

ORIGINAL

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Case No. 13-1973

Plaintiff-Appellee,

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

-vs-

SUDINIA JOHNSON,

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

Defendant-Appellant.

**MEMORANDUM OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS
ASSOCIATION, FAIRFIELD COUNTY PROSECUTOR GREGG MARX,
CUYAHOGA COUNTY PROSECUTOR TIMOTHY J. MCGINTY, AND FRANKLIN
COUNTY PROSECUTOR RON O'BRIEN OPPOSING DEFENDANT'S MOTION
TO STRIKE**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR 0043876
(Counsel of Record)
Chief Counsel, Appellate Division
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: staylor@franklincountyohio.gov

Counsel for Amici Curiae OPAA and
Franklin County Prosecutor Ron O'Brien

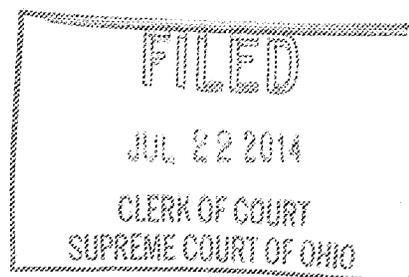
GREGG MARX 0008068
Fairfield County Prosecuting Attorney
239 West Main Street, Suite 101
Lancaster, Ohio 43130
Phone: 740-652-7560
Fax: 740-653-4708
E-mail: gmarx@co.fairfield.oh.us

Counsel for Amici Curiae OPAA and
Fairfield County Prosecuting Attorney Gregg Marx

TIMOTHY J. MCGINTY 0024626
Cuyahoga County Prosecuting Attorney
KATHERINE MULLIN 0084122
(Counsel of Record)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Phone: 216-443-7800
Fax: 216-443-7806
E-mail: kemullin@cuyahogacounty.us

Counsel for Amici Curiae OPAA and
Cuyahoga County Prosecutor
Timothy J. McGinty

Other Counsel Listed on Certificate
of Service



**MEMORANDUM OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS
ASSOCIATION, FAIRFIELD COUNTY PROSECUTOR GREGG MARX,
CUYAHOGA COUNTY PROSECUTOR TIMOTHY J. MCGINTY, AND
FRANKLIN COUNTY PROSECUTOR RON O'BRIEN OPPOSING
DEFENDANT'S MOTION TO STRIKE**

Amici Prosecutors Marx, McGinty, and O'Brien and amicus OPAA hereby oppose defendant Johnson's motion to strike their June 23, 2014, amicus brief.

Defendant Johnson complains that the June 23rd amicus brief presents a proposition of law addressing the validity of warrantless GPS attachment and monitoring when there is reasonable suspicion or probable cause therefor. Defendant complains that the validity/merits proposition goes beyond the narrow proposition he presented vis-à-vis the reach of the good-faith exception.

Defendant's complaints lack merit for several reasons. As noted in the amicus brief, issues related to the validity of warrantless GPS searches are properly before this Court for at least two reasons. First, they can provide alternative grounds for affirming the Twelfth District's decision. *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944).

More importantly, the questions regarding the validity of such searches help inform the question of whether the good-faith exception applies. As noted in *United States v. Leon*, 468 U.S. 897, 924-25, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), "it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue." This Court's analysis of the good-faith exception should not merely assume that a warrant was required when there are legitimate questions about whether a warrant really is required. The police conduct

did not amount to a deliberate, reckless, or grossly-negligent disregard of Fourth Amendment rights when there were strong reasons to think that no “search” was involved and that, even if a “search” was involved, no warrant would be required because of the absence of “privacy” interests in monitoring travels of a vehicle on public roadways.

Defendant’s own briefing in this Court shows that the issue of the validity of the GPS attachment/monitoring bears great relevance to the case. The defense repeatedly argued in its May 6th merit brief that the actions of the officer were “unlawful,” “illegal,” and “violated” the Fourth Amendment. Defendant’s Merit Brief, at 3, 5, 6, 8, 12, 13, 13-14, 14, 15, 16, 17 (“violated his Fourth Amendment rights”; “Hackney’s action violated the Fourth Amendment”; “Fourth Amendment violations are excused only when * * *”; “police are responsible for their violations of constitutional law”; “any evidence obtained as a result of the unlawful search in this case must be suppressed”; “illegally placed GPS device”; “Hackney’s erroneous belief he could attach a GPS device”; prosecutor “guessed * * * incorrectly”; “evidence obtained in violation of the Fourth Amendment must be excluded”; “traditional remedy” of exclusion for “unconstitutional search”; not applying exclusion “violates Mr. Johnson’s constitutional rights”; officer “erred”; officer “made a mistake”; “deputy performed an illegal search when he installed a GPS tracking device on Mr. Johnson’s vehicle without a warrant.”; evidence “tainted by the illegal placement of the GPS device”).

Given the oft-repeated defense assertion of illegality and unconstitutionality,

the defense should hardly be heard to complain that its assertions are being challenged. Notably, the defense is not asking this Court to strike its own references to the supposed “illegal” or “unconstitutional” search.

In addition, defendant’s proposition of law actually *does* include the issue of whether the officer could undertake a warrantless GPS search. According to the defense proposition of law:

When no binding appellate precedent exists to authorize a police officer’s warrantless use of a GPS tracking device, *United States v. Davis* does not authorize application of the good faith exception to the exclusionary rule.

Amici are asking this Court to issue “binding appellate precedent” to “authorize a police officer’s warrantless use of a GPS tracking device * * *.” This Court’s decision would become “binding appellate precedent” that “exists” and that would authorize and thereby uphold the officer’s actions in this case.

An unintended irony of the defense motion to strike is that the defense briefing touts the importance of “binding appellate precedent” and yet is opposing this Court actually rendering such “binding appellate precedent.”

Overall, the motion to strike misses the point of amicus briefing, which is to place the case in its broader context. An amicus should be able to point out that a proposition of law is problematic because its underlying assumptions are incorrect. An amicus brief can provide the “bigger picture” in which the case arises and can note that it would be improvident to address one issue without addressing or deciding other issue(s).

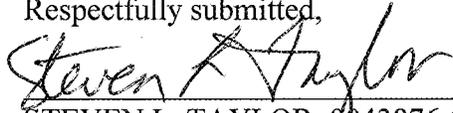
Nor should the matter be determined by the fact that the defense presents a single proposition of law and the briefing by amici sets forth two propositions of law. The rules do not limit the appellee or amicus to a single proposition of law because the appellant has presented a single proposition of law. The appellee (and therefore an amicus supporting the appellee – see S.Ct.Prac.R. 16.06) “shall comply with the provisions of S.Ct.Prac.R. 16.02(B), answer the appellant’s contentions, and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken.” S.Ct.Prac.R. 16.03(B)(1). The rules allow the appellee and supporting amicus to subdivide the argument portion of their briefs into multiple propositions of law. S.Ct.Prac.R. 16.02(B)(4).

The arguments of amici “answer the appellant’s contentions.” The defense is claiming that warrantless GPS tracking is illegal, unconstitutional, and violates the Fourth Amendment. The amici are answering those contentions by arguing that such tracking was legal and constitutional and did not violate the Fourth Amendment.

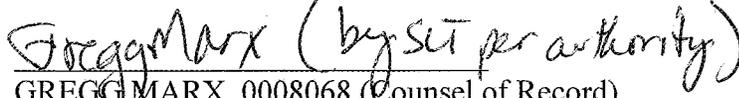
The arguments of amici also “make any other appropriate contentions as reasons for affirmance * * *.” See, also, *Constantine, supra*.

The motion to strike should be denied.

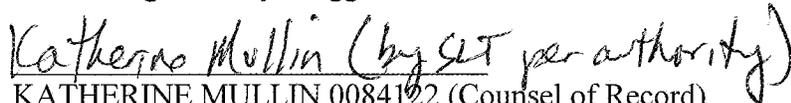
Respectfully submitted,



STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Amici Curiae OPAA and Franklin County
Prosecutor Ron O'Brien



GREGG MARX 0008068 (Counsel of Record)
Fairfield County Prosecuting Attorney
Counsel for Amici Curiae OPAA and Fairfield County
Prosecuting Attorney Gregg Marx



KATHERINE MULLIN 0084122 (Counsel of Record)
Assistant Prosecuting Attorney
Counsel for Amici Curiae OPAA and Cuyahoga County
Prosecutor Timothy J. McGinty

CERTIFICATE OF SERVICE

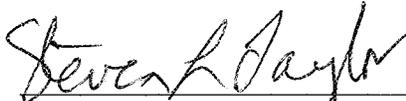
This is to certify that a copy of the foregoing was sent by regular U.S. Mail
on this 22nd day of July, 2014, to the following counsel of record:

Michael A. Oster, Jr.
Butler County Prosecutor's Office
Government Services Center
315 High Street, 11th Floor
Hamilton, Ohio 45012-0515

William R. Gallagher
Arenstein & Gallagher
114 East 8th Street
Cincinnati, Ohio 45202

Candace C. Crouse
Pinales, Stachler, Young, Burrell & Crouse Co., LPA
455 Delta Avenue, Suite 105
Cincinnati, Ohio 45226

Eric E. Murphy
State Solicitor
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215



STEVEN L. TAYLOR 0043876