

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-0668

STATE OF OHIO,

Appellant/Cross-Appellee

v.

LARRY McWHORTER,

Appellee/Cross-Appellant.

}
}
} On Appeal from the Cuyahoga County Court
} of Appeals, 8th Judicial District

}
} Court of Appeals
} Case No. 95108

APPELLEE'S MEMORANDUM
IN OPPOSITION TO JURISDICTION

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FILED
MAY 25 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THE STATE'S APPEAL DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION
OR AN ISSUE OF GREAT PUBLIC INTEREST**

In this case, the State asks this Court to adopt a position it mistakenly believes the United States Supreme Court has espoused, and to ignore a long-settled issue of law: that appellate courts, in reviewing rulings on motions to suppress evidence, should defer to the trial court's findings of fact so long as they are supported by competent, credible evidence. The gravamen of the State's argument is that the appellate court failed to consider whether the exclusionary rule should apply. As will be seen, the application of the exclusionary rule in this case is not only consistent with 4th Amendment law, but compelled by it.

What is more, even were this Court to adopt the State's Proposition of Law, it would not change the outcome of the case. The State argues that a police officer's mistaken understanding of the law in stopping a vehicle should be discounted so long as the officer had a reasonable belief that a violation had occurred. As will be seen, the courts below held that there *was no reason* to believe that a traffic violation had occurred.

In short, the State asks this Court to hear this case for the purpose of adopting a view of the exclusionary rule that is not the law and should not be the law, and which, even if adopted, would not change the outcome of this case. Accepting jurisdiction in this case for that purpose is hardly consistent with this Court's role.

STATEMENT OF THE CASE AND FACTS

On February 11, 2010, Officer William Mazur was driving in the area of East 71st and Fullerton Ave. in the City of Cleveland, when he observed a vehicle being driven in the opposite direction by Mr. McWhorter. Officer Mazur claimed that Mr. McWhorter's windshield had a crack

in it, and on this basis, he turned around and followed the vehicle. (T.r. 7). Several blocks later, Officer Mazur conducted a traffic stop, and asked Mr. McWhorter for his license. (T.r. 8-9). Mr. McWhorter stated that his license was suspended, and Officer Mazur arrested him for driving under suspension. (T.r. 9). Prior to placing him in the zone car, Officer Mazur searched Mr. McWhorter, and found a rock of crack cocaine and three pills.

The case turned on the nature of the crack in the windshield that Officer Mazur observed. Although the State asserts that “the windshield infirmity actually consisted of multiple cracks that ran the length of the windshield,” Memorandum at 1, 3, the record indicates that the officer initially testified that there were “multiple cracks,” then shortly thereafter backtracked to stating that it was “possible” there were two, but “one for sure.” (T.r. 13). Moreover, the officer initially stated that he stopped Mr. McWhorter’s vehicle because of a supposed violation of Cleveland Ordinance 431.25 and 437.01. The former section has nothing to do with the situation here; it prohibits one from operating a vehicle when his view is obstructed by *load or persons*. When confronted with that on cross-examination, the officer sought refuge in the latter section, which prohibits driving a vehicle “which is in such unsafe condition as to endanger any person or property.”

The officer claimed that the crack in the windshield did create such a condition, but was unable to explain why. He insisted that the crack would have “distorted” the driver’s view, but after extensive cross-examination on the point, couldn’t explain how, other than to say that the crack would be in the driver’s line of sight. (T.r. 13-17). Notwithstanding the supposed distortion, the officer acknowledged that Mr. McWhorter did not have to bend over in his seat or otherwise move from the driver’s position in order to see (T.r. 13). Furthermore, despite the fact that Mr. McWhorter’s car was approaching him, it was not until Mr. McWhorter’s car was alongside his that the officer even noticed the crack in the windshield. (T.r. 19). Moreover, the crack had no

discernible effect on Mr. McWhorter's ability to drive the vehicle; during the several blocks that the officer followed Mr. McWhorter in the snowy streets before initiating the traffic stop, he did not see anything erratic in Mr. McWhorter's driving. (T.r. 21). It was hardly surprising, then, that the trial court "does not believe that a cracked windshield, *as described by the police officer*, is such an unsafe vehicle that would be such an unsafe condition [sic] to endanger any person or property." (T.r. 37) (Emphasis supplied).

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW NO. 1: Evidence Obtained During A Traffic Stop Should Not Be Suppressed Where An Officer Is Mistaken About The Statute/Ordinance That Was Violated So Long As There Was Reason To Believe That There Was A Violation.

The State's argument is two-fold. First, it contends that the United States Supreme Court has created a "good-faith" exception to the exclusionary rule for warrantless searches, and that application of this exception would permit the search involved here to pass constitutional muster. Second, the State argues that the search here is valid because an officer's mistake of law as to the basis of the stop does not require exclusion of the evidence. Neither of these arguments is valid.

I. There is no "good-faith" exception to the warrant clause.

In *United States v. Leon* (1984), 104 S.Ct 3405, the Supreme Court held that the exclusionary rule would not be applied to searches and seizures conducted with a warrant so long as the officers had a "good-faith" belief in the warrant's validity. The State argues that this has been extended to warrantless searches as well, based upon its belief that "recent United States Supreme Court cases highlight the necessity of conducting a benefit analysis before applying the exclusionary

rule.”

“Recent” seems to be a relative term here; the only case cited which is more recent than 1984 is *Herring v. United States* (2009), 129 S.Ct. 695. According to the State, *Herring* created a good faith exception to the exclusionary rule “to mistakes made by the police,” and that *Herring* requires a court to conduct a cost/benefit analysis in each case before applying the rule; the evidence cannot be excluded unless the court determines that “exclusion outweighs the substantial social costs at issue.” Memorandum at 6. This argument is completely wrong, on several levels.

1. *Herring did not create a new test.* The major problem with the State’s argument is that, if the Supreme Court had intended to articulate a new test for the exclusionary rule in *Herring*, they would have applied it just a few months later in *Arizona v. Gant* (2010), 129 S.Ct. 1710. In that case, the Court overruled *New York v. Belton* (1981), 101 S.Ct. 2860, which had adopted a “bright line” rule that where the police arrested the occupant of a vehicle, they could search the interior of the vehicle incident to that arrest, even if the occupants had been removed from the car and no longer had access to anything in the interior. In *Gant*, the Court overruled *Belton* and held that the police could only search the car once the occupants had been removed if they had reason to believe that evidence of the crime could be found in the car.

If the Court in *Herring* really had adopted a test whereby exclusion would depend on whether the police officers’ conduct had been sufficiently egregious, one can only wonder why no one sought to mention it in *Gant*, especially considering the evidence of good faith on the part of the police in the latter case: they were simply following a Supreme Court precedent which had existed for almost thirty years.

2. *Herring presented a factual situation substantially different from that presented here.* The officers in *Herring* arrested the defendant on an outstanding warrant, and the search incident to that

arrest discovered drugs and a gun; the warrant, it turned out, was no longer valid, but through oversight had been allowed to remain in the police data base. Fifteen years earlier, the Court in *Arizona v. Evans* (1995), 115 S.Ct. 1185, had held that the failure of a court clerk to remove an invalid warrant didn't require exclusion of the evidence in that scenario, so *Herring* was little more than an extension of that precedent. Furthermore, there is substantial merit to the Court's conclusion in *Herring* that applying the exclusionary rule in that context would not serve the rule's purpose of deterring police misconduct, because the arrest by the officer was sufficiently attenuated from the simple negligence of the clerk to make deterrence extremely unlikely. Here, there is no attenuation: it is the officer's intentional conduct, not the negligence of some clerk, which presents the question of the legality of the search.

3. *The Court's comments in Herring regarding the societal costs of the exclusionary rule were dicta.* The comments in Chief Justice Roberts' opinion on the costs of the exclusionary rule are quite similar to those of Justice Scalia four years earlier in *Hudson v. Michigan* (2006), 126 S.Ct. 2159. This Court, in *State v. Oliver* (2007), 112 Ohio St.3d 447, found those comments significant:

“As the court noted in *Hudson*, the exclusionary rule and the concomitant suppression of evidence generate ‘substantial social costs’ in permitting the guilty to go free and the dangerous to remain at large. [Citations omitted.] Because of that ‘costly toll,’ the courts must apply the exclusionary rule cautiously and only in cases where its power to deter police misconduct outweighs its costs to the public. * * * *Hudson* presents a significant and arguably new interpretation of the exclusionary rule.” At P 12-13.

Hudson did not in fact “present a new interpretation of the exclusionary rule”; four years later, Justice Scalia would produce the fifth vote in *Gant*, with nary a peep about the exclusionary rule's “substantial societal costs.”

4. *Adoption of the State's proposed balancing test would lead to further confusion in 4th Amendment law.* As Justice Rehnquist famously observed, “the decisions of this Court dealing with

the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law search and seizure law is something less than a seamless web.” *Cady v. Dombrowski* (1973), 93 S.Ct. 2523, 2527. The State now proposes that the good faith exception to the warrant exception adopted by the Court in *Leon, supra*, be extended to warrantless searches.

Doing so poses the certainty of making even murkier the morass that is 4th Amendment law. The good faith exception to warrant searches adopted in *Leon* had solid logical underpinnings: it was hard to see how excluding evidence would deter police misconduct when the police had done precisely what the 4th Amendment commands by seeking a warrant. Excluding evidence seized through a warrantless search has no similar logical justification, and introduces a whole new set of variables into the calculus of determining whether a search is valid. The challenges police officers face on the job in regard to search and seizure issues are well-known: a decision they have to make in a split-second will be pored over for hours by lawyers and judges. Under the State’s test, the officer has to guess not only whether those people will determine that his decision was wrong, but whether it was “deliberate, reckless, or grossly negligent.” It is difficult to imagine a standard less clear.

Moreover, the State’s suggestion that a cost/benefit analysis be applied in *each case* in which the 4th Amendment is implicated is an invitation to disaster. *Herring, Leon, and Hudson* applied the analysis to a *class* of cases: *Leon* decided that the cost of applying the exclusionary rule to cases involving search warrants outweighed the benefit of doing so, *Herring* held the same with regard to arrests made as a result of negligent errors in the maintenance of a police database, and *Hudson* held the same for the “knock-and-announce” rule.

But application of a cost/benefit analysis to a *single case* is fraught with problems. How does the court measure the deterrence value of suppression? By how much public attention the case gets?

How does it measure cost? By how bad the crime committed by the defendant was? Adoption of a cost/benefit analysis on a case-by-case basis would result in the rule becoming that exclusion doesn't apply in serious crimes, unless the case gets picked up by the press and a lot of police officers wind up reading about it. The result of this would be that the exclusionary rule would be *more* likely to apply in serious cases, since those cases are much more likely to receive public attention, and public attention is what would increase the deterrent effect of suppression.

5. *The costs of the exclusionary rule are exaggerated.* The popular perception persists that legions of criminals are regularly freed because of some hypertechnical violation of search and seizure law. Empirical studies, on the other hand, have consistently found that motions to suppress evidence are successfully pursued in only a tiny fraction of cases. A typical example can be found in Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 American Bar Foundation Research Journal No. 3 (1983):

“Motions to suppress physical evidence are filed in fewer than 5% of the cases. . . The success rate of motions to suppress is equally marginal. Successful motions to suppress physical evidence occur in only 0.69% of the cases. . .”

Moreover, a major problem here is what is known in statistics as biased sample selection. Judges ruling on motions to suppress see only the costs of excluding evidence; they never see the benefit of deterring illegal police conduct. If the police stop a car for no reason and find 20 kilos of cocaine, when that evidence is suppressed, that can be clearly identified as a cost of the exclusionary rule. When police refrain from stopping twenty cars for no reason because they know if they find anything it will be suppressed, the benefit of allowing twenty people to go on their way without unwarranted police interference – a clear benefit in a society that prizes liberty – is never realized. But it is there.

II. The courts below were correct in concluding that the police officer in this case did not have an objectively reasonable belief that a traffic violation had occurred.

Even if the cost/benefit analysis of the exclusionary rule is not adopted, the State contends, the search here should have been upheld, because the exclusionary rule should not be applied to the officer's mistake of law, and other courts have held that a crack in a windshield is a sufficient basis to justify a stop. Again, the State's argument is meritless.

1. *An officer's mistake of law does not excuse a violation of the 4th Amendment.* As noted, the traffic stop here was based on the officer's belief that, by virtue of the crack in his windshield, Mr. McWhorter had violated Cleveland Ordinance 431.25. That ordinance provides:

"431.25 Driver's View and Control to be Unobstructed by Load or Persons

"(a) No person shall drive a vehicle when it is so loaded, or when there is in the front seat such number of persons, as to obstruct the view of the driver to the front or sides of the vehicle or to interfere with the driver's control over the driving mechanism of the vehicle.

"(b) No passenger in a vehicle shall ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with his control over the driving mechanism of the vehicle."

The ordinance obviously has no application here; there was no load or persons which even arguably interfered with Mr. McWhorter's view. Nonetheless, the State argues that the officer's "mistake of law" excuses the 4th Amendment violation.

This argument has been consistently rejected by the courts. In *State v. Fears*, 8th Dist. 2011 Ohio 930, the officers had stopped the defendant for having his turn signal on without turning. The Cleveland ordinance at issue actually required a driver to signal before turning, not to turn after signaling. In rejecting the State's argument that the officer's mistake of law could be excused because the police were acting with a "good-faith" belief that they'd witnessed a traffic infraction, the court cited *United States v. Miller* (5th Cir. 1998), 146 F.3d 274 for the proposition that "legal

justification [for the stop] must be objectively grounded,” and further relied upon *United States v. McDonald* (7th Cir. 2006), 453 F.3d 958, where the police had mistakenly stopped a driver for displaying a turn signal on a road with a 90-degree turn. The court in that case had upheld suppression, finding that

“We agree with the majority of circuits to have considered the issue that a police officer’s mistake of law cannot support probable cause to conduct a stop. Probable cause only exists when an officer has a ‘reasonable’ belief that a law has been broken. [Citations omitted.] Law enforcement officials have a certain degree of leeway to conduct searches and seizures, but ‘the flip side of that leeway is that the legal justification must be objectively grounded.’ An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law.” 453 F.3d at 961.

2. *The courts have consistently held that where the police stop a vehicle for a crack in the windshield, the crack must be “substantial.”* Perhaps recognizing the problems with its reliance on an ordinance which obviously has no application to this case, the State then moves to the other basis for the officer’s stop, 437.01, which prohibits driving a vehicle which is “in such unsafe condition as to endanger any person or property.” The statute is the municipal counterpart to Ohio R.C. §4513.02(A).¹ Essentially, the State claims here that *any* crack in a windshield is sufficient proof of an unsafe vehicle so as to warrant a stop.

The State relies on three cases for support of that contention: *State v. Heiney*, 11th Dist. 2001 Ohio 4287, *State v. Goins*, 4th Dist. 1996 Ohio App. LEXIS 2192, and *State v. Repp*, 5th Dist. 2001 Ohio 7034. Each is distinguishable on the facts, suffers from flawed analysis, or both.

In *Heiney*, for example, the court found that a “*substantial* spider crack on the front

¹ “No person shall drive or move, or cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person.”

windshield. . . was sufficient to create a reasonable suspicion that R.C. 4513.02 was being violated.” (Emphasis supplied.) In *Goins*, the court found that a “linear crack all along the top portion of the front windshield” constituted a violation, noting that Ohio R.C. §4513.02(B) allows the Ohio State Highway Patrol to “stop and test any car thought to be unsafe or which has equipment that is not in proper repair,” that Ohio Adm. Code 4501:2-1-11 provides that the glass on motor vehicles shall be “free of discoloration or diffusion, cracks, and other unauthorized obstructions,” and that the defendant’s vehicle was thus operating “in contravention of Ohio Adm. Code 4501:2-1-11 and [] in violation of the law.” In *Repp*, the stop was based on “a large crack across the middle of the driver’s side windshield,” and the court upheld the stop, using the same reasoning as the *Goins* court.

In short, in all of the cases cited by the State there was no real question that the windshield crack was substantial. As for the legal analysis in *Goins* and *Repp*, the flaw in their reasoning was exposed in *State v. Latham*, 2nd Dist. 2004 Ohio 2314, ¶¶16-19:

“The State argues that when R.C. 4513.02(A) and O.A.C. 4501:2-1-11 are read in conjunction, it becomes a violation of R.C. 4513.02(A) to operate a vehicle with any cracks in the windshield. Thus, under the State’s interpretation, any crack in the windshield, regardless of how minor, renders the vehicle in an unsafe condition such that its operation would endanger persons. We disagree.

“O.A.C. 4501:2-1-11 is the administrative section for Motor Vehicle Inspection by the state highway patrol. Thus, we agree with the trial court that this section of the administrative code relates to R.C. 4513.02(B) that authorizes the state highway patrol to stop and inspect vehicles. Although we agree that administrative agencies’ rules that are issued pursuant to statutory authority have the force and effect of law, we do not agree that O.A.C. 4501:2-1-11 was issued pursuant to any authority set out in R.C. 4513.02(A). This is in marked contrast to R.C. 4513.241 that specifically authorizes the director of public safety to adopt rules governing the use of tinted glass on vehicle windshields as is set out in O.A.C. 4501-41.”²

² The *Latham* court also distinguished *Goins* on the basis that “the officers who conducted the traffic stop of Latham were not highway patrolmen who are authorized by R.C. 4513.02(B) to conduct stops of vehicles for the purposes of inspection of equipment.” Officer Mazur, of course, was a Cleveland police officer.

The court in *Latham* concluded that the proper analysis was that

“as the simple appearance of a crack in a windshield does not give rise to a reasonable suspicion of a violation of R.C. 4513.02(A), we must determine whether the particular facts surrounding the crack in the windshield in this case gave rise to a reasonable suspicion that Latham’s truck was in an unsafe condition such that its operation would endanger persons.”

The court concluded that the crack in that case did not render the vehicle unsafe. In line with *Latham*, other courts have rejected a *per se* rule that a crack in windshield automatically confers a basis to conduct a traffic stop. *State v. Cooper*, 2nd Dist. 2010 Ohio 1120, ¶21 (“a crack in the windshield is generally found to amount to a reasonable suspicion of a violation of R.C. 4513.02(A) only when the crack is ‘substantial’ or impairs the driver’s vision”); *State v. Kendall*, 5th Dist. 2010 Ohio 227, ¶31 (“the size and placement of the crack must be sufficient to create a reasonable suspicion that R.C. 4513.02 was being violated”); *State v. Emerick*, 4th Dist. 2007 Ohio 4398 (“large” crack was sufficiently “obvious and significant” that it gave basis for officer’s conclusion that vehicle was unsafe).

This leaves the question of whether the crack in Mr. McWhorter’s windshield did indeed render the vehicle unsafe, but also the question of who gets to decide this or, more accurately, how much deference the trial court’s determination is entitled to be given. As explained above, the fact that the windshield was cracked is not, in itself, sufficient to create the basis for a stop: the officer must show that the crack was significant enough that it rendered the vehicle unsafe to operate. The trial court clearly found that the officer’s testimony did not establish that:

“The Court does not believe that a cracked windshield, *as described by the police officer*, is such an unsafe vehicle that would be such an unsafe condition [sic] to endanger any person or property.” (T.r. 37) (Emphasis supplied).

As this Court held in *State v. Burnside* (2003), 100 Ohio St.3d 152, 154-155, in reviewing

a ruling on a motion to suppress, “an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence.” The appellate court here reviewed the trial court’s ruling under that standard, and concluded that the court’s ruling was indeed supported by competent, credible evidence.

3. *The subjective belief of the officer has no place in 4th Amendment analysis.* The State’s argument here really boils down the assertion that the search was valid because the police officer *subjectively* believed that there was a violation, notwithstanding the fact that the *objective* evidence did not support that determination. This flies in the fact of long-standing 4th Amendment law. As the Court recognized in *Whren v. United States* (1996), 116 S.Ct. 1769, 1774, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” This view was reiterated just last week in *Kentucky v. King* (2011), 563 U.S. ____, slip opinion 09-1272, pp. 10-11:

“Our cases have repeatedly rejected a subjective approach, asking only whether ‘the circumstances, viewed objectively, justify the action.’ [Citations omitted.] * * * The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that ‘evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.’”

Here, the lower courts determined that the officer’s belief that Mr. McWhorter had violated the Cleveland ordinance pertaining to unsafe vehicles was not objectively reasonable. That should be the end of the inquiry.

4. *Adoption of the State’s position would essentially eliminate 4th Amendment protection for drivers or occupants of automobiles.* The State’s position is deceptively simple: a police officer should have the right to stop a vehicle if he believes that the driver may have committed a traffic violation. As noted, the State’s argument essentially immunizes the police officer’s determination on that score from review by the courts.

The consequences of this are greatly magnified when we consider the ordinance at issue here.

Section 437.01 provides,

“(a) No person shall drive or move, or cause or knowingly permit to be driven or moved, on any street any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person or property.”

What the State really argues is that a police officer should have the right to stop any vehicle which he subjectively believes is in an “unsafe condition,” and that his decision cannot be reviewed for its objective reasonableness. This would essentially eliminate the “reasonable suspicion” standard for traffic stops and replace it with one in which a stop would be justified solely upon the whim or caprice of the officer.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest or a substantial constitutional question with regard to the issues raised in the Cross-Appeal. Appellee submits that this Court should deny jurisdiction.

Respectfully submitted,



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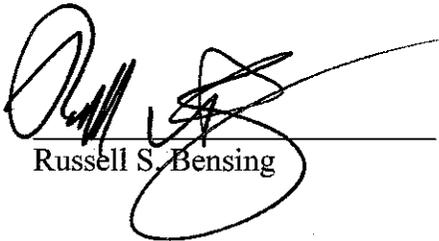
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SERVICE

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