

IN THE SUPREME COURT OF OHIO  
2010

ORIGINAL

STATE OF OHIO,

Case No. 09-1552

Plaintiff-Appellant,

-vs-

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

ADRIAN L. JOHNSON,

Court of Appeals  
Case No. 08AP-990

Defendant-Appellee

**REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO**

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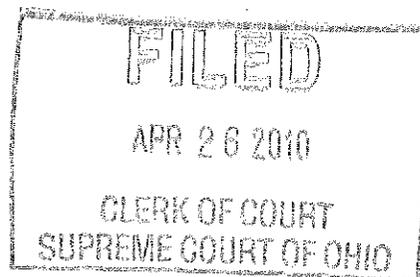
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## ARGUMENT

Proposition of Law No. 1. The federal Exclusionary Rule will only be applied to suppress evidence when the Fourth Amendment violation is the result of deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. (*Herring v. United States* (2009), 129 S.Ct. 695, followed)

The State's merit brief anticipated several of defendant's arguments, and therefore it is unnecessary to repeat such briefing regarding the State's four propositions of law. The State stands by its initial briefing in all respects and will use this reply brief to respond to a few key points.

Defendant errs in attempting to shoehorn this case within the criteria for suppression set forth in *Herring v. United States* (2009), 129 S.Ct. 695. There was no deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights. Nor can the officers' obvious concern about drug dealing and guns in the vicinity of the Dairy Mart be characterized as recurring or systemic negligence. The high-crime nature of the area was a rightful reason for the police to be concerned about the location. The high-crime-area reputation of the location is an articulable fact that police can consider as part of the totality of circumstances in assessing probable cause and reasonable suspicion. *Illinois v. Wardlow* (2000), 528 U.S. 119, 124; *State v. Bobo* (1988), 37 Ohio St.3d 177, 179.

Defendant suggests that the marijuana offense was a mere pretext for the police to conduct a general search of defendant. But there was no evidence of "pretext." The police had justification to believe that defendant was involved in the marijuana offense, and the police could rightly investigate. There was no evidence that they subjectively

hoped to uncover anything else.

In any event, as defendant concedes, “pretext” would not vitiate the search. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3; *Whren v. United States* (1996), 517 U.S. 806. The officers believed they could search for marijuana; if they hoped to turn up something else, that hope would not be a basis to suppress such evidence.

Overall, in response to the *Herring*-based first proposition of law, and in response to the second proposition of law that is based on *State v. Lindway* (1936), 131 Ohio St. 166, defendant engages in a defense of the Exclusionary Rule largely based on the need for “judicial integrity.” Defendant also contends that, if the Exclusionary Rule requires letting the guilty go free, then so be it, as “it is the law that sets him free.”

The State must strongly disagree with these contentions. There is considerable tension between the portrayal of the Exclusionary Rule as the guardian of “judicial integrity” and the contention that the Exclusionary Rule is some omnipresent, uncontrollable authority compelling that the guilty go free. The former assumes a judiciary eager to suppress evidence in order to preserve its integrity; the latter assumes a judiciary having the remedy of suppression thrust upon it.

In fact, the Exclusionary Rule is merely a judicially-created remedy not compelled by the language of the constitutional provisions themselves. The search-and-seizure constitutional provisions do not set the guilty free; judges and their judicially-created remedy do.

Of course, setting the guilty free is a bitter pill and difficult to justify, and so the justifications for the Exclusionary Rule often take flight into high-minded abstractions

about protecting “judicial integrity.” This is the “misguided sentimentality” mentioned in *Lindway*. At bottom, though, the “judicial integrity” justification is doubtful. Courts do not vouch for the bona fides of the testimony and exhibits they admit into evidence. Witnesses with substantial credibility problems, including defendants, are freely allowed to testify. There is no “concern” about “judicial integrity” in such circumstances, and for good reason. The jury decides who is telling the truth, not the court. But when highly-reliable and highly-relevant physical evidence is sought to be introduced, “judicial integrity” is wrongly seen by some as needing protection from the truth based on the collateral issue of the constitutionality of how the evidence came to light.

The “judicial integrity” justification for the Exclusionary Rule is exactly backwards. The essential goal of a criminal trial should be a search for the truth, and the Exclusionary Rule results in a loss of “judicial integrity” by diverting the trial from that search for truth. The goal should be punishing the guilty and acquitting the innocent, not setting the guilty free.

The abstraction of “judicial integrity” is small solace to the next victim of the guilty criminal who is set free and who very well could be emboldened by his victory based on the Exclusionary Rule. This particular defendant would be set free without punishment, even though he confessed to wanting to deal his cocaine and crack cocaine. Some may be tempted to view this defendant as a low-level offender, but “[p]ossession, use, and distribution of illegal drugs represent ‘one of the greatest problems affecting the health and welfare of our population.’” *Harmelin v. Michigan*

(1991), 501 U.S. 957, 1002 (controlling plurality) (quoting another case). Any claim that drug offenses are victimless “is false to the point of absurdity.” *Id.* at 1002.

To be sure, not all beneficiaries of the Exclusionary Rule are set completely free. But the Exclusionary Rule is certainly a “guilty man’s defense,” as only incriminating evidence would be excluded. No defendant would seek to suppress exculpatory evidence. So, at the defendant’s option, the Exclusionary Rule is employed only to suppress incriminating evidence. Even if the prosecutor still has enough evidence to go forward, the search for truth is still diverted, as the reliable incriminating evidence is excluded and the chances of an acquittal are increased.

Even in cases settled by plea agreement, the guilty defendant can wield suppression issues as leverage in the effort to obtain a more favorable plea agreement. And, even in cases where the motion is meritless and even frivolous, the Exclusionary Rule will have compelled the expenditure of countless hours by police, prosecutors, and courts responding to and dealing with the motion to suppress. These substantial costs imposed on the criminal-justice system, including sometimes letting the guilty go free, are just too high a price to pay for the speculative benefits claimed by proponents of the Exclusionary Rule.

The foregoing arguments are largely reasons for not having an Exclusionary Rule at all, and they are most relevant to the *Lindway*-based second proposition of law, which contends that there is no Exclusionary Rule under Article I, Section 14, of the Ohio Constitution. But many of these arguments also have relevance to the State’s *Herring*-based first proposition of law relative to the federal Exclusionary Rule. This

Court of course must adhere to the federal Exclusionary Rule vis-à-vis the Fourth Amendment, but *Herring* recognizes that, given the substantial costs involved, there should be no exclusion under the federal Exclusionary Rule unless there was a deliberate, reckless, or grossly-negligent disregard for the Fourth Amendment or recurring or systemic negligence in violating the Fourth Amendment. *Herring* should be followed insofar as this Court might find the Fourth Amendment was violated.

The State's first proposition of law should be sustained.

Proposition of Law No. 2. There is no Exclusionary Rule for a violation of the search-and-seizure provisions of Article I, Section 14, of the Ohio Constitution. (*State v. Lindway* (1936), 131 Ohio St. 166, paragraphs four, five, and six of the syllabus, approved and followed).

For many of the reasons stated above under the first proposition of law, this Court should follow *Lindway* and hold that there is no Exclusionary Rule for a violation of the Ohio search-and-seizure constitutional provision.

Defendant's citation to the "new federalism" argument warrants a response here. Great care must be used in addressing the notion that the Fourth Amendment provides a "floor" of protection below which state courts cannot go. This is entirely true, as the state courts, per *Mapp v. Ohio* (1961), 367 U.S. 643, are bound to apply the Fourth Amendment and to exclude evidence if the federal Exclusionary Rule requires it. Ohio courts cannot rely on state law to admit evidence that the federal Exclusionary Rule compels to be excluded. In that way, federal law is a "floor" below which Ohio courts cannot go in particular cases.

It is also true that state courts under their state constitutions can go above the basic

“floor” of federal law by providing greater constitutional search-and-seizure protections. Even if the search was lawful under the Fourth Amendment, and even if the federal Exclusionary Rule does not compel exclusion, a state court can determine that its own state constitutional provision was violated and/or that such evidence should be excluded. The cases discussing a federal-law “floor” are discussing this scenario of the defendant winning on a state-law suppression claim even though he loses under his federal-law suppression claim.

But these cases should not be mistaken for the view that the “new federalism” is a one-way street in which state law must always be construed to afford the same or greater suppression rights as federal law. State law can afford fewer or no suppression rights, and, because it is a matter of state law, the federal courts are bound to accept such a state-law construction. *Wainwright v. Goode* (1983), 464 U.S. 78, 84; *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.* (1976), 426 U.S. 482, 488; *Howard v. Kentucky* (1906), 200 U.S. 164, 173. As this Court recognized in *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, paragraph one of the syllabus, the Ohio Constitution “is a document of *independent* force.” (Emphasis added). “[S]tate courts’ interpretations of state constitutions are to be accepted as final” in the federal courts. *Id.* at 42. “It is fundamental that state courts be left free and unfettered by [the United States Supreme Court] in interpreting their state constitutions.” *Michigan v. Long* (1983), 463 U.S. 1032, 1041 (quoting another case). Federalism “does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state’s view of its own guarantee may indeed be less

stringent, in which case the state remains bound to whatever is the contemporary federal rule.” *State v. Kennedy* (1983), 295 Ore. 260, 270-71, 666 P.2d 1316, 1323.

Construing state law to preclude suppression under state law merely deprives the defendant of a state-law suppression basis for a motion to suppress. The defendant can still proceed on whatever federal-law suppression claim he might have, i.e., he can still rely on the federal “floor” of protection. This is the nature of suppression claims. The defendant will cite state law and/or federal law. The fact that one fails does not mean that the other fails, and, likewise, the fact that one succeeds does not mean that the other must succeed as well.

This Court is not compelled to construe Article I, Section 14 of the Ohio Constitution more broadly than the Fourth Amendment. This Court is not required to construe Section 14 in the same way as the Fourth Amendment. It can construe Section 14 to provide less protection than the Fourth Amendment. Even more so, it is not required to adopt an Exclusionary Rule in any form for Section 14 violations merely because the federal courts recognize such a rule for Fourth Amendment violations. Whether Section 14 was violated, and whether an Exclusionary Rule attaches to such a violation, are purely matters of state law.

In *California v. Greenwood* (1988), 486 U.S. 35, 43, the Court recognized that “[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.” But the Court also recognized that the States may eliminate the Exclusionary Rule for a violation of state law, as California had done through constitutional amendment: “California could

amend its Constitution to negate the [California Supreme Court] holding in *Krivda* that state law forbids warrantless searches of trash. We are convinced that the State may likewise eliminate the exclusionary rule as a remedy for violations of that right.” Id. at 44. “[T]he people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.” Id. at 45.

The State’s second proposition of law should be sustained.

Proposition of Law No. 3. Probable cause only requires a fair probability of criminal activity, not a showing by a preponderance of the evidence or beyond a reasonable doubt. In assessing probable cause, a court must consider the facts in their totality.

The State stands by its contentions that probable cause existed to search defendant and exigent circumstances existed to conduct such search without a warrant. The State wishes to emphasize three points here.

First, it is legally irrelevant that none of the occupants were eventually charged with marijuana possession. A focus on the failure to issue a citation “suffers from logical and legal difficulties,” as probable cause is governed by the information known to the officers at the time of search or seizure, not by the charges brought later. *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶¶ 20-22 (“constitutionality of a prolonged traffic stop does not depend on the issuance of a citation.”). Indeed, an officer’s affirmative reliance on the wrong charge will not vitiate the arrest when another valid basis for arrest existed. *Devenpeck v. Alford* (2004) 543 U.S. 146, 153.

Defendant also errs in attempting to portray the facts as showing only his mere proximity to illegal activity. There were several additional factors supporting probable cause, including the high-crime-area nature of the location, the open nature of the offense, the evidence he had arrived with the others in the car in which the offense occurred, the evidence he was returning to that same vehicle, and then the suspicious nature of his actions at 1:30 a.m. in attempting to distance himself from the vehicle and others. The involvement of a vehicle and his status as a recent and would-be passenger in the vehicle removes this case from the “mere proximity” line of cases and puts the case into a category of cases recognizing a reasonable inference of passenger involvement in criminal activity in a vehicle. *State v. Brown* (1992), 63 Ohio St.3d 349, 351-52, overruled on other grounds in *State v. Murrell* (2002), 94 Ohio St.3d 489; *Maryland v. Pringle* (2003), 540 U.S. 366, 372; *Wyoming v. Houghton* (1999), 526 U.S. 295, 304-305; *County Court v. Allen* (1979), 442 U.S. 140, 164-65.

Finally, defendant errs in focusing on the fact that Officer Sanderson performed the search of defendant’s pockets, not Officer Coleman. Defendant is attempting to differentiate the basis for the search based on the information held by the different officers. But there is no basis to differentiate the two in this way, as they were aware of the same basic facts supporting the search because they both saw what happened and Coleman communicated with Sanderson. Moreover, “[s]o long as ‘the law enforcement system as a whole has complied with the Fourth Amendment’ and possesses facts adding up to probable cause, the arrest will be valid even though the arresting officer alone does not possess these facts.” *State v. Henderson* (1990), 51

Ohio St.3d 54, 57 (quoting 1 LaFave & Israel, Criminal Procedure (1984) 208, Section 3.3(e)). “[P]robable cause may be based on the knowledge of more than one officer. Thus, it is irrelevant which officer had a particular bit of information.” *State v. Waddy* (1992), 63 Ohio St.3d 424, 441-42, citing *State v. Benner* (1988), 40 Ohio St.3d 301, 308. Probable cause is evaluated based on the collective information of officers engaged in particular investigation. *Id.* at 308. This is especially so when an officer is acting at the behest of another officer or agency. *United States v. Hensley* (1985), 469 U.S. 221, 230-33.

The State’s third proposition of law should be sustained.

Proposition of Law No. 4. For purposes of search-incident-to-arrest doctrine, an arrest is “lawful” even if violative of state law governing when a person can be arrested for a minor offense. A violation of R.C. 2935.26 therefore does not provide a basis for finding an arrest invalid for constitutional purposes; nor does it provide a basis for finding a violation of the Ohio Constitution, which does not provide a basis for suppression in any event.

The State stands by its search-incident-to-arrest arguments, including the contention that the search of the pocket can be justified as a search incident to arrest even though Officer Sanderson did not formally arrest defendant until after the search. As stated in *Rawlings v. Kentucky* (1980), 448 U.S. 98, 111: “Where the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.” The Court emphasized that the “fruits of the search of petitioner’s person were \* \* \* not necessary to support probable cause to arrest petitioner.” *Id.* at 111 n. 6.

In *Peters v. New York* (1968), 392 U.S. 40, 67, the Court used the same approach:

[A] search incident to a lawful arrest may not precede the arrest and serve as part of its justification. It is a question of fact precisely when, in each case, the arrest took place. And while there was some inconclusive discussion in the trial court concerning when Officer Lasky “arrested” Peters, it is clear that the arrest had, for purposes of constitutional justification, already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly “seized” him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. At that point he had the authority to search Peters, and the incident search was obviously justified \* \* \*. (Citations omitted)

The concurrence also recognized the following:

Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden. There is no case in which a defendant may validly say, “Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.”

*Id.* at 77 (Harlan, J., concurring). “[T]he prosecution must be able to date the arrest as early as it chooses following the development of probable cause.” *Id.*

This practice of deeming the defendant “arrested” as soon as probable cause existed for arrest is part of the broader doctrine that an officer’s subjective reasoning need not match up with the legal reasoning that later provides the legal grounds for a court to uphold his actions. *Ohio v. Robinette* (1996), 519 U.S. 33, 38; *Scott v. United States* (1978), 436 U.S. 128, 138; see, also, *Whren*, *supra*; *Devenpeck*, *supra*. For constitutional purposes, probable cause to arrest defendant existed before the search of his pocket. As a

result, the search can be justified as “incident to arrest,” even though the officer said he “arrested” defendant after the search.

Of course, defendant complains that the state statute governing minor-misdemeanor arrests precluded an arrest for the marijuana offense. But, as recognized in *Virginia v. Moore* (2008), 128 S.Ct. 1598, such statute does not govern the *constitutional* legitimacy of the arrest or the search incident thereto. And, as recognized by this Court in cases like *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, a statute will not support suppression unless the statute expressly provides for that remedy.

Defendant cites *Knowles v. Iowa* (1998), 525 U.S. 113, and contends that there can be no “search incident to citation.” But this is a misreading of the facts and law emanating from *Knowles*. The Iowa statute in *Knowles* allowed a search incident to arrest whenever a citation was issued, and the defendant in *Knowles* was stopped for speeding. The officer issued a citation and, pursuant to the Iowa statute, searched the vehicle and found marijuana. The *Knowles* Court carefully limited its review to an as-applied challenge to the statute, and it emphasized the twin justifications for searches incident to arrest, i.e., the need to disarm the suspect preparatory to taking him into custody, and the need to preserve evidence. The prosecution could not show a need to disarm the speeder, as only a citation was issued and routine traffic stops do not carry the same need to disarm as custodial arrests. Nor could the prosecution show the need to preserve evidence, as all of the evidence of the speeding offense had already been

gathered at the time of the issuance of the citation, and none could be expected in a search of the speeder's person or car. The *Knowles* Court concluded, as follows:

In [*United States v. Robinson*, [(1973), 414 U.S. 218,] we held that the authority to conduct a full field search as incident to an arrest was a "bright-line rule," which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so. \* \* \*

*Knowles*, 525 U.S. at 118-19.

The present case is distinguishable. The police had not yet decided to issue only a citation. Moreover, their probable cause related to more than just a traffic offense; the offense they were investigating involved the presence of contraband marijuana, and therefore the justification for preserving evidence was present here. The increased danger to law enforcement was also present, as close contact with defendant was required to deal with the situation further. In addition, *Knowles* only involved a search of the vehicle, whereas the present case involved a search of defendant's person consistent with an "arrest" of defendant so that the search-incident-to-arrest approach can be used to justify the search.

*Knowles* does not affect the validity of the *Rawlings* principle that, when probable cause to arrest already exists, a search can be justified as incident to arrest even though the formal arrest came later. *In re Lennies H.* (2005), 126 Cal. App.4th 1232, 1239-40, 25 Cal. Rptr.3d 13, 18-19 & n. 3 ("we find nothing in *Knowles v. Iowa*,

as calling into doubt *Rawlings v. Kentucky.*”); *State v. Sherman* (La. 2006), 931 So.2d 286, 297 (applying *Rawlings* and distinguishing *Knowles*).

The State’s fourth proposition of law should be sustained.

### CONCLUSION

For the foregoing reasons, and for the reasons stated in the State’s merit brief, the State requests that this Court reverse the judgment of the Tenth District Court of Appeals and reinstate the judgment of conviction in all respects.<sup>1</sup>

Respectfully submitted,

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<sup>1</sup> If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was hand delivered on this 26<sup>th</sup> day of Apr., 2010, to the office of Allen V. Adair, 373 South High Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215, counsel of record for defendant-appellee.

  
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