

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2014-1273
Plaintiff-Appellee, : **On Appeal from the**
vs. : **Richland County Court of Appeals,**
 : **Fifth Appellate District**
QUAYSHAUN LEAK, : Court of Appeals Case No. 2013-CA-72
Defendant-Appellant. :

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF PLAINTIFF-APPELLEE, STATE OF OHIO**

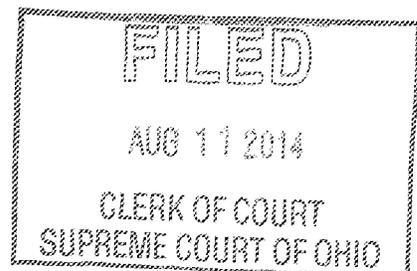
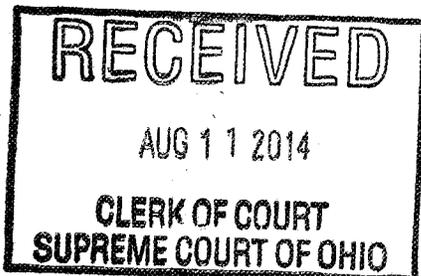
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**Explanation why this case is not a case of public or great general concern
and does not involve a substantial constitutional question.**

The State of Ohio submits that this case presents absolutely no unique facts, rulings, or issues. Nor is this case one of great public concern. Nor does this case raise any substantial constitutional questions worthy of review by this Honorable Court.

The Appellant argues that the impoundment of the vehicle in this case was unconstitutional and thus, the Appellant should have succeeded in his motion to suppress evidence from the inventory search of his vehicle. The Appellant alleges that the “automatic impound policy” of the Mansfield Police Department (MPD) is unconstitutional. He also avers that the impoundment was pretextual so that the officer would be able to search the vehicle for evidence of the crime.

However, no automatic impound policy of MPD was discussed at the suppression hearing. The only MPD policy regarding impounding vehicles that was discussed at the suppression hearing was that once a vehicle was going to be towed, an MPD officer was allowed to inventory the vehicle. That is well-accepted practice under *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092 (1976). On appeal, the issue of the tow of the Appellant’s car was only argued as improper because it was pretextual, not because it was an unconstitutional policy. Additionally, because the only evidence adduced at the suppression hearing was that the vehicle was the Appellant’s or believed to be the Appellant’s, both the State and the Appellant argued as if the appellant owned the vehicle on appeal. Now, the Appellant argues that he did not own the vehicle, which raises the issue of standing to contest the tow and subsequent inventory search of the vehicle. Standing was not argued in the Fifth District Court of Appeals.

For these reasons, the Appellant cannot argue these issues now. Standing was not determined by the appellate court as the Appellant never argued that the vehicle was not his. Furthermore, the appellate court did not decide whether MPD had an “automatic impound policy” and whether that policy, as applied here or in general, is constitutional. Because these issues have not been heard below, they cannot be raised now.

Furthermore, if this Honorable Court chooses to hear this case, the State would argue that the Appellant does not have standing to raise the constitutional rights of others if he is going to argue that he did not own the vehicle that was towed. Even if he could raise those issues, the tow was proper, as the trial court and the appellate court found in this case. Finally, no “automatic impound policy” was discussed in this case and the Appellant misconstrues the facts to create this issue. The MPD officer decided to impound the vehicle, and that was reviewed and approved by both the trial court and the appellate court.

For these reasons, the State submits that this case presents no unique facts rulings or issues. The Appellant has bent the facts and argued new issues in order to try to make it appear as if it does. Nor is this a case of great concern. Finally, this case does not raise any substantial constitutional questions worthy of review by this Honorable Court. Thus, jurisdiction should not be granted.

Factual and Procedural History

The procedural history is not at issue in this case. The State agrees with the facts and procedural history as outlined in *State v. Leak*, 5th Dist. Richland No. 13CA72, 2014-Ohio-2492. In this case, on August 8, 2012, Mansfield Police Officer Ryan Anschutz was dispatched to arrest the Appellant, Quayshaun Leak, for a warrant on a domestic violence charge that occurred earlier that day. [Suppression Transcript (ST) 4.] Officer Anschutz was informed of the Appellant's address and his vehicle information. The Appellant was not at home, so Officer Anschutz searched the streets for the vehicle. [ST 4.]

Officer Anschutz saw the Appellant in the parked vehicle in a cul-de-sac near the Appellant's residence. The vehicle was as described, including a North Carolina license plate. The Appellant was seated in the front, passenger seat. [ST 4-5.] The Appellant was secured and arrested. Officer Anschutz towed the vehicle because the Appellant was being arrested and he was believed to be the owner of the vehicle. [ST 6-7, 11-12.] Officer Anschutz could not remember at the suppression hearing whether the person in the driver's seat had a valid license. [ST 10.]

During the inventory search of the vehicle, Officer Anschutz found a loaded, black Hi-Point 9mm handgun under the front, passenger seat where the Appellant had been sitting. [ST 6.] When shown the handgun, the Appellant admitted it was his because Mansfield is "a rough town." [ST 6.]

As a result of these events, the Appellant was indicted by the Richland County grand jury for Carrying a Concealed Weapon in violation of R.C. 2923.12(A)(2), a felony

of the fourth degree; and Improper Handling of a Firearm in a Motor Vehicle in violation of R.C. 2923.16(B), a felony of the fourth degree.

The Appellant filed a Motion to Suppress Evidence on January 28, 2013. An evidentiary hearing was held on that motion on April 4, 2013. The trial court denied the Motion to Suppress Evidence, finding that the Appellant was properly arrested pursuant to a warrant, that the vehicle was properly impounded, and that the search of the vehicle was part of a proper inventory search. The Appellant changed his plea to no contest on June 13, 2013, and was found guilty by the court. The Appellant was sentenced to one year prison on each count, run consecutively, but suspended. The Appellant was placed on community control for 30 months and given a \$1,500 fine.

The Appellant appealed his conviction in *State v. Leak*, 5th Dist. Richland No. 13CA72, 2014-Ohio-2492. In *Leak*, he raised three arguments. The second and third assignments of error were both alleged sentencing errors and were granted. The first assignment of error alleged that the trial court erred in denying his motion to suppress because the tow and inventory search of his vehicle was pretextual. *Leak*, at ¶ 10. The appellate court found that Leak was believed to be the owner of the vehicle, that the arrest was proper, that the decision to tow the vehicle was not pretextual, and that the inventory search of the vehicle was valid as part of the tow. *Leak*, at ¶ 8-20.

The Appellant requests jurisdiction of this Honorable Court regarding the same issues. The State opposes jurisdiction with this memorandum.

Argument of Appellee, State of Ohio

RESPONSE TO SOLE PROPOSITION OF LAW:

Impound of the vehicle was proper when the alleged owner was arrested.

The Appellant now argues that impound of his vehicle was improper because he did not own it, but was merely a passenger inside. The Appellant further argues that the impound policy of MPD is overly broad. However, neither of these issues were argued or decided below. The Appellant cannot raise new issues for consideration before this Honorable Court. Further, even if these issues could be raised, the Appellant, in denying ownership of the car, would not have standing to contest the impound of the vehicle. Further, the impounding of the vehicle in this case served a community caretaking function of getting a vehicle off the roadway because it could not remain there indefinitely.

Issues not properly presented to the appeals court for its consideration will not be reviewed by the Supreme Court. This is true even if the issue was argued before the trial court. *Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St.3d 350, 352, 474 N.E.2d 295 (1984). "The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court." *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977), paragraph two of the syllabus. As these issues above were not properly presented or decided below, they are not now reviewable by this Honorable Court.

Here, the Appellant argued at the trial court that the impound was improper because it was pretextual. The trial court overruled the motion to suppress, finding that the arrest was proper, that the Appellant owned the vehicle, and that the impound of the

vehicle was proper. On appeal, the Appellant argued that the impound was pretextual and that the officer was using the impound as a ruse to allow an improper search for evidence of the crime. *Leak*, at ¶ 10. The Fifth District Court of Appeals found that the Appellant owned the vehicle or that the officer had a reasonable belief that the Appellant owned the vehicle, the arrest of the Appellant was lawful, the impound of the Appellant's vehicle was proper, and the impound and inventory search were not pretextual. *Leak*, at ¶ 8-20.

In this request for jurisdiction, the Appellant raises two new issues that have never been argued before and were not decided below. First, he argues that he was not the owner of the vehicle. He next argues that the "automatic impound policy" of MPD is unconstitutional. Neither issue was presented or decided below, thus they cannot be raised now. Nor are the facts sufficient on the record to determine either issue.

While the Appellant raised the possibility that he was not the owner of the vehicle on appeal, standing was not raised because at the suppression hearing the only evidence provided was that the officer believed the vehicle was the Appellant's vehicle. Further, the trial court made the factual finding that the vehicle was owned by the Appellant. While not directly argued to the appellate court, the appellate court also found that the vehicle was the Appellant's or the officer had a reasonable belief of such based upon what he knew. *Leak*, at ¶ 14-18. Thus, standing was never directly raised to the appellate court.

If the Appellant had argued at the suppression hearing that the vehicle was not his, then the State would have raised the issue of standing. As this Honorable Court is aware, Fourth Amendment rights are personal and cannot be raised vicariously. In the

case of a vehicle search, that right must be raised by the owner of the vehicle or person given permission to drive the vehicle. *See Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978). Here, as it is now argued by the Appellant, he would neither be the owner or the driver of the vehicle, but merely a passenger. The Appellant would not even been given the ability to challenge the vehicle's detainment here because this was not a traffic stop as the vehicle was parked before and during the police encounter. Further, the reason the vehicle was detained was to arrest the Appellant on a valid warrant, not a traffic stop for which a passenger was an innocent bystander. For these reasons, the Appellant's current argument that he was definitely not the owner of the vehicle and that he also was not given permission to use the vehicle, raises serious issues with his standing to argue the constitutional validity of the impound of the vehicle. The issue of standing was not fully briefed nor decided by the appellate court. As noted above, the only testimony on the record was that the Appellant was the owner or the purported owner of this vehicle. Since both the trial court and the appellate court found this to be true, standing was never fully argued and cannot be raised now.

Additionally, the Appellant did not raise the issue of the MPD's "automatic impound policy" on appeal. The issue of the officer's ability to impound vehicles in general based upon a policy was not raised nor decided by the appellate court. Furthermore, even if this argument had been raised, there was no evidence on the record to show such a policy. Upon review of the suppression hearing transcript and both the trial court's findings and the appellate decision, the State misspoke in its appellate brief when it stated that this tow was part of MPD's policy. No evidence was presented regarding when to tow a vehicle as per a policy of MPD at the suppression

hearing. The only policy discussed at that hearing was that an inventory search by the officer requesting the tow was required by MPD policy. *See South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092 (1976). Without evidence of such, the Appellant now creates an “automatic impound policy” out of whole cloth. Thus, even if this issue had been raised below, it would have been overruled as not supported by the record.

This Honorable Court need not review the findings of the appellate court as they are supported by the facts and law. The only testimony presented was that the Appellant was the owner of the vehicle or believed to be the owner of the vehicle. The Appellant was arrested pursuant to a valid warrant. The officer decided to tow the vehicle of the Appellant. The tow was proper and not pretextual. While the officer did admit that it was possible evidence of the domestic violence was in the vehicle, that was not why he was towing the vehicle. While not explicitly stating why the vehicle was towed, it can be assumed that the officer was following the community caretaking function outlined in *Opperman*. Here, the vehicle was parked in the street. Without knowledge of when the car would be moved again, the officer was removing a public nuisance. There are both state statutes and city ordinances devoted to how and when to remove vehicles parked on city streets. *See* R.C. 4513.60, 4513.61, and Mansfield Codified Ordinance 307.01. The officer was also protecting the vehicle from damage by others as it would have remained abandoned on the street. *See City of Columbus v. Brown*, 10th Dist. Franklin No. 76AP-793, 1977 Ohio App. LEXIS 9257 (March 3, 1977).

For these reasons, the request for jurisdiction should be denied. The Appellant raises new arguments not decided by the court below. Even if those arguments had been raised before, there is no factual basis for the claims and they would have been

overruled. Finally, the impound of the vehicle was proper and the trial and appellate courts ruled correctly in allowing such a search.

Conclusion

Wherefore, for the foregoing reasons, the State of Ohio respectfully requests this Honorable Court deny the Appellant jurisdiction to pursue his appeal.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Plaintiff-Appellee, State of Ohio, was sent to Attorney Craig Jaquith, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, by regular U.S. mail, this 2nd day of August, 2014.



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