ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

DENNIS GOULD,

Defendant-Appellee.

Case No. 2010-1315

On Appeal from the Lucas County Court of Appeals, Sixth Appellate District

Court of Appeals Case No. L-08-1383

REPLY BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING ATTORNEY RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
(Counsel of Record)
373 South High Street–13th Fl.
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6012
Email: slgilber@franklincountyohio.gov

Counsel for Amicus Curiae Franklin County Prosecuting Attorney Ron O'Brien

JULIA R. BATES 0013426
Lucas County Prosecuting Attorney
EVY M. JARRETT 0062485
Assistant Prosecuting Attorney
(Counsel of Record)
Lucas County Courthouse
Toledo, Ohio 43624
Phone: 419-213-2001
Fax: 419-213-2011

Counsel for Plaintiff-Appellant

TIMOTHY YOUNG 0059200
Ohio Public Defender
JEREMY J. MASTERS 0079587
Assistant Public Defender
(Counsel of Record)
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Phone: 614-466-5394

Counsel for Defendant-Appellee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

Proposition of Law: 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), 555 U.S. 135, 129 S.Ct. 695, followed.

CONCLUSION 6

CERTIFICATE OF SERVICE ..... unnumbered

TABLE OF AUTHORITIES

Cases

Arizona v. Evans (1995), 514 U.S. 1 3

Arizona v. Gant (2008), 552 U.S. 1230, 128 S.Ct. 1443 2

Arizona v. Gant (2010), 129 S.Ct. 1710 2

City of Maumee v. Weisner (1999), 87 Ohio St.3d 295 4

City of Wilmington v. Conner (2001), 144 Ohio App.3d 735 5

Franks v. Delaware (1978), 438 U.S. 154 3

Herring v. Untied States (2009), 555 U.S. 135, 129 S.Ct. 695 ..... passim

Illinois v. Krull (1987), 480 U.S. 340 ..... 2, 4

Pennsylvania Bd. of Probation and parole v. Scott (1998), 524 U.S. 357 4

State v. Geiter, 190 Ohio App.3d 541, 2010-Ohio-6017 2

State v. Greer (1996), 114 Ohio App.3d 299 5

State v. Lindway (1936), 131 Ohio St. 166 5

United States v. Gonzalez (C.A. 9, 2010), 598 F.3d 1095 2

United States v. Julius (C.A. 2, 2010), 610 F.3d 60 3

United States v. Leon (1984), 468 U.S. 897 4

United States v. Monghur (C.A. 9, 2009), 588 F.3d 975 2

United States v. Smart (C.A. 8, 2005), 393 F.3d 767 5

Constitutional Provisions

United States Constitution, Fourth Amendment 1, 2, 4, 5

ARGUMENT

Proposition of Law: 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), 555 U.S. 135, 129 S.Ct. 695, followed.

Under *Herring*, the fact that the police violated the Fourth Amendment is not enough to suppress evidence. Courts must take the further step of assessing whether the police misconduct was sufficiently deliberate that the deterrence benefits of suppression outweigh the substantial societal costs of excluding relevant evidence of guilt. In order for the exclusionary rule to achieve any meaningful deterrence, the defendant must show that the police engaged in "deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systemic negligence." *Herring v. Untied States* (2009), 555 U.S. 135, 129 S.Ct. 695, 702.

Despite the broad language in *Herring*, defendant argues that the holding in *Herring* is limited to the narrow facts of that case. Defendant maintains that *Herring* does not apply here because Detective Lester did not rely on a warrant and because her misconduct was not attenuated from the search. According to defendant, the "deterrence value of suppression in the present case is significant." (Defendant's Brief, 21)

But defendant's arguments only highlight the flaws of the Sixth District's opinion. The Sixth District engaged in no analysis whatsoever regarding whether suppressing the evidence would deter police misconduct. The Court never assessed whether Detective Lester's decision to proceed without a warrant made her conduct "deliberate." (Id. at 15) Nor did the Court assess whether Lester's misconduct was attenuated from the search. Instead, the Court found that suppression was required for no other reason but that there was a Fourth Amendment violation.

This oversimplified "Fourth Amendment violation = suppression" analysis is exactly what *Herring* prohibits.

Defendant's "no warrant" and "not attenuated" arguments are without merit anyway. To start, the absence of a warrant does not per se make the police's conduct "deliberate." As stated in Amicus's initial brief, the Supreme Court itself held that the exclusionary rule does not apply when the police rely on an unconstitutional state statute to justify a warrantless search. (Amicus Brief, 7, citing *Illinois v. Krull* (1987), 480 U.S. 340, 349) Also, numerous courts have refused to suppress evidence when the police search a vehicle incident to an arrest, even though the search—while legal at the time—is now unconstitutional under *Arizona v. Gant* (2010), 129 S.Ct. 1710. (Amicus Brief, 6-7) Defendant is wrong in contending that *Gant* somehow signaled a retreat from *Herring*. The question presented in *Gant* was limited to the scope of the Fourth Amendment; the scope of the exclusionary rule—a question separate from the Fourth Amendment question—was not at issue in *Gant*. *Arizona v. Gant* (2008), 552 U.S. 1230, 128 S.Ct. 1443; see, also, *United States v. Gonzalez* (C.A. 9, 2010), 598 F.3d 1095, 1107 ("Nothing in *Gant* eliminates or narrows the good faith exception to the exclusionary rule for the simple reason that the issue whether the good faith exception applied was not raised nor reached in *Gant*.") (Bea J., dissenting from denial en banc).

Amicus cited *United States v. Monghur* (C.A. 9, 2009), 588 F.3d 975, as another example of a court applying *Herring* to an unconstitutional warrantless search. (Amicus Brief, 7) Amicus acknowledges that the Ninth Circuit has subsequently vacated *Monghur*, and Amicus sincerely apologizes to this Court for this error. However, the point is still the same: The good-faith analysis under *Herring* applies even if the police rely on an exception to the warrant requirement. *State v. Geiter*, 190 Ohio App.3d 541, 2010-Ohio-6017, ¶ 44 (applying *Herring*

and affirming denial to suppress evidence found during warrantless traffic stop, finding that officer "could not know that his conduct in stopping a car to investigate possible criminal activity would subsequently prove to lack a foundation."); *United States v. Julius* (C.A. 2, 2010), 610 F.3d 60, 66 (court declined to decide whether warrantless search violated Fourth Amendment and instead remanded case to trial court "to consider whether, if Deputy Wood's search was conducted in violation of the Fourth Amendment, the exclusionary rule applies in light of *Herring*.").

Nor does the exclusionary rule turn on whether the police error was attenuated from the search. In *Franks v. Delaware* (1978), 438 U.S. 154, the Court held that police negligence in obtaining a warrant does not violate the Fourth Amendment at all, let alone require suppression. Id. at 171. There was no attenuation in *Franks*—the police's negligence directly led to the acquisition of the warrant. The Court in *Herring* relied extensively on *Franks*, noting that both cases "concern false information provided by police." *Herring*, 129 S.Ct. at 703. The Court never suggested that suppression was less warranted in *Herring* because the police error was one step further removed from the search.

Even if attenuation is a factor in assessing the deterrence benefits of exclusion, defendant is wrong in arguing that the search here was caused by police error unattenuated from the search. To the extent there was any misconduct at all, it was Easterwood's misrepresentation to Lester that defendant had abandoned the computer. Thus, the present case is similar to *Arizona v. Evans* (1995), 514 U.S. 1, which involved the police relying on false information provided by court employees, and *Herring* itself, which involved the police relying on false information provided by another police agency. As defendant admits, the errors in both *Evans* and *Herring* were attenuated from the search. And, of course, Lester was justified in believing Easterwood,

who is considered an "identified citizen informant" and whose tips are considered "highly reliable." *City of Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 300. The deterrence and culpability analyses are objective in nature, *Herring*, 129 S.Ct. at 703, and, under these circumstances, Lester's decision to search the computer without a warrant was objectively reasonable.

Defendant also errs in arguing that the "costs to society do not vary according to the details of a particular case." (Defendant's Brief, 18) "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.'" *Herring*, 129 S.Ct. at 701, quoting *United States v. Leon* (1984), 468 U.S. 897, 908. It naturally follows, then, that the costs of exclusion are higher the more dangerous the defendant is and the more likely excluding the evidence will result in acquittal. But regardless of whether the costs of exclusion are fixed or vary with each case, one thing is clear—the costs are "substantial." *Herring*, 129 S.Ct. at 700, quoting *Krull*, 480 U.S. at 353. "'[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" *Herring*, 129 S.Ct. at 701, quoting *Pennsylvania Bd. of Probation and parole v. Scott* (1998), 524 U.S. 357, 364-65.

More importantly, defendant's "fixed costs" argument again only highlights the flaws in the Sixth District's "Fourth Amendment violation = suppression" approach. The Sixth District did not assess or even acknowledge the costs of suppressing the evidence. Instead, the Court found that suppression flowed automatically from a Fourth Amendment violation.

Two final points: First, Amicus disagrees with defendant that the exclusionary rule has greater application when the police make a mistake of law. (Defendant's Brief, 22) *Herring* makes no distinction between mistakes of law and mistakes of fact. As long as the mistake—be it legal or

factual—was not deliberate, reckless, or grossly negligent, and was not the result of recurring or systemic negligence, then suppression is unwarranted. *Herring*, 129 S.Ct. at 702. Even before *Herring*, courts recognized that reasonable mistakes of law do not require suppression. *United States v. Smart* (C.A. 8, 2005), 393 F.3d 767, 770; *City of Wilmington v. Conner* (2001), 144 Ohio App.3d 735, 740, citing *State v. Greer* (1996), 114 Ohio App.3d 299, 300-01. Indeed, the law can oftentimes be more difficult for a police officer to discern than the facts.

Second, Amicus agrees with defendant that whether *State v. Lindway* (1936), 131 Ohio St. 166, remains good law is not at issue in this case. (Defendant's Brief, 23) The Sixth District did not rely on or even mention the Ohio Constitution in its decision. However, this Court's observations in *Lindway* are equally pertinent to the exclusionary rule under the Fourth Amendment. Should this Court decide to assess the search under the Ohio Constitution, Amicus respectfully submits that this Court should adhere to *Lindway*. See, State's 2-16-10 Merit Brief and 4-26-10 Reply Brief in *State v. Johnson*, Sup. Ct. No. 09-1552.

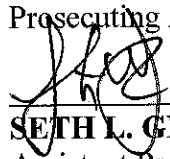
In the end, Amicus respectfully requests that this Court follow *Herring* and hold that the federal exclusionary rule will only be applied to suppress evidence when the Fourth Amendment violation is the result of deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights or involves circumstances of recurring or systemic negligence. *Herring*, 129 S.Ct. at 702.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Amicus's initial brief, Amicus Curiae Franklin County Prosecutor Ron O'Brien respectfully requests that this Court reverse the judgment of the Sixth District.

Respectfully submitted,

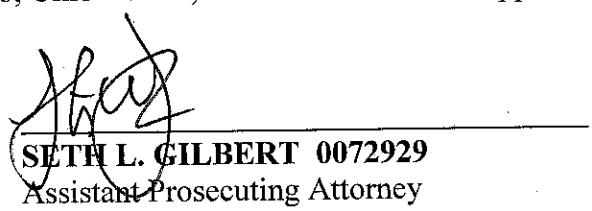
RON O'BRIEN 0017245
Prosecuting Attorney



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney
Counsel for Amicus Curiae Franklin County
Prosecuting Attorney Ron O'Brien

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, May 16, 2011, to Jeremy J. Masters, Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for Defendant-Appellee; and Evy Jarrett, Assistant Prosecuting Attorney, Lucas County Courthouse, Toledo, Ohio 43624, counsel for Plaintiff-Appellant.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney