

IN THE SUPREME COURT OF OHIO

13-1973

STATE OF OHIO
Plaintiff-Appellee

: On Appeal from the Court of Appeals
: Twelfth Appellate District,
: Butler County, Ohio

vs.

:
: Court of Appeals
: Case No: CA 2012-11-235

SUDINIA JOHNSON,
Defendant-Appellant,

:
: Trial Case No: CR 2008-11-1919

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SUDINIA JOHNSON**

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Four Ohio Appellate courts have been faced with the issue of applying the holding of *United States v Davis*, ___ U.S. ___, 131 S.Ct. 2419 (2011) where no binding precedent authorizes the warrantless search at issue. Each court had to decide if the good faith exception to the exclusionary rule will excuse the officers' failure to secure a warrant before conducting the search at issue. Three courts applied the *Davis* holding to its facts and rendered decisions consistent with the mandate of *Davis*.¹ The fourth chose not to apply the holding, failing to follow three Ohio appellate courts who decided the issue before it and instead introduced a new fact intensive "cost benefit" analysis in deciding the good faith exception to the exclusionary rule should apply in the absence of binding precedent. Thus the instant appeal.

The three courts applying the holding in *Davis*, the 8th District, the 11th District and the 2nd District all recognize there is no binding precedent in Ohio or in the 6th Circuit authorizing the warrantless use of GPS devices. As a result each appellate court noted it was bound to apply the exclusionary rule because it was directed to do so by the United States Supreme Court. The 12th District Court of Appeals characterizes these decisions as "narrowly applying" *Davis*. And instead of applying the holding of *Davis* the appellate court engaged in the unauthorized weighing of the cost and benefits of applying the exclusionary rule in this case.

The 12th District Court of Appeal correctly identified the question before it; "whether the *Davis* good faith exception applies here, where prior to our decision in Johnson I there was no Ohio Supreme Court or Twelfth District case law authorizing the warrantless installation and

¹ *State v. Henry*, 2012 Ohio 4748 (2nd Dist), *State v. Allen*, 2013 Ohio 4188 (8th Dist), and *State v. Allen*, 2013 Ohio 434 (11th Dist).

monitoring of a GPS device." ¶23. It then announced a new procedure for courts to engage in when faced with the same issue. *State v. Johnson*, 2013 Ohio 4865 (12th Dist)(Appendix pg 2)

Consistent application of the law is something all Ohioans should be able to expect from its courts. Appellate courts facing a new issue should be able to look to either this Court or its fellow district courts to find if any have addressed the same issue. When different districts have ruled on the same issue but came to different conclusions, it is imperative this Court step in and offer guidance to those courts who have not faced the issue.

The warrantless surveillance of citizens is a subject of great interest not only in Ohio, this country but the world over. This Court weighed in on the use of GPS devices in Ohio when it decided *State v Johnson*, 131 Ohio St.3d 301, 2012 Ohio 975 (12th Dist) following the United States Supreme Court decision in *United States v Jones*, ___ U.S. ___, 132 S.Ct. 945 (2012). The logical consequence is how to handle the evidence obtained as result of the warrantless use of the GPS devices. All courts addressing the issue agree the decision of *United States v Davis* is the applicable case. Three courts of appeals have found *Davis* controls and the good faith exception to the exclusionary rule is not applicable. One court has declined to follow the same analysis or adopt the same view of the United States Court's decision in *Davis*.

Also at issue with the split of opinions is how law enforcement is to proceed when considering making a warrantless search. If there is no binding precedent in Ohio guiding their decision, can they rely on other state court decisions and if so which states? If so, which states are to be considered persuasive when making a decision? Can an officer rely on the opinions of other police officers, organizations or a prosecutor as suggested by the court of appeals below? Three appellate courts have said if there is no binding precedent an officer may not conduct a warrantless search. One now says an officer may be able to conduct a warrantless search if she

reasonably believes she does not need one. If an officer is in one of the other eight counties of Ohio which has not yet ruled on this issue, what guidance is there when there is no binding precedent?

Because of the split of opinions issued by Ohio appellate courts, judges, police officers, lawyers and citizens are left with questions of how to handle warrantless searches where there is no binding precedent authorizing the search. Can the police officer proceed with confidence his belief the search is permissible will not result in the exclusion of the evidence recovered later? Can a prosecutor bring charges with confidence the evidence supporting the charges will not be excluded from the trial? Can a trial judge cite to an Ohio appellate court decision on the issue with confidence the decision is sound and not in conflict with other decisions by other Ohio courts? The decision in *Davis* to permit good faith reliance on "binding precedent" does not include good faith reliance on training seminars, opinions of a prosecutor or "common knowledge of other drug agents."

This Court is asked to accept this case and resolved the conflict among district courts of appeals in Ohio on the application of the good faith exception to the exclusionary rule when no binding precedent is available to guide their decision making.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL POSTURE

Sudinia Johnson was indicted in November 2008 on a number of drug related charges following his arrest by Butler County Sheriffs. He filed a number of pre-trial motions; a motion to sever, a motion to suppress statements and a motion to suppress evidence. He supplemented his Motion to Suppress Evidence with a request to suppress based on the placement of a GPS device to the car he was driving when he was arrested. After an evidentiary hearing, the trial court denied the motion. The judge noted the issue was one of first impression in Ohio and there was no binding law for it to use for guidance on the issue. In denying the motion, the trial judge made a finding a warrant was not necessary for law enforcement to place a GPS tracking device on Johnson's car. Johnson entered a no contest plea to the trafficking and possession charge and he was sentenced to 15 years on prison.

Johnson appealed the decision of the trial court. The Twelfth District Court of Appeals held Johnson did not have an expectation of privacy in the undercarriage of his car and placing the GPS device on Johnson's car was not a search. *State v. Johnson*, 2010 Ohio 5808.

Johnson appealed to this Court which accepted review of the case. After the matter was briefed and argued and awaiting decision, the United States Supreme Court issued its decision in *United States v Jones*, ___U.S. ___, 132 S.Ct. 945 (2012). Based on the holding in *Jones* this Court vacated the decision of the court of appeals and remanded the case back to the trial court for application of *Jones*. *State v. Johnson*, 131 Ohio St.3d 301, 2012 Ohio 975.

The parties agreed and stipulated the transcript and exhibits from the original motion to suppress hearing should be all that needed to be considered by the trial court. In October 2012 the trial court found Johnson's Fourth Amendment rights were violated by the warrantless

placement of a GPS device on his car. The trial court announced it considered the holding in *United States v. Davis* ___ U.S. ___, 131 S.Ct. 2419 (2011) and determined the police acted in good faith and the exclusionary rule would not apply to the suppression of evidence. The trial court noted there was no binding precedent in Ohio to guide the officers' actions but that the benefit of exclusion did not outweigh the heavy costs on society by excluding the evidence at trial. Johnson again entered a no contest plea to the drug charges and received a ten year sentence to the Ohio Department of Corrections. Johnson appealed the decision of the trial court to the Twelfth District Court of Appeals.

On November 4, 2012 the court of appeals found there was no binding precedent in Ohio or the Sixth Circuit at the time the police placed the GPS device on Johnson's car. It noted three appellate courts in Ohio had already decided the same issue, applied *Davis* found good faith did not apply and ordered the evidence seized should be excluded because no binding precedent existed in Ohio to authorize police not seeking a warrant. Despite the three rulings by Ohio Appellate Courts the 12th District found the police acted in good faith when they believed a warrant was not necessary. The court found that binding precedent was not required under *Davis* for the good faith exception to excuse the officers' failure to seek a warrant and affirmed the decision of the trial court.

STATEMENT OF FACTS

On October 23, 2008 while conducting an investigation into whether Sudinia Johnson was involved with narcotics, Butler County Deputy Hackney decides to attach a GPS tracking device to Johnson's car. Officer Hackney does not seek to obtain a search warrant from a judge despite having time to do so. Officer Hackney believes he does not need to seek a warrant.

To justify his decision not to seek a warrant for placing the GPS tracking device on Johnson's car Officer Hackney relies on the sole opinion of an assistant county prosecutor when the two spoke a year or two before. (Tr. 27) The deputy believes he may have consulted with others. In addition to this prosecutor's opinion, Hackney remembers police trainings which "touched on GPS" and that "it was common knowledge among drug units" that placement of a GPS device does not require a warrant.(Tr. 28 and 40) Hackney does not do as all federal agents in Ohio do and proceed with caution and request a warrant until the issue is firmly decided by a binding court.²

The officer and others go to Johnson's home, find his car and slide beneath it placing the tracking device in order to track Johnson's every whereabouts. The officers are able to track the car as it leaves Ohio and travels to a Chicago suburb. There police are able to engage retired law enforcement to take up visual surveillance in a mall shopping parking lot. Police are able to learn of another car traveling with Johnson. The two cars are followed from Illinois to Ohio with local police monitoring the progress by way of the GPS device placed on Johnson's car. At the Ohio state line local police and cooperating police agencies then take up visual surveillance until a requested "traffic stop" of Johnson and another car is made in Butler County. In the end police

² The Justice Department before the *Jones* decision advised agents to seek a warrant for GPS tracking devices even though they believed one was not necessary because "anything less presents significant risks of suppression." www.cdt.org/blogs/greg-nojeim/1708tracking-big-foot-why-gps-location-requires-warrant.

obtain cocaine, information and evidence including a statement from Johnson. All information and evidence obtained in this case is the direct result of placing the GPS tracking device on Johnson's car.

ARGUMENT

Proposition of Law: When no binding precedent exists to authorize a police officer's warrantless search, the holding in *United States v Davis* does not permit the application of the good faith exception to the exclusionary rule.

After the United States decision in *United States v Jones*, ___ U.S. ___, 132 S.Ct. 945 (2012) the question became whether to suppress the evidence and information obtained from the warrantless use of GPS devices. This Court is now asked to provide the guidance to all Ohio courts. The exclusionary rule should apply in this case because there is no binding precedent to support the decision to use a GPS device without judicial approval. This is the holding of *Davis*.

In *Davis*, police conducted a search of a vehicle in strict compliance with the holding of *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981). During the criminal case Mr. Davis lost a motion to suppress the search and after conviction appealed that decision. While the matter was pending on appeal the Supreme Court overruled *Belton* in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009). The appellate court handling Mr. Davis' appeal reversed the trial court's ruling on the motion based on the decision in *Gant*. The Supreme Court of the United States accepted the case to determine if the good faith exception to the exclusionary rule should extend to situations where the police officer's warrantless search was done in strict compliance accordance with then existing binding precedent. The Court in *Davis* announced searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule and added this set of facts to the limited list of scenarios where the exclusionary rule would not apply.

In announcing its decision, the Court noted it had to weigh the societal costs of applying the exclusionary rule along with the deterrence effect suppression would have on future police conduct. When considering deterrence the Court recognized it var[ied] with the culpability of

the law enforcement conduct. *Davis* at 2247 quoting *Herring v. United States*, 545 U.S. 135, 129 S.Ct. 695 (2009). After a full discussion and analysis of the societal costs of suppression, the Court found the officers were acting in strict compliance with binding precedent and their actions were entitled to be recognized with the application of the "good faith" exception to the exclusionary rule.

While the *Davis* Court engaged in a weighing of the societal costs and benefits associated with suppression, it did not announce this as a test for lower courts to apply when faced with a similar question. Instead of providing a balancing test for other courts to apply, the United States Supreme Court provided a specific test to apply. It is a narrow test. Good faith can apply when officers act in strict compliance with the existing binding precedent. The phrase "binding precedent" is repeated throughout the opinion. The Court never considers whether the officer believed he was acting correctly, or spoke to a prosecutor or attended some training on the issue underlying the search. The Court does not announce a police officer's actions may trigger the application of the good faith exception if he acts in accordance with an identifiable trend in the law, or a general understanding of the law. Though these are the reasons cited by the 12th District as the basis for extending good faith beyond the holding of *Davis*. It considers its holding as a reasonable extension of the ruling in *Davis*. However this belief is dispelled in the opinion issued in *Davis*. In fact the majority in *Davis* noted its decision might have been different if it were a "jurisdiction in which the question remains open." *Id* at 2432 (J Sotomayer, concurring).

As a result of decisions rendered by the United States Supreme Court the good faith exception to the exclusionary rule can only be used when police actions pursuant to a warrant later found to be invalid, a statute which is later declared unconstitutional, a database which

contained erroneous information and now binding legal precedent which is subsequently overturned. The Appellate Court here has created a new scenario for the application of the good faith exception not recognized by the United States Supreme Court; "where an officer has not acted with a deliberate, reckless or grossly negligent disregard for the [defendant's] Fourth Amendment rights." *Johnson* opinion at ¶30 The trial court and the 12th District declared *Davis* should extend to a police officer's reliance on persuasive non-binding authority. However the opinion in *Davis* refutes this position.

Justice Alito wrote in *Davis* the defendant argued "applying the good faith exception to searches conducted in reliance on binding precedent will stunt the development of 4th Amendment law. With no possibility of suppression, criminal defendants will have no incentive * * * to request that courts overrule precedent." 131 S.Ct. at 2432. Alito and the five justices who concurred rejected this position:

"And in any event, applying the good faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents. In most instances, as in this case, the precedent sought to be challenged will be a decision of a Federal Court of Appeals or State Supreme Court. But a good faith exception for objectively reasonable reliance on binding precedent will not prevent review and correction of such decisions. This Court reviews criminal convictions from 12 Federal Courts of Appeals, 50 state courts of last resort, and the District Court of Columbia Court of Appeals. Of one or even many of the these courts uphold a particular type of search or seizure, *defendants in jurisdictions in which the question remains open will still have an undiminished incentive to litigate the issue.* This Court can then grant certiorari, and the development of Fourth Amendment law will in no way be stunted." *State v. Henry*, supra quoting *Davis* at 2433.(emphasis added)

The 2nd, 8th and 11th Appellate District Courts in Ohio understood the directive from the United States Supreme Court. Each court noted there was no binding precedent authorizing the warrantless use of GPS devices in Ohio. As a result, each of these courts held the good faith exception to the exclusionary rule could not apply. Each noted the exclusionary rule had to

apply because of the directive of *Davis*. Other jurisdictions have done the same. See *United States v. Katzin*, 2012 U.S. Dist. LEXIS 65677 (E.D. Pa. 2012), *United States v. Lujan*, 2012 U.S. Dist LEXIS 95804 (N.D. Dist 2012), *United States v. Ortiz*, 2012 U.S. Dist. LEXIS 101245 (E.D. Pa. 2012), *United States v. Lee*, 862 F.Supp.2d 560 (E.D. Ky 2012), *United States v. Robinson*, 903 F.Supp.2d 766 (E.D. Mo. 2012)

The trial court and the 12th District Court of Appeals in this case does not apply the test announced in *Davis*. Instead each engages in a case specific weighing analysis of the societal benefits versus costs associated with suppression. In doing so the rule of *Davis* is ignored. In doing so, the decision offers nothing for any court in Ohio to follow.

Courts have addressed problems with such a holding. "The risk of institutionalizing a policy of permitting reliance on non-binding authority, particularly in the face of other, contrary non-binding authority, at least borders on being categorized as systemic negligence." *State v. Allen*, 2013 Ohio at ¶24 citing *United States v. Katzin*, 2012 U.S. Dist. LEXIS 65677 (E.D. Pa. May 9, 2012) "Indeed, allowing the government the shelter of the good faith exception in this case would encourage law enforcement to beg forgiveness, rather than ask permission, in ambiguous situations involving basic civil rights." *Id.*

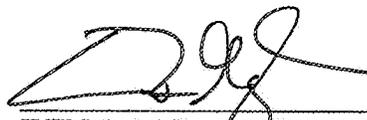
Instead the rule in Ohio for all courts should be as it was announced by the 8th District Court of Appeals: "Until the United States Supreme Court addresses questions left unanswered by *Jones*, specifically what is the proper remedy when the governing law is unsettled, we will adopt a strict reading of *Davis* and apply the exclusionary remedy to suppress evidence gathered from a warrantless GPS initiative, because no binding precedent existed in our jurisdiction prior to *Jones*. *Allen* at ¶33 This should be the directive given to all Ohio courts. The only way for

this to occur is for this Court to accept jurisdiction of this case, order briefing of the issue and then issue a ruling.

CONCLUSION

There was no binding precedent in Ohio authorizing police to place a GPS tracking device on Sudinia Johnson's car without a warrant. The United States Supreme Court in *United States v Davis* held the good faith exception to the exclusionary rule is applicable if a warrantless search is performed in strict compliance with binding precedent later overturned. There is now a split of district in Ohio as to whether *Davis* is applicable when no binding precedent authorizes a warrantless search. Respectfully this Honorable Court is asked to accept jurisdiction of this case and order briefing on the issue presented.

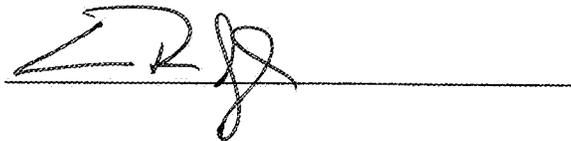
Respectfully submitted,



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CERTIFICATE OF SERVICE

11th I hereby certify that a copy of the foregoing was served upon the Prosecutor's Office this day of December 2013



FILED BUTLER CO.
COURT OF APPEALS

NOV 04 2013

MARY L. SWAIN
CLERK OF COURTS

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

FILED

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MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

SUDINIA D. JOHNSON,

Defendant-Appellant.

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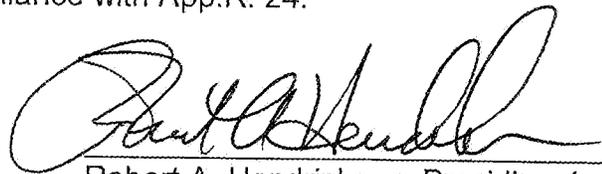
CASE NO. CA2012-11-235

JUDGMENT ENTRY

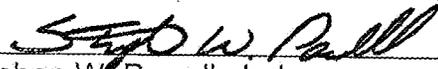
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

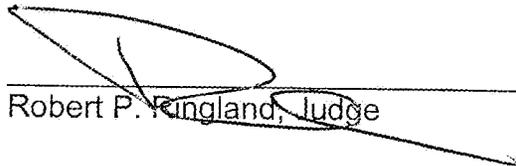
Costs to be taxed in compliance with App.R. 24.



Robert A. Hendrickson, Presiding Judge



Stephen W. Powell, Judge



Robert P. England, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2012-11-235
 :
 - vs - : OPINION
 : 11/4/2013
 :
 SUDINIA D. JOHNSON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-11-1919

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HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Sudinia Johnson, appeals from his convictions for trafficking in cocaine and possession of cocaine following his plea of no-contest in the Butler County Court of Common Pleas. Johnson argues that the trial court erred in overruling his motion to suppress evidence obtained through the warrantless attachment and subsequent use of a GPS tracking device on the exterior of his vehicle. Because suppression of the

evidence would not yield appreciable deterrence and law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find that the trial court did not err in denying Johnson's motion to suppress. For the reasons set forth below, Johnson's convictions are affirmed.

I. FACTUAL BACKGROUND

{¶ 2} The following facts were originally set forth in *State v. Johnson*, 190 Ohio App.3d 750, 2010-Ohio-5808 (12th Dist.) (hereafter, *Johnson I*), and are hereby incorporated in full:

Detective Mike Hackney, a supervisor in the drug-and-vice-investigations unit for the Butler County Sheriff's Office, received information from three separate confidential informants that Johnson was trafficking in cocaine. Specifically, Hackney was informed that Johnson had recently dispersed multiple kilos of cocaine, that Johnson was preparing to acquire seven more kilos, and that Johnson moved the cocaine in a van. Hackney testified at the motion-to-suppress hearing that he had been familiar with Johnson's possessing and driving a white Chevy van at the time the informants gave him the information.

[On October 23, 2008] Hackney and two other agents performed a trash pull at Johnson's residence, and while there, they attached a GPS device to Johnson's van, which was parked on the east side of the road opposite the residences. Hackney testified that he attached the GPS device to the metal portion of the undercarriage of the van. Hackney stated that the device was "no bigger than a pager" and was encased in a magnetic case so that the device did not require any hard wiring into the van's electrical systems.

* * *

After attaching the device, the agents intermittently tracked the GPS through a secured website. The Tuesday after installation, the GPS indicated that the van was located in a shopping center around Cook County, Illinois. Hackney began making arrangements with law enforcement in Chicago to verify the location of Johnson's van. * * * Rudy Medellin, * * * a retired Immigration and Customs officer, * * * agreed to go to the shopping center and verify the location of Johnson's van.

Medellin arrived at the Chicago shopping center and confirmed the van's location and that the van matched the description and license-plate number of the van Johnson was known to possess and drive. * * * Medellin then followed the van from the shopping center to a residence in the Chicago area, where he saw * * * two men exit the van and enter the residence.

Medellin saw one man, later identified as Johnson, exit the residence carrying a package or box, and enter the van. Medellin saw the other man, later identified as Otis Kelly, drive away in a Ford that had Ohio plates. Medellin followed Johnson's van and the Ford until they reached the Butler County area and communicated with Hackney via cell phone during the surveillance.

Hackney continued to contact law-enforcement officials throughout Ohio, readying them to assist once Johnson and Kelly entered Ohio from Indiana. Hackney drove toward Cincinnati and, after coming upon Johnson's van, began to follow him. Hackney advised law-enforcement officers to stop the van and Ford "if they were able to find probable cause to make a stop." Deputy Daren Rhoads, a canine handler with the Butler County Sheriff's Office, initiated a stop after Johnson made a marked-lane violation.

* * *

By the time Rhoads initiated the traffic stop, other officers were also in the position to offer back-up. Officers directed Johnson to exit his vehicle and then escorted him onto the sidewalk so that Rhoads could deploy his canine partner. The canine made a passive response on the driver's side door and on the passenger's side sliding door. After the canine walk-around, Johnson gave his consent to have the van searched.

Rhoads and other officers performed a preliminary sweep of Johnson's van for narcotics, but did not find any drugs or related paraphernalia in the vehicle. During this time, police vehicles and Johnson's van were situated on the road. After the initial search, officers moved Johnson's van approximately one-tenth of a mile to the location where police had pulled over the Ford driven by Otis Kelly. Officers there had also deployed two canine units around Kelly's Ford, and the canines detected the presence of narcotics. The officers ultimately located seven kilos of cocaine within a hidden compartment in the Ford's trunk and arrested Kelly for possession of cocaine. (Footnote omitted).

Once the van was situated at the second location, Rhoads continued his search with the help of an interdiction officer for the Ohio State Highway Patrol. The two concentrated on the undercarriage of the van and looked for any hidden compartments that Rhoads may have missed during his preliminary search. No drugs were recovered from the van.

* * * Officers later seized Johnson's keys and discovered that one of the keys on Johnson's key ring opened the hidden compartment in the Ford that contained the seven kilos of cocaine seized from Kelly's vehicle. [The evidence was seized and Johnson was arrested.]

Johnson I at ¶ 2-13.

{¶ 3} Johnson was indicted in November 2008 on one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2), one count of possession of cocaine in violation of R.C. 2925.11, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3). Following his indictment, Johnson filed numerous motions to suppress evidence obtained by law enforcement as well as a motion to sever the charge of having weapons while under disability from the trafficking and possession charges. Johnson's motion to sever was granted, a bench trial was held, and Johnson was acquitted of having weapons while under disability.

{¶ 4} An evidentiary hearing on Johnson's motions to suppress was held on March 3, 2009. At this time, the trial court considered Johnson's "Supplemental Motion to Suppress as to GPS Issue," in which Johnson sought to suppress all evidence obtained "directly or indirectly" from searches and seizures of himself and his property as "said searches and seizures were conducted with the unmonitored, unbridled use of a GPS device" in violation of his constitutional rights. The trial court denied Johnson's motion to suppress as to the GPS issue. Thereafter, Johnson entered a plea of no-contest to the trafficking and possession charges, and he was sentenced to 15 years in prison.

{¶ 5} Johnson appealed, arguing that "[t]he trial court erred in denying the motion to suppress when it ruled police did not need a search warrant to place a GPS tracking device on Mr. Johnson's car." *Johnson I*, 2010-Ohio-5808 at ¶ 18. In *Johnson I*, this court concluded that Johnson did not have a reasonable expectation of privacy in the undercarriage of his vehicle and that the placement and subsequent use of the GPS device to track the vehicle's whereabouts did not constitute a search or seizure under either the Fourth Amendment to the United States Constitution or Section 14, Article I of Ohio's Constitution. *Id.* at ¶ 18-47.

{¶ 6} Johnson appealed to the Ohio Supreme Court, which accepted review of the case. *State v. Johnson*, 128 Ohio St.3d 1425, 2011-Ohio-1049. While the matter was pending before the Ohio Supreme Court, the United States Supreme Court issued a decision in *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945, 948 (2012), holding that the government's "installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" within the context of the Fourth Amendment. (Footnote omitted). Thereafter, the Ohio Supreme Court vacated our holding in *Johnson I*, and remanded the case back to the trial court for application of *Jones*. *State v. Johnson*, 131 Ohio St.3d 301, 2012-Ohio-975, ¶ 1.

{¶ 7} The trial court permitted both parties to file supplemental briefs addressing the impact that *Jones* had on Johnson's motion to suppress. At a hearing on September 12, 2012, Johnson and the state stipulated to the trial court's consideration of the transcript and exhibits from the March 3, 2009 evidentiary hearing. The parties further agreed that no additional evidence was necessary for the trial court to rule on the motion to suppress. At a hearing held on October 19, 2012, the trial court issued a decision denying Johnson's motion to suppress. Although the court found a clear violation of Johnson's Fourth Amendment right in the warrantless placement of the GPS device on Johnson's vehicle, the court concluded

that exclusion of the evidence obtained from the use of the GPS device was not warranted under the facts of the case. Relying on *Davis v. United States*, ___ U.S. ___, 131 S.Ct. 2419 (2011), the trial court concluded that "the deterrence benefit exclusion in this case of non-culpable, non-flagrant police conduct does not outweigh the heavy costs of exclusion to society and the judicial system. * * * The Court finds that the officers acted in good faith * * * and the evidence will be admitted at trial."

{¶ 8} Following the denial of his motion to suppress, Johnson entered a plea of no-contest to the trafficking and possession charges. The possession charge was merged with the trafficking charge for sentencing purposes, and Johnson was sentenced to ten years in prison.

{¶ 9} Johnson now appeals, challenging the trial court's denial of his motion to suppress.

II. ANALYSIS

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE EXCLUSIONARY RULE AND SUPPRESS ALL EVIDENCE AND INFORMATION OBTAINED BY POLICE AFTER IT DETERMINED A WARRANT WAS NECESSARY TO PLACE A GPS DEVICE ON MR. JOHNSON'S CAR IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

{¶ 12} In his sole assignment of error, Johnson argues the trial court erred in denying his motion to suppress on the basis of the "good faith exception" to the exclusionary rule. Johnson argues that the good faith exception set forth in *Davis* is limited in application to those situations in which there is a "binding appellate procedure authoriz[ing] a particular police practice." As there was no binding case law in effect at the time the Butler County

Sheriff's Office placed the GPS device on his car, Johnson argues that the police were not acting in good faith. Johnson, therefore, argues that *Davis* and *Jones* require suppression of the evidence obtained through the use of the GPS device.

{¶ 13} The state argues for a broader reading of *Davis*. The state contends that Johnson's motion to suppress should be denied on the basis of the good faith doctrine as law enforcement acted with an objectively reasonable good faith belief that their conduct in attaching and monitoring the GPS device without the authorization of a warrant was lawful. The state argues that "binding" judicial precedent is not necessary under *Davis*' good faith exception to the exclusionary rule. Rather, the state contends, the focus under *Davis* is on the culpability of the police. Because officers from the Butler County Sheriff's Office did not act with a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights, the state argues that exclusion of the evidence is not required under the facts of this case.

A. Standard of Review

{¶ 14} Our review of a trial court's denial of a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038, ¶ 10. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

B. The Exclusionary Rule and the Good Faith Doctrine

{¶ 15} The exclusionary rule is a "prudential doctrine" that was created by the United States Supreme Court to "compel respect for the constitutional guaranty" expressed in the Fourth Amendment. *Davis*, 131 S.Ct. at 2426, citing *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437 (1960). The Supreme Court has "repeatedly held" that the exclusionary rule's "sole purpose * * * is to deter future Fourth Amendment violations." *Id.* Courts should not "reflexive[ly]" apply the exclusionary rule, but rather, should limit application of the doctrine "to situations in which this purpose [of deterring future Fourth Amendment violations] is 'thought most efficaciously served.'" *Id.*, quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613 (1974). Accordingly, "[w]here suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly * * * unwarranted.'" *Id.* at 2426-2427, quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021 (1976).

{¶ 16} Deterrent value alone, however, is insufficient for exclusion because any analysis must also "account for the substantial social costs generated by the rule," since exclusion "exact[s] a heavy toll on both the judicial system and society at large." (Internal citations omitted.) *Id.* at 2427. As suppression "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," the "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Id.* "[S]ociety must swallow this bitter pill * * * only as a 'last resort.'" (Emphasis added). *Id.*, quoting *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159 (2006). Accordingly, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

{¶ 17} "[T]he deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue." *Id.*, quoting *Herring v. United States*, 555 U.S. 135, 143, 129 S.Ct. 695 (2009). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends

to outweigh the resulting costs. * * * But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful * * * or when their conduct involves only simply 'isolated' negligence * * * the 'deterrence rationale loses much of its force' and exclusion cannot 'pay its way.'" *Id.* at 2427-2428, quoting *United States v. Leon*, 468 U.S. 897, 908-909, 104 S.Ct. 3405 (1984) and *Herring* at 143-144.

{¶ 18} In *Davis*, the petitioner, Davis, sought to exclude evidence obtained in a search following a routine traffic stop. *Id.* at 2425. After Davis had been arrested, placed in handcuffs, and put in the back of a patrol car, the police searched the vehicle Davis had been riding in and found a revolver. *Id.* At the time the search was conducted, officers were acting in compliance with *New York v. Belton*, 453 U.S. 454, 459-460, 101 S.Ct. 2860 (1981), which held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile." Davis was convicted on one count of possession of a firearm, but he appealed his conviction arguing that the search was unconstitutional. *Davis* at 2426. While his appeal was pending, the United States Supreme Court adopted a new test in *Arizona v. Gant*, 556 U.S. 332, 343, 129 S.Ct. 1710 (2009), holding that an automobile search incident to a recent occupant's arrest is constitutional if (1) the arrestee is within reaching distance of the vehicle during the search or (2) the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest.

{¶ 19} The issue the United States Supreme Court faced in *Davis* was whether to apply the exclusionary rule to suppress evidence obtained by police officers who, at the time of the search, were acting in compliance with binding precedent that was later overruled. *Davis* at 2423. The Court ultimately concluded that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 2423-2424. The Court's holding was predicated on a determination that "suppression

would do nothing to deter police misconduct in these circumstances" and "would come at a high cost to both the truth and the public safety." *Id.* at 2423.

C. Application of the Good Faith Doctrine to GPS Cases

{¶ 20} Following the Supreme Court's decision in *Jones*, courts across the country have addressed the propriety of applying *Davis* to cases in which GPS monitoring began before *Jones* was decided. "These decisions may be generally divided in two groups: (1) [courts] with pre-*Jones* binding appellate precedent sanctioning the warrantless installation and use of GPS devices, and (2) [courts] with no such binding appellate authority." *United States v. Guyton*, E.D.La. No. 11-271, 2013 WL 55837, *3 (Jan. 3, 2013).

{¶ 21} Courts falling within the first category have had no problem applying *Davis* to deny the suppression of evidence. See *State v. Rich*, 12th Dist. Butler No. CA2012-03-044, 2013-Ohio-857 (relying on *Johnson I* as binding appellate precedent within the Twelfth District Court of Appeals); *United States v. Smith*, D.Nev. No. 2:11-cr-00058-GMN-CWH, 2012 WL 4898652 (Oct. 15, 2012) (relying on binding appellate precedent in the Ninth Circuit); *United States v. Amaya*, 853 F. Supp.2d 818 (N.D. Iowa 2012) (relying on binding appellate precedent in the Eighth Circuit); *United States v. Nelson*, S.D.Ga. No. CR612-005, 2012 WL 3052914 (July 25, 2012) (relying on binding appellate precedent in the Eleventh Circuit).

{¶ 22} Courts falling within the second category, however, are divided on how *Davis* should be applied. Some courts have construed *Davis* narrowly and hold that the good faith exception is inapplicable in the absence of binding appellate precedent. See *State v. Allen*, 8th Dist. Cuyahoga Nos. 99289 and 99291, 2013-Ohio-4188; *State v. Allen*, 11th Dist. Lake No. 2011-L-157, 2013-Ohio-434; *State v. Henry*, 2d Dist. Montgomery No. 11-CR-829, 2012-Ohio-4748; *United States v. Katzin*, E.D.Pa. No. 11-226, 2012 WL 1646894 (May 9, 2012);

United States v. Lee, 862 F.Supp.2d 560 (E.D.Ky. 2012); *United States v. Lujan*, N.D.Miss. No. 2:11CR11-SA, 2012 WL 2861546 (July 11, 2012). Other courts interpret *Davis* to require a case-by-case inquiry into whether law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful. See *Guyton*, 2013 WL 55837; *United States v. Oladosu*, 887 F.Supp.2d 437 (D.R.I. 2012); *United States v. Baez*, 878 F.Supp.2d 288 (D.Mass. 2012); *United States v. Leon*, 856 F. Supp.2d 1188 (D.Haw. 2012); *United States v. Rose*, 914 F.Supp.2d 15 (D.Mass. 2012); *United States v. Lopez*, 895 F.Supp.2d 592 (D.Del. 2012).

{¶ 23} The question before this court is whether the *Davis* good faith exception applies here, where prior to our decision in *Johnson I* there was no Ohio Supreme Court or Twelfth District case law authorizing the warrantless installation and monitoring of a GPS device. We believe that a case-by-case approach examining the culpability and conduct of law enforcement is more appropriate given the preference expressed in *Davis* for a cost-benefit analysis in exclusion cases as opposed to a "reflexive" application of the doctrine to all cases involving a Fourth Amendment violation. *Davis*, 131 S.Ct. at 2427 ("We abandoned the old, 'reflexive' application of the [exclusionary] doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits").

{¶ 24} In analyzing whether the Butler County Sheriff's Office acted with a "deliberate," "reckless," or "grossly negligent" disregard for Johnson's Fourth Amendment rights, we find that in addition to examining the specific actions taken by Detective Hackney and the sheriff's office, it is also necessary to examine the legal landscape as of October 23, 2008, the date the GPS device was placed on Johnson's vehicle.

{¶ 25} At the March 3, 2009 hearing, Hackney testified that the GPS device was placed on Johnson's vehicle without first attempting to obtain a warrant. Hackney explained that he had previously installed GPS devices on suspects' vehicles in other cases without

having obtained a warrant. Prior to placing such GPS devices, Hackney had consulted with assistant prosecutor Dave Kash about the legality of using GPS devices.¹ Hackney further stated that he had talked with his fellow officers, his supervisors, and with other law enforcement agencies about the use of GPS devices. He explained that "it was kind of common knowledge among other drug units or talking to other drug units that as long as the GPS is not hard wired, as long as it is placed on -- in a public area, removed in a public area, it is basically a tool or an extension of surveillance."

{¶ 26} Hackney's belief that a warrant was unnecessary was not unfounded given the legal landscape that existed at the time the GPS device was placed on Johnson's car. As of October 23, 2008, no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles that remained on public roadways was a violation of the Fourth Amendment. Courts that had considered the issue of electronic monitoring determined that the United States Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983) controlled. In *Knotts*, the Supreme Court held that there was no Fourth Amendment violation where officers used an electronic beeper, which had been hidden inside of a chemical container prior to the container coming into the defendant's possession, to track a defendant's movements as he traveled on public roads with the container in his car. The Supreme Court held that a defendant "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.²

1. At the March 3, 2009 hearing, Hackney specified that he had talked to Dave Kash about a "[y]ear and a half [to] two years" ago about the legality of using a GPS device without a warrant.

2. Compare *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983), with *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984), where the Supreme Court determined that the monitoring of an electronic beeper in a *private* residence constitutes a search requiring a warrant as the location of the beeper was not open to visual surveillance.

{¶ 27} Subsequent to the United States Supreme Court's decision in *Knotts*, the Ninth Circuit determined in *United States v. McIver*, 186 F.3d 1119, 1126-1127 (9th Cir.1999), that the placement of a magnetic electronic tracking device on the undercarriage of a vehicle did not violate the Fourth Amendment. In *McIver*, law enforcement placed a magnetized tracking device on the undercarriage of the defendant's vehicle while the vehicle was parked in the defendant's driveway. *Id.* at 1123. The transmitter sent a signal to a monitoring unit used by police officers that informed officers when the transmitter was nearby and in what direction the transmitter was traveling. *Id.* The defendant challenged the constitutionality of using the tracking device, arguing the use of the device constituted both an illegal search and seizure. *Id.* at 1126. The Ninth Circuit disagreed, finding that no search occurred as the defendant failed to produce evidence demonstrating that he intended to shield the undercarriage of his vehicle from inspection by others or that placing the device permitted officers to pry into a hidden or enclosed area. *Id.* at 1127. The court further concluded that a seizure had not occurred as the defendant was not deprived of dominion and control of his vehicle and there was no evidence that use of the tracking device caused any damage to the electric components of the vehicle. *Id.*

{¶ 28} Thereafter, in 2007, the Seventh Circuit issued a decision in *United States v. Garcia*, 474 F.3d 994 (7th Cir.2007), addressing the warrantless placement and subsequent monitoring of a GPS device on a defendant's motor vehicle. In *Garcia*, the Seventh Circuit found the use of GPS devices analogous to the Supreme Court's sanction of beeper technology in *Knotts*. *Id.* at 996-997. The court concluded that the Fourth Amendment "cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth" and concluded that scientific enhancement allowing police to monitor a suspect on a public road was not a search requiring the authorization of a warrant. *Id.* at 998.

{¶ 29} Following the placement of the GPS device on Johnson's vehicle and the Seventh Circuit's decision in *Garcia*, numerous other courts upheld the warrantless attachment and monitoring of a GPS device on a suspect's vehicle prior to the United States Supreme Court's decision in *Jones*. See *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir.2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir.2010); *United States v. Hernandez*, 647 F.3d 216 (5th Cir.2011). It was not until August 6, 2010, more than 21 months after the GPS device was placed on Johnson's vehicle, that the D.C. Circuit Court broke with the majority of other jurisdictions by holding that the use of a GPS tracking device for 28 days violated a defendant's reasonable expectation of privacy and was a violation of the defendant's Fourth Amendment rights. *United States v. Maynard*, 615 F.3d 544 (D.C.Cir.2010).

{¶ 30} Given that, at the time Hackney attached the GPS device to Johnson's car, the United States Supreme Court had sanctioned the use of beeper technology without a warrant in *Knotts*, at least one circuit court had applied the rationale expressed in *Knotts* and determined that the warrantless placement and subsequent monitoring of a GPS device on a vehicle was not a violation of a defendant's Fourth Amendment rights, and Hackney acted only after consulting with fellow officers, other law enforcement agencies, and a prosecutor, we find that the Butler County Sheriff's Office acted "with an objectively 'reasonable good-faith belief' that their conduct [was] lawful." *Davis*, 131 S.Ct. at 2427, quoting *Leon*, 468 U.S. at 909. Taking into account the steps taken by law enforcement and the legal landscape that existed at the time the GPS device was attached to Johnson's vehicle, we find that law enforcement did not exhibit a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights in attaching and monitoring the GPS device without the authorization of a warrant. Suppression under the facts of this case would therefore fail to yield appreciable deterrence. As such, the deterrence value does not outweigh the social

costs exacted by application of the exclusionary rule, which would require the court "to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Id.*

{¶ 31} We therefore find that the good faith exception to the exclusionary rule applies in this case. The evidence obtained from the attachment and subsequent use of the GPS device is not subject to exclusion.

III. CONCLUSION

{¶ 32} Having found that suppression of the evidence would not yield appreciable deterrence and that law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find no error in the trial court's denial of Johnson's motion to suppress.

{¶ 33} Johnson's sole assignment of error is overruled.

{¶ 34} Judgment affirmed.

S. POWELL and RINGLAND, JJ., concur.

evidence would not yield appreciable deterrence and law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find that the trial court did not err in denying Johnson's motion to suppress. For the reasons set forth below, Johnson's convictions are affirmed.

I. FACTUAL BACKGROUND

{¶ 2} The following facts were originally set forth in *State v. Johnson*, 190 Ohio App.3d 750, 2010-Ohio-5808 (12th Dist.) (hereafter, *Johnson I*), and are hereby incorporated in full:

Detective Mike Hackney, a supervisor in the drug-and-vice-investigations unit for the Butler County Sheriff's Office, received information from three separate confidential informants that Johnson was trafficking in cocaine. Specifically, Hackney was informed that Johnson had recently dispersed multiple kilos of cocaine, that Johnson was preparing to acquire seven more kilos, and that Johnson moved the cocaine in a van. Hackney testified at the motion-to-suppress hearing that he had been familiar with Johnson's possessing and driving a white Chevy van at the time the informants gave him the information.

[On October 23, 2008] Hackney and two other agents performed a trash pull at Johnson's residence, and while there, they attached a GPS device to Johnson's van, which was parked on the east side of the road opposite the residences. Hackney testified that he attached the GPS device to the metal portion of the undercarriage of the van. Hackney stated that the device was "no bigger than a pager" and was encased in a magnetic case so that the device did not require any hard wiring into the van's electrical systems.

* * *

After attaching the device, the agents intermittently tracked the GPS through a secured website. The Tuesday after installation, the GPS indicated that the van was located in a shopping center around Cook County, Illinois. Hackney began making arrangements with law enforcement in Chicago to verify the location of Johnson's van. * * * Rudy Medellin, * * * a retired Immigration and Customs officer, * * * agreed to go to the shopping center and verify the location of Johnson's van.

Medellin arrived at the Chicago shopping center and confirmed the van's location and that the van matched the description and license-plate number of the van Johnson was known to possess and drive. * * * Medellin then followed the van from the shopping center to a residence in the Chicago area, where he saw * * * two men exit the van and enter the residence.

Medellin saw one man, later identified as Johnson, exit the residence carrying a package or box, and enter the van. Medellin saw the other man, later identified as Otis Kelly, drive away in a Ford that had Ohio plates. Medellin followed Johnson's van and the Ford until they reached the Butler County area and communicated with Hackney via cell phone during the surveillance.

Hackney continued to contact law-enforcement officials throughout Ohio, readying them to assist once Johnson and Kelly entered Ohio from Indiana. Hackney drove toward Cincinnati and, after coming upon Johnson's van, began to follow him. Hackney advised law-enforcement officers to stop the van and Ford "if they were able to find probable cause to make a stop." Deputy Daren Rhoads, a canine handler with the Butler County Sheriff's Office, initiated a stop after Johnson made a marked-lane violation.

* * *

By the time Rhoads initiated the traffic stop, other officers were also in the position to offer back-up. Officers directed Johnson to exit his vehicle and then escorted him onto the sidewalk so that Rhoads could deploy his canine partner. The canine made a passive response on the driver's side door and on the passenger's side sliding door. After the canine walk-around, Johnson gave his consent to have the van searched.

Rhoads and other officers performed a preliminary sweep of Johnson's van for narcotics, but did not find any drugs or related paraphernalia in the vehicle. During this time, police vehicles and Johnson's van were situated on the road. After the initial search, officers moved Johnson's van approximately one-tenth of a mile to the location where police had pulled over the Ford driven by Otis Kelly. Officers there had also deployed two canine units around Kelly's Ford, and the canines detected the presence of narcotics. The officers ultimately located seven kilos of cocaine within a hidden compartment in the Ford's trunk and arrested Kelly for possession of cocaine. (Footnote omitted).

Once the van was situated at the second location, Rhoads continued his search with the help of an interdiction officer for the Ohio State Highway Patrol. The two concentrated on the undercarriage of the van and looked for any hidden compartments that Rhoads may have missed during his preliminary search. No drugs were recovered from the van.

* * * Officers later seized Johnson's keys and discovered that one of the keys on Johnson's key ring opened the hidden compartment in the Ford that contained the seven kilos of cocaine seized from Kelly's vehicle. [The evidence was seized and Johnson was arrested.]

Johnson I at ¶ 2-13.

{¶ 3} Johnson was indicted in November 2008 on one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2), one count of possession of cocaine in violation of R.C. 2925.11, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3). Following his indictment, Johnson filed numerous motions to suppress evidence obtained by law enforcement as well as a motion to sever the charge of having weapons while under disability from the trafficking and possession charges. Johnson's motion to sever was granted, a bench trial was held, and Johnson was acquitted of having weapons while under disability.

{¶ 4} An evidentiary hearing on Johnson's motions to suppress was held on March 3, 2009. At this time, the trial court considered Johnson's "Supplemental Motion to Suppress as to GPS Issue," in which Johnson sought to suppress all evidence obtained "directly or indirectly" from searches and seizures of himself and his property as "said searches and seizures were conducted with the unmonitored, unbridled use of a GPS device" in violation of his constitutional rights. The trial court denied Johnson's motion to suppress as to the GPS issue. Thereafter, Johnson entered a plea of no-contest to the trafficking and possession charges, and he was sentenced to 15 years in prison.

{¶ 5} Johnson appealed, arguing that "[t]he trial court erred in denying the motion to suppress when it ruled police did not need a search warrant to place a GPS tracking device on Mr. Johnson's car." *Johnson I*, 2010-Ohio-5808 at ¶ 18. In *Johnson I*, this court concluded that Johnson did not have a reasonable expectation of privacy in the undercarriage of his vehicle and that the placement and subsequent use of the GPS device to track the vehicle's whereabouts did not constitute a search or seizure under either the Fourth Amendment to the United States Constitution or Section 14, Article I of Ohio's Constitution. *Id.* at ¶ 18-47.

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{¶ 8} Following the denial of his motion to suppress, Johnson entered a plea of no-contest to the trafficking and possession charges. The possession charge was merged with the trafficking charge for sentencing purposes, and Johnson was sentenced to ten years in prison.

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¶ 14 } Our review of a trial court's denial of a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. Butler No. CA2005-03-074, 2005-Ohio-6038, ¶ 10. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

B. The Exclusionary Rule and the Good Faith Doctrine

{¶ 15} The exclusionary rule is a "prudential doctrine" that was created by the United States Supreme Court to "compel respect for the constitutional guaranty" expressed in the Fourth Amendment. *Davis*, 131 S.Ct. at 2426, citing *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437 (1960). The Supreme Court has "repeatedly held" that the exclusionary rule's "sole purpose * * * is to deter future Fourth Amendment violations." *Id.* Courts should not "reflexive[ly]" apply the exclusionary rule, but rather, should limit application of the doctrine "to situations in which this purpose [of deterring future Fourth Amendment violations] is 'thought most efficaciously served.'" *Id.*, quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613 (1974). Accordingly, "[w]here suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly * * * unwarranted.'" *Id.* at 2426-2427, quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021 (1976).

{¶ 16} Deterrent value alone, however, is insufficient for exclusion because any analysis must also "account for the substantial social costs generated by the rule," since exclusion "exact[s] a heavy toll on both the judicial system and society at large." (Internal citations omitted.) *Id.* at 2427. As suppression "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," the "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Id.* "[S]ociety must swallow this bitter pill * * * *only* as a 'last resort.'" (Emphasis added). *Id.*, quoting *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159 (2006). Accordingly, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

{¶ 17} "[T]he deterrence benefits of exclusion 'vary with the culpability of the law enforcement conduct' at issue." *Id.*, quoting *Herring v. United States*, 555 U.S. 135, 143, 129 S.Ct. 695 (2009). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends

to outweigh the resulting costs. * * * But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful * * * or when their conduct involves only simply 'isolated' negligence * * * the 'deterrence rationale loses much of its force' and exclusion cannot 'pay its way.'" *Id.* at 2427-2428, quoting *United States v. Leon*, 468 U.S. 897, 908-909, 104 S.Ct. 3405 (1984) and *Herring* at 143-144.

{¶ 18} In *Davis*, the petitioner, Davis, sought to exclude evidence obtained in a search following a routine traffic stop. *Id.* at 2425. After Davis had been arrested, placed in handcuffs, and put in the back of a patrol car, the police searched the vehicle Davis had been riding in and found a revolver. *Id.* At the time the search was conducted, officers were acting in compliance with *New York v. Belton*, 453 U.S. 454, 459-460, 101 S.Ct. 2860 (1981), which held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile." Davis was convicted on one count of possession of a firearm, but he appealed his conviction arguing that the search was unconstitutional. *Davis* at 2426. While his appeal was pending, the United States Supreme Court adopted a new test in *Arizona v. Gant*, 556 U.S. 332, 343, 129 S.Ct. 1710 (2009), holding that an automobile search incident to a recent occupant's arrest is constitutional if (1) the arrestee is within reaching distance of the vehicle during the search or (2) the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest.

{¶ 19} The issue the United States Supreme Court faced in *Davis* was whether to apply the exclusionary rule to suppress evidence obtained by police officers who, at the time of the search, were acting in compliance with binding precedent that was later overruled. *Davis* at 2423. The Court ultimately concluded that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 2423-2424. The Court's holding was predicated on a determination that "suppression

would do nothing to deter police misconduct in these circumstances" and "would come at a high cost to both the truth and the public safety." *Id.* at 2423.

C. Application of the Good Faith Doctrine to GPS Cases

{¶ 20} Following the Supreme Court's decision in *Jones*, courts across the country have addressed the propriety of applying *Davis* to cases in which GPS monitoring began before *Jones* was decided. "These decisions may be generally divided in two groups: (1) [courts] with pre-*Jones* binding appellate precedent sanctioning the warrantless installation and use of GPS devices, and (2) [courts] with no such binding appellate authority." *United States v. Guyton*, E.D.La. No. 11-271, 2013 WL 55837, *3 (Jan. 3, 2013).

{¶ 21} Courts falling within the first category have had no problem applying *Davis* to deny the suppression of evidence. See *State v. Rich*, 12th Dist. Butler No. CA2012-03-044, 2013-Ohio-857 (relying on *Johnson I* as binding appellate precedent within the Twelfth District Court of Appeals); *United States v. Smith*, D.Nev. No. 2:11-cr-00058-GMN-CWH, 2012 WL 4898652 (Oct. 15, 2012) (relying on binding appellate precedent in the Ninth Circuit); *United States v. Amaya*, 853 F. Supp.2d 818 (N.D. Iowa 2012) (relying on binding appellate precedent in the Eighth Circuit); *United States v. Nelson*, S.D.Ga. No. CR612-005, 2012 WL 3052914 (July 25, 2012) (relying on binding appellate precedent in the Eleventh Circuit).

{¶ 22} Courts falling within the second category, however, are divided on how *Davis* should be applied. Some courts have construed *Davis* narrowly and hold that the good faith exception is inapplicable in the absence of binding appellate precedent. See *State v. Allen*, 8th Dist. Cuyahoga Nos. 99289 and 99291, 2013-Ohio-4188; *State v. Allen*, 11th Dist. Lake No. 2011-L-157, 2013-Ohio-434; *State v. Henry*, 2d Dist. Montgomery No. 11-CR-829, 2012-Ohio-4748; *United States v. Katzin*, E.D.Pa. No. 11-226, 2012 WL 1646894 (May 9, 2012);

United States v. Lee, 862 F.Supp.2d 560 (E.D.Ky. 2012); *United States v. Lujan*, N.D.Miss. No. 2:11CR11-SA, 2012 WL 2861546 (July 11, 2012). Other courts interpret *Davis* to require a case-by-case inquiry into whether law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful. See *Guyton*, 2013 WL 55837; *United States v. Oladosu*, 887 F.Supp.2d 437 (D.R.I. 2012); *United States v. Baez*, 878 F.Supp.2d 288 (D.Mass. 2012); *United States v. Leon*, 856 F. Supp.2d 1188 (D.Haw. 2012); *United States v. Rose*, 914 F.Supp.2d 15 (D.Mass. 2012); *United States v. Lopez*, 895 F.Supp.2d 592 (D.Del. 2012).

{¶ 23} The question before this court is whether the *Davis* good faith exception applies here, where prior to our decision in *Johnson I* there was no Ohio Supreme Court or Twelfth District case law authorizing the warrantless installation and monitoring of a GPS device. We believe that a case-by-case approach examining the culpability and conduct of law enforcement is more appropriate given the preference expressed in *Davis* for a cost-benefit analysis in exclusion cases as opposed to a "reflexive" application of the doctrine to all cases involving a Fourth Amendment violation. *Davis*, 131 S.Ct. at 2427 ("We abandoned the old, 'reflexive' application of the [exclusionary] doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits").

{¶ 24} In analyzing whether the Butler County Sheriff's Office acted with a "deliberate," "reckless," or "grossly negligent" disregard for Johnson's Fourth Amendment rights, we find that in addition to examining the specific actions taken by Detective Hackney and the sheriff's office, it is also necessary to examine the legal landscape as of October 23, 2008, the date the GPS device was placed on Johnson's vehicle.

{¶ 25} At the March 3, 2009 hearing, Hackney testified that the GPS device was placed on Johnson's vehicle without first attempting to obtain a warrant. Hackney explained that he had previously installed GPS devices on suspects' vehicles in other cases without

having obtained a warrant. Prior to placing such GPS devices, Hackney had consulted with assistant prosecutor Dave Kash about the legality of using GPS devices.¹ Hackney further stated that he had talked with his fellow officers, his supervisors, and with other law enforcement agencies about the use of GPS devices. He explained that "it was kind of common knowledge among other drug units or talking to other drug units that as long as the GPS is not hard wired, as long as it is placed on -- in a public area, removed in a public area, it is basically a tool or an extension of surveillance."

{¶ 26} Hackney's belief that a warrant was unnecessary was not unfounded given the legal landscape that existed at the time the GPS device was placed on Johnson's car. As of October 23, 2008, no court had ruled that the warrantless installation and monitoring of GPS devices on vehicles that remained on public roadways was a violation of the Fourth Amendment. Courts that had considered the issue of electronic monitoring determined that the United States Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983) controlled. In *Knotts*, the Supreme Court held that there was no Fourth Amendment violation where officers used an electronic beeper, which had been hidden inside of a chemical container prior to the container coming into the defendant's possession, to track a defendant's movements as he traveled on public roads with the container in his car. The Supreme Court held that a defendant "traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281.²

1. At the March 3, 2009 hearing, Hackney specified that he had talked to Dave Kash about a "[y]ear and a half [to] two years" ago about the legality of using a GPS device without a warrant.

2. Compare *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983), with *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984), where the Supreme Court determined that the monitoring of an electronic beeper in a *private* residence constitutes a search requiring a warrant as the location of the beeper was not open to visual surveillance.

{¶ 27} Subsequent to the United States Supreme Court's decision in *Knotts*, the Ninth Circuit determined in *United States v. McIver*, 186 F.3d 1119, 1126-1127 (9th Cir.1999), that the placement of a magnetic electronic tracking device on the undercarriage of a vehicle did not violate the Fourth Amendment. In *McIver*, law enforcement placed a magnetized tracking device on the undercarriage of the defendant's vehicle while the vehicle was parked in the defendant's driveway. *Id.* at 1123. The transmitter sent a signal to a monitoring unit used by police officers that informed officers when the transmitter was nearby and in what direction the transmitter was traveling. *Id.* The defendant challenged the constitutionality of using the tracking device, arguing the use of the device constituted both an illegal search and seizure. *Id.* at 1126. The Ninth Circuit disagreed, finding that no search occurred as the defendant failed to produce evidence demonstrating that he intended to shield the undercarriage of his vehicle from inspection by others or that placing the device permitted officers to pry into a hidden or enclosed area. *Id.* at 1127. The court further concluded that a seizure had not occurred as the defendant was not deprived of dominion and control of his vehicle and there was no evidence that use of the tracking device caused any damage to the electric components of the vehicle. *Id.*

{¶ 28} Thereafter, in 2007, the Seventh Circuit issued a decision in *United States v. Garcia*, 474 F.3d 994 (7th Cir.2007), addressing the warrantless placement and subsequent monitoring of a GPS device on a defendant's motor vehicle. In *Garcia*, the Seventh Circuit found the use of GPS devices analogous to the Supreme Court's sanction of beeper technology in *Knotts*. *Id.* at 996-997. The court concluded that the Fourth Amendment "cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth" and concluded that scientific enhancement allowing police to monitor a suspect on a public road was not a search requiring the authorization of a warrant. *Id.* at 998.

{¶ 29} Following the placement of the GPS device on Johnson's vehicle and the Seventh Circuit's decision in *Garcia*, numerous other courts upheld the warrantless attachment and monitoring of a GPS device on a suspect's vehicle prior to the United States Supreme Court's decision in *Jones*. See *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir.2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir.2010); *United States v. Hernandez*, 647 F.3d 216 (5th Cir.2011). It was not until August 6, 2010, more than 21 months after the GPS device was placed on Johnson's vehicle, that the D.C. Circuit Court broke with the majority of other jurisdictions by holding that the use of a GPS tracking device for 28 days violated a defendant's reasonable expectation of privacy and was a violation of the defendant's Fourth Amendment rights. *United States v. Maynard*, 615 F.3d 544 (D.C.Cir.2010).

{¶ 30} Given that, at the time Hackney attached the GPS device to Johnson's car, the United States Supreme Court had sanctioned the use of beeper technology without a warrant in *Knotts*, at least one circuit court had applied the rationale expressed in *Knotts* and determined that the warrantless placement and subsequent monitoring of a GPS device on a vehicle was not a violation of a defendant's Fourth Amendment rights, and Hackney acted only after consulting with fellow officers, other law enforcement agencies, and a prosecutor, we find that the Butler County Sheriff's Office acted "with an objectively 'reasonable good-faith belief' that their conduct [was] lawful." *Davis*, 131 S.Ct. at 2427, quoting *Leon*, 468 U.S. at 909. Taking into account the steps taken by law enforcement and the legal landscape that existed at the time the GPS device was attached to Johnson's vehicle, we find that law enforcement did not exhibit a deliberate, reckless, or grossly negligent disregard for Johnson's Fourth Amendment rights in attaching and monitoring the GPS device without the authorization of a warrant. Suppression under the facts of this case would therefore fail to yield appreciable deterrence. As such, the deterrence value does not outweigh the social

costs exacted by application of the exclusionary rule, which would require the court "to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Id.*

{¶ 31} We therefore find that the good faith exception to the exclusionary rule applies in this case. The evidence obtained from the attachment and subsequent use of the GPS device is not subject to exclusion.

III. CONCLUSION

{¶ 32} Having found that suppression of the evidence would not yield appreciable deterrence and that law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, we find no error in the trial court's denial of Johnson's motion to suppress.

{¶ 33} Johnson's sole assignment of error is overruled.

{¶ 34} Judgment affirmed.

S. POWELL and RINGLAND, JJ., concur.