

IN THE SUPREME COURT OF OHIO

State of Ohio

Plaintiff-Appellant,

vs.

Darnell Jones

Defendant-Appellee.

Case No. **09-0364**

On Appeal from the  
Montgomery County Court  
of Appeals, Second  
Appellate District

Court of Appeals  
Case No. 22558

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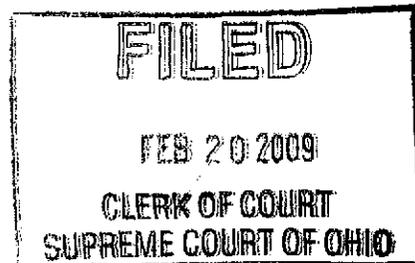
MEMORANDUM IN SUPPORT OF JURISDICITON  
OF APPELLANT, THE STATE OF OHIO

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### Why Leave To Appeal Should Be Granted

The Second District Court of Appeals agreed with the State that Darnell Jones had no standing to complain about the warrantless search of Room 130 at the Royal Motel because he had no expectation of privacy in the room itself. But the Court also found that his lack of standing to complain about the search of the room did not mean that he had no expectation of privacy in the property he had placed in the room. So, although he could not complain about the warrantless search of a room he had clearly abandoned, he could, according to the Court, challenge the search of the grocery-bag of drugs he had stashed between the bed and the dresser. The Court of Appeals has created a privacy interest in property placed in a space – a room, a garage, a house – in which the person has no expectation of privacy.

Under this decision, a defendant who has concealed a bag containing evidence of a murder in an abandoned warehouse may claim, when the bag is found in a warrantless search of the building, an expectation of privacy in the bag, even if he has no standing to challenge the search of the warehouse itself. This misapplication of the Fourth Amendment will impair the prosecution of guilty defendants by depriving a fact-finder of probative evidence of guilt.

In addition, this case also presents a question of great and public interest in preserving the finality of judgments and the duty to put parties on notice of the issues challenged on appeal. When the court of appeals suppressed the evidence in this case, it did so by addressing a purported error which had been raised neither at trial nor on appeal. In doing so, the court of appeals not only misapplied the application of the Fourth Amendment and the Exclusionary Rule, but deprived the State of the opportunity to respond to any charge of error. Such sua sponte action on the part of reviewing courts threatens both the appellate process and the reliability of final judgments.

### **Statement Of The Case**

This is an appeal by the State of Ohio from a decision reversing the trial court's denial of Jones' motion to suppress evidence. The trial court found that Jones did not have standing to challenge the search of a motel room that he had no privacy interests in. The Court of Appeals reversed; while it agreed that Jones had no expectation of privacy in the motel room, it held that he did have standing to challenge the warrantless search of the bag he had left there, an issue not raised in the trial court or on appeal.

### **Statement Of Facts**

On January 18, 2007, at approximately 3:00 a.m., Darnell Jones and Terry Taylor went to the Royal Motel with a female Taylor picked up for them for sexual relations. The room was registered to Taylor, but Jones paid for it and obtained a key. Check out time was at noon.

At about 11:00 a.m. the next morning, police stopped Taylor, who had just parked in front of Room 130, for failing to signal his turn into the motel lot. Taylor, it turned out, did not have a valid driver's license, and the officers arrested him. At about the same time, Jones walked out of Room 130, carrying a multi-colored plastic shopping bag. The officer asked Jones if he had a driver's license because they wanted someone to take possession of Taylor's vehicle. Jones told them he didn't but said the woman they were with did. Jones went back into Room 130 and came out a few moments later with the unidentified woman. He no longer had the shopping bag.

The woman had an active *capias* and was arrested. Jones claimed to have only a fake ID, and the social security number he gave came back to a man at least two inches shorter than he was. Because Jones gave the police false information and admitted to possessing fraudulent identification, the officers pursued the investigation to identify him. At that point, the officers

entered the room to look for something that would reveal Jones' identity and, since Jones' had no privacy interests in the room, to look in the bag he had left there. The bag, stuffed between the dresser and the bed, contained drugs and paraphernalia.

### Argument

- I. The Fourth Amendment does not protect a privacy interest in property a person leaves in a place in which that person has abandoned.

The Court of Appeals held that Jones had an actual expectation of privacy in a shopping bag he had left in a room, even though he had no expectation of privacy in the room itself. The Court based its holding on a distinction between private spaces and public view. But this holding that one can retain a privacy interest in property left in a room in which that person has no privacy interest makes no sense.

It is rudimentary that one does not have standing to object to a search and seizure of property that he has voluntarily abandoned. *Abel v. United States* (1960), 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (search of hotel room by FBI agents without a warrant after defendant had relinquished his room and seizure of abandoned articles held permissible); *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044, paragraph two of the syllabus and cases cited therein. "The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. *Katz v. United States* (1967), 389 U.S. 347, 83 S.Ct. 507." *Freeman*, supra, at 297, quoting *United States v. Colbert* (C.A.5, 1973), 474 F.2d 174, 176.

The Court, however, found that the item was not abandoned merely because it was not left in public. This does not make sense, and the Court does not explain its rationale. Once a

person forfeits and relinquishes his privacy interests in a place, that person also forfeits his privacy interests in everything contained in or left at that place. Cf. *Freeman*, supra at 296-297; *State v. Kramer*, 3<sup>rd</sup> Dist. No. 11-80-26; *U.S. v. Davis* (1988), 849 F.2d 1474. In other words, a defendant who leaves an item in an abandoned non-public place has no more privacy interests in the place or contents therein than if he left the item in public view. This makes sense. And this is why Jones only challenged the search of the room and not the bag at both the trial court and appellate court levels. Importantly, both the trial court and the appellate court agreed that Jones did not have an expectation of privacy in the motel room to challenge a search of the room. The analysis should have stopped there: the Court had no business going any further.

Simply, a person should not benefit by hiding evidence of a crime in an abandoned place – a motel room or an abandoned building - and then claim the protections of the Fourth Amendment. It is not reasonable for society to recognize such an interest. The Court of Appeals failed to apply these well-established principles. Therefore, the appellate court's decision must be reversed to prevent any further misapplication of the principles of the Fourth Amendment in Ohio.

- II. Where an issue is raised neither at trial nor on appeal, the sua sponte raising of such error by an appellate court deprives the parties of notice and an opportunity to respond to the challenged error.

The Court of Appeals' sua sponte recognition of the purported error wholly deprived the State of the opportunity to defend the admissibility of the evidence. App.R. 12(A) provides that appellate courts must determine an appeal on its merits based on the assignments of error presented for review, and it confers upon the courts discretion to review assignments not presented in conformity with App.R. 16. App.R. 12(A)(1)(b) and (2). In any event, the plain language of the rule provides that a court of appeals may only consider errors actually presented.

Nonetheless, this Court's prior case law has found appellate courts do have discretion to review errors neither raised nor briefed on appeal, but, just as in reviewing matters actually presented but not brought to the attention of the trial court, the discretion should be exercised cautiously and only to prevent a manifest miscarriage of justice. *State v. 1981 Dodge Ram* (1988), 36 Ohio St.3d 168, 169-170, 171, 522 N.E.2d 524. Thus, whether an error was not brought to the attention of the trial court and then presented for review on appeal, or whether the error was neither presented to the trial court nor to the appellate court, a reviewing court should only notice an error if it is obvious and outcome determinative. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus; *Dodge Ram Van*, supra, at 171.

In *State v. Peagler*, 76 Ohio St.3d 496, 501, 1996-Ohio-73, this Court held that an appellate court may decide an issue on grounds different from those determined by the trial court, so long as the evidentiary basis on which the appellate court decides a legal issue was adduced before the trial court and made a part of the record thereof. The record in this case does not satisfy the standard required by *Peagler*. Furthermore, the sua sponte raising of an error which has been neither raised at the trial level nor on appeal defies the definition of plain, or "obvious," error. The growing trend of addressing issues, raised neither at the trial court nor appellate levels, threatens both the appellate process and the public's ability to rely on the finality of criminal convictions.

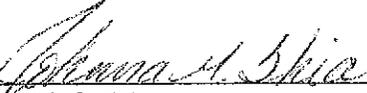
In this case, the purported "error" was neither error, nor addressed by either party. This case presents the perfect opportunity for this Court to address the practice of reviewing courts in sua sponte raising and finding error.

**CONCLUSION**

For all of the reasons discussed herein, the State respectfully asks this Court to accept jurisdiction in this matter.

Respectfully submitted,

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IN THE COURT OF APPEALS OF OHIO  
 SECOND APPELLATE DISTRICT  
 MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22558
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CR-0211
v.	:	
	:	(Criminal Appeal from
DARNELL JONES	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

.....  
OPINION

Rendered on the 9<sup>th</sup> day of January, 2009.  
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 FAIN, J.

Defendant-appellant Darnell Jones appeals from his conviction and sentence, following a no-contest plea, upon one count of possession of cocaine in an amount

exceeding 100 grams, but not exceeding 500 grams. Jones contends that the trial court erred in overruling his motion to suppress evidence based upon an alleged unlawful search and seizure.

The parties' arguments mainly center around the propriety of a police officer's having entered a motel room without probable cause, and without a search warrant, but Jones also argued at trial, and on appeal, that a police officer's search of a shopping bag that he initially carried out of the motel room, but left in the motel room after having gone back inside to bring out another person to whom the police wished to speak, was unlawful. We agree with the State that Jones disclaimed any privacy interest he may otherwise have had in the motel room when he told the police officers that it was not his room, but we agree with Jones that he had not abandoned his privacy interest in the bag, and that the officer's having opened it without probable cause and without a search warrant, was unlawful. All of the evidence against Jones was obtained from the bag, not from elsewhere in the motel room. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I

The chain of events germane to this appeal began when Dayton police officers Scott Florea and Officer Olmsted<sup>1</sup> pulled alongside a car being driven by Terry Taylor, a friend of Jones. Taylor made an abrupt right turn into the parking lot of the Royal Motel, without signaling.

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<sup>1</sup>Olmsted, who did not testify, was identified by Florea, who did testify, simply as "Officer Olmsted."

Florea and Olmsted decided to cite Taylor for the traffic violation. They had to turn around and come back to the motel. They pulled up behind the car being driven by Taylor, who was still inside, thereby effecting a stop. During the course of establishing Taylor's identity for the purpose of citing him, the officers discovered that Taylor, by his own admission, had no driver's license. Taylor was removed from the car. It was at this moment that Jones entered the scene.

Florea testified that:

"I saw the Defendant walk out of Room 130 carrying a orange, like a multi-colored plastic – I believe it was Aldi shopping bag that was kind of rolled up and he was holding it in his hands.

\*\*\*

"He was shocked, a look of shock on his face. It was his eyes opened up real wide like he wasn't expecting us to be sitting there. So, he looked like a deer in the headlights."

Florea, who testified that he wanted to see who they could release the car to, asked Jones if Jones had a driver's license. Florea testified that Jones responded: " \*\*\* he said, no, but my girl does and immediately turned around and walked back into the room." "A few seconds later," Jones came out of the room with a female, but Jones no longer had the Aldi shopping bag with him.

When Florea checked on the female's license status, he determined that there was an active capias warrant for her arrest. She was then put in the back of the cruiser, along with Taylor.

Olmsted then asked Jones if he had any identification. According to Florea, Jones "said that he had a fake ID that he used to get in clubs." Jones was asked to whom the car

belonged. Jones "said it was his girl's car," which Florea ultimately determined to be a reference not to the female who had been in the room with Jones and Taylor, but to Jones's girlfriend.

Meanwhile, efforts to verify Jones's identity were less than completely successful. Jones gave the officers his social security number, but it returned a description that included a height of 5' 11". Florea said that Jones was as tall as Florea, and that Florea is 6' 1", so Florea was not satisfied as to Jones's identity.

Likewise, efforts to discover who had rented the room were not successful. The female said she didn't know. Jones "said that it was not his room." Florea was not sure whether Taylor was ever asked about the renting of the room.

Florea decided to enter the motel room, the door to which had not closed completely, "because I didn't believe who he [Jones] was." Interestingly, in arguing the motion at the close of the hearing, the prosecutor argued for the State that: "When the officers went back into the room, they had a two-fold purpose clearly; one is looking for ID to determine who this individual, and the other was to determine what was inside their Aldi's bag that drew their attention."

Florea testified concerning his entry into the motel room as follows:

"Q. Okay. What happens next?

"A. At that point, we were asking who the room belonged to. We were talking to everybody about who was in possession of the room. The girl stated she did not know whose room it was. The Defendant said that it was not his room. He was coming from that room. And I remember specifically telling Officer Olmsted that he was carrying a bag –

"Q. Okay.

"A. – when he first came out, and he wasn't carrying a bag when he came out the second time.

"MR. BURSEY [representing Jones]: Objection; non-responsive. Move to strike the last statements.

"MR. BARRENTINE [representing the State]: The question was what happens next. So, that seems to be pretty responsive.

"THE COURT: Yeah. Overruled. Thank you.

"THE WITNESS: At that point, the door to the room was not closed completely. We then attempted to obtain any kind of identification for the individual, and we went inside the hotel room to check for it.

"Q. Okay. Where did you look for any sort of identification, physically inside?

"A. Well, I specifically wanted to – I mean, the bag he was carrying might have his ID in there. So, I was looking for the bag he was carrying when he came out of the room, and I found it. It was stuffed between the mattress and the night stand. I guess if you were facing the bed, it would be on the right side.

"Q. Okay. What happens next?

"A. I opened the bag and looked inside, and I saw a measuring cup that was full of a white rock-like substance, suspected to be crack cocaine. At that point, I also saw what appeared to be a compressed brick in the bottom of the bag as well. It appeared to be a brick of powdered cocaine. And I saw one or two scales inside the bag as well just from looking from the top down.

"Q. Was there any ID in that bag?

"A. No."

Jones was arrested and charged by indictment with one count of Possession of Cocaine in an amount exceeding 100 grams, but not exceeding 500 grams; one count of Possession of Crack Cocaine in an amount exceeding five grams, but not exceeding ten grams; and three counts of Possession of Criminal Tools. Jones moved to suppress the evidence obtained from the motel room, contending that it was obtained as the result of an unlawful search and seizure. Although Jones's original motion did not refer specifically to the search of the bag as being unlawful, in his post-hearing memorandum in support of his motion to suppress, Jones did argue specifically that he had an expectation of privacy in the bag, as well as in the motel room, generally.

At the conclusion of the suppression hearing, the trial court did not immediately rule upon the motion, but requested briefs by the parties. On July 18, 2007, the trial court overruled the motion "[a]s reported and in accordance with the decision stated in open Court on Monday, July 9, 2007," the suppression hearing having taken place on June 11, 2007. Unfortunately, we do not have a transcript of the proceeding on July 9, 2007, in which the trial court apparently expressed its reason for overruling the motion to suppress, so we do not have the benefit of the trial court's reasoning in resolving this appeal.

After Jones's motion to suppress was overruled, he entered into a plea bargain wherein he pled no contest to one count of Possession of Cocaine in an amount exceeding 100 grams, but not exceeding 500 grams, and the other counts were dismissed. The trial court entered a judgment of conviction, and Jones was sentenced accordingly. From his conviction and sentence, Jones appeals.

II

Jones's sole assignment of error is as follows:

"WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

The primary focus of Jones's argument is that the police lacked probable cause to search the motel room, although he does also argue as a separate issue whether the police could properly search the Aldi shopping bag. The State's appellate brief is addressed exclusively to the motel room, and does not discuss the shopping bag.

The State's argument concerning the search of the motel room is that Jones lacks standing to complain about the search, since he abandoned any privacy interest he might otherwise have had in the motel room when he left it, with the door not fully closed, and told the officers it was not his. Taylor testified that Jones provided the money for the room, but that it was registered in Taylor's name because Taylor had identification. Taylor testified that their purpose in renting the room was to have consensual sex with the female, which Taylor testified was not the subject of a commercial transaction.

We agree with the State that upon this record, Jones has failed to establish that he had a sufficient privacy interest in the motel room to have standing to complain about the search of the room. But that does not resolve the separate issue of the search of the Aldi shopping bag.

Florea clearly believed that Jones had a possessory interest, at least, in the Aldi bag and its contents. He claimed he wanted to look in the bag to see if he could find any identification for Jones.

*California v. Acevedo* (1991), 500 U.S. 565, 579-580, 111 S.Ct. 1982, 114 L.Ed.2d 619, stands for the proposition that even the search of a brown paper bag has Fourth Amendment protection if the bag is opened by the police. Florea never claimed to have been able to see, or otherwise to ascertain the nature of, the contents of the Aldi shopping bag before opening it. The Aldi shopping bag appears to have been an opaque plastic bag. We presume that the opening of the Aldi shopping bag, like the opening of the brown paper bag in *California v. Acevedo*, supra, while not requiring the use of a lockpick, a hacksaw, or an explosive device, did require some manipulation of the bag to gain access to its contents.

In its trial memorandum in opposition to the motion to suppress, the State cited *State v. Freeman* (1980), 64 Ohio St.2d 291, in which a defendant was deemed to have abandoned luggage he was carrying when the defendant, upon being apprehended by police, dropped the luggage in a public bus station and ran from the police. In that case, the Supreme Court of Ohio cited *United States v. Colbert* (5<sup>th</sup> Cir., 1973), 474 F.2d 174, 176, for the proposition that:

" 'Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts. *United States v. Cowan*, 2d Cir. 1968, 396 F. 2d 83, 87. All relevant circumstances existing at the time of the alleged abandonment should be considered. *United States v. Manning*, 5<sup>th</sup> Cir. 1971, 440 F. 2d 1105, 1111. \* \* \*. The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. *United*

*States v. Edwards* [(5<sup>th</sup> Cir., 1971), 441 F. 2d 749] at 753; cf. *Katz v. United States*, 1967, 389 U.S. 347 \* \* \* .”

Although Jones may have disclaimed any reasonable expectation of privacy in the motel room by denying it was his and by leaving the room with the door not fully closed, the motel room was not a public place of the same character as the bus station in *State v. Freeman*, supra. Jones clearly had access to the room, and there is nothing in the record to suggest that, when he left the bag behind in the room to escort the female out of the room to respond to the police, he had reason to believe that he would be taken into custody or otherwise prevented from re-entering the room where he had left the bag. Under these circumstances, we conclude that Jones cannot be deemed to have abandoned the bag. Understandably, he did not want it on his person when he went back outside the room where the police were present.

Florea never claimed to have had, and the State does not claim that he had, probable cause to believe that the Aldi shopping bag contained contraband or evidence of criminal activity. Therefore, his search of the bag was unlawful, and the evidence obtained as a result should have been suppressed.

Jones's sole assignment of error is sustained.

III

Jones's sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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BROGAN and WOLFF, JJ., concur.

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Hon. A. J. Wagner

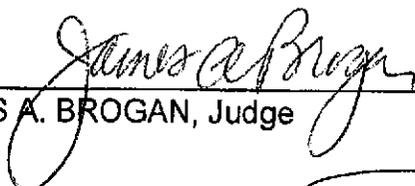
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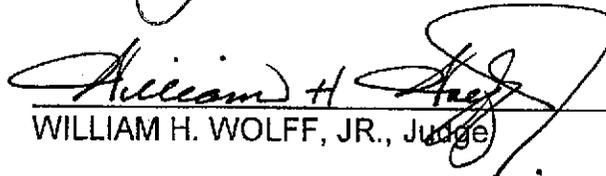
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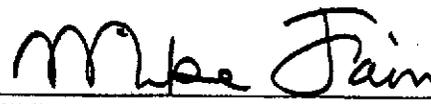
STATE OF OHIO	:	Appellate Case No. 22558
	:	
Plaintiff-Appellee	:	Trial Court Case No. 07-CR-0211
	:	
v.	:	(Criminal Appeal from
	:	Common Pleas Court)
DARNELL JONES	:	
	:	<b>FINAL ENTRY</b>
Defendant-Appellant	:	

Pursuant to the opinion of this court rendered on the 9th day  
 of January, 2009, the judgment of the trial court is **Reversed**, and this cause  
 is **Remanded** for further proceedings consistent with the opinion.

Costs to be paid as stated in App.R. 24.

  
 \_\_\_\_\_  
 JAMES A. BROGAN, Judge

  
 \_\_\_\_\_  
 WILLIAM H. WOLFF, JR., Judge

  
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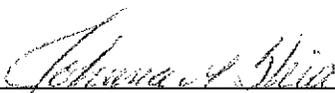
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support was sent by first class mail on this 19<sup>th</sup> day of February, 2009, to the following: Lucas Wilder, Counsel of Record, 120 West Second Street, Suite 400, Dayton, Ohio 45402 and Timothy Young, Ohio Public Defender Commission, 8 East Long Street – 11<sup>th</sup> Floor, Columbus, Ohio 43215-2998.

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