

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	Case No. 2014-0104
Plaintiff-Appellant,	*	ON APPEAL FROM THE
-vs-	*	WOOD COUNTY COURT OF
TERRENCE BROWN,	*	APPEALS, SIXTH APPELLATE
Defendant-Appellee.	*	DISTRICT
	*	Court of Appeals
	*	Case No. WD-12-070
	*	

**BRIEF OF AMICUS CURIAE LUCAS COUNTY PROSECUTOR JULIA R. BATES IN
SUPPORT OF APPELLANT STATE OF OHIO**

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO
By: Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43624
Phone No: (419) 213-4700
Fax No: (419) 213-4595

RON O'BRIEN
Franklin County Prosecuting Attorney
By: Seth L. Gilbert #0072929
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614.525.3555
sgilbert@franklincountyohio.gov

ON BEHALF OF AMICUS CURIAE APPELLANT

COUNSEL FOR AMICUS CURIAE OHIO
PROSECUTING ATTORNEYS
ASSOCIATION

PAUL A. DOBSON
Wood County Prosecutor
By: Thomas A. Matuszak #0067770
David T. Harold #0072338
Assistant Prosecuting Attorneys
One Courthouse Square
Bowling Green, Ohio 43402
Phone 419.354.9250

Lawrence Gold #0078779
3852 Fairwood Drive
Sylvania, Ohio 43560
Phone: 419.843.5719

COUNSEL FOR DEFENDANT-APPELLEE
TERRENCE BROWN

COUNSEL FOR PLAINTIFF-APPELLANT

Robert L. Berry #0007896
7582 S. Goodrich Square
New Albany, Ohio 43054

COUNSEL FOR AMICUS CURIAE
BUCKEYE STATE SHERIFFS
ASSOCIATION

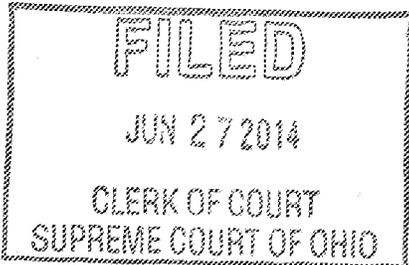
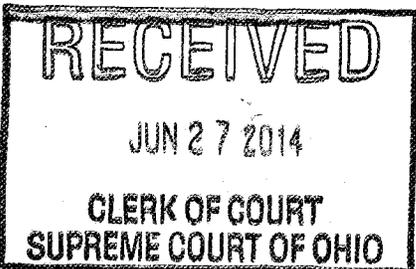


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STATEMENT OF INTEREST OF AMICUS CURIAE

The Lucas County Prosecutor's Office prosecutes thousands of felony cases every year. Many of those cases involve motions to suppress evidence, often based on alleged violations of statutory provisions. The appropriate standards and tests for such motions to suppress are of vital interest to Lucas County Prosecutor Julia Bates.

Additionally, Lucas County has eleven townships within its borders. Three of those townships have their own police departments. The territorial jurisdiction of township police departments set forth in R.C. 4513.39 and the consequences of officers' exceeding that jurisdiction are significant concerns for the prosecution of crimes within Lucas County.

Lucas County Prosecutor Julia R. Bates therefore submits the following brief in support of the State of Ohio.

INTRODUCTION

The Statutory Violation

The Sixth District's opinion in this case rests on an admitted violation of R.C. 4513.39, which restricts township police officers' "power to make arrests" for certain violations on state highways. The stipulation to the violation was consistent with this Court's prior holding that the statute's phrase " 'power to make arrests' does include the right to stop motorists for traffic offenses." *State v. Holbert*, 38 Ohio St.2d 113, 117, 311 N.E.2d 22 (1974).

But this Court has held in other contexts that "arrest" means more than a traffic citation:

The word 'arrest' is derived from the French 'arreter,' meaning to stop or stay, as signifies a restraint of a person. An arrest occurs when the following four

requisite elements are involved: (1) An intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested.

Furthermore, an arrest, in the technical, as well as the common sense, signifies the apprehension of an individual or the restraint of a person's freedom in contemplation of the formal charging with a crime.

State v. Darrah, 64 Ohio St.2d 22, 26, 412 N.E.2d 1328 (1980) (internal quotation marks and citations omitted).

Although relying on *Holbert*, *Darrah* concluded "we reiterate our prior and unambiguous rejection of the concept that receipt of a traffic citation is the functional equivalent of an arrest." *Id.* *Darrah's* explanation of the term "arrest" has been applied in other Fourth Amendment contexts. See, e.g., *State v. Jones*, 1st Dist. No. C-130069, 2014-Ohio-1201, ¶¶10-11; and *State v. Hodge*, 10th Dist. No. 11AP-1099, 2012-Ohio-4306, ¶13 (applying *Darrah* to warrantless searches incident to arrest).

If R.C. 4513.39's reference to "power to arrest" is construed to refer to a full custodial arrest, as distinct from the issuance of a traffic citation, then the officer in this case could not be said to have violated the terms of the statute. The officer made a stop after observing a marked lane violation as prohibited by R.C. 4511.33. However, there was no suggestion the officer intended to effect a custodial arrest until additional events led to the discovery of drugs in the vehicle. Appellee was arrested for possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(c). R.C. 4513.39 does not prohibit an arrest for that offense. The officer's conduct is problematic only if the phrase "power to arrest" is construed to include a stop for purposes of issuing a traffic citation for the marked lane violation.

Although a different construction of the jurisdiction statute would have avoided the constitutional problem now confronting this Court, the parties and lower courts were constrained by *Holbert* so that the statutory violation was admitted. Such an admission to a statutory violation would not previously have resulted in suppression, but in this case the Sixth District significantly expanded the grounds for suppression of evidence under the Ohio Constitution.

Expansion of Constitutional Rights

In this case, the Sixth Appellate District found that probable cause for a traffic stop existed, so that the stop did not violate the Fourth Amendment to the United States Constitution. *State v. Brown*, 6th Dist. No. WD-12-070, 2013-Ohio-5351 ("*Brown (6th Dist.)*"). Nevertheless, the Sixth District held that the stop violated the territorial jurisdiction provisions of R.C. 4513.39, and "a stop made in violation of state law is reasonable under Article I, Section 14, of the Ohio Constitution only when probable cause to make the stop exists and the government's interests in allowing unauthorized officers to make this type of stop outweighs the intrusion upon individual privacy." *Brown (6th Dist.)*, ¶19.

The Sixth District did not analyze whether there were "persuasive reasons" for finding that Article I, Section 14 of the Ohio Constitution offers broader protections against a violation of R.C. 4513.39 than the Fourth Amendment does. See *State v. Robinette*, 80 Ohio St.3d 234, 239, 1997 Ohio 343, 685 N.E.2d 762 (1997). The Sixth District also did not analyze this Court's past refusal to apply a balancing test to determine when to impose a sanction for a violation of the territorial limits on arrest powers. See *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, ¶22. And--notwithstanding its

articulation of a balancing test--the Sixth District did not actually analyze the governmental interests in enforcing traffic laws relative to the intrusion on individual privacy rights.

Ultimately, the Sixth District simply held that because the officer violated R.C. 4513.39 and there were no extenuating circumstances, the stop was unreasonable under the Ohio Constitution:

It is undisputed that the township officer violated R.C. 4513.39 by making the extraterritorial stop on an interstate highway for a marked lane violation, which is specified in R.C. 4513.39(A) as being within the exclusive jurisdiction of the state highway patrol, sheriffs, and sheriff deputies. Further, no extenuating circumstances were presented to justify an extraterritorial stop by township police officers for this type of traffic violation. Therefore, we find the extraterritorial stop was unreasonable under the Ohio Constitution.

Brown (6th Dist.), ¶19.

The Sixth District's reasoning has potentially wide-reaching implications. Because the opinion sets forth no "persuasive reasons" for finding that the Ohio Constitution offers broader protection than the United States Constitution, the opinion invites arguments that any statutory violation in the absence of extenuating circumstances requires suppression. The Sixth District's reasoning elevates any statutory violation to a violation of the Ohio Constitution, with perhaps an exception for situations involving "extenuating circumstances."

Such an expansion is inconsistent with current Ohio law, which generally tracks federal case law. Moreover, the Sixth District's divergence from federal case law has a number of disadvantages from the perspective of the judiciary and law enforcement.

Despite the broad body of federal case law from which to draw, search and seizure issues are necessarily fact-specific and consume significant judicial resources. Divergence from Fourth Amendment authority will burden the courts with the task of not only applying

federal case law, but also anticipating how the Ohio Constitution applies to search and seizure problems. Particularly because the relevant provisions are worded almost identically, discerning the distinctions between the two constitutional provisions poses a unique challenge to the judiciary.

Of course, law enforcement agencies confront similar difficulties when state law diverges from federal law. In the end, faced with a floor for individual rights set by federal law, as well as the knowledge that state constitutional analysis may result in recognition of greater individual rights, law enforcement may err on the side of not taking steps that would be deemed reasonable under federal case law. But federal case law has determined such steps to be reasonable precisely because they serve the protection of officer or public safety. For example, appellee's acts in this case--drifting over a fog line--are indicators of impaired driving ability. *State v. Burwell*, 3d Dist. No. 12-09-06, 2010-Ohio-1087, ¶24. Deterrence of the officer's conduct in this case ultimately serves to undermine the public interest in maintaining roadways free of impaired drivers, even though federal case law supports the reasonableness of the officer's stop.

This court has observed, "We must be cautious and conservative when we are asked to expand constitutional rights under the Ohio Constitution, particularly when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the Supreme Court." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶76. The Sixth District's decision disregarded this admonition, and amicus curiae therefore supports the State's request that the decision be reversed.

STATEMENT OF CASE AND FACTS

Amicus curiae Lucas County Prosecutor's Office adopts appellant's statement of the case and facts.

ARGUMENT

First Proposition of Law: Section 14, Article I of the Ohio Constitution is not violated when a law enforcement officer has probable cause to make a traffic stop. *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, applied.

This Court has observed that Section 14, Article I of the Ohio Constitution has language that is "virtually identical" to the Fourth Amendment to the United States Constitution. *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, f.n.1. Moreover, "since the Bill of Rights in the Constitution of the United States is in almost the exact language of that found in our own, the reasoning of the United States court upon this aspect of the case should be very persuasive." *Nicholas v. Cleveland*, 125 Ohio St. 474, 484, 182 N.E. 26, 30 (1932), overruled in irrelevant part by *State v. Lindway*, 131 Ohio St. 166, 5 Ohio Op. 538, 2 N.E.2d 490 (1936). The Ohio Constitution therefore "affords protections that are coextensive with those provided by the Fourth Amendment" and "we should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise." *State v. Robinette*, 80 Ohio St.3d 234, 239, 1997-Ohio-343, 685 N.E.2d 762 (1997), quoting *State v. Geraldo*, 68 Ohio St. 2d 120, 125-126, 369-370, 429 N.E.2d 141, 145-146 (1981). Accord *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, 860 N.E.2d 1006, f.n.2. Of course, lower courts have relied on this Court's previous unwillingness to expand the Ohio Constitution beyond the Fourth Amendment in its evaluation of search and seizure

problems. See, e.g., *State v. Quinn*, 12th Dist. No. CA2011-06-116, 2012-Ohio-3123, ¶18 (declining to hold that the Ohio Constitution provides greater protections against trash pulls than the Fourth Amendment).

This Court has repeatedly recognized that the exclusionary rule is a judicial remedy for a violation of constitutional rights, not a violation of statutory provisions. A violation of the territorial jurisdiction statute R.C. 2935.03 does not require exclusion of evidence when the officer had probable cause to arrest an individual's traffic violation. *Kettering v. Hollen*, 64 Ohio St.2d 232, 234, 416 N.E.2d 598 (1980). Similarly, a liquor control investigator's violation of statutory authority to stop and arrest likewise does not invoke the exclusionary rule. *State v. Droste*, 83 Ohio St.3d 36, 1998-Ohio-182, 697 N.E.2d 620, syllabus. See also *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶32 (holding that even if a statute required a DNA profile to be removed from CODIS upon an acquittal, a violation of the statute in and of itself does not require suppression of evidence).

This Court has recognized very limited exceptions to this general rule. Exceptions exist for "a legislative mandate requiring the application of the exclusionary rule." *Hollen, supra*, 264 Ohio St.2d at 234, 416 N.E.2d 598. Examples of such legislative remedies include R.C. 2945.73, which provides for the dismissal of a case for violation of speedy-trial statutes, intended to protect the Sixth Amendment right to a speedy trial. See *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, f.n. 5. Similarly, R.C. 2933.62(A) prohibits the admission of evidence of communications intercepted in violation of R.C. 2933.51 through 2933.66, while R.C. 4549.14 provides that an officer may not testify if he made an arrest while using a vehicle not marked in accordance with R.C.

4549.13. No similar legislative remedy for a violation of the statute appears in R.C. 4513.39.

The absence of a statutory remedy does not mean that the judiciary should intervene to create a suppression remedy. Rather, this Court has previously respected the choice of the General Assembly not to provide a remedy for a jurisdictional oversight. When a traffic stop is constitutionally sound, "we are not in the position to rectify this possible legislative oversight by elevating a violation of R.C. 2935.03 to a Fourth Amendment violation." See *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, ¶21. See also *State v. Ruff*, 1st Dist. No. C-110250, 2012-Ohio-1910, syllabus (noncompliance with R.C. 2933.83 alone is insufficient to warrant suppression).

A. Limited Exception for Custodial Arrests for Minor Misdemeanors.

In 2000, this Court held that a full custodial arrest for a minor misdemeanor offense violates the Fourth Amendment of the United States Constitution as well as Section 14, Article I of the Ohio Constitution. See *State v. Jones*, 88 Ohio St.3d 430, 2000-Ohio-374, 727 N.E.2d 886 ("*Jones (2000)*"). *Jones (2000)* reasoned that the government's interests in making a full custodial arrest for a minor misdemeanor offense are minimal and outweighed by the serious intrusion upon a person's liberty and privacy. *Id.* at 440.

The following year, the United States Supreme Court reached a contrary result on similar facts, holding that if an officer has probable cause to believe that an individual has committed "even a very minor criminal offense in his presence," an arrest does not violate the Fourth Amendment. See *Atwater v. Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

Following *Atwater*, this Court again considered minor misdemeanor arrests in violation of R.C. 2935.26(A). *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶7. *Brown* concluded that "the balancing test set forth in *Jones* provides ample reason for holding that Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors." *Id.*, ¶22.

This Court has declined to extend *Brown* to other contexts. For example, the Court has rejected the view "that the Ohio Constitution provides even greater protection such that unprovoked flight in a high-crime area upon seeing police officers is insufficient to justify a stop." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶53. *Jordan* described *Brown* as "acknowledging that 'we should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise,'" but concluding "that ample reasons existed for holding that the Ohio Constitution provides greater protection than the Fourth Amendment regarding warrantless arrests for minor misdemeanors." *Id.*, ¶55, quoting *Brown* at syllabus. However, *Jordan* noted, "None of the considerations compelling our determination in *Brown* are present here, and we discern no persuasive reasons for holding that the Ohio Constitution affords greater protection than the Fourth Amendment under the circumstances of this case." *Id.*, ¶55.

Jordan thus emphasized the need for "persuasive" or "ample" reasons to find that the Ohio Constitution provides greater protection than the Fourth Amendment. And the Sixth District offered no such reasons in this case. No textual difference was identified

between the Ohio and United States Constitutions. See *State v. Williams*, 93 N.J. 39, 59, 459 A.2d 641, 651 (1983). No matter of interest peculiar to Ohio was identified. *Id.* And there was no discussion of any public attitude demanding suppression. *Id.*

In fact, Ohio authorities generally refuse to suppress evidence obtained as a result of a violation of jurisdictional statutes. See *State v. Strehl*, 9th Dist. No. 10CA0063-M, 2012-Ohio-119, ¶19 and *City of Cleveland v. Persaud*, 6 N.E.2d 701, 2014 Ohio Misc. LEXIS 10 (violations of R.C. 5503.02). See also *State v. Wilson*, 10th Dist. No. 13AP-205, 2013-Ohio-4799, ¶11; *State v. Vicarel*, 7th Dist. No. 06 MA 129, 2007-Ohio-4746, ¶15; *State v. Henderson*, 2nd Dist. No. 22831, 2009-Ohio-4122, ¶11 (alleged violations of R.C. 2935.03). Such case law suggests that there is no persuasive reason to depart from Fourth Amendment jurisprudence in analyzing motions to suppress based on a violation of R.C. 4513.39.

B. Viability of Balancing Test.

The Sixth District ostensibly applied a balancing test which considered the relative interests of the government against individual interest, but such a balancing test is no longer required for a traffic stop under the circumstances of this case.

This Court has previously balanced the interests of the government in making a traffic stop against the rights of the affected driver in considering a violation of R.C. 2935.03(A)(1). See *State v. Weideman*, 94 Ohio St.3d 501, 2002-Ohio-1484, 764 N.E.2d 997 (2002). But following the *Weideman* decision, the United States Supreme Court held that when an officer has probable cause to believe a person committed even a minor crime

in his presence, the arrest is constitutionally reasonable. *Virginia v. Moore*, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008).

The following year this Court acknowledged *Moore* in holding that an officer's violation of R.C. 2935.03 did not give rise to a Fourth Amendment violation. See *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464 ("*Jones (2009)*"). *Moore* "removed any room for finding that a violation of a state statute, such as R.C. 2935.03, in and of itself, could give rise to a Fourth Amendment violation and result in the suppression of evidence." *Jones (2009)* at ¶15. Thus, "**when an officer has probable cause * * * the balancing of private and public interests is not in doubt.** The arrest is constitutionally reasonable." *Id.* at ¶17 (emphasis added), quoting *Moore* at 171. Consistent with *Moore*, *Jones (2009)* concluded that "a law-enforcement officer who personally observes a traffic violation while outside the officer's statutory territorial jurisdiction has probable cause to make a traffic stop." The Court explicitly rejected "a balancing test for determining when to impose a suitable sanction for a law-enforcement officer's violation of the territorial limits on arrest powers." *Id.* at ¶ 22. See also *State v. Dillehay*, 3d Dist. No. 17-12-07, 2013-Ohio-327, ¶35 (rejecting the application of a balancing test of governmental interests and individual rights based on *Jones (2009)*).

This case involves neither a legislative sanction for violation of R.C. 4513.39 nor a minor misdemeanor arrest. Moreover, there is no compelling reason to depart from Fourth Amendment jurisprudence to impose a balancing test weighing public and private interests. The Court's prior precedents do not required suppression of the evidence obtained during the stop, and the Sixth District's decision should be reversed.

CONCLUSION

The traffic stop in this case was reasonable under the Fourth Amendment, and there is no persuasive reason for diverging from Fourth Amendment jurisprudence in applying Article 14, Section 1 of the Ohio Constitution. Amicus curiae therefore joins appellant in requesting reversal of the Sixth District's decision.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: Evvy M. Jarrett by BMA
Evvy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this

27th

day of June, 2014, to the following:

RON O'BRIEN
Franklin County Prosecuting Attorney
By: Seth L. Gilbert #0072929
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215

COUNSEL FOR AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION

PAUL A. DOBSON
Wood County Prosecutor
By: Thomas A. Matuszak #0067770
David T. Harold #0072338
Assistant Prosecuting Attorneys
One Courthouse Square
Bowling Green, Ohio 43402

COUNSEL FOR PLAINTIFF-APPELLANT

Lawrence Gold #0078779
3852 Fairwood Drive
Sylvania, Ohio 43560
COUNSEL FOR DEFENDANT-APPELLEE TERENCE BROWN

Robert L. Berry #0007896
7582 S. Goodrich Square
New Albany, Ohio 43054

COUNSEL FOR AMICUS CURIAE BUCKEYE STATE SHERIFFS ASSOCIATION

Evy M. Jarrett by BUA

Evy M. Jarrett, #0062485

Assistant Prosecuting Attorney