

ORIGINAL

IN THE SUPREME COURT
OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

Supreme Court Case No. 2008-1781

vs.

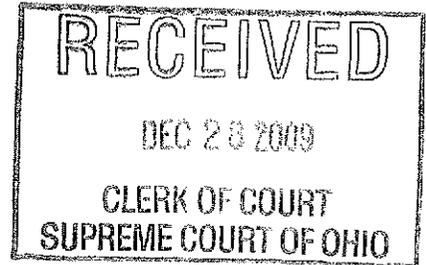
On Appeal from the Greene County
Court of Appeals, Second District

ANTWAUN SMITH,
Defendant-Appellant.

Court of Appeals Case No. 07-CA-47

**MOTION FOR RECONSIDERATION
OF APPELLEE - STATE OF OHIO**

STEPHEN K. HALLER #0009172
Greene County Prosecuting Attorney
61 Greene Street, 2nd Floor
Xenia, Ohio 45385



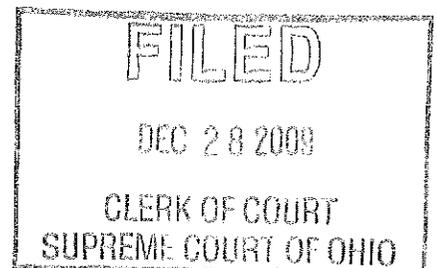
ELIZABETH A. ELLIS #0074332
Assistant Prosecuting Attorney

TX: (937) 562-5250
FX: (937) 562-5107

**COUNSEL FOR APPELLEE,
STATE OF OHIO**

CRAIG M. JAQUITH #0052997 (COUNSEL OF RECORD)
Assistant State Public Defender
8 East Long Street
Columbus, Ohio 43215
TX: (614) 466-5394
FX: (614) 752-5167

COUNSEL FOR APPELLANT



INTRODUCTION

On December 15, 2009, this Court reversed the decision of the Second District Court of Appeals to hold that the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment of the United States Constitution when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances. *State v. Smith*, Slip Op. No. 2009-Ohio-6426.

On page 7 of the State's Merit Brief filed June 2, 2009, the State argued that even if the search of the cell phone were improper, the Defendant cannot show that his conviction warrants reversal in light of all of the other evidence of guilt in this case. The State submitted that the introduction of the evidence obtained from the cell phone was merely corroborative, and not prejudicial to the Defendant.

Accordingly, the State is seeking reconsideration pursuant to S. Ct. R. XI §2 of the issue of whether the exclusionary rule must be employed in this case, and whether the error of introducing the evidence from the cell phone was harmless.

STATEMENT OF FACTS

On January 21, 2007, Detective Craig Polston of the ACE Task Force received a call informing him that a large amount of crack cocaine was found in the residence of Wendy Northern at 3884 Timberline Drive in Beavercreek, Ohio (TR. p. 99-100). Ms. Northern had been transported to Miami Valley Hospital as a result of a possible drug overdose. Detectives Polston and Scott Molnar (also from the ACE Task Force) responded to the hospital to interview Ms. Northern (TR. p. 100-101). While at the hospital, Ms. Northern was asked about her main drug supplier and if she would cooperate with detectives and place phone calls to her supplier to set up a controlled buy (TR. p. 101). Ms. Northern agreed to cooperate with detectives (TR. p. 101). Ms. Northern told detectives that her drug supplier, to whom she referred as 'Capo', had been riding as a passenger in a vehicle that had been stopped down the street from her home and was cited for possessing a small amount of marijuana (TR p. 111-112). Detective Polston pulled the information from the traffic stop (including vehicle type, color, make and model) and subsequent arrest and learned the identity of the passenger to be Antwuan Smith (TR p. 112). Detective Polston then showed a BMV photo of Antwuan Smith to Wendy Northern and she identified Mr. Smith, the Defendant to be her drug supplier a.k.a. 'Capo' (TR p. 112). After getting Ms. Northern some medication she needed, the detectives took her to the police station to get a written statement and to place some controlled phone calls (TR p. 102-103). These phone calls were placed to a cell phone and were recorded (TR p. 103). Detective Polston asked Ms. Northern to request an ounce of crack cocaine (which equates to approximately 28 grams) from her supplier (TR p. 107).

During the phone conversation, the Defendant agreed to come to Ms. Northern's home to deliver an ounce of crack cocaine (TR p. 291). The Defendant was originally supposed to be at Ms. Northern's home, but did not show up until much later than expected (TR p. 294-295). While Ms. Northern was being transported to back to the Greene County jail, she received a call from the Defendant telling her that he was in her driveway (TR p. 295). This information was immediately relayed to police officers.

While in the driveway of the home, the Defendant and his passengers were ordered out of the vehicle at gunpoint (TR p. 298). Officer Williams ordered the Defendant to walk diagonally back toward his voice (TR p. 300). When ordered to put his hands up, the Defendant did not comply; this command was repeated several times and the Defendant finally complied (TR p. 208-209). Officer Williams testified there was "a good two to four second time span" where the Defendant hands weren't visible (TR p. 212). The Defendant also "took a few shuffle steps back with his hands where [Officer Williams] still could not see [his hands]" (TR p. 214-215). During this time, there were three to six inches of snow on the ground and it was dark outside (TR p. 216, 296). No crack cocaine was found on the Defendant's person. Crack cocaine was ultimately discovered under the snow in a footprint left by the Defendant when he exited the vehicle (TR p. 309). The Defendant was arrested at the scene.

PROPOSITION OF LAW NO. 1:

THE APPLICATION OF THE EXCLUSIONARY RULE IS UNNECESSARY
IN THE WARRANTLESS SEARCH OF A CELL PHONE WHERE THERE
IS NO EVIDENCE THAT THE POLICE KNEW THE SEARCH WAS
UNCONSTITUTIONAL AND WHERE THE DEFENDANT IS NOT
PREJUDICED BY THE INTRODUCTION OF THE EVIDENCE

In *Herring v. United States* (2009), 129 S. Ct. 695, the United States Supreme Court held that the application of the exclusionary rule to a Fourth Amendment violation is not automatic. The Majority further noted that when a Fourth Amendment determination was made upon a reasonable but mistaken assumption, the person subjected to the search is not necessarily the victim of a constitutional violation. *Id.* at 699.

In reaffirming that the application of the exclusionary rule must be limited to those cases that are sufficiently deliberate that exclusion can meaningfully deter it, or sufficiently culpable that such deterrence is worth the price paid by the justice system, the *Herring* majority noted, “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence....[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.....The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free-something that ‘offends basic concepts of the criminal justice system.’...[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” *Herring*, supra, at 700-701 (internal citations omitted).

In the case at bar, the police reasonably searched the Defendant and all containers found on his person incident to arrest. The fact that a cell phone's status as a container was not settled at the time does not render the search unreasonable. Federal Courts of Appeal had previously held that you can search a pager incident to arrest, so it is reasonable to assume that a cell phone would fall into the same category. See *State v. Smith*, supra at ¶ 20. Moreover, Judges and Justices cannot even agree on the status of a cell phone as a container. The Second District Court of Appeals held 2-1 that it was, this Court split 4-3 that it was not, and the Federal Circuit Courts that have considered the issue are split. When the highest legal minds of our community are at odds on this issue, it simply cannot be held that a police officer is deliberately or recklessly engaging in police misconduct.

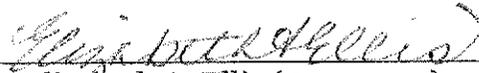
Furthermore, the Defendant has still never established how the introduction of this evidence was prejudicial to him at trial. See *State v. Martinez*, Shelby County App. No. 13-04-49, 2006 Ohio 2002. The confidential informant in the case at bar testified at trial that she arranged the purchase of drugs with the Defendant over the phone. She had previously purchased drugs from him and recognized him on site. Thus, the introduction of the evidence of the Defendant's call log demonstrating the call from the informant was merely corroborative and cumulative. Thus, the Defendant cannot demonstrate prejudice, and his conviction must be affirmed.

CONCLUSION

The Defendant in this case was properly convicted in the trial court. There is no evidence of inappropriate behavior on the part of the police department, nor is there any evidence that the Defendant was prejudiced by the introduction of the now unconstitutional search. Accordingly, the State urges this Court to reconsider its holding in the case at bar, to determine whether the application of the exclusionary rule is warranted in this case.

Respectfully Submitted,

STEPHEN K. HALLER
PROSECUTING ATTORNEY,
GREENE COUNTY, OHIO

By: 
Elizabeth A. Ellis (#0074332)
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been sent to Craig M. Jaquith, Assistant State Public Defender, 8 East Long Street, Columbus, Ohio 43215-2998 via regular U.S. mail, the date the same was mailed to the Clerk.

Elizabeth H. Lewis