

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

-vs-

DARNELL JONES

Defendant-Appellee.

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CASE NO. 2009-0364

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APPELLEE DARNELL JONES' BRIEF ON THE MERITS

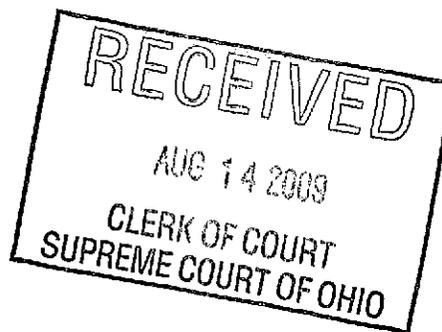
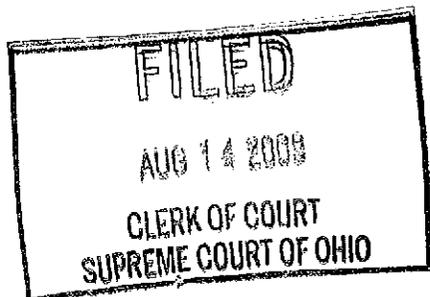
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## STATEMENT OF FACTS

Between 2:00 a.m. and 3:00 a.m. on January 18, 2007, Appellee Darnell Jones (hereinafter "Jones") and his friend, Terry Taylor, accompanied a woman to a local motel. *Tr.*, pp. 35, 40-41, 48. Jones provided money for the room and obtained a key to the room, but the room was registered to his friend because Jones had no valid identification. *Tr.*, pp. 37, 40, 45-46, 51, 52.

The next morning at approximately 11:00 a.m., an officer observed Taylor's vehicle enter the motel parking lot without using his turn signal. *Tr.*, pp. 6, 41. Taylor parked his car in front of the motel room. *Tr.*, pp. 6, 37. Check-out time was 12:00 p.m. and Taylor was returning to pick up Jones. *Tr.*, p. 52.

Officers Florea and Olmsted decided to cite Taylor for the traffic violation. In doing so, they had to turn around and come back to the motel. They pulled up behind Taylor's car 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 Appellee Jones entered the scene.

Officer Florea testified he "...saw [Jones] walk out of Room 130 carrying an 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." Florea, who testified that he wanted to see who they could release the car to, asked Jones if he 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 he 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.

Officer 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 then asked to whom the car belonged. He responded and "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 be his (Jones') girlfriend.

The officers questioned Jones about the hotel room. 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. [Jones] 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.

\* \* \*

"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."

The officer entered the motel room without a warrant. *Tr.*, p. 13. He found the bag that Jones had been carrying stuffed in between a mattress and a nightstand. *Tr.*, p. 14.

## ARGUMENT

### Response to Proposition of Law No. 1.

**The officer's search of Jones' plastic bag was in violation of Jones' constitutional rights.**

The 4<sup>th</sup> Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The protections of the Fourth Amendment apply to searches of articles and places which, by their nature and condition, demonstrate that the public has a justifiable expectation of privacy in them and their contents.

A criminal defendant is not required to have an ownership or possessory interest in premises in order to have standing to complain of a Fourth Amendment violation with respect to a law enforcement officer's entry into those premises; a defendant is only required to have a reasonable expectation of privacy in those premises. *Minnesota v. Olson* (1990), 495 U.S. 91, 95.

Receptacles that are closed and have been secured against intrusion demonstrate that expectation. *United States v. Chadwick* (1977), 433 U.S. 1. Typical examples are: foot lockers, *Chadwick, supra*; suitcases, *Florida v. Royer* (1983), 560 U.S. 491, purses, *Rawlings v. Kentucky* (1980), 448 U.S. 98; duffel bags, *Frazier v. Cupp* (1969), 394 U.S. 731; letters, *United states v. Van Leeuwen* (1970), 397 U.S. 249; and boxes of all types. Even brown paper bags, *California v. Acevedo* (1991), 500 U.S. 565, and cigarette packages, *United States v. Robinson* (1973), 414 U.S. 218, qualify. And, at least one federal court has expanded protection to a plastic bag. See *United States v. Most*, 876 F.2d 191, 197-98 (D.C. Cir. 1989) (finding reasonable expectation of privacy in

*contents of plastic bag left with grocery store clerk).*

In California v. Acevedo (1991), *supra*, the United States Supreme Court ruled that even the search of a brown paper bag has Fourth Amendment protection if the bag is opened by the police. In this case, Officer 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. The opening of the Aldi shopping bag, like the opening of the brown paper bag in California v. Acevedo, 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.

Jones had a reasonable expectation of privacy in the plastic bag. First, the bag was wrapped, closed and placed (between a mattress and nightstand) in a manner suggesting that Jones was preserving his privacy in the bag. Second, the bag may have been found in plain view, but the contents of the bag were not readily discernible without opening it. Finally, there was no evidence that the search of the bag was justified under any exception to the warrant requirement.

Furthermore, Officer Florea clearly believed that Jones had a possessory interest, at least, in the Aldi bag and its contents. Florea claimed he wanted to look in the bag to see if he could find any identification for Jones. Based upon the foregoing case law and the testimony, Jones had a privacy interest in the plastic bag.

The State argues, however, that Jones abandoned any possessory interest in the bag. "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, 5th 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 [(5th Cir., 1971), 441 F. 2d 749] at 753; cf. Katz v. United States, 1967, 389 U.S. 347 \* \* \*."

Jones never abandoned a privacy interest in the plastic bag. There is a very long line of case law establishing the principle that police may freely seize and search abandoned items, such as items thrown from vehicles during a police chase, items placed in trash containers, or items dropped by a pedestrian while fleeing from the police. State v. Dubose, 2005 Ohio 6602 (7<sup>th</sup> App. District) citing to Abel v. United States (1960), 362 U.S. 217, 241; State v. Freeman (1980), 64 Ohio St.2d 291, 296; United States v. Flynn (C.A.10, 2002), 309 F.3d 736; United States v. Mustone (C.A.1, 1972), 469 F.2d 970; State v. Hill (1998), 127 Ohio App.3d 265, 269. Since the Fourth Amendment only protects those places and items that a person expects to remain private, and since abandoned items are available for anyone to find and peruse, courts have consistently denied Fourth Amendment protection over abandoned items. Bond v. United States (C.A.7, 1996), 77 F.3d 1009, 1013.

However, the facts of this case do not fit into any of the standard examples of abandonment. With respect to the plastic bag, Jones never: denied ownership; threw it away; deposited it into a trash container; dropped it on the sidewalk and kick it out of view. The officers saw him enter the hotel room with the closed plastic Aldi's bag, but exit without the bag. The officers did ask about whether the hotel room was his, but the inquiry ended. There is no evidence that he abandoned his interest in the plastic bag he took into the room.

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. 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, 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.

Finally, Officer 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.

## **Response to Proposition of Law No. II.**

**The State had every chance to argue the challenged error on appeal but failed to do so.**

In its brief, the State contends that the court of appeals deprived it of notice and an opportunity to respond by *sua sponte* raising the error of whether Jones had a privacy interest violated with respect to the plastic bag. This argument is without merit.

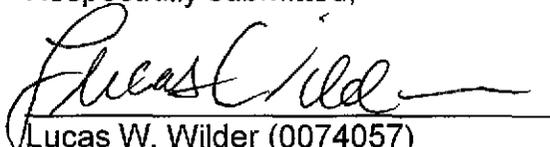
At the trial court level, former counsel for Jones did not raise the argument (either by brief or at the suppression hearing) that the officers violated his rights to the plastic bag. Instead, the State and former counsel focused arguments on whether Jones had a privacy interest in the motel room itself.

Undersigned counsel was then appointed on appeal. In Jones' Brief to the Second District Court of Appeals, counsel expressly raised the issue of whether a privacy interest in the plastic bag existed and whether that right was violated. *See section "D. SEARCH OF THE BAG" at pp. 6-7 of Appellant Darnell Jones' Brief.* The brief was in compliance with App. R. 16(A). Accordingly, the State had an opportunity to respond to the various assignment of errors and issues presented in counsel's brief. However, in its brief in opposition, the State did not respond to this argument. The State had every chance to address this argument on appeal but failed to do so.

**CONCLUSION**

Appellee Jones' privacy rights to the plastic bag were violated and the contents found should have been suppressed. Further, the State's argument that this issue was never raised is incorrect and should be dismissed. The decision of the Second District Court of Appeals should be affirmed.

Respectfully submitted,



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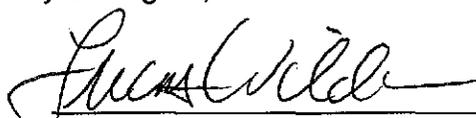
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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing was mailed to Johnna Shia, Esq. (APA for the State), to the Office of the Ohio Public Defender (250 East Broad Street - Suite 1400 Columbus, Ohio 43215) and to Darnell Jones (c/o Montgomery County Jail) on this 12<sup>th</sup> day of August, 2009.



Lucas W. Wilder (0074057)