

IN THE SUPREME COURT OF OHIO

STATE OF OHIO )  
DIVISION OF WILDLIFE )  
 )  
Plaintiff/Appellee )  
 )  
v. )  
 )  
WILLIAM R. COBURN )  
TODD R. PARKISON )  
MARVIN D. COBURN )  
 )  
Defendants/Appellants )

SUPREME COURT CASE NO.: 2008-0536

On Appeal from the Erie County,  
Ohio Court of Appeals, Sixth  
Appellate District

CASE NO. E-07-049  
E-07-050  
E-07-051

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**DEFENDANTS/APPELLANTS WILLIAM R. COBURN, TODD R. PARKISON AND  
MARVIN D. COBURN'S REPLY BRIEF TO THE MERIT BRIEF OF APPELLEE AND  
THE MERIT BRIEF OF *AMICUS CURIAE* OFFICE OF THE OHIO ATTORNEY  
GENERAL IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

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FILED

SEP 22 2008

CLERK OF COURT  
SUPREME COURT OF OHIO

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## **I. INTRODUCTION**

The State of Ohio is asking this Honorable Court to affirm the decision of the 6<sup>th</sup> District Court of Appeals' which held that an Ohio Wildlife Officer may, without good cause, enter upon private property. The Court of Appeals' Decision must be reversed because this interpretation and application of the relevant statutes to the facts in this case violate the Fourth Amendment to the United States Constitution and Article 1, §14 of the Ohio Constitution.

The Fourth Amendment to the United States Constitution and Article 1, §14 of the Ohio Constitution,<sup>1</sup> provide citizens of the State of Ohio with the security of knowing that, except upon good cause, they are protected from unreasonable searches and seizures. Unquestionably, the State of Ohio has an interest in protecting wildlife within the state. However, the State of Ohio has a greater interest and responsibility in upholding a citizen's fundamental constitutional rights against unlawful searches and seizures.

## **II. STATEMENT OF THE FACTS**

On September 1, 2006, Appellant/Defendant, William Coburn ("Coburn") invited his father Marvin Coburn, ("Marvin") and their friend Catawba Police Officer, Todd Parkison ("Officer Parkison") to hunt mourning doves on Coburn's private land.<sup>2</sup>

Erie County Wildlife Officer Jared R. Abele, #1282 ("Officer Abele") resided in a rented residence adjacent to Coburn's private land. Beginning at 7:35 a.m., Officer Abele observed, in plain view, Coburn, Officer Parkison and Marvin hunting mourning doves on Coburn's land.

On or about October 17, 2006, more that six weeks after confronting the three men

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<sup>1</sup> All constitutional provisions and statutes cited herein can be found in the Appendix to the Merit Brief of Defendants/Appellants William R. Coburn, Marvin D. Coburn and Todd R. Parkison.

<sup>2</sup> All factual references made herein are supported in Volumes I, II and III of the Supplement. Volumes I and II were filed with Defendant/Appellants' Merit Brief and Volume III is being filed contemporaneously herewith.

hunting mourning doves, Coburn, Officer Parkison and Marvin were issued Citations.<sup>3</sup> Subsequently, on or about October 23, 2006, Officer Abele filed Law Enforcement Statements (“Statements”) supplementing each previously issued Citation (collectively referred to as “Charging Documents”).<sup>4</sup>

In the Charging Documents, Officer Abele reported: “I OBSERVED THREE INDIVIDUALS DOVE HUNTING ON WILLIAM COBURN’S PROPERTY...AT APPROXIMATELY 8:30AM, I CONTACTED WILLIAM COBURN AND THE OTHER TWO HUNTERS TO CHECK FOR HUNTING LICENSE AND BAG LIMIT COMPLIANCE.” Officer Abele admitted to exceeding his authority by entering Coburn’s property to check for Coburn’s license compliance.<sup>5</sup> The Charging Documents did not charge Coburn, Marvin or Officer Parkison with hunting without a valid hunting license or for non-compliance with bag limits.

Officer Abele’s Statements are clearly inconsistent with the Citations in that the Citations issued by Officer Abele state that the Citations were issued at 7:38 a.m.; even though the Citations were not served until October 17, 2006. In his Statements, Officer Abele claims he did not approach the hunters until some time after 8:30 a.m. Furthermore, during the previous hour while he was observing the three men hunting, Officer Abele did not observe in plain view the three hunters unlawfully hunting. The Citations for hunting over a baited field could not have been issued prior to the time Officer Abele entered Coburn’s land. Therefore, Officer Abele, at the time he entered Coburn’s property, was without “good cause to believe and [did not] ....

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<sup>3</sup> Citation of William R Coburn, Supplement Volume III, p. 289-290.

<sup>4</sup> The Office of the Attorney General relied upon the Charging Documents in the Merit Brief of the *Amicus Curiae*.

<sup>5</sup> Officer Abele’s Statement is contrary to O.R.C. §1533.10 which provides that an owner of land can hunt on his own property without a hunting license.

believe that a law [was] being violated.” O.R.C. § 1531.13.

### III. LAW AND ARGUMENT

**Proposition of Law: The observation, in plain view, by an Ohio Wildlife Officer of the owner of private land and guests hunting, without an articulable belief that a law is being violated, does not provide the Wildlife Officer, pursuant to O.R.C. § 1531.13, with good cause to enter upon the private land of the owner-hunter to check for hunting licenses and bag limit compliance.**

Both the State of Ohio and the Attorney General rely on *State v. O’Neal* (1996), 114 Ohio App. 3d 335 for the proposition that “[a] motion to dismiss charges in an indictment tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the state or the defendant.” However, this Honorable Court recently decided *State v. Brady* \_\_N.E.2d \_\_, 2008 WL (September 11, 2008) and limited the holding in *O’Neal*, stating:

Because *Brady*’s pretrial motion to dismiss did not require a determination of the general issue for trial, Crim.R. 12(C) allowed the trial court to consider it. Moreover, because Crim.R. 12(F) expressly permits a court to consider briefs, affidavits, the proffer of testimony, and other exhibits, the trial court could properly consider evidence beyond statements.

Crim.R.12 (F) expressly permits a court to consider briefs, affidavits, the proffer of testimony, and *other exhibits*, in considering a Crim.R. 12(C) motion to dismiss. Therefore, Officer Abele’s Statements were properly considered by the trial court even though they were filed on October 23, 2006, six days after the original Citations issued on October 17, 2006, six weeks after the alleged violations occurred, because they supplemented the Citations and thus collectively became part of the Charging Documents.

Therefore, the Charging Documents were properly considered by the trial court. At the very least, the trial court could properly review the factual inconsistencies between Officer

Abele's Statements and the Citations to determine that the charges were insufficient to withstand a motion to dismiss. Thus, the trial court appropriately consider the Charging Documents in granting the motion to dismiss.<sup>6</sup>

Ohio Revised Code ("O.R.C.") §§1531.13, 1531.14, 1533.14 and 1533.10 must be read, interpreted and applied *in pari materia* in order to determine whether an Ohio wildlife officer, who observes hunters hunting on land which is known to the wildlife officer to be owned by one of the hunters, may without good cause, enter upon the landowner's land to check for hunting licenses and compliance with bag limits. The Court of Appeals did not consider O.R.C. §1533.10 in rendering its decision.

**In this case, Abele saw Appellees hunting and then he entered the property to check their licenses and bags. Once he saw people hunting, R.C. §1531.14 gave him the authority to enter the land in pursuit of his duties, one of which is to ensure that people are hunting lawfully. R.C. §1531.13. We disagree with the trial court that R.C. §1531.14 gives wildlife officers "unfettered" access to private property. Nothing on our decision today should be read to say that wildlife officers can enter private property at any time for any reason.**

(Emphasis added). February 1, 2008 Decision and Judgment Entry of the Court of Appeals, Supplement, P. 27.

O.R.C. §1533.10 is clear that "...an owner of land may hunt on his land without a license."

Nevertheless, the Court of Appeals acknowledged that Officer Abele, "saw Appellees hunting and then he entered the property to check **their** licenses and bags." Therefore, Officer Abele entered Coburn's property to check for (Coburn's) hunting license and bag limit

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<sup>6</sup> The motion to dismiss was not filed until December 1, 2006, several weeks after the Charging Documents were filed.

compliance. Officer Abele knew from his one hour observation that he had no basis to believe that a law was being violated.

O.R.C. §1531.13 provides, in relevant part:

Any regularly employed salaried wildlife officer may enter any private lands or waters if the wildlife officer has *good cause* to believe and does believe that a law is being violated.

O.R.C. §1531.14 provides:

Any person regularly employed by the division of wildlife . . . while in the normal, *lawful*, and peaceful pursuit of such investigation, work, or enforcement may enter upon, cross over, be upon, and remain upon privately owned lands for such purposes and shall not be subject to arrest for trespass while so engaged or for such cause thereafter. (Emphasis added.)

O.R.C. §1533.14 states, in relevant part:

Every person, while hunting or trapping on the lands of *another*, shall carry the person's hunting license on the person's own self and exhibit it to any wildlife officer, constable, sheriff, deputy sheriff, or police officer, or *to the owner or person in lawful control* of the land upon which the person is hunting or trapping, or to any other person. Failure to so carry or exhibit such a license constitutes an offense under this section. This chapter and Chapter 1531 of the Revised Code do not allow any person to hunt or trap on any land without the written consent of the owner thereof. (Emphasis added.)

When these four statutes are read, interpreted and applied *in pari materia*, and are construed with the necessary consideration for the three hunters constitutional protections, only one interpretation makes sense, and that is that for a wildlife officer to *lawfully* enter onto a landowner's land upon which landowner is hunting with others, the wildlife officer must have *good cause* to enter upon that land. Legal authority or good cause to enter the lands of another dictates that the officer must articulate facts and circumstances that give rise to a *reasonable suspicion* that a person engaged is in illegal activity. *State v. Crosby*, 72 Ohio App.3d 148

(1991). Quite simply, in this case, no such circumstances were articulated by Officer Abele because no such circumstances existed. Officer Abele observed, in plain view, three men hunting – Coburn, Marvin and Officer Parkison – on property Officer Abele knew was owned by Coburn. There is no indication that Officer Abele had “good cause to believe and did believe” that a law was being violated. Thus, because Officer Abele was unable to articulate a reasonable belief that the hunters were violating the law, he was without good cause to lawfully enter Coburn’s land. Therefore Officer Abele acted without legal authority to issue the Charging Documents. *State v. Crosby*, 72 Ohio App.3d at 152-153.

The State and the Attorney General *Amicus Curiae* argue that the father and guest of a landowner cannot hunt without a license on the landowner’s property. This is a red herring! Neither Marvin nor Officer Parkison were cited for hunting without a license. Officer Abele observed Marvin and Officer Parkison in plain view for over an hour and did not cite either of them for hunting on the land of another in violation of O.R.C. §1533.14, without displaying a valid hunting license or for engaging in over-limit bagging. Furthermore, Officer Abele did not know whether, in accordance with O.R.C. §1533.14, Coburn had checked and was aware that Marvin and Officer Parkison had valid hunting licenses. The only conclusion to be drawn from this set of circumstances is that they were legally hunting on Coburn’s property and Officer Abele used this purported violation as a pretense to unlawfully enter Coburn’s property.

Nothing in the Charging Documents indicates that Officer Abele believed that the law was being violated. Furthermore, Officer Abele had no reason to believe that any of the three hunters were engaged in unlawful hunting in the open fields, away from the curtilage of Coburn’s home. The “open fields” doctrine, as outlined in the cases cited by the Attorney General, are distinguishable from the instant case.

The cases relied upon by the State of Ohio require a finding of good cause or a reasonable suspicion that illegal activity is occurring before a wildlife officer can lawfully enter privately owned property. Good cause may be the open and obvious violation of state hunting laws as found in *State v. Rohr* (1988) 53 Ohio App.3d 132, *infra*, or the obvious failure to exhibit hunting licenses. Neither of these open and obvious violations is present in the instant case. Consequently, this Honorable Court should conclude that Officer Abele did not have good cause to enter Coburn's land and the Court of Appeals decision should be reversed.

In *State v. Rohr* (1988) 53 Ohio App.3d 132, **the investigating officer approached a parked vehicle and observed, in plain view, two shotgun barrels sticking up in the air.** He further observed that one of the occupants of the vehicle was not displaying his hunting license and could not produce a valid hunting license upon request. Because there was an open and obvious violation of state law, there was no need to find good cause for a search.

In *Commonwealth v. Russo* (Pa. 2007), 934 A.2d 1199, wildlife officers **investigated a "tip" that defendant was illegally baiting** in violation of the laws of the Commonwealth of Pennsylvania. Wildlife officers investigated the allegation that the defendant was illegally baiting and hunting bear and determined that he illegally baited his hunting grounds and killed a bear.

Likewise, in *State v. Hoagland* (Minn. 1978), 270 N.W. 778, **a wildlife officer heard a shot and observed events that led him to conclude that illegal night hunting had taken place.** The wildlife officer immediately entered the property where he believed the illegal hunting had occurred and questioned a hunter about the suspicious activity. The wildlife officer had good cause to enter the property and investigate the illegal activity he had observed.

In *State v. Boyer* (Mont. 2002), 42 P.3d 771, **a wildlife officer observed what appeared to be an unoccupied boat anchored in a river.** The officer, concerned for the safety of those

on board, steered his boat towards the anchored vessel and was greeted by the defendant who claimed to have just awakened from a nap and got up off the floor of the boat. Ultimately, the wildlife officer found that the fisherman had caught fish in amounts in excess of the legal possession limit. The officer confiscated the illegally caught fish and the fisherman was charged with possession of unlawfully killed game fish.

The State of Ohio relies on several other cases which are factually distinguishable from the instant matter. In *State v. Agthorp*, 1983 WL 6237 (Ohio App. 11 Dist.), the **defendant voluntarily permitted wildlife officers to inspect the tag** on the deer he was transporting, after he was stopped on a public road a short distance away from the land where he was hunting.

In *State v. Davis*, 2004 WL 958051 (Ohio App. 5 Dist.), 2004-Ohio-2255, the court held that a plain view exception to the warrant requirement applied where **the wildlife officer observed a firearm with a closed action in defendant's vehicle**, and the illegality of the firearm was openly observed by the wildlife officer.

In *State v. Lucas*, 1984 WL 3535, (Ohio App. 4 Dist.), **wildlife officers were investigating a complaint of the pollution** of a stream running across a citizen's private property. The investigation led the wildlife officers to the property of the defendant, who the wildlife officers determined had caused the pollution. The court determined that it would be highly impractical and unduly burdensome to require a warrant for the investigation of every piece of property through which the stream flowed. The court, construing O.R.C. §1531.14 and O.R.C. §1531.13 *in pari materia*, concluded:

Under R.C. §1531.03, ***where he believes a law is being violated*** he may enter lands and, vested with the authority of law enforcement officers, make an arrest. Under the first statute [O.R.C. §1531.14] the wildlife officer is merely authorized to enter lands in order to do his job without being a trespasser, ***but once he has cause to believe a crime is being committed*** his entry is as a law

enforcement officer.  
(Emphasis provided.)

None of these cases are factually similar to the instant matter. Here, there was no prior investigation and no "tip" that illegal activity was occurring. There was only Officer Abele observing in plain view for one hour, Coburn, Marvin and Parkison legally hunting on Coburn's land. The three hunters were hunting within the permitted hours and there was no suspicious sound, unidentified shot or over-limit bagging that led Officer Abele to conclude that the hunters were illegally hunting. There were no immediate safety concerns which would require a wildlife officer's safety and well-being check.

Furthermore, there was no indication that Coburn, Marvin and/or Parkison had concealed or openly held illegal weapons on their persons or in their vehicle. Officer Abele knew, because he had observed in plain view the hunters for an hour, that the hunters were properly licensed and had not exceeded the bag limits. This pretense was intended to circumvent the requirement that he have good cause to enter land upon which he had no lawful authority to enter. Finally, Officer Abele made no statement that he believed a law was being violated, nor did he express that he had cause to believe the law was being violated. Without the requisite good cause, Officer Abele could not have been "authorized to enter the lands" owned by Coburn.

#### **IV. CONCLUSION**

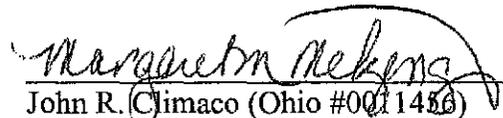
When O.R.C. §1531.14, §1531.13, §1533.14 and §1533.10 are read and interpreted *in pari materia*, it is clear that the Ohio legislature did not intend for wildlife officers, without good cause, to have lawful authority to enter private land. The mere observation of Coburn, Marvin and Parkison, one of whom was known to Officer Abele to own the private land upon which the three hunters were hunting, in the absence of other articulable facts indicating a belief that a law was being violated, did not provide Officer Abele with good cause to enter upon Coburn's

private land to check for hunting licenses and compliance with bag limits. This is especially true in light of the fact that Officer Abele observed the hunters for one hour prior to entering Coburn's land and nothing in the Charging Documents indicates that he witnessed the law being violated.

The laws of the State of Ohio should not be construed to vest wildlife officers with authority that violates constitutional protections. This Honorable Court should reverse the decision of the Court of Appeals and affirm the decision of the Trial Court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the Reply to Merit Brief of Appellee and Merit Brief of *Amicus Curiae* of the Attorney General was served upon the following this 22<sup>nd</sup> day of September, 2008, by regular U.S. Mail.

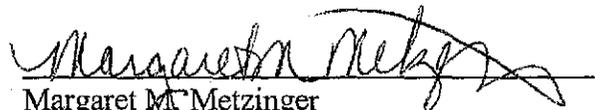
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**INDEX**

**CITATION ISSUED TO WILLIAM R. COBURN ..... P289**

Summons and complaint  
 Minor misdemeanor citation

332440

ERIE  
MILLAN  
(City/Township) (Name of County)  
ERIE County, Ohio

THE STATE OF OHIO  
WILDLIFE  
(Division)  
WILLIAM RY COBURN  
(Name of Defendant)  
1157 MARTIN HUNT RD  
(Street Address)  
MAYFIELD OH 44824  
(City, State, Zip Code)

CASE NO. \_\_\_\_\_  
DOC. \_\_\_\_\_ PAGE \_\_\_\_\_  
D.O.B. 11/02/1963 AGE \_\_\_\_\_  
SEX M WT 150 HT 510  
HAIR BRN EYES BLU  
S.S.N. 273-74-5097

Employed by \_\_\_\_\_  
Phone No. \_\_\_\_\_

SUMMONS

You are ordered to appear at 8:30 (a.m.) on 30 OCT 2006  
in the ERIE (County) (Municipal) Court  
located at 150 W. MASON RD MILLAN OH 44824  
(Street) (City)

Ohio. If you fail to appear at this time and a warrant may be issued for your arrest.  
This summons served personally on the defendant on 10/17 2006

COMPLAINT

On or about SEPT. 1, 2006 at 7:36 (a.m.) (p.m.)  
in MARGARETTA City/Township, ERIE County, Ohio

you did unlawfully HUNT ANTI-AERIALS ON  
OFFSHORE WIND TURBINES IN  
OR OVER A DUTY-FREE AREA.

In violation of Section 1531.02 and/or 1501.21-1501.29  
(P.R.C.)  
#1002 (Signature of Issuing/Charging Officer)

Being duly sworn the issuing/charging law enforcement officer states that he (she)  
has read the above complaint and that it is true

(Issuing/Charging Officer)

Sworn to and subscribed before me by \_\_\_\_\_  
on \_\_\_\_\_ 20 \_\_\_\_\_

Judge/Clerk/Deputy Clerk

County/Municipal Court

Notary Public

My Commission Expires \_\_\_\_\_ 20 \_\_\_\_\_

County/State of Ohio

NOTICE TO DEFENDANT: The officer is not required to swear to the complaint upon  
your copy of the summons and complaint. He (She) swears to the complaint on the  
copy he (she) files with the court. You may obtain a copy of the sworn complaint  
before hearing time. You will be given a copy of the sworn complaint before or at the  
hearing. For information regarding your duty to appear call

(419) 499-4689  
(Defendant's Signature)

#

Chris  
Sent around }

**TO DEFENDANT: READ THIS MATERIAL CAREFULLY.**

**PERSONAL APPEARANCE REQUIRED.** If the officer marked this block, you must appear in court.

**BAIL AND SECURITY:** The posting of bail or the depositing of security is to secure your appearance or the processing of the offense through the Clerk of Court. It is not a payment of fine and costs.

**OFFENSES THAT MAY NOT BE WAIVED**

The following offenses require court appearance and may not be processed by the Clerk of Court.

Any felony or indictable offense; Operating a motor vehicle under the influence of alcohol or any drug or abuse; Leaving scene of accident; Driving while under suspension or revocation of driver's license; Driving without being licensed to drive; A second moving traffic offense within 12 months; Passing a standing school bus; Willfully eluding or fleeing a police officer; Drag racing.

**DISPOSITION BY CLERK OF COURT:** If you are charged with an offense other than those listed above, you may, within seven days after the day you receive the ticket, plead guilty to the offense charged and dispose of the case without court appearance by:

- (1) appearing personally at the office of the Clerk of Court, signing the waiver printed below and paying the fine and costs; or
- (2) signing the waiver printed below and mailing it and a check or money order for the total of the fine and costs to the Clerk of Court.

**MAKE CHECK OR MONEY ORDER PAYABLE TO:** \_\_\_\_\_

**INFORMATION:** For information regarding your duty to appear or the amount of fine and costs, or the location of the Clerk of Court, call \_\_\_\_\_

**CONTESTED CASE: COURT APPEARANCE REQUIRED.** If you desire to contest the charge or if court appearance is required, you must appear at the time and place stated in the summons.

**NOTICE TO DEFENDANT UNDER EIGHTEEN YEARS OF AGE:** You must appear before the Juvenile Court at the time and place determined by that Court. The Juvenile Court will notify you when and where to appear. This ticket will be filed with the Juvenile Court and may be used as a juvenile complaint. For information regarding your duty to appear at Juvenile Court call \_\_\_\_\_

\_\_\_\_\_ (in telephone numbers)  
Address of Juvenile Court: \_\_\_\_\_

**GUILTY PLEA, WAIVER OF TRIAL, PAYMENT OF FINE AND COSTS**

I, the undersigned defendant, do hereby enter my written plea of guilty to the offense charged in this citation. I realize that by signing this guilty plea I admit my guilt of the offense charged and waive my right to contest the offense in a trial before the court or jury.

FINE \$ 150.00 \_\_\_\_\_ (Signature of Defendant)

COSTS \$ 70.00 \_\_\_\_\_ (Address)

TOTAL \$ 220.00 \_\_\_\_\_

Guilty plea, waiver and payment made in person or by mail. Receipt given to defendant personally or mailed by ordinary mail to defendant's above address on \_\_\_\_\_ (Date)

RECEIPT NO. \_\_\_\_\_ (Signature and Title of Person Taking Guilty Plea, Waiver, and Payment)