

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, * Case No. 2010-1315
Plaintiff-Appellant, * On appeal from the Lucas County
 * Court of Appeals, Sixth Appellate
 * District
-vs- * Court of Appeals Case No.
DENNIS GOULD, * L-08-1383
 *
Defendant-Appellee.

MEMORANDUM OF PLAINTIFF-APPELLANT IN SUPPORT OF JURISDICTION

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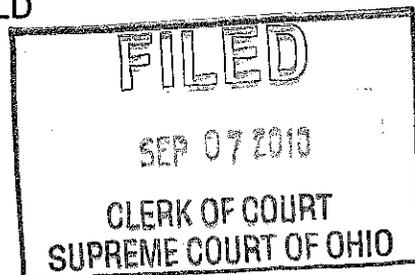
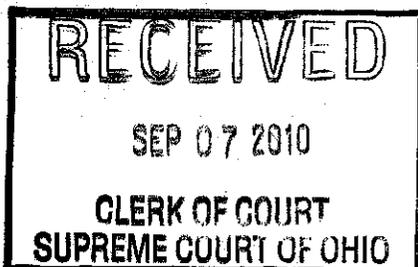


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EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

The crimes at issue in this case are serious and predatory, and the evidence of appellee's guilt is unquestionable. Appellee photographed himself committing acts of rape and gross sexual imposition on a seven-year-old-girl who appeared to be intoxicated. He stored the images on a computer hard drive, which his mother subsequently gave to Toledo police. The detective who received the hard drive concluded that it was abandoned and authorized a warrantless search of its contents.

The trial court held that the search was proper because appellee abandoned the hard drive and had no reasonable expectation of privacy in its contents. The trial court also found that the detective could reasonably have believed that appellee had abandoned any reasonable expectation of privacy in the hard drive. On appeal, the Sixth District found that no competent, credible evidence supported a finding of abandonment. According to the Sixth District, the search violated appellee's Fourth Amendment rights, and as a result, evidence obtained from the hard drive should have been suppressed. *State v. Gould*, 6th Dist. No. L-08-1383, 2010-Ohio-3437.

The Sixth District's opinion failed to consider the recent decision of *Herring v. United States* (2009), 129 S.Ct. 695, 172 L.Ed.2d 496. In *Herring*, the Supreme Court reinforced earlier holdings that suppression is not an automatic right arising out of a violation of the Fourth Amendment. *Herring* also noted that the exclusionary rule has been applied only when the conduct of law enforcement officials was deliberate, reckless, or grossly negligent or involved circumstances of recurring or systemic negligence. Finally, *Herring* provided that the exclusionary rule may be applied only

when the deterrent value of application outweighs the social cost of allowing a guilty party to go free.

This Court has previously recognized that the people of Ohio have a "paramount interest" in knowing how their courts will interpret and apply pronouncements by the U.S. Supreme Court regarding the exclusionary rule. See *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372. Thus far, this Court has not had occasion to apply or interpret *Herring* for the benefit of the judiciary or the public. This case is that occasion.

This case also permits a determination of whether Section 14, Article I of the Ohio Constitution affords broader protections than the Fourth Amendment to the U.S. Constitution. The general rule is that no exclusionary rule derives from the Ohio Constitution. See *State v. Lindway* (1936), 131 Ohio St. 166, paragraphs 4, 5 and 6 of the syllabus. This Court recognized an exception to the general rule when a search was performed in connection with an arrest for a minor misdemeanor in violation of R.C. 2935.26. See, e.g., *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, ¶¶22-25. *Brown* did not overrule or analyze *Lindway*, and this case provides an opportunity to clarify *Lindway's* continued validity, as well as the scope of the protections afforded by Ohio Constitution in comparison to the Fourth Amendment.

A third issue is the appropriate standard of review of a trial court's factual findings incident to a motion to suppress. The Sixth District's decision recited the "competent, credible evidence" standard for review of a factual finding of abandonment, but the Sixth District actually afforded little deference to the trial court's factual findings. Rather, the Sixth District chose to believe the mother's testimony, which was at odds

with the detective's testimony. However, the applicable standard of review does not permit an appellate court to substitute its judgment for that of the trial court merely because it finds one witness to be more credible than another.

The "competent, credible evidence" standard for review of factual findings mirrors the civil manifest-weight-of-the-evidence standard of review. See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. The deference afforded to the trial court in a review of a civil manifest-weight-of-the-evidence challenge is also appropriate for a review of a trial court's factual findings in a suppression hearing. This case offers the opportunity to clarify the standard of review applicable to motions to suppress and to guide appellate courts in the extent to which they are entitled to weigh or discount testimony provided at the hearing.

Finally, the case raises the issue of the circumstances from which abandonment may be inferred. This Court has held that abandonment may be found when an individual "voluntarily discarded, left behind, or otherwise relinquished his interest in the property" so that he no longer retains a reasonable expectation of privacy in the item. *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, 414 N.E.2d 1044. Appellee physically relinquished the hard drive and failed to claim or protect the drive for an extended time period after he stole a vehicle belonging to his roommate who had access to the hard drive in his absence. There was thus "competent, credible evidence" supporting the trial court's factual findings.

This case presents constitutional issues as well as to issues related to the facts from which a trial court may find abandonment and the standard of review of that finding. The State therefore requests review of the Sixth District's decision.

STATEMENT OF THE CASE

In 2007, appellee was indicted on charges of rape, gross sexual imposition, pandering sexually oriented matter involving a minor, and illegal use of a minor in nudity oriented material or performance. Before trial, appellee moved to suppress evidence of materials discovered on a computer hard drive, including photographs showing his face while he performed oral sex on a seven-year-old girl. After an evidentiary hearing, the trial court denied the motion, finding that appellee abandoned the hard drive, and that a law enforcement officer could reasonably have believed that appellee abandoned any expectation of privacy in the hard drive.

Appellee was found guilty by a jury of all counts charged and was sentenced to prison. The Sixth District reversed, finding that there was no credible, competent evidence to support a finding of abandonment and that the objective facts of the case did not support the detective's subjective belief that the hard drive was abandoned.

STATEMENT OF RELEVANT FACTS

At the suppression hearing, appellee's mother, Sharon Easterwood, testified that appellee moved into her home in December, 2005 or January, 2006. Appellee gave her a computer hard drive to keep for him. Appellee's brother Douglas later told Easterwood that he had seen child pornography on appellee's computer.

Easterwood testified that she gave the hard drive back to appellee in May or June, 2006, when he moved into an apartment he shared with his brother Greg. Around August, appellee left Toledo, taking Greg's truck without permission, and leaving personal property in the apartment. Appellee did not tell anyone in his family

where he was going, and his cell phone number was no longer valid.

Easterwood did not hear from appellee for a number of weeks, but at some point, appellee's mail began coming to her house. On October 10, 2006, appellee called to ask whether his brother had reported the theft of the truck. He did not say anything about any of his own possessions. He did not call again until after his arrest.

Easterwood testified that after appellee left with his brother's truck, Greg sold most of appellee's possessions at a garage sale. Easterwood recovered some of appellee's belongings from the apartment, including the hard drive. She called Toledo police and took the hard drive to Detective Gina Lester on December 2, 2006. Because appellee's cell phone bills began coming to Easterwood's home, she was able to determine his new phone number, and she gave that number to Detective Lester.

Detective Lester's testimony differed in some respects from Easterwood's testimony. Detective Lester testified that Easterwood brought the hard drive to the police station on September 6, 2006. According to Detective Lester, Easterwood said that the hard drive had been in her possession since December, 2005, that it might contain child pornography, and that she did not know where her son was and did not have a telephone number for him. Detective Lester took the hard drive and booked it into the property room. Later, Easterwood gave her a current cell phone number for appellee, and Detective Lester testified that she tried to reach appellee at the number several times. Appellee did not respond to the calls. On December 2, 2006, Detective Lester prepared a form authorizing a search of the drive. Easterwood signed the form.

At trial, evidence was introduced that the hard drive contained sexually explicit video and photographs of children, some of which were recognized as known subjects

of child pornography. Additionally, a number of photographs depicted an unknown child victim in what appeared to be a hotel room. Those photographs showed the child holding an adult's penis, with ejaculate on the child's stomach; a man's face and a man in profile with his tongue on the child's vagina; a child with an adult's penis in her mouth; an adult's penis touching the child's vagina; and an adult's penis penetrating the child's vagina. In some of those photographs, the child was holding a Jack Daniel's whiskey bottle, and her eyes were half-closed and unfocused.

A forensics computer examiner compared a known photograph of appellee to the photographs of the man performing oral sex on the child. He concluded that the male in the photographs was appellee, and Easterwood confirmed that the man in two of the photographs was her son. The victim's father identified the child as the daughter of appellee's ex-girlfriend, and the manager of the Best Motel in Toledo testified that the room shown in the photographs was Room 22 of the motel. He also identified a registration card filed under appellee's name.

ARGUMENT

First Proposition of Law: The exclusionary rule may only be applied to conduct by law enforcement officers that is deliberate, reckless, or grossly negligent or where the conduct is part of recurring or systemic negligence. Evidence may not be excluded unless the conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States* (2009), 129 S.Ct. 695, 172 L.Ed.2d 496, explained.

In *Herring*, the Supreme Court observed that "[t]he fact that a Fourth Amendment violation occurred--i.e., that a search or arrest was unreasonable--does not necessarily mean that the exclusionary rule applies." *Id.*, 129 S.Ct. at 700. In fact, the

presumption is against exclusion, which "has always been our last resort, not our first impulse." *Id.*, quoting *Hudson v. Michigan* (2006), 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56. *Herring* laid to rest any notion that the exclusionary rule is a right inherent in the Constitution. Exclusion of evidence "is not an individual right," and "applies only where it results in appreciable deterrence." *Herring*, 129 S.Ct. at 700.

Because the rule's purpose is to deter future Fourth Amendment violations, the conduct at issue by law enforcement officials must be "sufficiently deliberate that exclusion can meaningfully deter it." *Id.* at 702. The exclusionary rule has no application to simple negligence by law enforcement officials: "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.*

Finally, the culpability of law enforcement officials is a threshold requirement but not a guarantee of exclusion. Before application of the exclusionary rule, the benefits of deterrence must be balanced against the social cost of allowing a guilty party to go free:

In addition, the benefits of deterrence must outweigh the costs. 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.

Id., at 700-701 (quotation marks and citations omitted).

Three aspects of *Herring* are relevant to this case. First, the case clearly provides that even when a violation of the Fourth Amendment occurs, suppression

does not automatically flow from that violation. In this case, the Sixth Appellate District erred in assuming that a violation of Fourth Amendment rights automatically requires suppression of evidence.

Second, *Herring* emphasized that "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 701. The Sixth District failed to address the officer's culpability, so the value of deterrence may not be determined. The closest the opinion comes to a discussion of the detective's culpability is the statement that her "subjective belief that the hard drive had been abandoned was unsupported by the objective facts and Easterwood's testimony." See *Gould*, *supra*, 2010-Ohio-3437, ¶31. In other words, the Sixth District found that the detective was mistaken in her belief that the hard drive had been abandoned. However, even a mistaken belief may be reasonable under the circumstances, particularly when that belief is based on a third party's representations. See, e.g., *United States v. Green* (S.D. Oh., 2000), 102 F. Supp.2d 904, 911; *United States v. Sledge* (C.A. 9, 1981), 650 F.2d 1075 and *United States v. Brazel* (C.A. 11, 1997), 102 F.3d 1120. The Sixth District Court did not address the reasonableness of Detective Lester's belief, even though the trial court explicitly found that she could reasonably have believed that appellee had abandoned any reasonable expectation of privacy in the hard-drive.

Finally, application of the exclusionary rule may occur only when the benefit of deterring future comparable conduct by law enforcement officers outweighs the high cost to society in allowing a guilty party to go free. The Sixth District did not engage in

this necessary step before determining that evidence from the hard drive should be suppressed, and the State submits that application of the balancing test would have resulted in a different outcome upon appeal.

Detective Lester authorized the search based on a private party's representations regarding the circumstances of her possession of the hard drive. Construed in the light most favorable to appellee, the case involves a mistaken belief based on a third party's representations. The mistake occurred under circumstances unlikely to be repeated, so the exclusionary rule's value in deterring future similar conduct is slight.

On the other side of the scale, application of the exclusionary rule exacts a significant social cost. This case involves both the creation and the possession of child pornography. Sexual crimes were indisputably committed against a seven-year-old child. Appellee's relationship with the child's mother facilitated the crimes, and the photographic evidence of those crimes indicated that the victim was intoxicated at the time. The severity and the predatory nature of the crimes--the social cost of letting a guilty man go free--weigh heavily against suppression of the evidence.

The State raised *Herring* before oral arguments in the Court of Appeals, and the case was discussed during arguments. Nevertheless, the Sixth District elected not to apply or to consider *Herring* in its opinion. The State therefore seeks review of the case in order to ensure application of U.S. Supreme Court precedent regarding the exclusionary rule.

Second Proposition of Law: No exclusionary rule exists for a violation of the search-and-seizure provisions of Section 14, Article I, of the Ohio Constitution. *State v. Lindway* (1936), 131 Ohio St. 166, paragraphs 4, 5, and 6 of the syllabus, applied.

The protections afforded by way of Section 14, Article I, of the Ohio Constitution are generally coextensive with the protections from the Fourth Amendment. *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-239, 1997-Ohio-343, 685 N.E.2d 762; *State v. Jordan*, 104 Ohio St.3d 21, 35, 2004-Ohio-6085, 817 N.E.2d 864, ¶155. This Court has previously held that the Ohio Constitution does not recognize an exclusionary rule for illegal searches:

4. In a criminal case, evidence obtained by an unlawful search is not thereby rendered inadmissible, and, if otherwise competent and pertinent to the main issue, will be received against an accused.

5. An application or motion to suppress or exclude such evidence made before trial or during trial is properly denied. The court need not concern itself with the collateral issue of how the evidence was procured. ***

6. The immunities from compulsory self-incrimination and unreasonable searches and seizures given by Sections 10 and 14, respectively, Article I, of the Constitution of Ohio, are not violated by the denial of such application or motion, and the admission of such evidence.

Lindway, supra, 131 Ohio St. at paragraphs 4, 5 and 6 of the syllabus.

After *Lindway*, this Court recognized an exception to the general rule in *Brown*, supra, 2003-Ohio-3931. *Brown* acknowledged that "we should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise." *Id.* at ¶22, quoting *Robinette*, supra, 80 Ohio St.3d at 239. *Brown* concluded that the Ohio Constitution provides greater protection than the Fourth Amendment when a search is incident to an arrest for a minor misdemeanor.

In *Jordan*, this Court considered a possible expansion of the exception created in *Brown*, but concluded that "[n]one of the considerations compelling our determination in *Brown*" were present. This case likewise presents no persuasive reasons for holding that the Ohio Constitution affords greater protection than the Fourth Amendment, and the case will provide an opportunity to clarify that Ohio's search and seizure law tracks U.S. Supreme Court authority interpreting and applying the Fourth Amendment.

Third Proposition of Law: A trial court's factual findings incident to the denial of a motion to suppress are reviewed for "competent, credible evidence" to support the findings. When the trial court specifically recognized a disparity between the testimony of two witnesses, and rendered its findings in consideration of that disparity, a reviewing court may not substitute its judgment for the trial court by giving more credence to the testimony of one witness than the other.

The State does not dispute that the Sixth Appellate District recited the correct standard of review in its opinion in this matter. Rather, appellant contends that the reasoning of the Sixth District was inconsistent with the standard recited.

This Court has previously held that abandonment is an issue of fact for the trial court's determination. See *Freeman*, supra, 64 Ohio St.2d at 297. A trial court's factual determinations in connection with a motion to suppress are reviewed for the presence of "competent, credible evidence." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶100; *Oliver*, supra, 2007-Ohio-372, ¶1. The standard is a "deferential standard," because the trial court assumes the role of trier of fact, and "the evaluation of evidence and the credibility of witnesses are issues for the trier of fact." See, e.g., *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972; and *Roberts*, supra, 2006-Ohio-3665, ¶100.

The "competent, credible evidence" standard mirrors the manifest-weight-of-the-

evidence standard applicable in civil cases. This Court has distinguished between the civil and criminal manifest-weight-of-the-evidence standards and concluded that the civil standard of "competent, credible evidence" is the more deferential of the two standards:

Both *C.E. Morris [Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578]* . . . and [*State v. Thompkins (1997), 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541*] instruct that the fact-finder should be afforded great deference. However, the standard in *C.E. Morris Co.* tends to merge the concepts of weight and sufficiency. . . . Thus, a judgment supported by "some competent, credible evidence going to all the essential elements of the case" must be affirmed. *C.E. Morris Co.* Conversely, under *Thompkins*, even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings. . . . Thus, the civil-manifest-weight-of-the-evidence standard affords the lower court more deference than does the criminal standard.

State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

The factual determinations incident to a suppression hearing are reviewed for precisely the same "competent, credible evidence" described in the civil manifest-weight-of-the-evidence standard. The same deference should be afforded to the trial court in a review of findings incident to suppression hearings.

In this case, the Court of Appeals did not employ a deferential review process. The Court of Appeals focused on inconsistencies between the testimony of Ms. Easterwood and Detective Lester at the suppression hearing. The opinion noted that Detective Lester testified that "Easterwood indicated to Detective Lester that [appellee] had given it to her in December, 2005 and instructed her not to allow anyone else to have it," and further noted that "the court cited a period of nine months as sufficient in finding the hard drive to have been abandoned." *Gould*, supra, ¶9, 18. On that basis, the Court of Appeals concluded that "the trial court apparently accepted Detective

Lester's testimony as an accurate recitation of the facts." *Id.* at ¶18. The opinion then detailed the inconsistencies between Ms. Easterwood's testimony and Detective Lester's statement as to what Ms. Easterwood said when she brought in the hard drive.

Of course, if the trial court "accepted Detective Lester's testimony as an accurate recitation of the facts," such acceptance represents a factual finding dependent on the trial court's assessment of the credibility of two witnesses. The trial court was able to see the witnesses' demeanor, to hear their vocal inflections and to evaluate their gestures and physical responses. Assessments of credibility based on such observations should not be set aside based on a bare reading of a transcript. As this Court has observed, a "[c]hoice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277.

But to the extent the Sixth District's opinion suggests that the trial court ignored Easterwood's testimony, that suggestion is unfounded. The trial court specifically recognized the two "slightly different versions of events" but found that the search was appropriate under either version:

In this case, under the fact scenarios presented by both Ms. Easterwood and detective Lester, the Court finds that detective Lester reasonably could have believed that the defendant had abandoned any reasonable expectation of privacy in the hard-drive. First, the Court notes that the defendant left the hard-drive with his mother for nine months, or with his brother for several months (along with most of the defendant's other possessions) after stealing his brother's truck, without leaving further instructions to preserve the device. Second, the Court finds that given this apparent lack of interest in diligently protecting the hard drive (or his other belongings), and given his failure to maintain contact with his mother, it is reasonable that the mother believed that the device contained

child pornography and thus posed a threat to the public.

(Opinion and Judgment Entry at p.4.)

This case represents an opportunity for this Court to clarify that an appellate court may not set aside a trial court's factual conclusions based on differences in testimony by two witnesses, particularly when the trial court recognized the inconsistency and rendered its decision in consideration of that inconsistency.

Fourth Proposition of Law: A trial court's finding that personal property is abandoned, or that a detective could reasonably believe that the property was abandoned, is supported by competent, credible evidence when there is testimony that the owner left the state for an undisclosed destination, stole his roommate's vehicle, left his personal property behind, and failed to contact his roommate or family for several months, until his roommate sold his possessions at a garage sale and his mail began going to a different address.

The test for abandonment is whether the owner "voluntarily discarded, left behind, or otherwise relinquished his interest in the property" so that he no longer retains a reasonable expectation of privacy with regard to it at the time of the search. *Freeman*, supra, 64 Ohio St.2d at 297.

The facts of this case support the conclusion that appellee abandoned personal property left in the apartment when he fled with his brother's truck. First, appellee physically relinquished the property. This case is analogous to cases in which a fleeing defendant relinquishes an object to make his flight easier. See, e.g., *Freeman*, supra (defendant abandoned his luggage when he dropped his bag and fled on foot). Appellee physically relinquished the hard drive in the course of fleeing with a vehicle belonging to his brother. Second, appellee failed to claim the property for an extended time. His failure to claim property left behind, or even to inquire about the status of the

property, is evidence of abandonment. See, e.g., *United States v. Chandler* (C.A. 8, 1999), 197 F.3d 1198, 1201. Finally, appellee assumed the risk that his roommate would sell, give away or dispose of the hard drive, and exposure of property to such risk goes directly to the reasonableness of his privacy expectations. Of course, appellee increased the normal risk inherent in leaving property on premises occupied by another person when he committed a theft offense against that person. 4 LaFare, Search and Seizure (4th ed. 2004) 151-152, §8.3(B).

The testimony at the suppression hearing thus provided competent, credible evidence to support a finding that the property was abandoned or that Detective Lester could reasonably believe that the property was abandoned. Review of the Sixth District's decision is warranted to clarify the circumstances from which a trial court may find abandonment of property.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court accept jurisdiction over this case.

Respectfully submitted,
JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 

Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via facsimile and ordinary U.S. Mail this 7th of September, 2010, to Deborah Kovac Rump, 1700 Canton Ave., Ste. 2 Toledo, Ohio 43604, attorney for defendant-appellee.



Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

EXHIBIT A

FILED
COURT OF APPEALS
2010 JUL 23 A 7:59

COURT OF APPEALS
LUCAS COUNTY
COURT

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1383

Appellee

Trial Court No. CR0200702249

v.

Dennis Gould

DECISION AND JUDGMENT

Appellant

Decided:

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to suppress evidence. For the reasons set forth below, this court reverses the judgment of the trial court.

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JUL 23 2010

{¶ 2} On June 12, 2007, appellant was indicted on two counts of rape, both felonies of the first degree; one count of gross sexual imposition, a felony of the third degree; six counts of pandering sexually-oriented material involving a minor, one of which was a felony of the second degree, and the remainder of which were felonies of the fourth degree; and five counts of the illegal use of a minor in nudity-oriented material or performance, all of which were felonies of the fifth degree.

{¶ 3} Appellant moved to suppress all evidence obtained from a computer hard drive. Of greater relevance, the evidence sought to be excluded contained images of appellant engaging in sexual acts with a minor child. The motion to suppress was premised upon grounds that the hard drive was searched without a warrant or valid consent. On November 11, 2007, an evidentiary hearing was conducted. The trial court held that the hard drive was abandoned property and, as such, the police had a reasonable basis to believe that appellant had relinquished any expectation of privacy pertaining to it.

{¶ 4} Subsequent to the suppression ruling against appellant, the case proceeded to a jury trial. Appellant was found guilty of all charges. On September 30, 2008, appellant was sentenced to a term of imprisonment of approximately 13.5 years, followed by two concurrent life sentences for the rape convictions, and a four year term for the gross sexual imposition conviction.

{¶ 5} On appeal, appellant sets forth the following sole assignment of error:

{¶ 6} "The state's case rests entirely on evidence seized during a search of Gould's computer hard drive. Gould had originally left that drive in the possession of his

mother with instructions that she was not to give it to anyone. She agreed. Gould's mother eventually took it from Gould's apartment and turned the drive over to the police. Gould did not consent to the search of the drive, and no exigent circumstances existed for the police to search it without warrant. The state argued it was abandoned property even though it was in Gould's apartment. Gould believes that the state failed to prove it was abandoned and, as such, his motion to suppress should have been granted."

{¶ 7} The following undisputed facts are relevant to the issue raised on appeal. Appellant filed a motion to suppress the evidence, namely, the computer hard drive. Two witnesses testified at the hearing. Sharon Easterwood who is appellant's mother and Detective Gina Lester of the Toledo Police Division.

{¶ 8} Detective Lester testified that on September 6, 2006, appellant's mother, Sharon Easterwood, came to the Northwest District Police Station. Easterwood came to the police to turn over a computer hard drive that belonged to appellant. Though she had not viewed its contents, Easterwood indicated her suspicion that the hard drive contained child pornography to Detective Lester. She came to this belief after one of her sons, Douglas, indicated that he had seen child pornography on appellant's computer. The record does not reflect whether Douglas had knowledge that this particular hard drive came from the same computer.

{¶ 9} When asked how the hard drive came into her possession, Easterwood indicated to Detective Lester that appellant had given it to her in December 2005, and instructed her not to allow anyone else to have it. She further stated that the hard drive

had been abandoned by appellant, and that she no longer felt comfortable keeping it in her home.

{¶ 10} Upon further inquiry, Easterwood stated that she had no knowledge of appellant's whereabouts and that she had very limited contact with him at the time. Appellant had gone absent some months earlier. At the meeting's conclusion, Detective Lester took possession of the hard drive and booked it into the department's property room. Based on the discussion with Easterwood, Detective Lester indicated her belief that the hard drive was abandoned property.

{¶ 11} Within two months of the initial meeting, Easterwood provided Detective Lester with appellant's new cellular telephone number. Easterwood indicated that the telephone bill began coming to her home, and she opened it to retrieve the number. Detective Lester made multiple attempts to contact appellant at the number and left voicemail messages identifying herself and asking for him to return her call. These calls were never returned.

{¶ 12} After repeatedly attempting to contact appellant over the course of three months, Detective Lester asked Easterwood to return to the police station on December 2, 2006, to complete a consent form to search the hard drive. Easterwood voluntarily completed the form. Detective Lester subsequently forwarded the hard drive to another detective at the police division and requested that he conduct a forensic analysis of its contents.

{¶ 13} On January 3, 2007, Detective Lester received a report on the hard drive's contents. It was found to contain pornographic videos of children, as well as photographs of appellant engaging in sexual acts with a minor child. Appellant was subsequently arrested in June 2007, in connection with the materials found on the hard drive.

{¶ 14} Easterwood's testimony at the suppression hearing appeared to conflict with the representations made to Detective Lester. Easterwood suggested that appellant initially gave her the hard drive in December 2005, when he temporarily moved into her home. Appellant then apparently took back the hard drive when he procured his own residence in June 2006.

{¶ 15} Easterwood conceded that in late August while appellant had gone absent, she asked her son Gregory's girlfriend, who had also moved into appellant's apartment, to go through appellant's belongings and retrieve the hard drive for her. The meeting with Detective Lester took place two weeks later and the hard drive was turned over.

{¶ 16} It is well-established that in reviewing a motion to suppress, the appellate court may not reverse the trial court ruling if it is supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. The rationale underlying this deferential standard of review is in recognition that the trial court is most effectively situated to weigh and consider evidence, witness credibility, and resolve factual questions. *State v. Mills* (1992), 62 Ohio St.3d 357, 366.

{¶ 17} In his sole assignment of error, appellant asserts that the trial court erred by not suppressing the images on the hard drive. Appellant argues that the state failed to

establish that the hard drive was abandoned. Appellant further claims that his mother had no authority to consent to a search of the hard drive.

{¶ 18} A review of the record sub judice reveals that the trial court apparently accepted Detective Lester's testimony as an accurate recitation of the facts. In its decision on appellant's motion to suppress, the court cited a period of nine months as sufficient in finding the hard drive to have been abandoned. On that basis, the court determined that the subsequent search by police did not violate Fourth Amendment limitations.

{¶ 19} Our review of the record, particularly the testimony of appellant's mother, leads to a contrary conclusion. During testimony at the suppression hearing, Easterwood unambiguously represented that she first gained possession of the hard drive nine months prior to her meeting with Detective Lester. Appellant regained possession of the hard drive when he moved out of his mother's home some months later. Easterwood ultimately conceded that she again secured possession of the hard drive by going to appellant's home and removing it without his knowledge or consent.

{¶ 20} Easterwood ultimately conceded that she failed to disclose the truth of how she came into possession of the hard drive to Detective Lester. Easterwood testified that her son Dennis Gould, the appellant herein, moved into her house and began residing with her sometime in January 2006.

{¶ 21} At some point during the period of time that he was living with his mother, appellant handed the hard drive to his mother and gave her explicit instructions to not let "anybody get their hands on it." It was Easterwood who then put the hard drive into a big brown manila envelope and put it in her nightstand.

{¶ 22} Appellant moved out of his mother's residence in May 2006, and was living at an Ontario Street address. The appellant had taken all of his personal possessions when he moved out of his mother's residence with the exception of the hard drive given to Easterwood in January. It remained in Easterwood's nightstand.

{¶ 23} At some undefined point in time after coming into possession of the hard drive, Easterwood had a telephone conversation with appellant's twin brother, Douglas. Douglas indicated that he had witnessed Dennis viewing child pornography on his computer when appellant lived in Mississippi and further surmised that such pornography was on the hard drive given to Easterwood. As a result of this telephone conversation, Easterwood gave the hard drive back to the appellant sometime around the first of June 2006.

{¶ 24} Appellant was living in his apartment by himself until the July 4th weekend of 2006 when his older brother Greg moved in with him. At some undetermined point in time, appellant's brother had a girlfriend also reside at the apartment.

{¶ 25} Easterwood had concluded that appellant had "gone missing essentially in August." She reached this conclusion from a statement made by appellant's brother. By

her own admission, she "wasn't around" appellant and could not indicate how or why she or her son Gregory had concluded that appellant had gone "missing" in August.

{¶ 26} After she concluded that appellant was "missing" in August, Easterwood went to appellant's apartment and asked "the girl" to "go through his things, which she did. And she gave it back to me. It was still in the brown manila envelope." It is undisputed that she took the drive to the Northwest District Police Station on September 6, 2006, several weeks after she obtained it from appellant's apartment.

{¶ 27} Her next contact with appellant occurred when she received a telephone call from him on October 10. Appellant asked Easterwood if his brother had filed a charge against him for stealing his truck. There was no discussion about his belongings or anything else concerning his apartment.

{¶ 28} The state contends that the hard drive was abandoned by appellant. Abandoned property is not subject to Fourth Amendment protection. *Abel v. United States* (1960), 362 U.S. 217. "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *United States v. Colbert* (C.A.5, 1973), 474 F.2d 174, 176. In determining whether someone has abandoned property, "[a]ll relevant circumstances existing at the time of the alleged abandonment should be considered." *Id.* "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." *Id.*

{¶ 29} At the suppression hearing, there was no evidence presented to demonstrate appellant's intent, by words spoken or acts done, to abandon the hard drive.

{¶ 30} While intent of one in possession of property or premises often cannot be inferred from his actions, abandonment will not be presumed. It must be clearly established by the party asserting it. *Coleman v. Maxwell* (C.A.6, 1967), 387 F.2d 134, certiorari denied (1968), 393 U.S. 1007. Mere absence from the premises without a clear intention to abandon could not legitimize a search of property found therein. *U.S. v. Robinson* (C.A.6, 1970), 430 F.2d 1141.

{¶ 31} Detective Lester's subjective belief that the hard drive had been abandoned was unsupported by the objective facts and Easterwood's testimony. More significantly, the detective could have obtained additional information concerning the circumstances surrounding Easterwood's access to the computer hard drive through further questioning and properly sought a search warrant for the hard drive. Accordingly, we find that the state failed to demonstrate by credible, competent evidence that the hard drive was abandoned.

{¶ 32} The state alternatively argues that the search of the hard drive did not exceed constitutional limitations because the Fourth Amendment proscribes only governmental search or seizure. The Fourth Amendment is "wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as

an agent of the Government or with the participation or knowledge of any government official." *United States v. Jacobsen* (1984), 466 U.S. 109, 113, quoting *Walter v. United States* (1980), 447 U.S. 649, 662. The court stipulated that "additional invasions of * * * privacy by the Government agent must be tested by the degree to which they exceed the scope of the private search." *Id.* at 115. The *Belcastro* court held that "the government may not exceed the scope of the private search [or seizure] unless it has the right to make an independent search, e.g. through a warrant." *State v. Belcastro*, 8th Dist. No. 77443, 2002-Ohio-2556, ¶ 7.

{¶ 33} In applying this legal precedent to the instant case, the record shows that Easterwood acted as a private individual and not as an agent of the government when she acquired the hard drive from appellant's residence. Therefore, the government's *seizure* of the hard drive did not exceed Fourth Amendment limitations. However, there is no evidence that Easterwood, or anyone else, "opened" the hard-drive and viewed its contents. The images on the hard drive were not manipulated until the police division did so at the direction of Detective Lester. Consequently, by conducting a warrantless search of the hard drive's contents absent exigent circumstances, the police exceeded the scope of Easterwood's private action.

{¶ 34} We find no credible, competent evidence to uphold the trial court's finding that the hard drive was abandoned property. The hard drive and its contents were subject to Fourth Amendment protections against warrantless governmental search. The state violated these protections when it exceeded the scope of the private seizure by appellant's

mother. As such, the disputed governmental search of the hard drive was unconstitutional and the evidence resulting from the search should have been suppressed. Appellant's sole assignment of error is found well-taken.

{¶ 35} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. The case is remanded to the trial court for further proceedings. Appellee is ordered to pay costs of this appeal pursuant to App.R. 24.

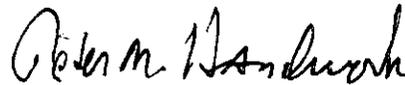
JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Arlene Singer, J.

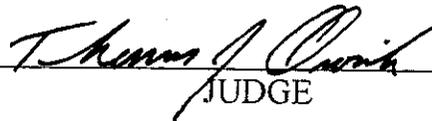
Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.