ORIGINAL

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

APPELLANT'S MOTION FOR RECONSIDERATION

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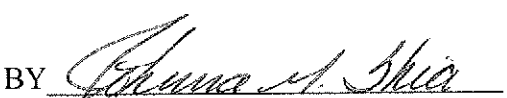
APPELLANT'S MOTION FOR RECONSIDERATION

Now comes Appellant the State of Ohio, by and through undersigned counsel, and files this motion for reconsideration pursuant to S.Ct. R. XI, Sec. 2, and requests this Honorable Court to reconsider its decision dismissing this appeal as improvidently accepted. The reasons for reconsideration are set forth in the accompanying memorandum.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 
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Memorandum

On June 3, 2009, this Court accepted this discretionary appeal to address the important constitutional issues implicated in this appeal. *State v. Jones*, 121 Ohio St.3d 1499, 2009-Ohio-2511, 907 N.E.2d 323 (Justice O'Connor's Dissent, ¶ 28) On December 3, 2009, this Court dismissed this appeal as improvidently accepted. Three Justices would have decided this appeal on the merits. With this motion, the State asks this Honorable Court to reconsider its decision, accept this appeal, and decide this appeal on its merits.

This important constitutional issue has not been squarely raised and passed upon in any prior appeal. Until now, no Ohio court has addressed the contents of a place separately from the place where the contents are left behind when determining whether a person has a reasonable expectation of privacy in their personal property. Justice Lundberg Stratton and Justice O'Connor, in their dissents, have both recognized the important constitutional issue presented in this appeal: Whether society is prepared to recognize as objectively reasonable a privacy interest in personal property a person leaves behind in a place in which they have relinquished any expectation of privacy.

The Second District Court of Appeals' decision was wrong in many respects and stands for the proposition that a defendant can claim the protections of the Fourth Amendment in his personal property that he leaves behind in a location in which he has expressly relinquished any expectation of privacy or even in a place where he has no expectation of privacy. This decision "creates an inconsistency in Fourth Amendment jurisprudence" and presents a question of public or great general interest. *Jones*, ¶ 2 (Justice Lundberg Stratton's Dissent)

<u>You say "Private," I say "public."</u> As Justice O'Connor noted in her dissent, "the critical inquiry is whether a defendant has a reasonable expectation of privacy in property left in a given

location." *Jones*, ¶ 39 (Justice O'Connor's Dissent) The court of appeals held that the motel room was not a "public place of the same character as the bus station" in *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, 414 N.E.2d 1044, even though it also found that Jones had relinquished his privacy interests in the room. *Jones*, 2009-Ohio-61, ¶ 42.

The court of appeals made a distinction where there isn't one. Four walls and a door do not make a location a "private place" for purposes of Fourth Amendment jurisprudence. Rather, a Fourth Amendment privacy interest is personal. The person who is prejudiced by the search must have an objectively reasonable expectation of privacy in the location for it to be considered a "private place." As held by two Federal Circuit Courts, if a person places their property in a location where they have neither a proprietary nor a possessory interest, they have no more expectation of privacy than if they had placed the bag "in plain view in a public place[.]" *United States v. Jackson*, 585 F.2d 653, 658 (4th Cir. 1978) citing, *United States v. Lisk*, 522 F.2d 228 (7th Cir. 1975). Therefore, because Jones did not have a reasonable expectation of privacy in the room, it is not a "private place." Any place in which one does not have a reasonable expectation of privacy is a "public place."

Although many Courts, including this one, have addressed the issue of a person's right to privacy and the issue of abandonment, only two non-Ohio cases come close to addressing the question presented in this appeal. One case, cited in Justice Lundberg Stratton's dissent, *State v. Ross* (Tenn.2001), 49 S.W.3d 833, stands for the proposition that a defendant's express disclaimer of ownership of a place, i.e., hotel room, at the time of a search is sufficient to extinguish his expectation of privacy in that place *and its contents*, i.e., container of drugs. *Jones*, ¶ 18. (Justice Lundberg Stratton's Dissent) The fact that the defendant was found inside the room, ordered out of the room by police, and possibly a guest of the hotel was not significant

or dispositive. The only dispositive fact in *Ross* was that the defendant relinquished any privacy interest in the *location* where he left his property and, therefore, his property as well.

The other case, *United States v. Figueroa*, 187 F.3d 623, 1998 WL 1085825 stands for the proposition that a defendant who does not have a reasonable expectation of privacy in a given location, can not claim the protection of the Fourth Amendment as to the contents he leaves in that location. In *Figueroa*, a defendant, running from the police, hid his container of drugs in a neighbor's apartment without their consent, and therefore, he had no reasonable expectation of privacy *in the location*. Because he left his property *in a location* in which he did not have a reasonable expectation of privacy, he had abandoned his property. The fact that the location was a "private place," – according to the court of appeals here - was not significant or dispositive. The only dispositive fact in this case was that the defendant did not have a reasonable expectation of privacy in the *location* where he left his property.

The distinction the court of appeals made between what is considered a public place and a private place will have drastic results. The location could be my house; your house, a neighbor's house, anyone's house or apartment; a hotel room, a motel room, a locker, a storage shed, or an abandoned warehouse - any place with four walls and a door would suffice for the court of appeals.

Use it or Lose it. The court of appeals relied on the facts that the officer saw him with the bag, hid it in the room, and may have had an intention of retrieving it. This describes every defendant in every abandonment case. However, it is the defendant's burden to establish a privacy interest in the bag and if he "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[,]" he has abandoned it. *Freeman*, at 297.

As noted by Justice O'Connor in her dissent, "the record is "wholly devoid of evidence or testimony suggesting that Jones had the authority to return to the room after his encounter with the police or that he actually intended to return to the motel room to recover the bag." *Jones*, ¶ 40. (Justice O'Connor's Dissenting Opinion) Jones only provided "speculation and conjecture to support his claim." Id. In fact, a defendant will leave the evidence of a crime behind and distance himself from it for one reason: so that he is not linked to it, associated with it, or connected to it in any way - herein lies the inconsistency.

Taken to the extreme, concealing an object, even in a public place – as defined by the court of appeals - i.e., under a rock or behind bushes, could infer – through conjecture and speculation – that a defendant had no intention of abandoning his property, regardless of the fact that he left it in a place where he has no reasonable expectation of privacy or a "public place." This will create dangerous situations. For example, a child in a public playground may come across a loaded gun and shoot another child. A child playing in an abandoned warehouse may find scales and used needles and contract an incurable disease. A child spending the night in a hotel room may find drugs hidden in the mattress and ingest them. Without probable cause to seize or search the container left behind, the police are without authority to protect the public from potential harm, even though the defendant relinquished any privacy interest in it when he left it behind in a place where he has no expectation of privacy.

Conclusion

In order to maintain consistency in Fourth Amendment jurisprudence and to protect the public from being exposed to contraband left behind by criminals, the State asks this Honorable Court to accept this appeal and decide this appeal on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Reconsider was sent by first class mail on this 9th day of December, 2009, to the following: Lucas Wilder, Counsel of Record, 120 West Second Street, Suite 400, Dayton, Ohio 45402, Claire R. Cahoon, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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