

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 2011-2134

Plaintiff-Appellant,

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

vs.

DAMAAD S. GARDNER

**COURT OF APPEALS
CASE NO: 24308**

Defendant-Appellee.

REPLY BRIEF OF APPELLANT, THE STATE OF OHIO

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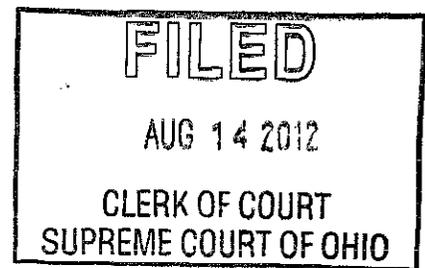
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Introduction

Although the officer testified to the circumstances that led to his decision to detain and frisk Damaad Gardner, the court did not determine whether that decision was objectively reasonable under *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 86 S.Ct. 1868 (1968) because prior precedent from the Second District Court of Appeals was dispositive: an arrest warrant clothes the police with the authority to take its subject into custody, whether or not the officers were aware that the warrant existed. *State v. Smith*, 2d Dist. No. 22434, 2008-Ohio-5523, discretionary appeal not allowed; motion for limited remand to resolve intra-district conflict en banc denied as moot, 121 Ohio St.3d 1411, 2009-Ohio-805; *State v. Pierson*, 128 Ohio App.3d 255, 714 N.E.2d 461 (1998); *Dayton v. Click* (Oct. 4, 1994), Montgomery App. No. 14328, 1994 WL 543210. Adopting the attenuation doctrine as the appropriate standard, the court found that the discovery of the evidence was the direct, proximate, and non-attenuated result of the detention and patdown, and it remanded for a determination as to whether the detention and frisk were lawful under *Terry v. Ohio*, supra.

In reversing that prior precedent, the Court of Appeals adopted the view of *United States v. Gross*, 624 F.3d 309 (6th Cir. 2010), which 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. Thus, even though Gardner was subject to being arrested, searched, and taken straight to jail at the moment the officer patted him down, he retained a privacy interest that protected him from the far lesser intrusion of being frisked without sufficient justification. Under this approach, the warrant is dormant unless the officer who encounters its subject happens to know about it.

Appellee and Amici argue that the prior precedent of the court of appeals holding that that an arrest warrant clothes the police with the authority to take its subject into custody, whether or not the officers were aware that the warrant existed, is inconsistent with the Fourth Amendment and that it is bad policy because it encourages officers to stop and frisk people without reasonable suspicion, hoping to find a warrant after the fact that would excuse their illegal conduct. It is to these arguments that the State now responds.

1. The rule announced in *Dayton v. Click* and abandoned in this case is consistent with the Fourth Amendment.

A. Because Gardner was subject to being arrested, searched, and taken to jail on the warrant, he had no expectation of privacy that would protect him from an insufficiently justified *Terry* stop and frisk: Appellee and Amici agree that an arrest warrant authorizes law enforcement to take its subject into custody, but they argue that the warrant does not limit the privacy interests of the subject in any other way. Under this theory, if the police seize evidence during an insufficiently supported stop or frisk and then discover that the detainee is wanted on a warrant, the arrest on the warrant is valid, but the evidence seized before its discovery must be excluded because the police violated the subject's Fourth Amendment right to go about his business with out unreasonable police interference. But the authority to arrest embodied in the warrant is independent of the officer's knowledge that the warrant exists, and the limitation the warrant necessarily places on the privacy interests of its subject does not contain an exemption for those, like Gardner, who are fortunate enough to encounter an officer who is unaware that the warrant exists.

An arrest warrant is not a suggestion, or a guide, or an alert: it is a command to law enforcement, issued by a court and based on probable cause, to arrest and detain a named

individual. R.C. 2935.18, App.R. 4. By the authority of the warrant for Gardner's arrest, which existed before, during, and after the detention and frisk that led to the discovery of the evidence, Gardner was subject to being arrested, searched incident to the arrest, and taken to jail. Because the warrant authorizes the police to deprive a person of his or her liberty, it necessarily authorizes a limited invasion of that person's privacy interest. *Steagald v. United States*, 451 U.S. 204, n.7, 101 S.Ct. 1642, 1648, 68 L.Ed.2d 38 (1981). In *Steagald*, the Court recognized that an arrest warrant authorizes an otherwise unlawful entry into a person's home to make the arrest. In fact, police officers could have entered Gardner's home without his consent to execute the arrest warrant if they had a reasonable belief he was within. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Thus, it is wrong to suggest that the existence of a warrant only very narrowly limits the expectations of privacy of the person it names; instead, the warrant utterly removes that person's expectation of privacy in his home when police have reason to believe he is there, and it subjects him to arrest in any public place where he may be found. Inherent in the limitation on privacy embodied in an arrest warrant that the Supreme Court recognized in *Payton* and *Steagald*, is the limitation on the subject's right under the Fourth Amendment to go about his business without police interference – by issuing the warrant, the court has commanded an intrusion into the subject's life. The authority to arrest embodied in the warrant supplants the subject's right to be free from unreasonable police interference. And an insufficiently supported frisk cannot be considered unreasonable police conduct where a court has found probable cause to arrest and issued a warrant.

B. The authority to arrest embodied in the warrant exists whether or not the officers are aware that the warrant exists. That Gardner was subject to arrest on the warrant is not in dispute. And he must agree that if the officer recognized him that day and knew he was wanted

on a warrant, or if the officer learned of the arrest warrant after the stop but before the frisk, he could have arrested him on the spot, searched him, and taken him to jail. Thus, in Gardner's view, the privacy rights of the subject of an arrest warrant depend not on Fourth Amendment principles but on whether the officers knew the warrant existed when they found the evidence. The State suggests that this approach does not protect the privacy rights of individuals under the Fourth Amendment but instead makes the protections arbitrary. What the rule does is give the person named a sporting chance – if she is lucky enough to encounter an officer who does not know that she is subject to immediate arrest and search, she can insist that her privacy rights are violated by an insufficiently justified stop and frisk, and win suppression of the evidence. But if the officers recognize the subject and know she is named in a warrant, she can be immediately arrested, searched incident to the arrest, and taken into custody.

In fact, as argued above, the arrest warrant supersedes the subject's expectation that he or she can go about his business, secure from unreasonable police interference. A person who is subject to arrest on a warrant has no right to insist that police act unreasonably in detaining him or patting him down.

Had this not been a fluid, fast-moving situation – the officer was arresting the driver on a warrant when Gardner's movements inside the car led him to suspect he was hiding a weapon – or if there were more officers on the scene at the time, the police would have almost certainly ascertained his identity, discovered the warrant, and arrested him. But we'll never know because Gardner's actions in the car, suggesting first that he was getting ready to flee and then that he was hiding a weapon, prompted the patdown for the safety of the officers. He forced their hand, now complains that because the officers did not know about it when they frisked him, the warrant that ordered his arrest had no effect on his expectation of privacy.

C. Brendlin v. California. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007), held that when police stop a vehicle, the passengers are seized within the meaning of the Fourth Amendment, which means that the passengers can challenge the circumstances of the stop. A significant portion of the oral argument in the United States Supreme Court, however, was spent considering a question the court did not decide: whether evidence discovered in a search incident to arrest on a warrant should be suppressed when the warrant was discovered in the course of an unlawful stop. The facts of *Brendlin* are not identical to those here - there, the officer discovered the warrant after the stop but before the arrest, but even so, Justice Souter's questions and comments go to the heart of the issue in this case. Noting that there were two ways to look at the situation: one, that the search incident to arrest that yielded the evidence was the product of a bad stop; or, two, the search was incident to execution of a valid arrest warrant, he questioned why, in a choice between, on the one hand, a warrant to arrest that had been issued by a neutral and detached magistrate and, on the other, a person who is discovered to be wanted on a warrant during an unlawful stop, the greater weight or emphasis should go to the unlawful stop.¹

Obviously, the issue was not before the court, and the justices' questions and comments must be given the weight appropriate to the circumstances. Nevertheless, the questions and comments of the court refute the suggestion that the Fourth Amendment clearly required the court of appeal to abandon its earlier precedent, adopt the attenuation doctrine, and suppress the evidence.

D. Cases cited by Appellee and Amici: The cases in the answering briefs tend to show not that the issue is settled in Gardner's favor, but that the courts that have examined the issue

¹ www.supremecourt.gov/oral_arguments/argument_transcripts/06-8120.pdf

have come to different conclusions. *United States v. Gross*, 624 F.3d 309 (6th Cir., 2010) stands squarely for the proposition Gardner wishes to establish, and, unlike some of the other cited cases, it contains an analysis of Fourth Amendment principles and the applicability of the exclusionary rule. The State suggests, for the reasons set out in the opening brief and this reply, that the Sixth Circuit is simply wrong.

Appellee and Amici cite *United States v. Lopez*, 443 F.3d 1280 (10th Cir.2006) and *United States v. Lockett*, 484 F.2d 89 (9th Cir.1973) as holding that “officers who violate a defendant’s Fourth Amendment rights in effecting an arrest, while unaware of the existence of an outstanding arrest warrant for the defendant, violate the Fourth Amendment.” Actually, the effect of a subsequently-discovered arrest warrant on an otherwise unlawful arrest was not the issue in either case, and neither decision analyzed or decided that question. In both cases, the question for the court was the reasonableness of the investigative detention, and the courts assumed, without analysis or citation to authority, that the discovery of an active warrant would not cure a faulty stop. The complicated and unusual facts in *El-Bey v. Roop*, 530 F.3d 407 (6th Cir. 2008), limit its impact here. The police didn’t merely stop and frisk El-Bey on less than reasonable suspicion – instead, while lawfully in his house they discovered that he was wanted on a warrant from New Jersey by going through his personal papers on his desk. *Bruce v. Perkins*, 701 F.Supp. 163 (N.D.Ill.1988), held, without analysis or discussion, that the idea that the discovery of an arrest warrant can save what would otherwise be an unlawful arrest is “preposterous.” *Fulson v. City of Columbus*, S.D. Ohio No C2-91-540 (Aug. 26, 1992) a 42 U.S.C §1983 action before the court on a motion for summary judgment merely cited *Bruce v. Perkins*, supra, without analysis, for the proposition that the plaintiff may be able to establish that his arrest was invalid if the arresting officer had no other basis and was unaware of the warrant. The State suggests that it is

not enough to declare, without analysis or citation to authority, that the idea that the subsequent discovery of an arrest warrant purges the contamination of an illegal stop is “preposterous.”

E. The attenuation doctrine: The court held that a later-discovered arrest warrant will not legitimize an illegal stop or frisk unless the connection between the illegality and the discovery of the evidence is so attenuated as to dissipate the contagion of the illegality. ¶ 37. Under the attenuation doctrine, the exclusionary rule will not apply when the connection between the illegal conduct and the seizure of the evidence is so attenuated as to dissipate the taint of the illegality. In *Brown v. Illinois*, 422 US 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416, the Supreme Court set forth three factors for determining whether the causal chain has been sufficiently attenuated to dissipate the contagion of the illegality: a) the time elapsed between the illegality and the acquisition of the evidence; b) the presence of intervening circumstances; and c) the purpose and flagrancy of the official misconduct. *Kansas* has adopted attenuation, and has concluded that the officers’ discovery of the arrest warrant is an intervening circumstance that breaks the chain of causation and prohibits application of the exclusionary rule. *Kansas v. Martin*, 179 P.3d 457 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 192, 172 L.Ed.2d.138 (2008). Florida has done the same. *Florida v. Frierson*, 926 So.2d 1139 (2006).

The idea that time, events, or the nature of the police conduct can dissipate the contamination of illegal police conduct does not fit comfortably in a situation where the intervening event is the discovery of an existing arrest warrant. The warrant is a pre-existing condition that subjects the person named to arrest, and the discovery after an unlawful stop or frisk stop “intervenes” in the sense that it comes between the unlawful conduct and the discovery of the evidence, but it doesn’t change anything. The authority to arrest that the warrant conferred existed independently of the officers’ knowledge of it, and the officer’s discovery of the warrant

is a neutral fact: it does not give the warrant any independent strength or impact or authority that it lacked before it was discovered; nor does it weaken whatever illegality that might have led to the seizure of the evidence. It is difficult to see how discovery of a pre-existing fact like the existence of a warrant constitutes an intervening circumstance that breaks the causal connection between illegal conduct and the discovery of the evidence.

However, in *Hudson v. Michigan*, 547 U.S. 586, 593, 126 S.Ct. 2159, 165 L.E.2d 56, the Court explained that attenuation is not limited to situations where the causal connection is remote:

[a]ttenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes to which the law is to serve.

The State suggests that if the attenuation doctrine applies where a bad stop or frisk leads to seizure of evidence of someone who is later found to be subject to arrest on a warrant, then the approach taken by *Kansas* and *Florida* be adopted, or that the broader definition of attenuation set out in *Hudson v. Michigan* be applied.

F. Application of the exclusionary rule: Amici is mistaken in asserting that when the police act unreasonably and violate the Fourth Amendment the fruits of the police illegality must be suppressed. The fact that a Fourth Amendment violation occurred- -i.e., that a search or arrest was unreasonable- - does not necessarily mean that the exclusionary rule applies. *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed. 2d 496 (2009). Exclusion is not an

individual right and applies only where it results in appreciable deterrence. *Id.* What's more, the benefits of deterrence must outweigh the costs. *Id.*

This is because the exclusion of evidence from a criminal proceeding imposes "substantial social costs." *Hudson*, 547 U.S. at 591; *Illinois v. Krull*, 480 U.S. 340, 352 (1987); *Leon*, 468 U.S. at 907. Suppression often diverts attention from "the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding," for it excludes the evidence that "typically" is "reliable" and "often the most probative information bearing on the guilt or innocence of the defendant." *Stone v. Powell*, 428 U.S. at 489-90. Because the exclusionary rule is prudential rather than constitutionally mandated, it is applicable only where its deterrence benefits outweigh its 'substantial social costs. *Id.* The benefits of suppressing evidence taken in an insufficiently justified stop and frisk when the person was subject to arrest on a warrant, search incident to that arrest, and being taken to jail are minimal.

G. Promoting Good Police Work: Appellee and Amici assert that the rule of *Dayton v. Click* cannot stand because it does not promote good police work, and, citing *United States v. Green*, they argue that the State's proposition of law invites police abuse. The question before the court is not whether the rule in *Click* promotes good police work or is subject to abuse; it is whether the constitution supports it. As shown, the Fourth Amendment supports the principle that an arrest warrant clothes the police with the authority to take its subject into custody, whether or not the officers were aware that the warrant existed. If allowed by the Fourth Amendment, the question of whether a different rule may be a better policy choice for the State of Ohio is one for the legislature. Indeed, Ohio law prohibits police officers from making custodial arrests for minor misdemeanors in most situations, even though the Constitution would

allow them to do so. R.C. 2935.261.2. *Atwater v. City of Laga Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

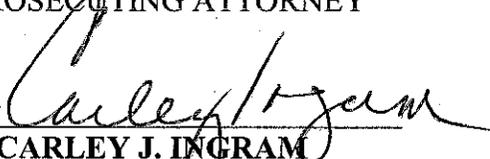
Finally, *Dayton v. Click* has been the law in the Second District for most of the past 19 years, and there is no evidence that officers have used it as a sword rather than a shield. Instead, the cases where the court of appeals relied on cases such as *State v. Click* to allow admission of evidence portray police officers who stopped and frisked someone because they believed that they had an objectively reasonable basis for concluding that the person was involved in criminal activity and, in some cases, was armed and dangerous. There is not a hint that police abused the rule.

Conclusion

Because the command to arrest embodied in the warrant superseded Gardner's right to go about his business without otherwise-unjustified police intrusion, the trial court was not required to consider whether the stop and frisk that led to the discovery of the evidence was based on objectively reasonable belief that Gardner was, had just been, or was about to be engaged in criminal activity and was presently armed and dangerous. The arrest warrant clothed the officer with the authority to take him into custody, whether or not the officer was aware that the warrant existed. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

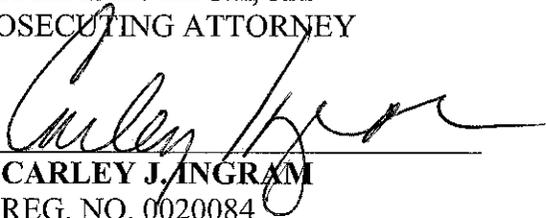
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