

NO. 2011-0668

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95108

STATE OF OHIO

Plaintiff-Appellant

-vs-

LARRY MCWHORTER

Defendant-Appellee

**MOTION FOR RECONSIDERATION, FILED PURSUANT TO S.C.T.R.P. XI,
§2(B)(1)**

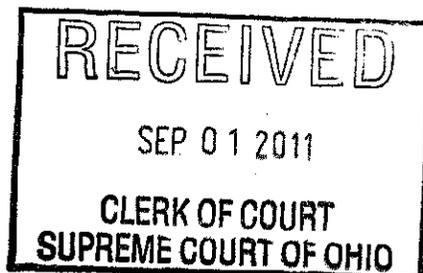
Counsel for Plaintiff-Appellant

WILLIAM D. MASON (0037540)
CUYAHOGA COUNTY PROSECUTOR

KATHERINE MULLIN (0084122)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellant

Russell Bensing, Esq. (#0010602)
1370 Ontario St.
1350 Standard Building
Cleveland, Ohio 44113



STATE'S MOTION FOR RECONSIDERATION

I. SUMMARY OF ARGUMENT

The State requests this Honorable Court reconsider its refusal to grant jurisdiction in this case. Since the filing of the State's notice of appeal and its memorandum in support of jurisdiction, the United State's Supreme Court has issued its decision in *Davis v. United States* (2011), 131 S.Ct. 2419, 180 L.Ed.2d. 285, which supports the State's proposition of law. Reconsideration should be granted in light of this case.

II. PROCEDURAL HISTORY

Larry McWhorter was pulled over by a Cleveland Police officer after the officer observed a crack in McWhorter's windshield. The defect actually consisted of multiple cracks that ran the length of the windshield. The officer asked McWhorter for his driver's license. McWhorter responded that his license was suspended. He was arrested and patted down prior to being placed in the officer's cruiser. The pat down revealed illegal narcotics in McWhorter's right coat pocket. The trial court granted McWhorter's motion to suppress and a majority of the Eighth District Court of Appeals (Eighth District) affirmed. *State v. McWhorter* (Kilbane, J., dissenting), Cuyahoga App. No. 95108, 2011-Ohio-1074.

The State asked this Court to accept jurisdiction, which this Court denied. The State now requests this Honorable Court reconsider its refusal to grant jurisdiction in this case.

III. LAW AND ANALYSIS

Under S. Ct. Prac. R. XI, § 2(B)(1), a party may request this Court reconsider its refusal to grant jurisdiction to hear a discretionary appeal. The State respectfully

requests this Court reconsider its opinion. The United States Supreme Court issued its decision in *Davis* after the State filed its memorandum in support of jurisdiction. *Davis* supports the State's position that it was improper to apply the exclusionary rule in this case. As such, reconsideration should be granted.

On June 16, 2011, the United States Supreme Court released its decision in *Davis v. United States* (2011), 131 S.Ct. 2419, 180 L.Ed.2d. 285, in which the Court 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 919, 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. *Id.*, at 909, 911, 104 S.Ct. 3405. In *Herring*, police employees erred in maintaining records in a warrant database. The United States Supreme Court stated that isolated, nonrecurring police negligence "lacks

the culpability required to justify the harsh sanction of exclusion.” 555 U.S., at 137, 144, 129 S.Ct. 695.*

In this case, Officer Mazur stopped McWhorter when he observed a crack that ran the length of McWhorter’s windshield. As the dissent in this case noted, numerous courts throughout Ohio have held that a crack in the windshield renders a vehicle unsafe. *McWhorter*, 2011-Ohio-1074 (Kilbane, J., dissenting) at ¶21 citing *State v. Smith*, Clermont App. No. 2007-05-064, 2008-Ohio-4431; *State v. Repp*, Knox App. No. 01-CA-11, 2001-Ohio-7034; *State v. Heiney*, Portage App. No. 2000-P-0081, 2001-Ohio-4287; *State v. Goins* (May 24, 1996), Ross App. No. 95CA2106. However, other appellate courts have “disagreed as to whether a crack in the windshield of a vehicle justifies a stop pursuant to R.C. 4513.02(A).” *State v. Cooper*, Montgomery App. No. 23719, 2010-Ohio-1120, ¶16 quoting *State v. Latham*, Montgomery App. No. 20302, 2004-Ohio-2314.

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.” 411 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 over the

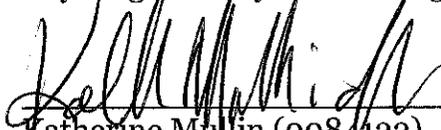
size of a windshield crack that could support stopping a vehicle. It said nothing about whether the mistaken *interpretation* was reasonable, as dictated by *Martin*. The fact that Ohio courts are in disagreement over when a crack in the windshield gives rise to a stop is a clear indication that the officer acted in good faith and that *Davis* should apply. *Davis*'s meaning is clear: exclusion of evidence is not automatic. Courts must determine whether or not exclusion is an appropriate remedy before applying this harsh penalty. This Court should grant reconsideration in light of *Davis* as it affirms the State's proposition of law.

IV. CONCLUSION

The State respectfully requests this Honorable Court reconsider its decision denying jurisdiction in this case. Reviewing courts must not automatically apply the exclusionary rule without conducting the proper analysis as stated in *Herring* and *Davis*. Exclusion should not apply when there is nothing to deter.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney



Katherine Mullin (0084122)
Assistant Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario St., Eighth Floor
Cleveland, Ohio 44113
(216) 698-7919
(216) 443-7806 fax
kemullin@cuyahogacounty.us email

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was sent by regular U.S. mail

this 31st day of August 2011 to:

Russell Bensing, Esq. (#0010602)
1370 Ontario St.
1350 Standard Building
Cleveland, Ohio 44113

A handwritten signature in black ink, appearing to read 'Katherine Mullin', written over a horizontal line.

Katherine Mullin (0084122)
Assistant Prosecuting Attorney