ORIGINAL

NO. 2011-0620

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94997

STATE OF OHIO,

Plaintiff-Appellant

-vs-

ANTHONY FEARS,

Defendant-Appellee

APPELLANT'S MOTION FOR RECONSIDERATION

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On July 6, 2011, this Court declined to accept jurisdiction of the State's appeal. The State asks that this Court reconsider its decision where the appellate court *erroneously* stated that a police officer's good faith in interpreting the law was immaterial to determining whether evidence would be suppressed. Since the filing of the State's notice of appeal and its memorandum in support of jurisdiction, the United States Supreme Court has unambiguously indicated that the application of the exclusionary rule does in fact turn on the officer's good faith; a consideration ignored by the appellate court in this case. Further, the exclusion of evidence is to be a last resort; not an automatic application where police, acting in good faith, are simply mistaken in their reading of a traffic ordinance.

On June 16, 2011, the United States Supreme Court in *Davis v. U.S.*, (2011) 131 S.Ct. 2419, reiterated that consideration of an officer's good faith in his actions is not only relevant, but is central, to determining whether to apply the exclusionary rule. In *Davis*, police conducted a search that was constitutional under case law at the time. A case decided subsequent to the police search would make their actions unconstitutional, but the Court held "(a)lthough the search in this case turned out to be unconstitutional under *Gant,* (the defendant) concedes that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way. Under this Court's exclusionary-rule precedents, the acknowledged absence of police culpability dooms (the defendant's) claim." *Id.*, at 2422. "That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'" *Id.,* at 2429, (Citing, *Leon,* at 104 S.Ct. 3405.) For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs. See *Herring, supra,* at 141, 129 S.Ct. 695; *Leon, supra,* at 910, 104 S.Ct. 3405. This cost benefit analysis in exclusion cases

focuses the inquiry on the "flagrancy of the police misconduct" at issue. *Leon,* at 909, 911, 104 S.Ct. 3405. In *Herring,* police employees erred in maintaining records in a warrant database. The United States Supreme Court held that isolated, nonrecurring police negligence lacks the culpability required to justify the harsh sanction of exclusion. 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496,

In this case, the trial court found that the police acted reasonably; there was no police misconduct. It stated, "[O]n the basis of the testimony the officers had a reasonable belief that a traffic violation was occurring; that traffic violation being change of course with a – with the turn signal being activated well in advance of the street at which the Defendant was making a turn." The court then detailed the subsequent events and found that the search resulting in the discovery of crack cocaine was lawful. However, despite the finding that the police acted in good faith, on appeal, the Eighth District Court of Appeals opinion stated that any good faith mistake of law on the part of the officers' was immaterial; it determined that a mistake of law regarding the use of a turn signal meant that the traffic stop was not justified. *Fears*, 2011-Ohio-920, at ¶ 13. The appellate court statement that the officer's good faith is immaterial is incorrect. Federal case law, as recently stated in *Davis*, overwhelmingly indicates that the officer's culpability is the focus of the inquiry, not automatic application of the exclusionary rule. The appellate court also ignored precedent when it did not consider the good faith of the officers in effecting the traffic stop. In *United States v. Martin,* the Eighth Circuit held that, "the validity of a stop depends on whether the officer's actions were objectively reasonable in the circumstances, *and in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one.*" □□□□F.3d 988, 1001, (8th Cir. 2005) (Citing, *United States v. Smart,* 393 F.3d 767, 770 (8th□Cir.2005). In its analysis in this case, the appellate court applied only the first clause of the

test; it ignored the second. It found that there was no objectively reasonable and articulable suspicion where there was a mistaken interpretation of the traffic code and that the officer's good faith was immaterial. It said nothing about whether the mistaken *interpretation* was reasonable, as dictated by *Martin.*

Not only did the appellate court in this matter fail to account for the officer's good faith interpretation of the traffic law, its application of the exclusionary rule in this case ignores that rule's sole purpose; that purpose being to deter future Fourth Amendment violations. See, e.g., *Herring, supra,* at 141, and n. 2, 129 S.Ct. 695; *United States v. Leon,* 468 U.S. 897, 909, 921, n. 22, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *Elkins, supra,* at 217, 80 S.Ct. 1437 ("calculated to prevent, not to repair"). The rules operation is limited to situations in which this purpose is "thought most efficaciously served." *United States v. Calandra,* 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Where suppression fails to yield "appreciable deterrence," exclusion is "clearly ... unwarranted." *Janis, supra,* at 454, 96 S.Ct. 3021. Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. *Hudson v. Michigan,* 547 U.S. 586, 596, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). Any analysis must also account for the "substantial social costs" generated by the rule. *Leon, supra,* at 907, 104 S.Ct. 3405. Exclusion exacts a heavy toll on both the judicial system and society at large. *Stone,* 428 U.S., at 490–491, 96 S.Ct. 3037. This cost must be incurred when necessary, but only as a "last resort." *Hudson, supra,* at 591, 126 S.Ct. 2159.

The traffic stop that led to the discovery of the evidence in this case was not malevolent. The officers, as found by the trial court, were simply mistaken in their reading of a traffic ordinance. Application of the exclusionary rule in this case does not deter future conduct. As such, exclusion of the evidence in this matter is unwarranted. When police exhibit deliberate,

reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is great and should outweigh the resulting costs of deterrence. *Davis*, 564 U.S. at 8, (Citing, *Herring,* at 144, 129 S.Ct. 695.) As explained in *Davis*:

> When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [*Herring*, 555 U. S.], at 144. But when the police act with an objectively "reasonable good faith belief" that their conduct is lawful, *Leon*, *supra*, at 909 (internal quotation marks omitted), or when their conduct involves only simple, "isolated" negligence, *Herring*, *supra*, at 137, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way." See *Leon*, *supra*, at 919, 908, n. 6 (quoting *United States* v. *Peltier*, 422 U. S. 531, 539 (1975)).

Because exclusion of evidence in this case was unwarranted and without the justifications of deterrence, the State asks that this Court reconsider its decision and accept the State's Proposition of Law in this case, which reads:

> When police act in good faith based on an objectively reasonable, yet mistaken interpretation of a criminal statute, when conducting a traffic stop, evidence obtained from a subsequent search should not be suppressed.

Moreover, the State notes that this Court has accepted a case from the Sixth Appellate District in *State v. Gould*, OSC No. 2010-1315, upon the following proposition of law:

> The exclusionary rule applies only when a violation of Fourth Amendment rights is the result of deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights or involves circumstances 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), _ U.S. _, 129 S.Ct. 695, 172 L.Ed.2d 496, explained.

The issue in this case concerns the same rules of application of the exclusionary rule. As detailed within *Davis*, supra, the United States Supreme Court has forcefully iterated that the purpose of the exclusionary rule is deterrence of police misconduct and is not to be applied where such deterrence does not exist, as application of the rule in that manner would have, "its

bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. See *Herring*, *supra*, at 141. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." *Hudson*, *supra,* at 591." *Davis*, 564 U.S., at 7.

In this case, suppressing evidence where police were mistaken as to a traffic ordinance should not be, under law, that "last resort." *Id.* The Fourth Amendment says nothing about suppressing evidence. Suppressing evidence that violates the Fourth Amendment is a judicial rule created by the court to, "compel respect for the constitutional guaranty." *Id*, (Quoting, *Elkins v. United States*, 364 U. S. 206, 217 (1960).) The rule is not an individual, or personal right; it is not designed to "redress a personal injury" caused by an unconstitutional search. *Id.*, (Quoting, *Stone* v. *Powell*, 428 U. S. 465, 486 (1976).) The exclusionary rule is to be used where it will deter gross, blatant disregard of constitutional rights by police. It should not be used in cases where officers are mistaken as to the meaning of a traffic ordinance and their mistake of law was found by a trial court to be reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration has been mailed via U.S. mail this the 7th day of July, 2011 to:

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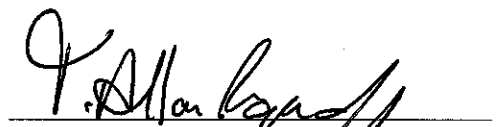

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