the fact that Mr. Duncan's obstinance and refusal to exit the vehicle gave probable cause to arrest him for obstruction of official business. Therefore, the vehicle was also impounded and inventoried pursuant to his arrest. Appellant argues that if the impoundment was unlawful then the arrest for

obstruction was unlawful. However, since Mr. Duncan's car was lawfully impounded, Appellant's second argument is frivolous.

In conclusion, the court of appeals decision in this case took into account all facts in evidence introduced at the suppression hearing and applied appropriate case law. Appellant's reliance on *Taylor* is misplaced. This particular fact scenario passes the test outlined in *Taylor* because the police had an impound policy which applied to unsafe vehicles. The United States Supreme Court has authorized inventories of vehicles pursuant to standard police procedures, and other appellate courts in Ohio have held that impoundment may be authorized by police policy. There was a written police procedure in place in this instance which applied to the facts at hand. This policy authorized the officer to impound Mr. Duncan's vehicle. Other cases from other districts support this finding.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

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Assistant Prosecuting Attorney
Counsel of Record

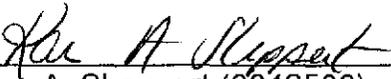
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PROOF OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Robert F. DiCello, Esquire, 7556 Mentor Avenue, Mentor, OH 44060, on this 1st day of August, 2007.



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KAS/klb