

ORIGINAL

THE SUPREME COURT OF OHIO

STATE OF OHIO

: Case Nos. 2011-1504
2011-1593

Appellee

:

vs.

: On Appeal from the
Summit County Court of Appeals,
Ninth Judicial District
Case No. 25379

JILLIAN D. HOBBS

:

Appellant

:

**MOTION FOR RECONSIDERATION
OF APPELLANT JILLIAN D. HOBBS**

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Motion for Reconsideration of Appellant Jillian D. Hobbs

Pursuant to S. Ct. Prac. R. 11.2 (B) (1) and (4) appellant Hobbs moves the court for reconsideration of the decision issued August 29, 2012 in certified Case No. 2011-1504 and the decision of same date dismissing as improvidently allowed the discretionary appeal in connected Case No. 2011-1593.

Ms. Hobbs respectfully moves this Court to reconsider those decisions to the extent that they conclude that the exclusionary rule does not apply to evidence existing in this record. The decision determined that a warrantless arrest was based upon a pre-arrest confession and that while the later issued required warrant for continued detention was constitutionally deficient, that detention warrant produced no evidence subject to suppression. *State v Hobbs*, Slip Opinion No. 2012-Ohio-3886 ¶23. On that basis it was also determined the discretionary appeal was improvidently accepted. ¶ 24.

As shown, the decision was wrong when it concluded that the invalid detention warrant led to no evidence subject to suppression. Dismissal of the discretionary appeal based upon that faulty premise was also wrong.

I. Grounds for Reconsideration

S. Ct. Prac. R. 11.2(A) provides that a motion for reconsideration "shall not constitute a reargument of the case." See also *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶9. Counsel regrets there was little if any oral argument here as to what evidence should be suppressed.

A motion for reconsideration can yield sharply divided views. *City of Rocky River v. State Employment Relations Board*, 41 Ohio St.3d 602, 535 N.E.2d 657 (1989). Here the initial opinion was 7-0 and it is respectfully submitted that on careful reflection all members will likewise recognize an error.

S.Ct. Prac. R. 11.2(B) (1) allows for reconsideration where the Court refuses to grant jurisdiction in a discretionary case or an appeal of right as not

It is error to treat as a factual finding and to defer to the legal conclusion that there was no evidence seized as a result of the invalid *arrest* warrant. “Appellate review of motion to suppress presents a mixed question of law and fact” Hobbs ¶ 6 (citation omitted). Whether other evidence aside from confession existed in the record is more akin to sufficiency not weighing the evidence. The “confession” found may well be treated as a “historical fact” reviewed only for “clear error” and one to which “due weight” must be given but whether other evidence exists in the record which was obtained due to the invalid detention warrant is *not* a “historical fact” entitled to any deference. *Ornelas v United States* 517 U.S. 690, 116 S.Ct. 1657 (1996)

The testimony of an arresting officer during the State’s redirect in the suppression hearing was the only *testimony* about what was seized. That testimony was misleading and even if inadvertently in error it was still unfairly misleading. *Manigault et al., v. Ford Motor Company, et al.* 96 Ohio St.3d 431, 775 N.E.2d 824, 2002-Ohio-5057 ¶9 (apparently misleading testimony cannot be ignored; new trial appropriate when expert testimony accompanying a videotape without audio is allegedly contradicted by a copy of the videotape with audio, even when the videotape with audio is not discovered until after the trial has been completed.)

Essentially the premise that there is no evidence seized as a result of the invalid detention warrant is the proverbial house built on sand which cannot withstand the waters of careful examination of the record.

The error of what and when evidence was seized arises from an important distinction between an arrest warrant issued after a warrantless arrest and a search warrant. A search warrant once executed either results in obtaining evidence by finding something or not finding something at the time of execution of the search warrant. The search warrant does not continue to seize any objects after it is executed and returned.

Likewise an arrest based on a warrant issued by a neutral magistrate *before* the physical arrest is made results in the initial seizure of the person and items in his/her immediate possession. Likewise that pre-arrest warrant continues the detention.

But this was a warrantless arrest based on an alleged confession made at appellant's home on a "visit to ask appellant about a recent burglary" Hobbs ¶2. Simply because no physical evidence was taken at the time of the warrantless arrest or before a warrant issued should NOT end the inquiry.

This Court correctly recognized that when a person is arrested without a warrant the arrested person must be promptly taken before a court having jurisdiction. *Hobbs* ¶15. Thereafter a judge clerk or magistrate "shall forthwith issue a warrant to the peace officer making the arrest" Hobbs ¶16

And most importantly this Court affirmed that "[a]ll further detention and further proceedings shall be pursuant to such affidavit or complaint and warrant." *Hobbs* ¶16 citing RC 2935.08 and Crim R. 4(A) (1). (italics added) After her initial arrest, Ms. Hobbs continued detention was pursuant to the invalid warrant not a warrantless arrest on confession. Obtaining evidence did not stop on detention.

The State disclosed in discovery that it intended to use evidence of a prior conviction and most importantly that it had obtained and would use recordings of Ms. Hobbs telephone calls from jail. These were *at least* two pieces of evidence that were obtained *after and thus "pursuant to"* the invalid arrest warrant. Most certainly the recorded jail conversations were directly obtained as a result of Ms. Hobbs "continued detention" in jail pursuant to the invalid warrant. The prior conviction and the recordings existed, they were disclosed by the State as "evidence" which would be used and should have been suppressed.

The State argued in the Ninth District that the actual conversations themselves were never made a part of the record but it has never denied that such recordings existed or denied that the recordings and the prior conviction were

disclosed in discovery. But these items *were never mentioned* by the State's trial counsel when the officer testified no evidence was seized based on the warrant.

When the State argued in trial and continued to argue in the appellate court that "no evidence" was seized it perpetuated a clearly inaccurate description of the evidence (certainly it is fair to charge that the State knew or should have known of its own discovery disclosures.) See, *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, ¶ 27 (Lundberg Stratton, J. concurring in part and dissenting in part) (noting that when it is conceded that this Court had been provided faulty data as it is not permitted to go outside the record it was "legally necessary for us to reconsider it")

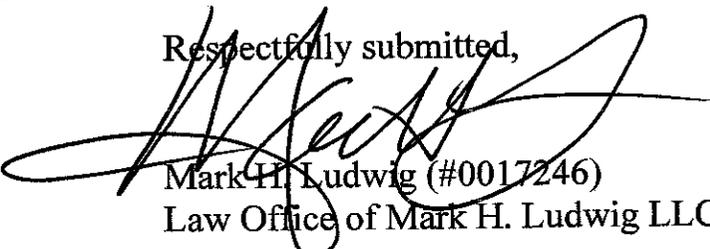
CONCLUSION

Whether the State could obtain a conviction without other acts/prior conviction evidence or without using the recorded jailhouse calls is not the issue. (The State never claimed harmless error on failure to exclude)

The motion for reconsideration should be granted as to the issue of the application of the exclusionary rule to certain evidence in this cause. The case may be decided on the merit briefs previously filed without further oral argument but appellant Hobbs would welcome any opportunity to further address in writing and at oral argument the need for reconsideration and the application of the exclusionary rule here.

Reconsideration should be granted for further proceedings consistent with this Court's decision on reconsideration.

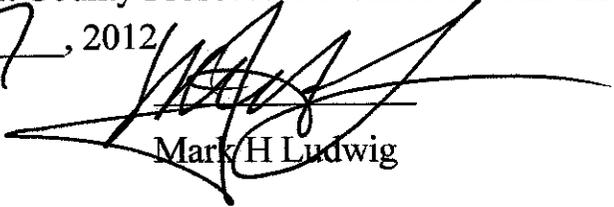
Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of the foregoing was sent by regular U.S. mail to the office and the attention of Ms. Heaven DiMartino, Assistant Prosecuting Attorney, Appellate Review Division Summit County Prosecutor's Office 53 University Ave. Akron Ohio 44308 on September 7, 2012.



Mark H Ludwig