

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 09-1688

Plaintiff-Appellee,

On Appeal from the Fairfield
County Court of Appeals
Fifth Appellate District
Case No.08 CA 00057

-vs-

ASHLEY M. HIGGINS,

Defendant-Appellant.

MEMORANDUM IN RESPONSE

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SUPREME COURT OF OHIO

DAVID L. LANDEFELD (0000627)
Fairfield County Prosecutor

AARON R. CONRAD (0075471)

GREGG MARX (0008068)
First Assistant Prosecuting Attorney
(COUNSEL OF RECORD)

(COUNSEL OF RECORD)

201 S. Broad Street, Ste. 400
Lancaster, Ohio, 43130
(740) 653-4259
(740) 653-4708 Fax

120 ½ E. Main Street
Lancaster, Ohio, 43130
(740) 277-6404
(740) 277 6424 (fax)

E-mail: gmarx@co.fairfield.oh.us
COUNSEL FOR PLAINTIFF-
APPELLEE STATE OF OHIO

COUNSEL FOR DEFENDANT-
APPELLANT

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**APPELLEE'S POSITION WHY THIS CASE DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION, IS NOT OF GREAT
PUBLIC INTEREST, AND WHY LEAVE TO APPEAL SHOULD BE DENIED**

A visitor to a prison has no reasonable expectation of privacy. *Hudson v. Palmer* (1984), 468 U.S. 517, 104 S. Ct. 3194. A visitor to a prison does not have the same rights and privileges that a person attending a public place of business would have. It appears that the trial court and Appellant make no distinction between someone visiting a mall and a person visiting an inmate in a correctional institution. Even public places do not have unbridled unrestricted access. Visitors and litigants are routinely screened at public courthouses. Most visitors to sporting events and concerts are checked for many objects.

Appellant ignores the fact that on this case no search ever occurred! Trooper Robinson asked Appellant to come to an interview room. Trooper Robinson told Appellant that many people try to bring drugs to inmates and that she needed to hand them over. Appellant then reached toward her bra area and removed a large bag containing six smaller bags of marijuana and placed them on a table.

The trial judge determined there was no search. The uncontroverted testimony from Trooper Robinson was that Appellant was free to leave. Appellant's claim that reasonable suspicion was needed to stop Appellant is counter-intuitive and not supported by the case law when the stop occurs at a prison. *Spear v. Sowders* (6th Cir. 1995), 71 F.3d 626.

Visitors do not have unrestricted access to prisoners just as prisoners do not have unrestricted access to the public. The substantial interests of penal institutions to prevent drugs and weapons from entering their facilities is greater than the fourth amendment rights of a visitor who is trying to smuggle in these items. Trooper Robinson had been given information that she

took steps to either confirm or deny. Trooper Robinson did not do this with coercion or threats. This type of investigatory stop in a prison should be allowed for preventative purposes.

This case is important only to Appellant and her family. Before Appellant ever saw Trooper Robinson, she had to walk or drive past multiple signs that inform visitors that they are not permitted to bring drugs into a prison and are subject to search. Appellant claims that this case presents a substantial constitutional question.

However, the Court of Appeals disagreed. While reversing the trial court, the Court held:

{¶58} Moreover, the nature of the interaction between Appellee and Trooper Robinson was the most benign type of interaction that could have taken place. The manner in which the interview was conducted was not harsh or oppressive. Appellee was not even searched, but voluntarily surrendered the drugs upon request of the trooper. Given the severely diminished expectation of privacy of Appellee upon entering the prison, coupled with the compelling state interests in internal order and safety in the prison, we find the seizure of Appellee to be clearly within constitutional limits.

State v. Higgins (August 6, 2009), Fairfield App. Case No. 08-CA-57, 2009-Ohio-379.

STATEMENT OF THE CASE AND FACTS

Ohio State Highway Patrol Trooper Rebekka Robinson is assigned as a plain clothes investigator working at the Southeastern Ohio Correctional Institution. ("SCI") Investigator Robinson began investigating Inmate Donel Harris who was receiving drugs allegedly from visitors at SCI. Trooper Robinson checked Harris's visitor lists and his recorded telephone calls and learned that Appellant was one of two females that were visiting him. Trooper Robinson monitored a telephone call that occurred in August, 2007, where Appellant mentioned "weed" on more than one occasion thereby incurring Inmate Harris's wrath.

Trooper Robinson discovered that Appellant was scheduled to visit Inmate Harris on January 20, 2008, and saw Appellant entering SCI. After Appellant emptied her pockets, she was given a visitor's pass and walked through the security door. Trooper Robinson approached Appellant, introduced herself and stated that she needed to talk to Appellant. Appellant said "ok" and they walked to a nearby interview room that was upstairs.

After they sat down, Trooper Robinson informed Appellant that she believed that Appellant had brought marijuana to Inmate Harris before and the investigator believed Appellant had brought more marijuana with her today. Trooper Robinson told Appellant that she needed to hand the drugs over. When Trooper Robinson told Appellant that many people bring drugs for inmates, Appellant moved her hand toward her left bra area, pulled out a bag containing six smaller bags of what appeared to be marihuana and placed the larger baggie on the table.

According to Trooper Robinson, prior to the discovery of the suspected marihuana, Appellant had not been placed under arrest and was free to leave. Trooper Robinson then searched Appellant but no additional contraband was found. Trooper Robinson then advised

Appellant of her *Miranda* rights, Appellant waived her rights, and wrote out a handwritten statement. Additional facts will be addressed in the argument portion of the brief.

On March 28, 2008, Appellant was indicted by the Fairfield County Grand Jury for one count of illegal conveyance of drugs of abuse onto the grounds of a detention facility in violation of R.C. §2921.36(A)(2). Appellee filed a motion to suppress evidence and requested an oral hearing. After an oral hearing was held, the Honorable Judge Richard E. Berens rendered a decision sustaining Appellant's motion. A Notice of Appeal and Certification was timely filed by the State of Ohio. On August 6, 2009, the Fifth Appellate District reversed the trial court's decision. *State v. Higgins* (August 6, 2009), Fairfield App. Case No. 08-CA-57, 2009-Ohio-379. Appellant filed a memorandum in support of jurisdiction on September 18, 2009.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW

FIRST PROPOSITION OF LAW:

The Fourth Amendment to the Constitution of the United States requires prison officials to possess some reasonable and articulable suspicion that crime is afoot prior to seizing and searching a visitor when the stop of the visitor is neither random nor uniform.

All visitors to SCI are checked in. Those visitors are required to sign up in advance of their visit. All visitors, including Appellant on the day in question, empty their pockets, and are given a visitor's pass before they are permitted to pass through security. On the roadway to the visitor's parking lot, a sign informs all visitors "**NOTICE** - ANY PERSON ENTERING THESE PREMISES SHALL BE SUBJECT TO SEARCH AT ANY TIME."

A posted sign at the front entrance informs all visitors, including Appellant, that it is prohibited to convey or deliver many listed items, including drugs, onto the grounds of a detention facility. The sign also informs visitors that violators are subject to arrest.

At the front door entrance a posted sign informed visitors, including Appellant, "STOP, No Weapons, No Cell Phones, No Drugs." Appellant needed to pass several signs to enter the prison.

Appellant did not testify and photographs of the signs referred to herein were admitted as exhibits and attached to the brief filed in the Court of Appeals. In fact, Appellant's counsel established at the oral hearing that every visitor entering SCI passes the signs. Defense counsel also established that every visitor passes through a metal detector and a security gate. There is a second security gate for the actual visiting room.

R.C. 2921.36(A)(2) prohibits the conveyance of drugs of abuse onto the grounds of a detention facility. R.C. 5120.421 discusses the rights of prison authorities to search visitors to a

correctional facility. R.C. 5120.421. That statute provides: “. . . visitors may be searched by the use of a magnetometer or similar device, by a pat-down of the visitor’s person that is conducted by a person that is of the same sex as the visitor, and by the examination of contents of pockets, bags, purses, packages and other containers . . . Searches of visitors may be conducted without cause, but shall be conducted uniformly or by automatic random selection. R.C. 5120.421 (C).

The trial court specifically found that Trooper Robinson did not search Appellant.

Here, Robinson did nothing to violate Higgins’ expectation of privacy that amounted to a search. Certainly Higgins expected the contents of her undergarments to remain private. And society readily recognizes such an expectation of privacy. But Higgins failed to show that Robinson took any action that breached Higgins’ expectation of privacy regarding her undergarments.

Higgins reached into her own bra and removed the drugs. Robinson never saw or knew the contents of Higgins’ undergarments until Higgins revealed them. Robinson did not violate Higgins’ expectation of privacy. Because Robinson took no affirmative action that violated Higgins expectation of privacy, the Court cannot say that Robinson performed a search.

Entry, 9/2/08, p. 3-4.

Although the calls between Inmate Harris and Appellant died down for several months, SCI Investigator Tom Ratcliffe received a “tip” that Harris was to have weed or marihuana brought to him through another scheduled visit. On or about December 30, 2007, Appellant visited Inmate Harris, and again on or about January 11, 2008. The second visit was monitored by Investigator Ratcliffe, but no contraband was observed. Appellant visited Inmate Harris again, on January 20, 2008, at which time the incident in question occurred.

After Appellant arrived at SCI and passed the security door, Trooper Robinson asked Appellant to accompany her to the conference room. In the conference room, Trooper Robinson informed Appellant of her suspicions, and that she knew Appellant had brought Inmate Harris

drugs before. Trooper Robinson testified that Appellant appeared nervous after being questioned about her participation in drug conveyance. After Trooper Robinson asked if Appellant was attempting to convey drugs to Inmate Harris on that day, Appellant replied that she was, and pulled a plastic bag containing approximately six bags of contraband later identified to be marihuana.

After handing over the drugs, Appellant was advised of her constitutional rights, and given her *Miranda* warnings. Appellant signed a *Miranda* waiver form, and gave a written statement confessing that she had conveyed drugs to Inmate Harris on a prior occasion. Appellant gave a detailed account of a letter Inmate Harris had written Appellant describing how to bring the drugs into the detention center. Appellant also stated that Inmate Harris had asked her to bring him drugs during their last encounter, on or about January 11, 2008. After completing her written confession, Appellant was placed under arrest and transported to the Fairfield County Jail.

The State of Ohio addresses the search of visitors to correctional institutions in ORC §5120.421. Section 5120.421(B) gives detention centers the authority to adopt rules, pursuant to Chapter 119 of the Revised Code, “[f]or the purposes of determining whether visitors to an institution under the control of the department of rehabilitation and correction are knowingly conveying, or attempting to convey, onto the grounds of the institution any...drug of abuse...in violation of R.C. 2921.36.” The diminished expectation of privacy of visitors to Southeastern Correctional Institute is clearly and explicitly established by the signs that are found at various points leading up the visitors’ entrance door. At SCI, the following three signs are present, in respective order: (1) “NOTICE ANY PERSON ENTERING THESE PREMISES SHALL BE SUBJECT TO SEARCH AT ANY TIME;” (2) “State Law Effective 5-23-78 Section 2921.36

O.R.C., **PROHIBITS** Conveying onto the grounds of a detention facility or delivery of item to Inmates thereof: 1. Any deadly weapons or parts thereof, or ammunition. 2. Any drugs. 3. Any intoxicating liquors. **FURTHERMORE** Whoever violates above subject is subject to arrest by detention authorities! **PENALTY** A felony or misdemeanor;” and finally, (3) “STOP No Weapons No Cell Phones No Drugs.” Copies of photographs of the signs were attached to the brief filed in the Court of Appeals as exhibits. Copies were also introduced as exhibits at the hearing on Appellant’s Motion to Suppress.

In the instant case, Appellant was put on notice of her diminished expectation of privacy, as she drove or walked past three separate indications of such inside the complex. Further, this was not the first time Appellant visited Inmate Harris at SCI, and therefore, Appellant was aware of the policies and precautions the detention center takes in order to provide for the security of the prison. Appellant’s notice of the rules and regulations of the SCI, as authorized by R.C. §5120.421, demonstrates that Appellant was not subjected to an unreasonable search or seizure.

Another factor courts consider when the reasonableness of a search is in question is the invasiveness of the search. Ohio Revised Code, §5120.421(D), authorizes the strip and body cavity searches of detention center visitors, “on the basis of reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that a visitor proposed to be so searched possesses, and intends to convey or already has conveyed, a...drug of abuse....” While a strip or body cavity search did not occur in this given incident, this section of the Revised Code demonstrates the length to which detention centers can go in order to protect its interest of prison security in cases where only “reasonable suspicion” exists.

In this case, Appellant was not even subjected to a pat-down, much less a strip or body cavity search, despite the presence of a reasonable and articulable suspicion that Appellant was in possession of drugs. After Trooper Robinson escorted Appellant to the conference room, the trooper informed Appellant of the monitored conversations that took place between Appellant and Inmate Harris. Once hearing this, Appellant removed a plastic bag from her bra area, which contained approximately six bags of what was later identified as marihuana. Appellant was not subjected to a pat-down search by a SCI officer of any kind. In fact, when questioned, Appellant consented by reaching into her own shirt, and voluntarily removing the marihuana. Appellant was not threatened, but instead, merely informed of the on-going SCI investigation concerning the interactions between Appellant and Inmate Harris. The trial court determined that no search occurred. Given the trial court's findings that a search did not occur, combined with the high governmental interest in prison security, Trooper Robinson did not subject Appellant to a search or seizure in violation of the Fourth Amendment.

Many courts have discussed laws relating to visitors to prisons.

...Nonetheless, the Fourth Amendment does not afford a person seeking to enter a penal institution the same rights that a person [*630] would have on public streets [**6] or in a home. It is clear that a prisoner does not have a due process right to unfettered visitation. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460, 104 L.Ed.2d 506, 109 S. Ct. 1904 (1989). (It cannot "seriously" be contended, in light of our previous cases—that an inmate's interest in unfettered visitation is [***5] guaranteed directly by the Due Process Clause."). See also *Sandin v. Connor*, 132 L.Ed.2d 418, 115 S. Ct. 2293 (1995) (limiting the ability of prison regulations to create liberty interests). *A fortiori*, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. In seeking entry to such a controlled environment, the visitor simultaneously acknowledges a lesser expectation of privacy. *Blackburn v. Snow*, 771 F.2d 556, 565 (1st Cir. 1985). The Supreme Court itself has pointed out that the "unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country, *Block v.*

Rutherford, 468 U.S. 576, 588-89, 82 L.Ed.2d 438, 104 S. Ct. 3227 (1984), and that “[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence.” [**7] *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L.Ed.2d 447, 99 S. Ct. 1961 (1979).

Spear v. Sowders (6th Cir. 1995), 71 F.3d 626.

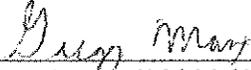
No search occurred in this case. Visitors to prison are prohibited from bringing drugs into state correctional facilities. SCI is a state correctional facility. The Revised Code and decisions from many cases clarify that visitors do not have carte blanche to try to sneak drugs into prisons. The trial court’s decision was unreasonable, arbitrary and contrary to law and properly reversed by the Court of Appeals. Accordingly, this Court should deny Appellant’s leave to appeal.

CONCLUSION

For the foregoing reasons, this Court should decline to accept jurisdiction in this case.

Respectfully submitted,

David L. Landefeld (0000627)
Prosecuting Attorney



Gregg Marx (0008068) (COUNSEL OF RECORD)
Assistant Prosecuting Attorney

COUNSEL FOR APPELLEE-STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Response was served upon Aaron R. Conrad, Attorney for Appellant, by placing a copy of the same in his designated mail box at the Hall of Justice, this 16th day of October, 2009.

Gregg Marx
Gregg Marx (0008068) (COUNSEL OF RECORD)
Assistant Prosecuting Attorney

COUNSEL FOR APPELLEE-STATE OF OHIO