

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2014-0104

Plaintiff-Appellant,

On Appeal from the Wood
County Court of Appeals,
Sixth Appellate District

vs.

TERRENCE BROWN

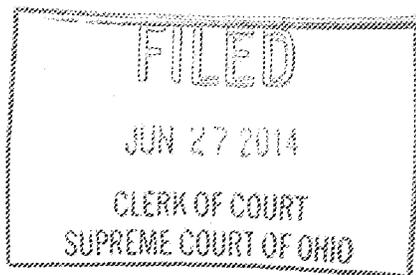
Court of Appeals
Case No.: WD-12-070

Defendant-Appellee.

MERIT BRIEF OF AMICUS CURIAE,
THE OFFICE OF THE MONTGOMERY COUNTY PROSECUTING ATTORNEY
IN SUPPORT OF PLAINTIFF-APPELLANT, THE STATE OF OHIO

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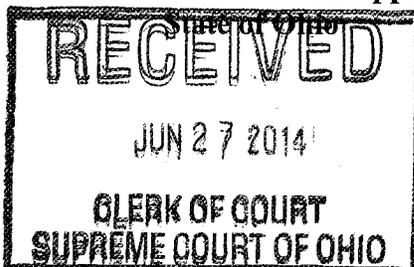


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Interest of Amicus Curiae

The Office of the Montgomery County Prosecuting Attorney prosecutes thousands of felony cases every year, many of which begin as traffic stops on one of the three interstate highways that pass through the county. Significant portions of those highways (I-70, I-75, and I-675) travel through five of Montgomery County's nine townships. Montgomery County Prosecuting Attorney, Mathias H. Heck, Jr., therefore, has a strong interest in issues relating to the enforcement of Ohio's traffic laws by township police officers on interstate highways, and an even stronger interest in the consequences, through application of the exclusionary rule, of traffic stops made in violation of R.C. 4513.39. Accordingly, in the interest of aiding this Court's review of this appeal, the Montgomery County Prosecutor's Office offers the following amicus brief in support of the position advanced by Appellant, the State of Ohio.

Statement of the Case and Facts

Amicus Curie adopts by reference the Statement of the Case and Statement of Facts set forth in the State's merit brief.

Argument

Proposition of Law: An extraterritorial traffic stop made in violation of R.C. 4513.39 constitutes a statutory violation only and does not rise to the level of an unreasonable search and seizure under the Fourth Amendment to the United States Constitution or Section 14, Article I of the Ohio Constitution. Evidence discovered and seized during such a stop, therefore, is not subject to suppression under the exclusionary rule.

The material facts in this case appear undisputed. Lake Township Police Officer Kelly Clark, while on routine patrol on I-280 in Lake Township, observed Defendant-Appellee Terrence Brown commit a marked-lanes violation, R.C. 4511.33(A)(1). And while all aspects of the ensuing traffic stop were constitutionally valid, one - and only one - defect in the validity of the stop existed: Officer Kelly, because he was a township police officer, was statutorily prohibited by R.C. 4513.39 from stopping motorists on a state highway for a marked-lanes violation.¹

But from these facts, the Sixth District Court of Appeals made the erroneous conclusion that Officer Kelly's statutory violation rose to the level of a constitutional violation that required the suppression of drug evidence subsequently recovered during the course of the traffic stop. The court of appeals arrived at its conclusion, however, by apparently ignoring much of this Court's past precedent and by misapplying other. Its decision, therefore, must be reversed.

1. Extraterritorial Traffic Stops

This Court has repeatedly made clear that a violation of a state statute prohibiting extraterritorial traffic stops does not, by itself, give rise to a Fourth Amendment violation or result in the suppression of evidence. *See Kettering v. Hollen*, 64 Ohio St.2d 232, 234-235, 416

¹This Court has construed R.C. 4513.39 to mean that "a township police officer has no authority to stop motorists for any of the offenses, enumerated in that statute, which have been committed on a state highway outside municipal corporations." *State v. Holbert*, 39 Ohio St.2d 113, 311 N.E.2d 22 (1974), paragraph two of the syllabus. The traffic offense that Brown was charged with is enumerated in the statute.

N.E.2d 598 (1980); *State v. Weidman*, 94 Ohio St.3d 501, 764 N.E.2d 997 (2002), syllabus; *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, ¶ 15.² As this Court explained in *Weidman*, “[w]here a law enforcement officer, acting outside the officer’s territorial jurisdiction, stops and detains a motorist for an offense committed and observed outside the officer’s jurisdiction, the seizure of the motorist by the officer is not unreasonable *per se* under the Fourth Amendment,” and “the officer’s statutory violation does not require suppression of all evidence flowing from the stop.” *Weidman* at 506. Rather than focusing on the extraterritoriality of the stop, this Court found that the focus should instead be on whether the officer had probable cause to make the stop. *Id.* See also *Jones* at syllabus (“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 stop is not unreasonable under the Fourth Amendment to the United States Constitution.”).

The court of appeals nevertheless suppressed the drug evidence that was discovered during the course of the traffic stop. It did so after concluding that the extraterritorial traffic stop, while constitutionally permissible under the Fourth Amendment, was nevertheless unreasonable under the independent authority of Article I, Section 14, of the Ohio Constitution. But its rationale for doing so goes against what this Court has previously said about extraterritorial traffic stops made on the basis of probable cause.

Specifically, the court of appeals found that because “no extenuating circumstances were presented to justify an extraterritorial stop by township police officers for this type of traffic violation,” the government’s interests in allowing unauthorized officers to make this type of a traffic stop was outweighed by the intrusion upon Brown’s privacy. *State v. Brown*, 6th Dist. No.

²In *Hollen*, *Weidman* and *Jones*, the statute at issue was R.C. 2935.03, which prohibits law enforcement officers from making traffic stops outside their territorial jurisdiction.

WD-12-070, 2013-Ohio-5351, ¶ 19-20. But this Court has already passed judgment on the weighing of interest associated with extraterritorial traffic stops and has come to a conclusion materially opposite that of the court of appeals here.

In *Weidman* for example, this Court concluded that, although the officer made the traffic stop outside his territorial jurisdiction, “[t]he state’s interest in protecting the public from a person who drives an automobile in a manner that endangers other drivers outweighs [the defendant’s] right to drive unhindered.” *Weidman*, 94 Ohio St.3d at 506, 764 N.E.2d 997. In *Jones*, this Court relied upon *Virginia v. Moore*, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), in acknowledging that “when an officer has probable cause to believe that a person has committed even a minor crime in his presence, the balancing of private and public interest is not in doubt. The arrest [or traffic stop] is constitutionally reasonable.” *Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, at ¶ 17, quoting *Moore* at 171.

The same is true here. Although he was outside his territorial jurisdiction at the time of the stop, Officer Kelly observed Brown commit a traffic offense in his presence and, as a result, made a traffic stop based upon probable cause. Under these circumstances, “[t]he government’s interest in promoting public safety by stopping and detaining a person who violates the law while operating a motor vehicle outweighs the momentary restriction of the driver’s freedom.” *State v. Annis*, 11th Dist. No. 2001-P-151, 2002-Ohio-5866, ¶ 25.

2. The Ohio Constitution

Ultimately, the court of appeals’ decision to apply the exclusionary rule here is founded upon its conclusion that the independent force of the Ohio Constitution demands that result. The court of appeals reached this conclusion by applying the “balancing test” enunciated in *State v. Jones*, 88 Ohio St.3d 430, 440, 727 N.E.2d 886 (2000), and adopted in *State v. Brown*, 99 Ohio

St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 - *Brown* being one of the few cases in which this Court has held that Article 1, Section 14, of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution. But at issue in *Brown* was the authority of police to make full custodial arrests for minor misdemeanors in violation of R.C. 2935.26(A), which prohibits arrests for minor misdemeanors in most situations. *Brown* at syllabus. But none of the considerations compelling this Court's determination in *Brown* are present here because the intrusion on personal liberties associated with a minor and temporary detention during a traffic stop pales in comparison to those of a full custodial arrest that was at issue in *Brown*.

And this Court, in deciding *Brown*, essentially made that point. After acknowledging that it has historically found that the protections afforded by Ohio's Constitution are coextensive with those provided by the Fourth Amendment, and 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,” *id.* at ¶ 22, quoting *State v. Robinette*, 80 Ohio St.3d 234, 239, 685 N.E.2d 762 (1997), this Court concluded that ample reasons existed “for holding that the Ohio Constitution provides greater protection than the Fourth Amendment *against warrantless arrests for minor misdemeanors.*” (Emphasis added.) *Id.*

But the “ample reasons” articulated in *Brown* for extending the protections of the Ohio Constitution beyond the Fourth Amendment when a minor-misdemeanor arrest is involved focused on two considerations. The first is that “effective law enforcement is not impaired by refusing to allow officers to arrest individuals for minor misdemeanor offenses when none of the exceptions set forth in R.C. 2936.26 applies.” *Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, at ¶ 18, quoting *Jones*, 88 Ohio St.3d at 440, 727 N.E.2d 886. But that

consideration goes *against* extending the protections of the Ohio Constitution beyond the Fourth Amendment when extraterritorial traffic stops are concerned, because effective law enforcement *is impaired* by refusing to allow officers to make traffic stops in violation of R.C. 4513.39. In fact, effective law enforcement is eliminated altogether if a township police officer is required to ignore certain traffic violations committed in his or her presence simply because the offense is committed on the interstate.

The second reason articulated in *Brown* for extending the protections of the Ohio Constitution beyond the Fourth Amendment when a minor-misdemeanor arrest is involved is that it is unreasonable for a police officer to effect an arrest for a non-jailable offense, thereby subjecting the offender “to the indignity of an arrest and police station detention,” when a simple nonintrusive summons to appear will serve the interests of law enforcement. *Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, at ¶ 24, quoting *State v. Bauer*, 307 Mont. 105, 36 P.3d 892 (2001). But when the intrusion upon a person’s liberty is limited to that of a routine traffic stop, the “indignities” that accompany an arrest are entirely absent.

It is perhaps for these reasons that this Court has never extended *Brown* beyond minor-misdemeanor arrests. See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 55 (finding that none of the considerations compelling this Court’s decision in *Brown* to hold that the Ohio Constitution provides greater protection than the Fourth Amendment apply to investigatory stops). And perhaps most telling, this Court did not extend *Brown* to the extraterritorial traffic stop at issue in *Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, despite having the opportunity to do so. The court of appeals’ decision to extend *Brown* to the extraterritorial traffic stop here is, therefore, legally unsound and should not be allowed to stand.

3. The Remedy for Violating R.C. 4513.39

Although the court of appeals erred in holding that a violation of R.C. 4513.39 rises to the level of a constitutional violation, and further erred in applying the exclusionary rule to a statutory violation, the question still remains as to what remedy, if any, should be afforded a defendant who is stopped by police in violation of R.C. 4513.39. This Court essentially answered that question in *Jones, supra*, when it recognized that “[g]enerally, establishing a remedy for a violation of a statute remains in the province of the General Assembly, not the [courts].” *Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E. 464, at ¶ 22. As this Court recognized as being the case with the statutorily-invalid extraterritorial traffic stop made in *Jones*, the General Assembly chose not to provide a remedy for a violation of R.C. 4513.39, although it could have done so. *Id.* at ¶ 21. Accordingly, “[this Court is] not in the position to rectify this possible legislative oversight by elevating a violation of [R.C. 4513.39] to a Fourth Amendment violation and imposing the exclusionary rule, because the stop in this case was constitutionally sound.” *Id.*

In short, any remedy afforded a defendant as a result of an officer’s violation of R.C. 4513.39 must first be established by the legislature before being imposed by the courts. And until the General Assembly provides for such a remedy, it is wrong for a court to apply the exclusionary rule in suppressing evidence seized during an extraterritorial traffic stop. The court of appeals erred, therefore, in finding that the exclusionary rule applied to the statutory violation that occurred in this case.

Conclusion

The precedent set down by this Court establishes as the prevailing rule of law that a violation of a state statute prohibiting extraterritorial traffic stops does not, by itself, give rise to a Fourth Amendment violation or result in the suppression of evidence. This Court's further precedent suggests that there is no persuasive reason why the Ohio Constitutional should afford greater protection than the federal constitution with respect to extraterritorial traffic stops. Accordingly, when the only deficiency in the validity of a traffic stop is that the stop is made in violation of R.C. 4513.39, the protections afforded by Section 14, Article I of the Ohio Constitution should be harmonized with those of the Fourth Amendment to the United States Constitution.

For these reasons and in view of the foregoing law and argument, as well as for the reasons set forth in the State of Ohio's merit brief, amicus curie the Office of the Montgomery County Prosecuting Attorney respectfully request that this Court reverse the decision of the Sixth District Court of Appeals for Wood County.

Respectfully submitted,

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PROSECUTING ATTORNEY

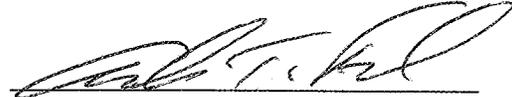
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**For Amicus Curie, the Office of the
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Merit Brief was sent by regular U.S. mail this 26TH day of June, 2014, to: Thomas A. Matuszak, David T. Harold, Wood County Prosecutor's Office, One Courthouse Square, Annex, Bowling Green, OH 43402 and Lawrence A. Gold, 3852 Fairwood Drive, Sylvania, OH 43560.



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