

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Appellee, :
 :
 v. :
 :
 LAURA MERICER :
 :
 Appellant. :

On Appeal from the
Hamilton County Court of
Appeals, First Appellate
District of Ohio

Case No.: 2007-0980

REPLY BRIEF OF APPELLANT, LAURA MERCIER

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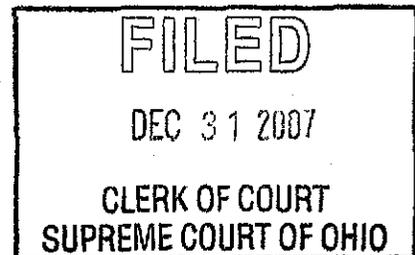


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ARGUMENT:

PROPOSITION OF LAW No. 1: A purse being worn or carried by an automobile passenger may not be searched if the passenger is not subject to search

The appellate court in this case failed to address the primary issue in this case - in conducting a warrantless search, is a purse being held by a female passenger in a car part of her "outer clothing"? The State addressed the issue in both the appellate court and its brief to this Court, but aside from a public policy argument, the State has offered no authority or argument in support of its position.

On the first page of its Argument section, the State's Merit Brief claims there are three reasons to affirm the trial court. However, each of these three arguments really boils down to a single public policy position.

First, the State claims that the United States Supreme Court expressed a need for a bright-line rule to benefit police officers in all searches. Second, the State claims that purses are containers that can hide contraband, so that distinguishes purses from parts of a person for the purposes of a search. Third, the State claims that as a matter of public policy reversal would limit the effectiveness of police. Essentially, these three reasons are all founded on the same principle: *As a matter of public policy the police need a bright-line rule that allows them to search anything or any passenger who may carry contraband in a lawfully stopped vehicle.* This is not a novel theory. It was advanced by prosecutors and rejected by the United States Supreme Court nearly 60 years ago.¹

A. THE BELTON RULE HAS NO APPLICATION IN THIS CASE

¹ *United States v. DiRe* (1948) 332 U.S. 581

The appellate court wrongly applied the *Belton* rule to this case. The state never argued that the *Belton* rule applied at trial level or in the court of appeals, and only after the appellate decision has it advanced the *Belton* rule in support of the search.

The *Belton* rule has no application to search the purse of a passenger who is not under arrest. The *Belton* court balanced the interests of the state and the rights of lawfully arrested passengers, and determined the interests of the state in having a uniform “bright line” rule were superior to the privacy interests of the arrested passengers. In so holding, the court wrote, “The justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.”² The creation of the bright line rule in *Belton* was justified only because of the diminished privacy interests of the arrested passenger. The passenger in this case was not arrested, not suspected of any wrongdoing, nor considered a threat by the police officers making the stop.

As the *Houghton*³ court held, in the area of warrantless searches, the need of the police in promoting a legitimate government interest must be balanced against the intrusion of a search on individual privacy. In *Belton*, the interest of the passengers was diminished due to their lawful arrest. Unlike the passengers in *Belton*, Ms. Mercier was not under arrest and had a heightened privacy interest.

The liberty interest of people in their ordinary course of life is different than those who are reasonably suspected of committing crimes and are under investigation. The exception for the need of warrant to search an automobile is based on the exigency of the circumstance. The automobile will usually drive off before a magistrate can be secured

² *New York v. Belton* (1981) 453 U.S. 454, 461.

³ *Wyoming v. Houghton* (1999) 526 U.S. 295

to issue a warrant. In this case, based upon the facts as they were presented at the motion hearing, the police did not feel Ms. Mercier was a suspect. The police did not believe she was dangerous. There was no probable cause for her to be searched, and had a magistrate been at the scene, no warrant would have issued to search her.⁴

The bright-line rule of *Belton* applies only where the passenger has a reduced privacy interest due to the passenger's lawful arrest. Suppression of evidence from a passenger who is not under arrest would not undermine *Belton*, since the *Belton* rule does not apply.

Additionally, in its brief, the State cites nine cases from other states as precedent for the search of passenger purses under *Belton*. All of these cases cited by the State involved a purse carried or worn by a passenger who was under arrest or involved an unattended purse. In each case, the facts fall squarely under either *Belton* (when the passenger was arrested) or *Houghton* (when the purse was not worn or carried by the passenger). As stated in Appellant's brief, there appear to be only two cases that address the search of a purse worn by a passenger who was not under arrest, and in each the search was found to violate the privacy rights of the passenger.

B. THE STATE DOES NOT HAVE AN OVERRIDING INTEREST IN SEARCHING THE PURSE OF AN UNACCUSED FEMALE PASSENGER.

Neither the United States Supreme Court nor this Court has made any sweeping endorsements of the use of bright line rules regarding all warrantless searches. While the *Belton* court found that a bright line rules can be helpful to police, it only created a bright line rule after weighing the needs of the state and privacy interests of the passengers.

⁴ *Houghton* at 303

The *Belton* court felt that a standard established by *Chimel v. California*⁵, of permitting the search of passenger compartments after lawful arrest of the occupants created a “highly sophisticated” standard that police and lower courts struggled to uniformly apply. As a result, the need for simplification on the matter was great, whereas the privacy interest of arrested passengers was low. When the needs and rights were balanced against each other, the need for a bright line rule outweighed the privacy interests of the arrested passenger.

The State would prefer this Court not balance the interests of the parties. Both the appellate decision and the State’s brief ignore the privacy interest of Ms. Mercier and focus solely on the convenience of bright line rules provide police. However, the United States Supreme Court has held that in order to determine whether a search is reasonable, the privacy rights of the passenger must be considered.⁶ As the *Houghton* court noted, “Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security.”⁷ Any state interest must be balanced against this severe intrusion of a cherished personal security.

A close examination of the needs of the state to search the purse of a passenger reveals that their needs are rather insignificant. It is important to remember that the police may not search a seemingly innocent passenger without unconstitutionally infringing on her rights, yet the State argues that it has an overriding interest in searching a purse she wears. The State advanced two rationales in support of this position, neither of which is persuasive.

⁵ *Chimel v. California* (1969) 395 U.S. 752

⁶ *Di Re* at 585

⁷ *Houghton* at 303 (citing *Terry v. Ohio* (1968) 392 U.S. 1, 24, 25)

First, the State claims a need to search all passengers' purses because contraband may be secreted in a purse. In the *Di Re* case, the prosecution similarly argued all passengers must be searched since contraband could be secreted on the person of passenger. Much like in this case, the prosecution in *Di Re* inferred that the passengers probably had knowledge of the crimes of the driver. The Court rejected the argument, holding, "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."⁸ The Court found that the possibility that contraband could be hidden on the person of a passenger did not create a need to search the passenger that was superior to the right of the passenger to be free from search.

If a small contraband, like drugs, can be hid in an unsearchable pocket of the passenger, how can the state contend that it has an urgent need to search a purse? There is no difference in putting contraband in a passenger's shoe or wallet or any other piece of outer-clothing and putting contraband in a purse. Similarly, the need to search a purse being worn by a passenger is no different than the need to search the pockets, the shoes, or the billfold of the passenger. If the need to search the passenger does not override the passenger's privacy interests, then the need to search the purse worn by the passenger does not override the passenger's privacy interests.

As the authority cited in Appellant's brief demonstrated, a purse worn by a woman has traditionally been considered part of the woman in the context of search and seizure law. The State has demonstrated no measurable government interest that would justify a departure from prior case law.

⁸ *Di Re* at 587.

Second, the State claims the need to search the purse of a passenger for safety reasons. A search of the purse worn by passenger who (1) is not under arrest, (2) free from personal search, and (3) presumably free to walk away, does not protect police. The “guilt by proximity to the driver” argument is no more persuasive with respect to weapons as it was to the *Di Re* court with respect to hiding contraband. It borders on ridiculous to suggest that the police have a compelling need to search a the purse of a passenger for safety reasons, when they felt no need to pat down the passenger for weapons before asking her to sit in the backseat of the squad car.

It is important to remember that the passenger in this case was suspected of no crime. While the State hypothesized in its brief that Ms. Mercier could have known about the driver’s crime, and probably witnessed it, there is no evidence of that in this case. On the contrary, there was no eyewitness testimony of the underlying drug transaction in this case. The officer who testified at the suppression hearing only heard the recording from the wire used by the buyer and presumed that the sale happened near the car Ms. Mercier was in.⁹

While the state only explicitly provided two legitimate government interests that support of the bright light rule, the State alludes to the overall benefit of bright line rules as being reason enough to justify the search. Mirroring the appellate decision, the State claims that if the police must concern themselves with whether a purse is worn or unattended it creates a difficult situation. Apparently, the State fears police officers would have problems distinguishing between a purse being worn by a passenger and an unattended purse found lying on the floor or on the backseat of a car. Such fears are

⁹ T.P. 10, ln. 7, 8.

unfounded, and quite frankly, insult the intelligence of police. It is safe to assume that every police officer in the state could distinguish between a purse being held or worn by a passenger and a purse that is not being held or worn by anyone.

Using the same type of logic, the State argues that unless this Court creates a bright line rule that allows police to search everything in the car, courts may confuse knapsacks, cell phones, personal digital assistants, address books, gym bags, and duffel bags with purses. Of course, wallets, cell phones, personal digital assistants, and other items in the pockets are passengers have already been found to be part of the person and off-limits for property only searches. Briefcases and duffel bags are rarely worn by passengers in the car. In fact, if you are being picked up by a taxi or limo, the driver will traditionally take your briefcase or bags and put them in the trunk, but will never ask for a purse. As Justice Breyer stated in *Houghton*, "Purses are special containers."¹⁰

To suggest a bright line that does not consider the location of the purse (whether it is worn or unattended) flies in the face of the *Houghton* decision. Of course, whether the purse is worn or unattended is of critical importance in measuring the privacy interests of the passenger. As the *Houghton* decision stated, "[T]he important issue is the location of the container within the automobile."¹¹

As both the concurring opinion and the majority opinion in *Houghton* state, a critical issue in weighing the passenger's privacy interest is the degree of intrusion the search produces. As the majority notes, a search of purse that was not in the control of the passenger is not that intrusive. Justice Scalia specifically wrote that if the passenger did not control the purse, anyone could have hidden contraband in the purse

¹⁰ *Houghton* at 308.

¹¹ *Id.* at 302

“surreptitiously, without the passenger’s knowledge or permission.” Logically, if a purse is not held or worn, and the passenger who owns the purse makes it available to others in the car to use as receptacle without her knowledge, then the search is less of an affront to her privacy than if she wears the purse. Similarly, if the people who are under arrest have equal access to the purse and could have hidden contraband in the purse without the owner’s knowledge, the police interest in the search increases.¹²

However, when a purse is worn by a person, it has been found to be an extension of her person. The purse is often used as a man’s billfold or as an extra pocket. As Justice Breyer wrote, if the purse is tantamount to “outer clothing” than it properly receives the extra protection afforded to billfolds, pockets, and other clothing capable of carrying items.¹³

The State wants the best of both worlds, when the police have probable cause to search a person, as was the case in *State v. McAfee*,¹⁴ the State argues that a purse worn by a person is an extension of that person. When the police do not have probable cause to search a person, as in this case, the State argues the purse is not an extension of that person. The determination of whether a purse is part of the person can not be simply the whim of the police. Instead, the location of the purse must be considered to determine if the passenger has a heightened protection.

CONCLUSION

In order to craft a bright line rule, courts must first consider the legitimate needs of the state and balance those needs against the privacy interests of the individual. The

¹² *Id.* at 305

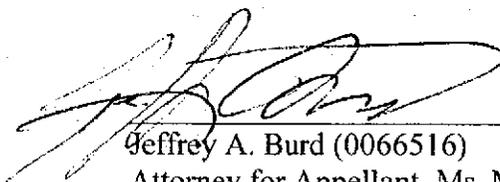
¹³ *Id.* at 308

¹⁴ *State v. McAfee* (1985) 26 Ohio App.3d 99, 498 N.E.2d 204.

Belton Rule does not apply to this case, as the Belton Rule balances the needs of the government with the privacy interests of a passenger who is lawfully under arrest. A passenger who is not under arrest has a heightened privacy interest and cannot be personally searched, even though the passenger could be hiding contraband on her person.

Purses are special containers that uniquely carry personal effects akin to wallets and pockets. Under Ohio law, a purse worn by a person has been considered to be part of her person for purposes of search and seizure. The warrantless search of a purse worn by a passenger who is not under arrest is effectively a search of her person. The appellate decision that permitted the search of the purse worn by such a passenger must be reversed.

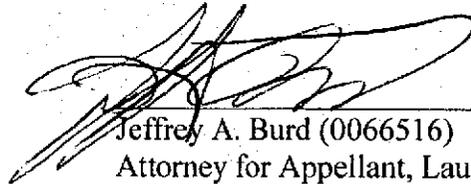
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this reply brief was sent via ordinary U.S. mail to Mr. James Michael Keeling, at 230 E. Ninth Street, Suite 400, Cincinnati, Ohio 45202, on this 31 day of December, 2007.



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