

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 11-2134

Plaintiff-Appellant,

vs.

**ON APPEAL FROM THE
MONTGOMERY COUNTY
COURT OF APPEALS, SECOND
APPELLATE DISTRICT**

DAMAAD S. GARDNER

**COURT OF APPEALS
CASE NO. 24308**

Defendant-Appellee.

MERIT BRIEF OF APPELLANT, THE STATE OF OHIO

MATHIAS H. HECK, JR.

PROSECUTING ATTORNEY

By **R. LYNN NOTHSTINE** (COUNSEL OF RECORD)

REG. NO. 0061560

ANDREW T. FRENCH (COUNSEL OF RECORD)

REG. NO. 0069384

Assistant Prosecuting Attorney's

Montgomery County Prosecutor's Office

Appellate Division

P.O. Box 972

301 West Third Street, Suite 500

Dayton, Ohio 45422

(937) 225-4117

ATTORNEYS FOR APPELLANT, STATE OF OHIO

Rebekah S. Neurherz (COUNSEL OF RECORD)

150 N. Limestone Street

Suite 218

Springfield, OH 45502

COUNSEL FOR APPELLEE, DAMAAD S. GARDNER

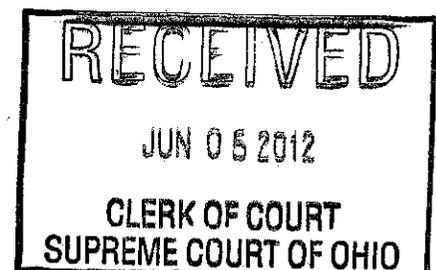
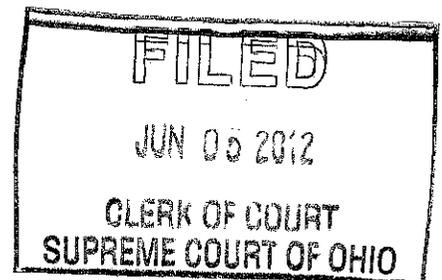


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii, iii
STATEMENT OF THE FACTS	1-4
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	4-10
<u>Proposition of Law:</u>	
When a person is subject to arrest on an outstanding warrant, he or she has no expectation of privacy that would protect him or her from execution of the warrant.	4-10
CONCLUSION	10
CERTIFICATE OF SERVICE	11
Appendices	<u>APPX. PAGE</u>
APPENDIX A	
Notice of Appeal to the Ohio Supreme Court (December 19, 2011)	1
APPENDIX B	
Opinion of the Court of Appeals for Montgomery County (November 4, 2011)	3
APPENDIX C	
Judgment Entry of the Court of Appeal for Montgomery County (November 4, 2011)	20

TABLE OF AUTHORITIES:

<u>CASES:</u>	<u>PAGE</u>
<i>Dayton v. Click</i> , 2 nd Dist No. 14328, 1994 WL 543210 (Oct. 5, 1994)	4, 6, 7, 8, 9, 10
<i>State v. Ford</i> , 149 Ohio App.3d 676, 778 N.E.2d 642 (2 nd Dist. 2002)	7
<i>State v. Garnett</i> , 10 th Dist. No. 09AP-1149, 2010-Ohio-5865, 2010 WL 4925844	7
<i>State v. Gray</i> , 2 nd Dist. No. 22688, 2009-Ohio-1411, 2009 WL 805122	7
<i>State v. Harding</i> , 180 Ohio App.3d 497, 2009-Ohio-59, 905 N.E.2d 1289 (2 nd Dist.)	7
<i>State v. Ingram</i> , 125 Ohio App.3d 411, 708 N.E.2d 782 (2 nd Dist.1998)	7
<i>State v. Jamison</i> , 2 nd Dist. No. 18453, 2001 WL 501942 (May 11, 2001)	7
<i>State v. Lynch</i> , 2 nd Dist. No. 17028, 1998 WL 288936 (June 6, 1998)	7
<i>State v. Meyers</i> , 2 nd Dist. No. 14856, 1995 WL 328159 (May 31, 1995)	6, 7
<i>State v. Pierson</i> , 128 Ohio App.3d 255, 714 N.E.2d 461 (2 nd Dist.1998)	7
<i>State v. Smith</i> , 2 nd Dist. No. 22434, 2008-Ohio-5523, 2008 WL 4688767	7
<i>State v. Walker-Stokes</i> , 180 Ohio App.3d 36, 2008-Ohio-6552, 903 N.E.2d 1277 (2 nd Dist.)	7, 9
<i>State v. Williams</i> , 2 nd Dist. No. 22535, 2008-Ohio 6030, 2008 WL 4958640	7
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	6, 7, 9
<i>U. S. v. Faulkner</i> , 636 F.3d 1009 (8 th Cir.2011)	10
<i>U. S. v. Gross</i> , 624 F.3d 309, 321 (6 th Cir.2010)	8, 10
 <u>RULES:</u>	
Crim.R. 4(A)	8
Crim.R. 4(D)	9
Crim.R. 4(D)(1)	8
Crim.R. 4(D)(3)	8

STATUES:

R.C. 2935.02

9

OTHER:

Fourth Amendment

7, 9, 10

STATEMENT OF THE FACTS

On March 17, 2010, Detective David House, a Dayton Police detective with 19 years experience, was working alone and driving an unmarked police cruiser as a part of the Strike Force Unit that patrols high drug areas in Dayton. (Tr. 8-10) At approximately 7:30 p.m., Detective House saw a white Dodge pickup drive through the intersection of Midway Avenue and Elmhurst. (Tr. 10-11) He began to follow the vehicle and noticed that it had license plates registered in Clinton County. (Tr. 11) Detective House stated that it was common for drug buyers to come to West Dayton from outside of Montgomery County to purchase narcotics. (Tr. 11)

He continued to follow the truck and checked its registration status through the LEADS system, which allows officers to check vehicle registration and for outstanding warrants. (Tr. 9, 11) The truck was registered to Robert Bach of Clinton County, who had been convicted of a drug offense in 2003. (Tr. 11) Detective House decided to continue to follow the truck to see if it was going to a known drug house. (Tr. 11) The truck traveled to 1125 Cicilion Avenue, parked in the driveway, and the two occupants got out and entered the residence. (Tr. 11) Detective House decided to watch the house for around 15 minutes because, based on his experience, if individuals stay at the house for only a few minutes it could be indicative of narcotic activity. (Tr. 11) After seeing no activity, Detective House left the area. (Tr. 12)

Detective House returned to 1125 Cicilion Avenue around 11:05 p.m, and the white Dodge truck was still parked in the driveway along with a Cadillac, which was blocking the entrance. (Tr. 12) The Cadillac was registered to Richard Easter who had an active felony warrant out of Butler County for failure to appear for a trial on a drug case. (Tr. 12) The

LEADS system described Easter as a 56 year old white male, approximately six feet tall, weighing 160 pounds, with brown hair and brown eyes. (Tr. 14)

Detective House moved up the street and continued to watch the house as two younger black males exited the residence. (Tr. 14) One of the individuals, later identified as Defendant-Appellee Damaad Gardner, got into the front passenger seat of the Cadillac and the other individual entered the back passenger seat. (Tr. 14) Approximately two minutes later a person matching Easter's description exited the house and got into the driver's seat of the Cadillac. (Tr. 14-15) The Cadillac passed Detective House, drove towards the intersection of Cicilion and Danridge and made a right hand turn onto Gettysburg. (Tr. 15) Detective House followed the Cadillac, and called for a marked cruiser to conduct a stop in an attempt to verify whether or not the driver was Easter and, if so, to place him under arrest for the active warrant. (Tr. 15)

The Cadillac turned into the Clark gas station near the 1600 block of Gettysburg and parked. The driver exited the car and walked towards the convenience center. (Tr. 15) Detective House, who was wearing a Dayton Police utility vest, pulled his car into the parking lot, parked around 25 to 30 feet away from the Cadillac, in no way blocking its exit, and approached the driver. (Tr. 16)

Detective House asked the driver if he was Richard Easter and he stated, "Yes." (Tr. 17) Detective House then informed Easter that there was a warrant for his arrest, asked him to turn around and placed him in handcuffs. (Tr. 17) As he was placing the handcuffs on Easter, Detective House saw Gardner move to the far right of his seat and place his right hand on the door handle. (Tr. 17) Detective House believed that Gardner was thinking about attempting to flee from the Cadillac so he walked with Easter around the back of the car to the passenger side so he could have Easter sit down and so he could make contact with the passengers. (Tr. 17-18)

As Detective House walked around the back of the car, he continued to watch Gardner and watched as he completely rose up out of the seat, and with his right hand began making shoving motions down towards his shorts as if he was reaching into the back of his shorts. (Tr. 18, 20) Gardner's movements, and the fact that they were in a high drug area, led Detective House to believe that Gardner could be trying to conceal or retrieve a weapon. (Tr. 20) Detective House yelled at Gardner and told him to take his hands out of his shorts and place them on the dashboard. (Tr. 20-21) He then sat Gardner on the ground, in front of the rear passenger door, and attempted to open the front passenger door, which was locked. (Tr. 21)

Detective House told Gardner to unlock the door and ordered him to step out of the Cadillac. (Tr. 21) Detective House turned Gardner towards the car, placed his hands behind his back, placed him in handcuffs (because he was still the only officer on the scene), and informed him that he was not under arrest but was using the handcuffs for his safety. (Tr. 22-23) Detective House then conducted a pat down search for weapons based on Gardner's shoving or grabbing movements towards the back of his shorts. (Tr. 22) With his right hand, Detective House began the search near the back of Gardner's shorts and immediately felt a rock-like substance, slightly smaller than a playing die, which he recognized as crack cocaine. (Tr. 23, 41) Detective House stated that he was very familiar with the feel of crack and had probably recovered it thousands of times during pat-downs. (Tr. 24)

Detective House continued the pat-down for weapons and when he finished, he worked the substance up out of Gardner's shorts, identified it as crack cocaine, and placed Gardner under arrest. When Detective House stated that he was placing Gardner under arrest and before he could give him his *Miranda* warnings, Gardner made the unsolicited statement that "He gave it to me to hide it." (Tr. 25) Detective House then gave Gardner his *Miranda* warnings as he was

waiting for other officers to arrive. (Tr. 25) After other officers arrived and the scene was secure, Detective House discovered that Gardner had an outstanding arrest warrant, issued on October 21, 2009 for failure to appear on a traffic citation. (Tr. 30-31) Gardner was therefore arrested on the warrant as well. (Tr. 30)

ARGUMENT

Proposition of Law:

When a person is subject to arrest on an outstanding warrant, he or she has no expectation of privacy that would protect him or her from execution of the warrant.

Introduction

In overruling Damaad Gardner's motion to suppress, the trial court relied upon a rule of law that was first announced in the Second Appellate District in a 1994 case called *Dayton v. Click*, 2nd Dist No. 14328, 1994 WL 543210 (Oct. 5, 1994). Pertinent excerpts from the trial court's explanation of its decision to rely on *Click* and overrule Gardner's motion are as follows:

The court has reviewed the exhibit in the case and the testimony. And the court concludes in this particular case that the motion of the defendant to suppress must be overruled.

The authority that is the basis for the motion to suppress is essentially it's the Fourth Amendment to the United States Constitution and the comparable Ohio Bill of Rights provision.

Searches—unreasonable searches and seizures are per se illegal except if there's a specific—if it fits within one of the well-delineated exceptions. And *Terry* is pursuant to the Fourth Amendment. *** But *Terry* and a case like *Adams v. Williams* out of the United States Supreme Court that limits what can occur during a *Terry* search, that it's the purposes of a limited search not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence and thus [a] frisk for weapons might be equally necessary and reasonable whether or not carrying a concealed weapon violating the applicable law. *** The case of *State v. Evans* saying that searches for weapons in the absence of probable cause to arrest are strictly circumscribed by the exigencies which justify their initiation, thus there are to be limited searches.

*** [T]hose cases are based on the idea of the Fourth Amendment, and what's the essence of the Fourth Amendment? It's protection of privacy. The right to be left alone, or privacy. *** But *** our Second District Court of Appeals, which this court is bound to follow, has essentially *** said, if you have an outstanding warrant, you have no expectation of privacy.

*** State's Exhibit No. 1 was admitted. It's not been contested. This exhibit clearly discloses that there was a warrant. *** [A]nd then apparently it was served or eventually returned on March 18th, which is the day after this stop. So, at the time of this stop, March 17, 2010, there was a warrant out for the arrest of the defendant.

*** There was a case called *Dayton v. Click* that was rendered some time ago – 1994. In that case, the court indicated that “Where a valid warrant for arrest exists, the exclusionary rule does not apply to exclude evidence of an illegal act discovered after an unlawful detention. In light of the existence of an outstanding warrant, a defendant has no reasonable expectation of privacy to be free from arrest and search by the police.” Okay.

*** There were cases after *Click*, such as *State v. Aufrance*, *State v. Jamison*, and, I believe, there was one called *State v. Ford*. They called into question whether or not the Second District still followed *Click*. Then the Second District decided *State v. Smith* on October the 24th of 2008. And in that case, the Court, citing *Dayton v. Click* again, found that [n]o privacy rights were violated even if there was an unlawful stop because, in that case, Smith had no reasonable expectation of privacy and being free from being stopped arbitrarily by the police since the police were authorized and directed by *** an Indiana court order to arrest. (internal quotation marks omitted). Okay, and then we have *State v. Harding*, which is consistent with *Click*.

*** So, here – that's what we have in this case. Presuming for a moment, assuming *arguendo* there was [an] illegal stop or illegal search, it matters not. I mean, because in this case we know Officer House didn't discover the arrest warrant until after the stop, search, pat-down and that had all occurred. But it makes no difference now under this authority. So, on the basis of *State v. Smith*, which is Appellate Case No. 22434 *** rendered on October the 24th, 2008, and, as I mentioned, on the basis of [*State v. Harding*], 180 Ohio App.3d 497, *** rendered on January the 9th, 2009, the *** motion to suppress is overruled.

(Tr. 69-74) Thus, the trial court concluded that Gardner could not challenge the legality of the pat-down for weapons that led to the discovery of drugs in his possession because he had no reasonable expectation of privacy that would protect him from execution of the warrant.

Dayton v. Click And Its Progeny

As the trial judge mentioned on the record, his decision to overrule Damaad Gardner's motion to suppress was based upon long-standing Second District precedent. Nearly eighteen years ago, the Second District Court of Appeals held that evidence derived from an unlawful detention need not be suppressed when the detainee was subject to a valid arrest warrant at the time. *Dayton v. Click, supra*. The court of appeals said: "In the case before us the officers' warrantless stop of Robert Click appears to have been unreasonable by *Terry* standards. However, at the time of the stop Click had no reasonable expectation of privacy in his vehicle because Click knew that there were outstanding warrants for his arrest. We see no violation of either Click's privacy rights or the principles behind the exclusionary rule simply because the officers were not aware of their duty to arrest Click until approximately twenty minutes after the stop." *Click*, at *2, referring to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

About eight months after the *Click* decision, the court of appeals held that evidence found in a search incident to an arrest on a warrant would not be suppressed simply because the officer discovered the warrant during a detention that could not be justified under *Terry*. *State v. Meyers*, 2nd Dist. No. 14856, 1995 WL 328159 (May 31, 1995). There, the court of appeals noted that "[g]iven a valid warrant to arrest, we simply do not get to issues involving warrantless searches and seizures. Agents of the state do not violate the law when they stop a person subject to an arrest warrant and privacy rights are not violated when the state has a warrant which authorizes the invasion of that privacy. We see no violation of the principles behind the

exclusionary rule simply because the arresting officer was not aware of the warrant to arrest Meyers until after the stop.” *Meyers*, at *1.

Click and *Meyers* were followed in *State v. Ingram*, 125 Ohio App.3d 411, 708 N.E.2d 782 (2nd Dist.1998) and *State v. Pierson*, 128 Ohio App.3d 255, 714 N.E.2d 461 (2nd Dist.1998), although for a time the court of appeals declined to extend *Click* and *Meyers* to situations in which evidence was unconstitutionally seized *before* the police made a valid arrest on a warrant. See *State v. Lynch*, 2nd Dist. No. 17028, 1998 WL 288936 (June 6, 1998); *State v. Jamison*, 2nd Dist. No. 18453, 2001 WL 501942 (May 11, 2001); and *State v. Ford*, 149 Ohio App.3d 676, 778 N.E.2d 642 (2nd Dist. 2002).

Eventually, however, the court of appeals clarified that, as a matter of law, an outstanding arrest warrant operates to deprive its subject of the reasonable expectation of privacy the Fourth Amendment protects. Therefore, the exclusionary rule does not apply to either a search or seizure of the subject that would otherwise be illegal because of a *Terry* violation. *State v. Smith*, 2nd Dist. No. 22434, 2008-Ohio-5523, 2008 WL 4688767, overruling *Jamison, supra*; *State v. Williams*, 2nd Dist. No. 22535, 2008-Ohio 6030, 2008 WL 4958640; *State v. Walker-Stokes*, 180 Ohio App.3d 36, 2008-Ohio-6552, 903 N.E.2d 1277 (2nd Dist.), overruling *Jamison, supra*, and *Ford, supra*; *State v. Harding*, 180 Ohio App.3d 497, 2009-Ohio-59, 905 N.E.2d 1289 (2nd Dist.); *State v. Gray*, 2nd Dist. No. 22688, 2009-Ohio-1411, 2009 WL 805122.

At least one other appellate district has recognized that an outstanding arrest warrant is independent justification for a traffic stop when the police officer might have been mistaken about whether the driver violated the law. *State v. Garnett*, 10th Dist. No. 09AP-1149, 2010-Ohio-5865, 2010 WL 4925844, ¶ 19, citing *Harding, supra*, and *Smith, supra*.

The Second District Changes Direction

In *Gardner*, the court of appeals reversed course. Ignoring its own long-standing precedent, the implications of the *pre-existence* of a warrant for Damaad Gardner's arrest, and the fact that eighteen years of *Click* has not resulted in the "dragnet" approach to law enforcement that concerns some courts¹, the court of appeals held that Gardner indeed had a reasonable expectation of privacy at the time he was seized and patted-down. *Gardner*, ¶ 38. Thus, the court held the exclusionary rule will apply in cases like Gardner's unless "the discovery of a warrant, and a search incident to arrest under the warrant, is so removed, unrelated, unforeseen, and independent from the unlawful stop and seizure that the exclusionary rule is not applicable." *Gardner*, ¶ 37. The police undoubtedly had the right to arrest Gardner after discovering the warrant and to search him incident to that arrest, so says the court of appeals, however, "if the warrant was discovered as a result of an unlawful stop or seizure (unless its discovery was unconnected to and attenuated from the illegality), then any evidence seized in the search incident to the arrest must be suppressed." *Gardner*, ¶ 38.

Misguided Reliance Upon the Attenuation Doctrine

The court of appeals' new approach to situations like the one in this case is misguided, mostly because it fails to take into account what an arrest warrant is and the implications that go along with the existence of a warrant. A warrant is issued by a judicial officer, or officer of the court designated by the judge, and is based upon a finding of probable cause that an offense has been committed and that the defendant committed it. Crim.R. 4(A). Accordingly, any officer authorized by law shall execute a warrant by arresting the defendant. Crim.R. 4(D)(1) and (3). In other words, a police officer is duty-bound to arrest a defendant for whom a warrant exists

¹ See, e.g., *U. S. v. Gross*, 624 F.3d 309, 321 (6th Cir.2010).

wherever the defendant is found. *Walker-Stokes, supra*, 180 Ohio App.3d 36, at ¶ 38, citing R.C. 2935.02 and Crim.R. 4(D) (“An arrest warrant charges law-enforcement officers to arrest the person for whom the warrant is issued.”). That renders application of the attenuation doctrine, as relied upon by the court of appeals below, to situations where the subject of an arrest warrant is detained by way of an unjustified *Terry* stop nonsensical.

The existence of an arrest warrant supplants the Fourth Amendment protections that would ordinarily apply, because the subject of the warrant no longer has a reasonable expectation of privacy that would prevent execution of the warrant. *Click, supra*. Thus, the question of whether, under the circumstances, a stop and frisk was sufficiently supported by an objectively-reasonable belief of criminal wrongdoing and danger is wholly irrelevant. Application of the attenuation doctrine in these cases is, therefore, erroneous because it means the court’s focus is misplaced: Rather than focusing on the fact that the Fourth Amendment is not even implicated in situations, like *Gardner’s*, where there is a pre-existing arrest warrant, the court will be focused upon when the arrest warrant is discovered (i.e., whether its discovery is an intervening circumstance) and under what circumstances (i.e., the subjective consideration of “flagrancy” of the police misconduct). But doing so misses the point entirely.

The existence of an arrest warrant should not be viewed as an intervening circumstance that is used as part of an attenuation-doctrine analysis, but rather as a pre-existing circumstance that diminishes a person’s expectation of privacy and validates any arrest made pursuant to the warrant – regardless of what initially led to the person’s seizure or the warrant’s discovery. Thus, while some courts appear to be enamored with the idea of applying the attenuation doctrine to determine whether exclusion of evidence is warranted in cases like *Gardner’s*, *see*,

e.g., U.S. v. Gross, supra, 624 F.3d 309; *U. S. v. Faulkner*, 636 F.3d 1009 (8th Cir.2011), these courts, like the court of appeals here, are simply wrong.

CONCLUSION

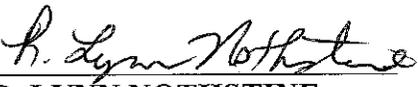
A police officer is commanded and duty-bound to arrest the subject of an arrest warrant wherever and whenever he or she is found. For years, the Second District Court of Appeals understood that a person named as the subject of an arrest warrant has no reasonable expectation of privacy that can trump execution of the warrant. *Click, supra*, and its progeny. When Damaad Gardner encountered Officer David House on March 17, 2010, he was the subject of a pre-existing arrest warrant. Thus, Gardner simply had no standing to complain that the Fourth Amendment protected him from an insufficiently justified investigative detention or pat-down search. The trial court's finding in that regard was legally correct and in keeping with long-standing Second District precedent. It should have been affirmed.

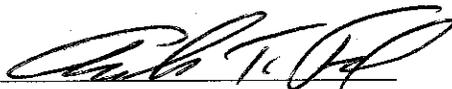
However, the court of appeals departed from its own case law and held that Damaad Gardner did, in fact, have a reasonable expectation of privacy that would allow him to challenge the legality of the stop and frisk that occurred in this case. From its Opinion, the court of appeals seems ready to embrace a misguided approach that requires analysis under the attenuation doctrine and might allow, under certain circumstances, for suppression of evidence found when an arrest warrant is executed. Thus, the Second District Court of Appeals' decision to reverse Gardner's conviction and remand the case for further findings in connection with Gardner's motion to suppress was error that should now be reversed by this Court.

The State of Ohio respectfully prays that the decision of the Second District Court of Appeals be reversed and Damaad Gardner's conviction for possession of crack cocaine be reinstated.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

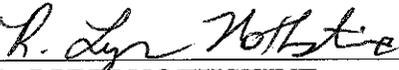
BY 
R. LYNN NOTHSTINE
REG. NO. 0061560
Assistant Prosecuting Attorney
APPELLATE DIVISION

BY 
ANDREW T. FRENCH
REG. NO. 0069384
Assistant Prosecuting Attorney
APPELLATE DIVISION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class mail on this 4th day of June, 2012, to the following: Rebekah S. Neuherz, 150 N. Limestone Street, Suite 218, Springfield, OH 45502 and Timothy Young, Ohio Public Defender Commission, 250 East Long Street, Suite 1400, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 

R. LYNN NOTHSTINE
REG. NO. 0061560

Assistant Prosecuting Attorneys
APPELLATE DIVISION

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

DAMAAD S. GARDNER

Defendant-Appellee.

Case No. 11-

11-2134

On Appeal from the
Montgomery County Court
of Appeals, Second
Appellate District

Court of Appeals
Case No. 24308

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

MATHIAS H. HECK, JR.
Prosecuting Attorney
CARLEY J. INGRAM (0020084)
(COUNSEL OF RECORD)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-5027

REBEKAH S. NEUHERZ
(COUNSEL OF RECORD)
Reg No. #0072093
150 N. Limestone Street
Suite 218
Springfield, Ohio 45502

COUNSEL FOR APPELLEE,
DAMAAD S. GARDNER

ATTORNEY FOR THE STATE OF OHIO,
APPELLANT

FILED
DEC 19 2011
CLERK OF COURT
SUPREME COURT OF OHIO

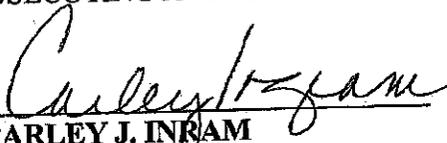
NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Damaad Gardner*, Case No. 24308 on November 4th, 2011.

This felony case presents a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 
CARLEY J. INGRAM
REG NO. 0020084
Assistant Prosecuting Attorney
APPELLATE DIVISION

**COUNSEL FOR APPELLANT,
STATE OF OHIO**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 19th day of December, 2011, to the following: Rebekah S. Neuherz, 150 N. Limestone Street, Suite 218, Springfield, Ohio 45502; and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 
CARLEY J. INGRAM
REG. NO. 0020084
Assistant Prosecuting Attorney
APPELLATE DIVISION



FILED
COURT OF APPEALS

2011 NOV -4 AM 8:45

GREGORY A BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
89

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24308
v.	:	T.C. NO. 10CR910
DAMAAD S. GARDNER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 4th day of November, 2011.

TIMOTHY J. COLE, Atty. Reg. No. 0084117, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

REBEKAH S. NEUHERZ, Atty. Reg. No. 0072093, 150 N. Limestone Street, Suite 218, Springfield, Ohio 45501
Attorney for Defendant-Appellant

FROELICH, J.

Defendant-appellant Damaad Gardner appeals from his conviction for possession of cocaine. For the following reasons, the judgment of the trial court is Reversed, and the

case is Remanded.

According to the testimony at the motion to suppress hearing, on the evening of March 17, 2010, Detective David House of the Dayton Police Department was patrolling in an unmarked cruiser in a high crime area, when he found himself behind a pick-up truck bearing out-of-county plates. Knowing that it is common for drug buyers to come from outside of Montgomery County to that area of Dayton to purchase illegal drugs, Detective House followed the truck. He checked the truck's registration through LEADS and learned that it was registered to a Clinton County man who had a 2003 conviction for a drug offense. Detective House continued to follow the truck to see if the driver was going to a known drug house.

The driver parked the truck in the driveway of a residence. The driver and his passenger got out and entered the residence. Detective House decided to watch the house believing that a short stay could be indicative of drug activity. Seeing no suspicious activity, Detective House left after about fifteen minutes.

Approximately three hours later, Detective House drove past the residence again. The truck was still in the driveway, along with a car. The car was registered to Richard Easter, who had an active warrant for his arrest from Butler County for failure to appear for trial on a drug charge. The LEADS system described Easter as a 56-year-old white male, approximately six feet tall, 160 pounds, with brown hair and brown eyes.

Detective House moved up the street and resumed watching the house to see if Easter would emerge. Two younger (than Easter's listed age) men came out of the house. One, later identified as Gardner, sat in the passenger seat of the car, and the other sat in

the back seat. A few minutes later, at approximately 11:10 p.m., a man matching Easter's description came out of the house, got into the driver's seat of the car, and began to drive away. Detective House followed the car, and was going to call for a marked cruiser to conduct a stop to see whether the driver was Easter and, if so, to place him under arrest for the outstanding warrant.

Before House was able to contact a marked cruiser, the driver turned into a gas station and parked, got out of the car, and walked up to the window and purchased cigarettes. Detective House, who was wearing a Dayton Police Department utility vest, parked 25 or 30 feet away and approached the driver. The man admitted that he was Richard Easter, and Detective House placed him under arrest. As Detective House was handcuffing Easter near the driver's door, he saw Gardner moving around inside the car, appearing to be ready to exit the car. Detective House walked Easter behind the car and around to the passenger side so that the detective could talk to the passengers. As the detective and Easter walked around the car, Detective House could see Gardner rise out of his seat and appear to reach into the back of his shorts. Concerned that Gardner might be armed, Detective House shouted for Gardner to place his hands on the dashboard, and Gardner did as told.

Detective House had Easter sit on the ground with his back against the rear door and then tried to open the front passenger door, but it was locked. He ordered Gardner to get out of the car, and Gardner complied. Because he was still the only officer on the scene, Detective House handcuffed Gardner. Detective House told Gardner that he was not under arrest and that he was being handcuffed for the officer's safety. Detective House conducted a pat down for weapons. He found no weapons, but he did feel something that

he said he immediately recognized to be crack cocaine in Gardner's shorts. Detective House removed the item and placed Gardner under arrest. Before any Miranda warnings were given, Gardner spontaneously stated, "something to the effect 'He gave it to me to hide it.'" After other officers appeared on the scene, they took custody of Gardner and determined that he had an outstanding traffic warrant for his arrest.

The trial court overruled the motion to suppress. Gardner pled no contest to one count of possession of cocaine and was sentenced to community control. Gardner appeals.

II

Gardner's Assignment of Error:

"THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS, FINDING THAT APPELLANT'S OUTSTANDING ARREST WARRANT CURED AN OTHERWISE ILLEGAL SEARCH."

In his sole assignment of error, Gardner claims that the trial court should have granted his motion to suppress because the officer lacked reasonable, articulable suspicion of criminal activity to justify detaining him and patting him down. When assessing a motion to suppress, the trial court is the finder of fact, judging the credibility of witnesses and the weight of evidence. *State v. Jackson*, Butler App. No. CA2002-01-013, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. An appellate court must rely on those findings and determine "without deference to the trial court, whether the court has applied the appropriate legal standard." *Id.*, quoting *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. When the trial court's ruling on a motion to suppress is supported by competent, credible evidence, an appellate court may not disturb that ruling. *Id.*, citing

State v. Retherford (1994), 93 Ohio App.3d 586, 592.

Both the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution protect an individual's reasonable expectation of privacy from warrantless searches and seizures, subject only to a few narrow, well-defined exceptions. See, e.g., *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, fn 1.

In overruling the motion, the court discussed, but specifically did not make factual findings, whether there was a reasonable, articulable suspicion to justify the pat down or whether the seizure resulted from the plain feel doctrine. Rather, the court held that when a valid warrant exists for a defendant's arrest, the individual has no reasonable expectation of privacy, and the exclusionary rule does not apply to exclude evidence that may have otherwise been unlawfully obtained by a police officer, even when the officer is not aware of the existence of the warrant until after the unlawful detention.

In *Dayton v. Click* (Oct. 5, 1994), Montgomery App. No. 14328, discretionary appeal not allowed, (1995), 71 Ohio St.3d 1477, Click was the driver of a vehicle that, the court found, was stopped with "no reasonable suspicion that [he] was involved in criminal activity." He originally gave a false name and was cited for driving without an operator's license. While still at the scene, he eventually gave his correct name and "said he gave a fictitious name because he had outstanding warrants in his name." *Id.* He was charged with obstruction of official business and moved to suppress all statements and any evidence gained by his seizure. This Court affirmed the denial of the motion finding that "at the time of the stop Click had no reasonable expectation of privacy in his vehicle because Click knew that there were outstanding warrants for his arrest." *Id.* We then held

that in "view of the above we do not get to the issue of whether the exclusionary rule applies to evidence of an illegal act which occurred after the unlawful stop." A concurring opinion commented that "Click's decision to give a false identity * * * was not a product of the illegality or the officer's efforts to exploit it." *Id.*

In *State v. Brown* (Jan. 28, 2000), Montgomery App. No. 17965, the trial court found that the officer "did not have the requisite reasonable suspicion to detain and question" the defendant. We held that when a warrant was subsequently discovered, "the warrant justified Brown's arrest" and that the search of the vehicle incident to arrest was lawful; the drugs that were found were not subject to suppression.

In *State v. Jamison* (May 11, 2001), Montgomery App. No. 18453, appeal dismissed 93 Ohio St.3d 1413 (2001), the trial court found that the stop and pat down of Jamison were justified, but that the seizure of his identification card, as opposed to any weapons or contraband, exceeded *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Therefore, despite the fact that the officers determined, based on this identification, that there was a warrant for his arrest, the subsequent search of his vehicle was unlawful. We cited *State v. Lynch* (June 6, 1998), Montgomery App. No. 17028, for the principle "that evidence unconstitutionally seized *before* a valid arrest under an outstanding warrant is subject to suppression" (emphasis in original); the court sustained the suppression because the discovery of the warrant "was made possible only" by using the identification card which "had been unlawfully retrieved." *Jamison, supra.*

However, in *State v. Smith*, Montgomery App. No. 22434, 2008-Ohio-5523, ¶12, discretionary appeal not accepted; motion for limited remand to the court of appeals to resolve intradistrict conflict en banc denied as moot, 121 Ohio St.3d 1411, 2009-Ohio-805,

we "specifically overrule[d Jamison] to the extent that it contradicts our holding in *Dayton v. Click* * * *." We held that Smith "had no reasonable expectation of privacy in being free from being stopped arbitrarily by police since the police were authorized and directed by an Indiana court to arrest him. * * * A search incident to that arrest would have disclosed the guns and drugs recovered by the police." *Id.* at ¶11. Later that year, in a case where the officer learned of an outstanding warrant after the discovery of drugs, we held that "the existence of the warrant rendered [the officer's] search and seizure of the drugs lawful." *State v. Williams*, Montgomery App. No. 22535, 2008-Ohio-6030, ¶22, citing *Click*, *supra*, and *Smith*, *supra*.

In *State v. Walker-Stokes*, 180 Ohio App.3d 36, 2008-Ohio-6552, ¶39, we said "we need not decide whether those difficulties [regarding lack of probable cause for a stop] rise to the level of reversible error." Even assuming an unlawful stop, a warrant was then found, the vehicle was searched, and a weapon was found. Citing *Smith*, we held that "because, as a matter of law, an outstanding arrest warrant operates to deprive its subject of the reasonable expectation of privacy the Fourth Amendment protects, the exclusionary rule does not apply to the search and seizure of the subject that would otherwise be illegal because of a *Terry* violation." *Id.* at ¶40 (emphasis in original). The concurring opinion found the issue to be "vexingly close." *Id.* at ¶43.

A trial court found in *State v. Harding*, 180 Ohio App.3d 497, 2009-Ohio-59, appeal not accepted, 121 Ohio St.3d 1504, 2009-Ohio-59; reconsideration denied 122 Ohio St.3d 1483, 2009-Ohio-2511, that a pedestrian was unlawfully stopped. When he supplied his name and social security number, which were transmitted to the dispatcher, a warrant was discovered. The defendant was arrested, and drugs were found on him. Finding that

"[e]specially on close questions of law, the doctrine of stare decisis requires that we follow the latest holding of our court on an issue of law," we held that the "defendant had no reasonable expectation of privacy because he had an outstanding warrant for his arrest * * *" and thus it does "not matter that the police became aware of the warrant following, and as a result of, an otherwise unlawful detention." *Id.* at ¶¶19-22. See, also, *State v. Gray*, Montgomery App. No. 22688, 2009-Ohio-1411, ¶12, stating "[t]he mere existence of an outstanding warrant, in other words, renders a seizure lawful, whether or not the officer is aware of the warrant at the time of the seizure."

An individual cannot complain of a search and request that anything seized be suppressed unless he or she has a reasonable and legitimate expectation of privacy in the place searched or the thing seized. See, e.g., *Minnesota v. Carter* (1998), 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (appellant lacked standing to bring Fourth Amendment challenge based on search of another person's home because he had no reasonable expectation of privacy therein); *Rawlings v. Kentucky* (1980), 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (holding that petitioner could not challenge the search of another person's purse because he lacked a reasonable expectation of privacy with regard to the purse).

However, when a person is seized (assuming it is a seizure¹), he or she has a reasonable expectation of privacy – to be let alone by the State – that has been violated. An individual "may not be detained even momentarily without reasonable, objective grounds for doing so." *Florida v. Royer* (1983), 460 U.S. 491, 498, 103 S.Ct.1319, 75 L.Ed.2d 229. As the Supreme Court reiterated in *Terry*, 392 U.S. at 9, "No right is held

¹A consensual encounter is not a seizure of the person. *United States v. Mendenhall* (1988), 446 U.S. 544, 555, 100 S.Ct. 1870, 64 L.Ed.2d 497.

more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (Quoting *Union Pacific R. Co. v. Botsford* (1891), 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734).

Individuals do not forfeit this expectation of privacy merely because there is a warrant for their arrest. They may not know of the warrant (or even of the allegation that they committed a crime or failed to pay a ticket), or the warrant could have been issued (or failed to have been recalled) in error. Further, even if they are aware of the warrant and may know they are "guilty" of whatever it is the warrant alleges, they still can go about their business until lawfully arrested. Any other analysis would eliminate constitutional protections for individuals who, subsequent to their stop, search, and seizure, are determined to have a warrant or to be guilty. A Kansas appellate court's dissent observed that *Harding's* effect "seems to be that a person wanted on an arrest warrant in Ohio has no Fourth Amendment protections against an unreasonable search and seizure." *Stafe v. Morales* (2010), 44 Kan.App.2d 1078, 1126, 242 P.3d 223, 251, review granted September 23, 2011.

Obviously, as Justice Frankfurter famously observed, many people who raise Fourth Amendment claims are "not very nice people." *United States v. Rabinowitz* (1950), 339 U.S. 56, 69, 70 S.Ct. 430, 94 L.Ed. 653 (dissenting opinion). Regardless, these protections apply to "those suspected or known to be offenders as well as the innocent." *Go-Bart Importing Co. v. United States* (1931), 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374. "The occasional benefits that compliance with the Fourth Amendment confers upon the guilty must be recognized as a necessary consequence of guaranteeing constitutional

protections for all members of our community.” *United States v. Ivy* (C.A.6, 1998), 165 F.3d 397, 404.

“The exclusionary rule suppresses evidence only when a constitutional violation is a proximate cause of the government’s receipt of the evidence. However, rather than speak in terms of proximate cause in exclusionary rule cases, the court has spoken of ‘attenuation’ and ‘dissipation of the taint.’ Its use of these metaphors apparently has led to no different results than it would have reached if it had just used more conventional causal language.” Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 Ohio St. J.Crim.L. 463, fn 75 (Fall, 2009).

For example, as far back as *Nardone v. United States* (1939), 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307, the court said that the causal connection between government’s unlawful conduct and its proof could “become so attenuated as to dissipate the taint;” as when an independent intervening cause, such as a defendant’s unprompted decision to confess or a witness’s unprompted decision to cooperate, has broken the causal chain. *Wong Sun v. United States* (1963), 371 U.S. 471, 487, 83 S.Ct. 407, 9 L.Ed.2d 441 (not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police; “the more apt question” is whether the evidence “has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint”).

The Sixth Circuit has directly addressed the question of “whether the discovery of a valid arrest warrant may serve to dissipate the taint of an unlawful detention.” *United States v. Gross* (C.A.6, 2010), 624 F.3d 309. It held that “where there is a stop with no legal purpose, the discovery of a warrant during that stop will not constitute an intervening

circumstance." *Id.* at 320. See, also, *United States v. Lopez* (C.A.10, 2006), 443 F.3d 1280 (where there was no reasonable suspicion or probable cause to detain a defendant, the continued detention of the defendant while an officer ran a warrants check constituted an unlawful seizure and required suppression of drugs found incident to the arrest on the warrant); *United States v. Lockett* (C.A.9, 1973), 484 F.2d 89 (per curiam) (officer's knowledge that a man was subject to an outstanding bench warrant, which knowledge was acquired only after unlawfully seizing the man, did not retroactively render the seizure of the person reasonable under the Fourth Amendment). But, see, *United States v. Johnson* (C.A.7, 2004), 383 F.3d 538 (holding that discovery of a warrant during an illegal stop constituted intervening circumstance).

"To hold otherwise would result in a rule that creates a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch' that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion. Despite a lack of reasonable suspicion, a well-established constitutional requirement, the officer may then seize those individuals, ask for their identifying information (which the individuals will feel coerced into giving as they will have been seized and will not feel free to leave or end the encounter), run their names through a warrant database, and then proceed to arrest and search those individuals for whom a warrant appears. Under this scenario, an officer need no longer have reasonable suspicion or probable cause, the very crux of our Fourth Amendment jurisprudence. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); [*United States v.*] *Williams* [2010], 615 F.3d [657] at 670, n. 6 ([A]llowing information obtained from a suspect about an

outstanding warrant to purge the taint of an unconstitutional search or seizure would have deleterious effects. It would encourage officers to seize individuals without reasonable suspicion-not merely engage them in consensual encounters-and ask them about outstanding warrants.');

); see, also, Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale L.J. 177 (2008) (commenting that a rule where the discovery of an outstanding warrant constitutes an intervening circumstance has the perverse effect of encouraging law enforcement officials to engage in illegal stops where they have an inarticulable hunch regarding a person on the street or in a car.)”

Gross, supra, at 321-22.

The Arizona Supreme Court in *State v. Hummons* (2011), 227 Ariz. 78, 253 P.3d 275, analyzed whether an illegal stop is sufficiently attenuated from a subsequent search to avoid the exclusionary rule. Applying *Brown v. Illinois* (1975), 422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416, the court considered three factors: the time elapsed between the illegality and the acquisition of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the official misconduct.

The court found that “in essentially every case” the time between the illegal stop and the discovery of the evidence is short and that the discovery of a valid arrest warrant is an intervening cause, but not one that can validate a search “[i]f the purpose of an illegal stop or seizure is to discover a warrant – in essence, to discover an intervening circumstance.”

Id. at ¶12. The court then examined the third factor, the purpose and flagrancy of the illegal conduct, and found that the officer did not approach the defendant “with the hope of arresting and searching him, nor did she otherwise engage in purposeful or flagrant illegality.”

Id. at ¶13. Therefore, the illegal stop was sufficiently attenuated from the

seizure, and the drugs found on the defendant incident to his arrest on the warrant should not be suppressed.

The Sixth Circuit in *Gross*, supra, also applied *Brown*, but found that "where a stop has no legal purpose, the discovery of a warrant during that stop will not constitute an intervening circumstance" that would dissipate the taint of an unlawful detention. *Gross*, at 320-21. " * * * [H]olding that the discovery of a warrant after an illegal stop is an intervening circumstance so long as the purpose of the stop is not because the officer believes the suspect has an outstanding warrant would encourage an officer to offer alternative reasons for the stop, such as a police hunch or community-caretaking. Essentially, we will have created a system of post-hoc rationalization through which the Fourth Amendment's prohibition against illegal searches and seizures can be nullified." *Id.* at 321-22.

Click's progeny in this District (we can find no citations to it by any other appellate court) is labyrinthine, if not desultory. "Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision." *Gallimore v. Children's Hosp. Med. Center* (1993), 67 Ohio St.3d 244, 257 (Moyer, C.J. dissenting). "Stare decisis remains a controlling doctrine in cases presenting questions on the law of contracts, property, and torts, but it is not controlling in cases presenting constitutional questions." *State v. Bodyke*, 126 Ohio St.3d 266, 275, 2010-Ohio-2424, ¶37. Because there is a constitutional protection underlying the proper application of the exclusionary rule, "stare decisis does not compel us with the same force as it does in other areas of the law." See, e.g., *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶45 (internal citations omitted).

If an individual is unlawfully stopped and evidence is seized, it is subject to the exclusionary rule because of the Fourth Amendment violation. This is true even if, subsequent to the discovery of the contraband and the defendant's arrest, it is determined that there is a warrant for his or her arrest. The later-discovered warrant itself does not retroactively legitimize the search and seizure.

None of this means that a defendant cannot be arrested for the outstanding warrant simply because his name was discovered as a result of an unlawful stop. "There is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity." *Hoosilapa v. I.N.S.* (C.A.9, 1978), 575 F.2d 735, 738. Most courts hold that *I.N.S. v. Lopez-Mendoza* (1984), 468 U.S. 1032, 1039, 104 S.Ct. 3479, 82 L.Ed.2d 778, stands for the proposition that "the body or identity of a defendant * * * in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." See, e.g., *United States v. Oscar-Torres* (C.A.4, 2007), 507 F.3d 224 (fingerprints); *United States v. Navarro-Dias* (C.A.6, 2005), 420 F.3d 581 (denying motion to suppress "regardless of whether the information was obtained by a violation of his Fourth Amendment rights").

This was recently before the United States Supreme Court. Jose Tolentino was unlawfully stopped, and his name and the fact that he was driving under suspension were discovered. The question before the court was whether that information, obtained only through his unlawful detention, could be used. The case was accepted but then dismissed. *People v. Tolentino* (2010), 14 N.Y.3d 382, 900 N.Y.S.2d 708, 926 N.E.2d 1212, cert. granted ___ U.S. ___, 131 S.Ct. 595, 138 L.Ed.2d 433 (2010), cert. dismissed as improvidently granted ___ U.S. ___, 131 S.Ct. 1387, 179 L.Ed.2d 470 (2011).

In *Herring v. United States* (2009), 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496,

the majority held that unreasonable searches do not automatically trigger the exclusionary rule. See, e.g., *Nolasco, et al., What Herring Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 Am.J.Crim.L. 221 (Spring, 2011). In *Herring*, the police relied on incorrect computer information that failed to reflect that a warrant had been recalled. The court stated that the exclusionary rule does not apply to unconstitutional searches resulting from mistakes due to "isolated negligence attenuated from the arrest." *Herring*, at 698. How this holding affects general Fourth Amendment law is open to debate. See, e.g., LaFave, *The Smell of a Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J.Crim.L & Criminology 757 (Summer, 2009), and Alschuler, *supra*.

Regardless, we cannot speculate on what a higher court might eventually hold. Some courts have held that discovery of a warrant after an illegal arrest is the fruit of the poisonous tree; others have held that the warrant is an intervening and attenuating circumstance; and others have held that the flagrancy of the police conduct and/or the foreseeability² of the discovery of a warrant should control the applicability of the rule.

Whether viewed as lack of proximate cause or as attenuation, there is a point, albeit perhaps ultimately subjective, at which the discovery of a warrant, and a search incident to arrest under the warrant, is so removed, unrelated, unforeseen, and independent from the unlawful stop and seizure that the exclusionary rule is not applicable. In the case before us, the warrant was discovered as a direct, proximate and non-attenuated result of

²See, e.g., Kimberly, *supra*, at fn 29, in which the author calculates the ratio of outstanding warrants to residents in Cincinnati as one to three, and suggests that it is thus not unforeseeable that a warrant check will discover an arrest warrant for the individual.

Gardner's seizure.

In summary, Gardner had a reasonable expectation of privacy at the time of the stop despite there being a warrant for his arrest. Once the warrant was discovered, the law enforcement officers had the right to infringe upon that expectation, arrest him, and conduct a search incident to that arrest. However, if the warrant was discovered as a result of an unlawful stop or seizure (unless its discovery was unconnected to and attenuated from the illegality), then any evidence seized in the search incident to the arrest must be suppressed.

We cannot tell from the record exactly when and how the officers discovered Gardner's name or that there was a warrant; whether the court found facts justifying – or not justifying – a *Terry* patdown; or whether, if such a patdown were justified, whether the seizure of the drugs was within the plain feel exception. We will reverse the judgment and remand the case to the trial court for further proceedings consistent with this opinion.

.....
DONOVAN, J., concurs.

HALL, J., dissenting:

At the time of his encounter with police, which led to the pat down and discovery of crack cocaine hidden in his shorts, the defendant had an outstanding warrant for his arrest. The warrant was not discovered until sometime after the pat down. This court held in *Dayton v. Click* (Oct. 5, 1994), Montgomery App. No. 14328, that a defendant with an outstanding arrest warrant does not have a reasonable expectation of privacy to be free from arrest and search. I recognize that the court has at times struggled with that decision. See, e.g., *State v. Jamison* (May 11, 2001) Montgomery App. No. 18453, overruled by

State v. Walker-Stokes, 180 Ohio App.3d 36, 2008-Ohio-6552. But the case law of the court, reaffirmed repeatedly, is that when a defendant has an outstanding arrest warrant, he has "no reasonable expectation of privacy to be free from arrest and search by the police." *State v. Williams*, Montgomery App. No.22535, 2008-Ohio-6030, ¶22, citing *State v. Smith*, Montgomery App. No. 22434, 2008-Ohio-5523, ¶11. The majority opinion effectively overrules those holdings.

In this record, there is no evidence that the police acted indiscriminately or in flagrant disregard of the defendant's rights. When a case with such police activity is presented to us, then will be the time to re-examine *Click*, *Smith*, and *Williams*.

Based upon the above case law, I believe that the trial court correctly determined that the defendant did not have a reasonable expectation of privacy and, therefore, the trial court properly overruled the defendant's Motion to Suppress. I would affirm.

.....

Copies mailed to:

Timothy J. Cole
Rebekah S. Neuherz
Hon. Timothy N. O'Connell



FILED
COURT OF APPEALS
2011 NOV 4 AM 8:45
GREGORY W. KUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
39

28

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24308
v.	:	T.C. NO. 10CR910
DAMAAD S. GARDNER	:	<u>FINAL ENTRY</u>
Defendant-Appellant	:	

Pursuant to the opinion of this court rendered on the 4th day of November, 2011, the judgment of the trial court is reversed and the case is remanded to the trial court for further proceedings consistent with this court's opinion.

Costs to be paid as stated in App.R. 24.


MARY E. DONOVAN, Judge


JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

(1
said)

Copies mailed to:

Timothy J. Cole
Assistant Prosecuting Attorney
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

Rebekah S. Neuherz
150 N. Limestone Street
Suite 218
Springfield, Ohio 45501

Hon. Timothy N. O'Connell
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422