ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Sup. Ct. No. 14-0104
Plaintiff-Appellant,	*	Ct. App. No. WD-12-070
-vs-	*	On Appeal from the Wood County Court of Appeals, Sixth Appellate District
TERRENCE BROWN,	*	
Defendant-Appellee.	*	

BRIEF OF DEFENDANT-APPELLEE, TERRENCE BROWN

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STATEMENT OF CASE

On May 19, 2011, Appellee was indicted on one count of Aggravated Possession of Drugs, in violation of R.C. 2925.11(A) and (C)(1)(d), a felony of the second degree. See indictment and Record of Trial Proceedings ("RTP") #2

On February 21 and 22, 2012 motions to suppress were filed by Appellee Brown. RTP #40 and #41.

On June 14, 2012 a hearing was held on Appellee's motion to suppress. RTP #48 and RTP #50.

On June 20, 2012, the trial court ruled denying Appellee's suppression motion. RTP #52.

On September 14, 2012 Appellee entered a no contest plea the amended charge of Aggravated Possession of Drugs, in violation of R.C. 2925.11(A) and (C)(1)(c), a felony of the second degree. RTQ #59. On November 26, 2012 Appellee was sentenced to a mandatory prison term of three years in the Ohio Department of Rehabilitation and Corrections ("ODRC"). RTP # 62, #85.

A timely appeal was filed on behalf of Appellee with the Sixth District Court of Appeals. The primary issue appealed was the trial court's denial of Appellee's motion to suppress on grounds of a violation of Appellee's constitutional right to be free from an unlawful search and seizure under the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Constitution. RTP #71-73. On December 6, 2012 the appellate court ruled in favor of Appellee. *State v. Brown*, 6th Dist. Wood No. WD-12-070, 2013-Ohio-5351, 4 N.E.2d 452; Record of Appellate Proceedings

("RAP") #25.

Plaintiff-Appellant, the State of Ohio, timely appealed the Sixth District's decision to the Supreme Court of Ohio which accepted the State's appeal on April 23, 2014.

STATEMENT OF FACTS

SUPPRESSION

Appellee's motion to suppress and appeal challenged Lake Township Officer Kelly Clark's stop under the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Constitution. RTP #40, #41. The motion focused on Officer Clark's lack of probable cause or reasonable suspicion to make the initial stop, in violation of Appellee's constitutional protections. Transcript of Proceedings ("TP"), p. 4, 5.

The June 14, 2012 suppression hearing brought forward the following:

The officer was sitting stationary in the median on I-280 in a marked car watching traffic when she pulled out to pursue another vehicle headed southbound. While driving in the passing lane, the officer testified at suppression hearing that she observed both tires on the passenger side of Appellee's vehicle go outside the white line. According to Officer Clark, this occurred on the curve in the road as Appellee's vehicle approached the 795 exit ramp off of the interstate. T.P., p. 8-10.

Based on the alleged marked lanes traffic violation, Appellee's vehicle was pulled over by Officer Clark. Appellee was driving with a suspended Michigan license and the Officer observed "criminal indicators" that led her to deploy her K-9, Bruno, who

conducted a sniff search of Appellee's vehicle. Subsequent investigation pursuant to the marked lanes traffic stop determined that drugs were located in the vehicle and Appellee was charged with one count of Possession of Drugs, in violation of R.C. 2925.11(A)(C)(1)(d), a felony of the second degree. T.P., p. 6, 7, 9, 37, 40,

APPEAL

As was conceded by the State of Ohio in their Appellate Brief, Officer Clark was without statutory authority to make an interstate traffic stop under R.C. 4513.39: Power to make arrests on highways. This statute confers, with several limited exceptions, the statutory authority to make arrests exclusively on the Ohio State Highway Patrol; not Township Officers. RAP #19 and #22.

The Sixth District Court of Appeals in deciding this matter ruled that Officer Clark's extraterritorial stop, although made in violation of R.C. 4513.39(A), passed constitutional muster under the Fourth Amendment of the United States Constitution. However, the Court of Appeals, decided that the Ohio Constitution, under Article I, Section 14, can provide greater protection than the Fourth Amendment of the United States Constitution. RAP #25. In reaching its decision, given the lack of exigent circumstances, the appellate court balanced the privacy right of an individual against the interest of the State in having an extraterritorial officer make a traffic stop for a de minimus violation, R.C. 4511.33 Driving in Marked Lanes, being a minor misdemeanor offense. The appellate court concluded that the trial court should have suppressed the evidence obtained from the traffic stop. RAP #25.

ARGUMENT

PROPOSITION OF LAW: A violation of R.C. 4513.39, under the facts of this case, rises to the level of a constitutional violation under Article I, Section 14 of the Ohio Constitution, therefore the exclusionary rule was properly invoked to suppress the fruits of the statutory violation.

1. Introduction

The facts and circumstances of the case at bar are unique in that they mark the first time the Sixth District Court of Appeals has invoked suppression of evidence for a statutory violation of R.C. 4513.39. Further, the appellate court's determination that Officer Clark's violation of said statute offends the constitutional protection against unlawful search and seizures, under Article I, Section 14, creates the opportunity for this Court to make a thorough examination of the court's power to fashion an appropriate remedy to such a constitutional violation.

Officer Kelly Clark lacked statutory authority to make a traffic stop on the interstate for a de minimus violation in the absence exigent circumstances. The Sixth District Court of Appeals correctly ruled that Officer Clark's stop of Appellee Brown was a violation of his constitutional rights under Article I, Section 14 of the Ohio Constitution. If this Court reverses, it is not illogical to assume that any officer, anywhere, at anytime, in anyplace, without risk of penalty, will make a stop, search and seizure of an individual despite lacking the statutory authority to do so.

2. Constitutional Law: The Fourth Amendment and Article I, Section 14

The Fourth Amendment to the United States Constitution, applied to the State of Ohio through the Fourteenth Amendment's Section 1 Due Process Clause, along with Article I, Section 14 of the Ohio Constitution, provides that "The right of the people to be

secure...against unreasonable searches and seizures shall not be violated..." Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Under this constitutional protection, searches and seizures conducted without the issuance of a prior judicial warrant are considered to be unreasonable *per se*, and therefore illegal. Katz v. United States (1967), 389 U.S. 347, 357, 88 S.Ct. 507; State v. Kessler (1978), 53 Ohio St.2d 204, 207, O.O. 3d 375.

The United States Supreme Court has long held that evidence obtained in violation of the Fourth Amendment's protection is subject to exclusion and therefore unavailable as evidence at trial during the State's case in chief. Mapp at p.655. The unreasonableness of a warrantless search, however, may be overcome if the state can prove an exception to the warrant requirement when the search and subsequent seizure commenced. Coolidge v. New Hampshire (1971), 403 U.S. 443, 444, 455, 91 S.Ct. 2022.

Ohio case law has also held that exclusion of evidence is warranted when a unconstitutional search and seizure takes place as a deterrent to the police misconduct. State v. Starkey, 2012-Ohio-6219 (Ohio App. 11 Dist. 2012) at paragraph 24, 25, 985 N.E.2d 295; State v. Young, 146 Ohio App.3d 245, 257, 765 N.E.2d 938 (11th Dist. 2001) citing U.S. v. Leon, 468 U.S. 897, 916, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); State v. Myers, 26 Ohio St.2d 190, 196, 271 N.E.2d 245 (1971); State v. Wilmoth, 22 Ohio St.3d 251, 262-264, 490 N.E.2d 1236 (1986).

Further, this Court has recognized that "the violation of a state statute may rise to the level of a constitutional violation." State v. Weideman, 94 Ohio St.3d 501, 505, 764 N.E.2d 997 (2002), citing State v. Jones, 88 Ohio St.3d 430, 432, 727 N.E.2d 886 (2000).

The Fourth Amendment's protection from unreasonable searches and seizures also extends to the operation of motor vehicles. State v. Friedman, 194 Ohio App.3d 677, 680, 2011-Ohio-2989. Importantly, a seizure occurs, within a constitutional context, when one's freedom is restrained even if the detention does not ultimately result in a full custodial arrest. Terry v. Ohio (1968), 392 U.S. 1, 25; State v. Andrews (1991), 57 Ohio St.3d 86, 87. Accordingly, any detention must be reasonable under the totality of the circumstances. Whren v. United States (1996), 517 U.S. 806, 809-810.

3. Statute: R.C. 4513.39:
The state conceded Officer Clark was without statutory authority

Appellee, who was initially stopped for a marked lanes violation, argued on appeal that Officer Kelly Clark, of the Lake Township Police Department, was without statutory authority to stop Appellee for his alleged traffic violation. *See Appellee's Sixth District Brief: Second Assignment of Error.* Appellee cited to R.C. 4513.39, a jurisdictional statute, which delegates the authority to make arrests on highways. The statute states in part:

> R.C. 4513.39 Power to make arrests on highways.
>
> (A) The state highway patrol and sheriffs or their deputies shall exercise, to the exclusion of all other peace officers except within municipal corporations and except as specified....the power to make arrests for violations on all state highways, of sections 4503.11, 4503.21, 4511.14 to 4511.16, inclusive, 4511.20 to 4511.23, 4511.26 to 4511.40, 4511.42 to 4511.48, 4511.58, 4511.59, 4511.62 to 4511.71, 4513.03 to 4513.13, 4513.15 to 4513.22, 4513.24 to 4513.34, 4549.01, 4549.08 to 4549.12, and 4549.62 of the Revised Code.

Under the statute, authority to make arrests is conferred on the state highway patrol although a violation of R.C. 4513.39 is without statutory remedy.

At Appellee's suppression hearing, Officer Clark testified that she didn't come

upon Appellee's violation by mere happenstance: she was stationary on I-280 observing north and southbound traffic. *Transcript of Proceedings, Motion To Suppress, p.8.* Officer Clark initially pulled out from her stationary position to follow another vehicle and observed Appellee's vehicle leave its lane of travel as he approached the 795 exit off of I-280. Officer Clark initiated a stop and pulled Appellee over, despite lacking the statutory authority to make a stop or arrest. *Transcript of Proceedings, Motion To Suppress, p.25.*

Appellee's Sixth District brief cited to State v. Holbert (1974), 38 Ohio St.2d 113 as the controlling case in this matter. *See Appellee's Sixth District Brief: Second Assignment of Error.* Holbert held that under R.C. 4513.39, a township police officer has no authority to stop a motorist for enumerated offenses that have been committed on a state highway outside of a municipal corporation. *See R.C. 4513.39 construed, Paragraph 2 of syllabus.*

In Holbert, this Court addressed whether R.C. 4513.39 excluded township police officers from making traffic stops for the violations listed in the statute's text:

> Appellee [the State] maintains that the statutory words, "power to make arrests," in R.C. 4513.39 do not include mere roadside stop-and-ticket situations. We are reluctant to choose from among various judicial definitions of "arrest," and thereby come to some resolution of the general applicability of R.C. 4513.39. The better approach is to read that statute in light of the fact that the vast majority of traffic offenses in this state involve no more direct contact with police officers than a brief, roadside confrontation. The General Assembly was aware of this when it enacted R.C. 4513.39, and has encouraged the expeditious handling of minor traffic violations since that time. Sensible and sound interpretation, therefore, compels our holding that the "power to make arrests" does include the right to stop motorists for traffic offenses... Id at p.117

Holbert was ultimately decided on the defendant's waiver of personal jurisdiction

under R.C. 2937.04-2937.06. This Court affirmed the decision of the Court of Appeals but held that R.C. 2937.06 did not form the proper basis for the Court of Appeals decision. *Id.* at 115-116.

Appellee's brief cited to the dissent in *Holbert,* however, regarding the statutory interpretation of R.C. 4513.39:

> With reference to statutory construction, there are very practical reasons why we should accept, whenever possible, the meaning which a legislative enactment reveals on its face. Here, we need only to inquire what the words of the statute mean. Could the meaning of the words, "the state Highway Patrol and sheriffs or their deputies shall exercise, to the exclusion of all other peace officers, except within municipal corporations, the power to make arrests for traffic violations on all state highways," be more obvious? (emphasis added.) Further, these words afford no latitude for interpretation, but clearly embrace township police officers in the exclusion from the power to make such arrests.
> The statute does not merely say that the excluded law officers may not arrest, but that they may not exercise "the power to make arrests" for traffic violations. A power is never imperative, but permits the act to be done at the will of the party to whom it is given. The stopping of the driver, the arrest of the driver, the giving of a traffic citation, and the filing of an affidavit, are all exercises of the power to make an arrest. This power is conferred, exclusively upon the State Highway Patrol and sheriffs or their deputies. Only those two categories of law officers may stop a driver of a vehicle and either admonish the driver, give him a citation, or arrest him summarily. This is what we should hold to be the meaning of "power to arrest." The township officer possesses no such power. *Id* at 119-120.

Officer Clark, as a municipal officer, obviously lacked statutory authority to make an arrest on the highway outside of the municipal corporation and was, in fact, prohibited from initiating the stop of Appellee's vehicle based on a marked lanes violation. R.C. 4511.33, Driving in Marked Lanes, is a statute listed in R.C. 4513.39 as being enforceable, outside of the municipal corporation, by the State Highway Patrol.

Appellee argued on appeal that any stop made by the township police officer based on this traffic violation was without legal authority and thereby unconstitutional

under the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Constitution. *See Appellee's Sixth District Brief: Second Assignment of Error.* As a consequence of Officer Clark's unauthorized and unconstitutional action, all evidence seized must be suppressed as the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 488.

R.C. 2935.03, Authority to arrest without warrant - pursuit outside jurisdiction, offered Officer Clark no relief in this matter as the statute that governs a township police officer's authority to make a warrantless arrest outside of her immediate jurisdiction. R.C. 2935.03(D) states, in part, that a municipal police officer,

> outside the limits of that territory, may pursue, arrest, and detain that person until a warrant can be obtained if all of the following apply:
>
> (1) The pursuit takes place without unreasonable delay after the offense is committed;
>
> (2) The pursuit is initiated within the limits of the political subdivision...
>
> (3) The offense involved is a felony, a misdemeanor of the first degree or a substantially equivalent municipal ordinance, a misdemeanor of the second degree or a substantially equivalent municipal ordinance, or any offense for which points are chargeable pursuant to section 4510.036 of the Revised Code."

The offense for which Officer Clark initiated a stop was neither a felony or misdemeanor listed in subsection (3) of the statute. Further, under case law, "a police officer that leaves his jurisdiction must observe the occurrence of an appropriately designated misdemeanor violation within his jurisdiction and must initiate the pursuit within his jurisdiction." State v. Annis, 2002-Ohio-5866 at paragraph 14; State v. Coppock (1995), 103 Ohio App.3d 405, 411.

Because Officer Clark, a Lake Township police officer, lacked the authority

granted by statute to the State Highway Patrol to make arrests on the interstate, the subsequent arrest of Appellant was unlawful. Based on the lack of statutory authority, the Sixth District Court of Appeals ruled, and the State of Ohio conceded, that Officer Clark's traffic stop violated R.C. 4513.39(A). See Brown, WD-12-070, 2013-Ohio-5351 at paragraphs 12, 13.

4. Article I, Section 14 of the Ohio Constitution can offer greater protection than the Fourth Amendment to the United States Constitution.

Because Officer Clark observed Appellee Brown commit a marked lanes violation in her presence, the Sixth District ruled that she had probable cause to make a traffic stop that did not offend the Fourth Amendment. See *Atwater v. Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). *Carroll v. United States*, 267 U.S. 132, 156-157, 45 S.Ct. 280. *See Sixth District Decision and Judgment at paragraph 14-15.*

However, the court also analyzed the facts and circumstances of the case under Article I, Section 14 of the Ohio Constitution with the understanding that as a document with independent force and effect, the Ohio constitutional protections and provisions could be construed as offering greater protection than that of the Fourth Amendment to the United States Constitution. *California v. Greenwood*, 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *Arizona v. Evans*, 514 U.S. 1, 8, 115 S.Ct. 1185, 131 L.Ed.2d 34, (1995); See also *Oregon v. Haas*, 420 U.S. 714, 719, (175 L.Ed.2d 1018), 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Arnold v. Cleveland*, 67 Ohio St.3d 35 (Ohio 1993), 616 N.E.2d 163. *See Sixth District Decision and Judgment at paragraph 15.*

The United States Supreme Court has held that state courts are free to construe their state constitutions as providing different or broader individual liberties than those afforded under the federal Constitution. See City of Mesquite v. Aladdin's Castle, Inc. (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 ("....[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and California v. Greenwood (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); Also see Pruneyard Shopping Ctr. v. Robins (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752. Further, in Michigan v. Long (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215, the Supreme Court added that a state courts' interpretation of its constitution is to be accepted as final, provided the state court explicitly bases its decision on 'independent and adequate state grounds.'

As a document of independent force, outside of the federal Constitution, state courts may rely on their constitutional provisions with regard to personal rights and liberties. Davenport v. Garcia (Tex.1992), 834 S.W.2d 4, 12, fn. 21; State v. Johnson (1975), 68 N.J. 349, 353, 346 A.2d 66, 67. State constitutional protections for individuals may not fall below the threshold established by the federal Constitution, but there is no prohibition against a state granting greater or broader protections to it's citizenry with regard to individual rights and civil liberties. Davenport, supra, 834 S.W.2d at 12, fn. 22. See also Brennan, State Constitutions and the Protection of Individual Rights (1977), 90

Harv.L.Rev. 489 and Interpretation and Authority in State Constitutionalism (1993), 106 Harv.L.Rev. 1147. In this regard, federal protections create the floor, not the ceiling, for state protections. To this point, "when a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights." Davenport, supra, 834 S.W.2d at 12.

5. Sixth District Court of Appeals Decision: Why State v. Brown, 6th Dist. Wood No. WD-12-070, 2013-Ohio-5351, 4 N.E.3d 452 should be upheld: Balancing Analysis

The 6th District's holding overturning the trial court was based on a determination that although Officer Kelly Clark's action where in violation of R.C. 4513.39, because she had probable cause, the ensuing traffic stop passed constitutional muster under the Fourth Amendment of the United States Constitution. This was not the result, however, under Article I, Section 14 of the Ohio Constitution where the court opined that greater protection was available for the individual. *See Sixth District Decision and Judgment at paragraph 14-16.*

The court's analysis focused on whether exclusion was mandated based on Officer Clark's violation of the jurisdictional statute; R.C. 4513.39. *See Sixth District Decision and Judgment at paragraph 13;* Also see Atwater v. Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). The court ruled that seizures based on the observations of an officer gave probable cause to arrest and therefore, the stop and seizure was a reasonable intrusion under the Fourth Amendment to the United States Constitution. See Atwater and Florida v. Royer, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Carroll v. United States, 267 U.S. 132, 156-157, 45 S.Ct. 280, 69

L.Ed. 543 (1925). *See Sixth District Decision and Judgment at paragraph 15.*

On this basis, under the Fourth Amendment, Officer Clark's stop, after observing Appellee's marked lanes violation, was constitutional and therefore did not automatically invoke exclusion of the drug evidence discovered subsequent to the stop and seizure. *Sixth District Decision and Judgment at paragraph 13.*

The court, however, did not end it's analysis there. The court went on to rule that Ohio's constitutional provisions against an unreasonable search and seizure could offer greater protection than the federal counterpart. *Sixth District Decision and Judgment at paragraph 15;* California v. Greenwood, 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). The court cited to several Ohio cases in which this Court found warrantless stops reasonable, despite violation of jurisdictional statutes by the arresting police officer. See City of Kettering v. Hollen, 64 Ohio St.2d 232, 235, 416 N.E.2d 598 (1980); State v. Weideman, 94 Ohio St.3d 501, 764 N.E.2d 997 (2002); *See Sixth District Decision and Judgment at paragraph 17.*

In Hollen, this Court based it's holding on weighing the 'totality of the circumstances' to determine of there was a constitutional violation by the arresting, extra-territorial officer. Additionally, the Court in Hollen found exigent circumstances in that the offense was committed in the officer's jurisdiction thereby prompting 'hot pursuit' of the offender by the officer. Weideman at p. 504.

In Weideman, the Court held that to determine whether an extra-territorial officer's traffic stop in violation of Ohio law was reasonable, despite the officer having probable cause, the Court had to consider the totality of the circumstances. Further, the Court balanced the government's interest in the traffic stop against the privacy right of the

individual to be free from such intrusions. Id. at p. 505.

The balancing test was developed by this Court in State v. Jones, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000), syllabus. Conflicting with the United States Supreme Court's decision in Atwater, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549, a case that involved an arrest for a misdemeanor seat belt offense, the Jones balancing test was limited by this Court to violations of the Ohio Constitution in State v. Brown, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, syllabus. This was the balancing test utilized by the Sixth District in the case at bar and, finding no exigent circumstances that would justify Officer Clark's action, despite having probable cause, the balance was correctly weighed in favor of the individual. *Sixth District Decision and Judgment at paragraph 20.*

6. The Exclusionary Rule Remedy

This Court has held that the exclusionary rule is not applicable to violations of state law absent a constitutional infringement. State v. Wilmoth, 22 Ohio St.3d 251, 262-264, 490 N.E.2d 1236 (1986); State v. Myers, 26 Ohio St.2d 190, 196, 271 N.E.2d 245 (1971). In State v. Weideman, 94 Ohio St.3d 501, 504, 2002-Ohio-1484, citing Kettering v. Hollen (1980), 64 Ohio St.2d 232, 234-235, this Court stated that "'[t]he exclusionary rule has been applied by this court to violations of a constitutional nature only,' further, '[i]t is clear....that the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights.'" Also see Hilliard v. Elfrink (1996), 77 Ohio St.3d 155, 158.

A violation of a state statute, however, may rise to the level of a constitutional

violation. *Weideman* at 505. As an example, in *State v. Jones* (2000), 88 Ohio St.3d 430, officers arrested an individual for jaywalking, in violation of R.C. 2935.26(A), which prohibits an arrest for a minor misdemeanor violation. This Court ruled that *Jones'* arrest was a violation of his constitutional rights.

Further, the United States Supreme Court has held that evidence obtained in violation of the Fourth Amendment will not necessarily be suppressed. See *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974). Generally, rulings regarding the Fourth Amendment exclusionary rule have balanced the competing interests of deterring improper police action against the use of the evidence of criminality obtained by said misconduct. *Leon*, 468 U.S. at 908-913.

The Sixth District in the immediate case ruled that Officer Clark's stop was indeed a violation of Ohio's constitution and determined, after balancing the interests, that the exclusionary rule was available as a remedy. *Sixth District Decision and Judgment at paragraph 19-20.* Ohio is not constricted or precluded from applying the exclusionary rule given the facts and circumstances of this case. As the United States Supreme Court ruled in *California v. Greenwood* (1988), 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30:

> States are not foreclosed by the Due Process Clause from using a similar balancing approach to delineate the scope of their own exclusionary rules. Hence, the people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate

federal law. Id. at 45.

In State v. Starkey 2012-Ohio-6219 (Ohio App. 11 Dist. 2012), 2012-P-0038, noting that the exclusionary rule is only applicable to constitutional violation, this Court analyzed the purpose and breadth of the rule, stating: "In a Fourth Amendment context, the judicially-created exclusionary rule, created to deter illegal police conduct, provides that evidence obtained through unconstitutional searches and seizures is subject to exclusion and prospectively inadmissible." Also see State v. Young, 146 Ohio App.3d 245, 257, 765 N.E.2d 938 (11th Dist.2001), citing U.S. v. Leon, 468 U.S. 897, 916, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984), and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); State v. Myers, 26 Ohio St.2d 190, 271 N.E.2d 245 (1971); State v. Downs, 51 Ohio St.2d 47, 63-64, 364 N.E.2d 1140 (1977); State v. Davis, 56 Ohio St.2d 51, 56, 381 N.E.2d 641 (1978); Kettering v. Hollen, 64 Ohio St.2d 232, 235, 416 N.E.2d 598 (1980); State v. Unger, 67 Ohio St.2d 65, 69-70, 423 N.E.2d 1078 (1981); State v. Droste, 83 Ohio St.3d 36, 697 N.E.2d 620 (1998), syllabus.

Accordingly, the Sixth District Court of Appeals ruled that exclusion was the correct remedy based on the facts and circumstances of Officer Clark's constitutional violation of Appellee Brown's right to be free from an unlawful search and seizure.

7. The Sixth District's Decision in State v. Brown, 6th Dist. Wood No. WD-12-070, 2013-Ohio-5351, 4 N.E.3d 452 was not decided in a vacuum.

In a similar case involving a marked lanes violation that preceded Brown, the Sixth District ruled that an extra-territorial officer was not divested of authority to make an arrest provided there was no constitutional infirmity to the police action, i.e., the officer had probable cause. See State v. Jones, 187 Ohio App.3d 478 (Ohio App. 6th Dist.

2010) at paragraph 17.

In *Jones*, which also involved a violation of R.C. 4513.39 by a township police officer, the Sixth District 'harmonized' the Fourth Amendment of the United States Constitution with Article I, Section 14 of the Ohio Constitution and the exclusionary rule was not invoked. *Id.* at paragraph 18; Also see *State v. Robinette*, 80 Ohio St.3d 234, 239, 685 N.E.2d 762 (1997). With *Jones*, in upholding the trial court, the Sixth District ruled:

> Though we agree that the suppression of ill-gotten evidence vindicates a deprivation of a constitutional right, specifically appellant's right to be free from unlawful searches and seizures under the Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, we disagree with appellant that a violation of R.C. 4513.39 rises to the level of a constitutional deprivation. *Id* at paragraph 2.

The Sixth District's decision in *Jones* cited to the Ohio Supreme Court's holding in *State v. Weideman*, (2002), 94 Ohio St.3d 501, 764 N.E.2d 997 (syllabus), for authority that an extra-territorial offer's traffic stop was not unreasonable *per se* under the Fourth Amendment. The court, however, held the door open for a fact pattern that would warrant exclusion, stating:

> Although a stop is not per se unreasonable, a court could find that an extraterritorial stop is unreasonable based on the unique facts and circumstances of a particular case.
> *Jones*, 187 Ohio App.3d 478 at paragraph 14.

Appellee Brown argues that those 'unique facts and circumstances' were found by the Sixth District Court of Appeals in the immediate case by the court balancing the interest of the government in making a warrantless, extra-territorial stop for a minor misdemeanor traffic violation against an individual's privacy interest. *See Sixth District Decision and Judgment at paragraph 19-20.* Under this balancing analysis, taking into consideration the facts and circumstances of this case, the court determined that there was

a constitutional violation under Article I, Section 14, thereby warranting suppression of the evidence obtained.

Conclusion

As famously expressed by Judge Benjamin Cardozo in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587: 'The criminal is to go free because the constable has blundered.' Similarly, Professor Wigmore explained in his well known treatise on evidence:

> 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.' *8 Wigmore Evidence (3d Ed. 1940), § 2184*." *Elkins v. United States*, 364 U.S. 206, 216-17, 80 S.Ct. 1437, 1443.

As conceded by the State of Ohio, Officer Clark had no statutory authority to make any stop or arrest on the interstate under R.C. 4513.39 Power to make arrests on highways, or, given the facts of the case, under R.C. 2935.03(D) Authority to arrest without warrant - pursuit outside jurisdiction. *See Sixth District Decision and Judgment at paragraph 12.*

Officer Clark didn't just happen to come upon a minor misdemeanor traffic violation; she was stationed on the interstate for the purpose of making traffic stops regardless of any lack of authority to do so. *Transcript of Proceedings, Suppression Hearing, June14, 2012, p. 8.* Based on past case law regarding violations of R.C. 4513.39, Officer Clark risked nothing with her violation. See *State v. Jones*, 187 Ohio App.3d 478 (Ohio App. 6 Dist. 2010), WD-09-011; *State v. Caldwell*, 2010-Ohio-1700, WD-08-075.

Although Officer Clark's traffic stop of Appellee Brown did not offend the provisions of the Fourth Amendment; Officer Clark had probable cause to stop Appellee Brown, Ohio can offer greater constitutional protection. The Sixth District's ruling took into account the facts and circumstances of the case and case law in fashioning its decision. The court correctly balanced the law enforcement interests of the State of Ohio against the privacy right of the individual to be free from an unreasonable search and seizure by an extra-territorial officer for a minor misdemeanor traffic violation. Given the specific facts and circumstances of this case, the individual's interest should outweigh the state's interest every time.

If the Sixth District Court of Appeals decision in *Brown* is overturned, what is next for extra-territorial officers that are without statutory authority? Will any police officer anywhere make any stop at anytime simply because they have probable cause? And, if so, how does that type of police action facilitate the needs of effective, legally sound law enforcement or, in the larger picture, the constitutional protections afforded by the Fourth Amendment and Article I, Section 14? Will that result prompt case after case of (township) police officers without statutory authority making traffic stops for minor

violations because it's a slow day in the township?

Overturning Brown rubber stamps extra-territorial police action with no restriction as to location or risk of penalty. Officer Clark's actions were wrong at the time and making her right jeopardizes fundamental liberties with unfettered police action without the jeopardy of any deterrent. Any officer may make any stop, any arrest, anywhere at anytime if *Brown* is overturned.

Further, this Court is not required to harmonize Article I, Section 14 of the Ohio Constitution with the Fourth Amendment to the United States Constitution. As an instrument with separate, independent weight and significance, Ohio can provide greater protection in safeguarding individual rights than that provided by the federal counterpart. *California v. Greenwood* (1988), 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30.

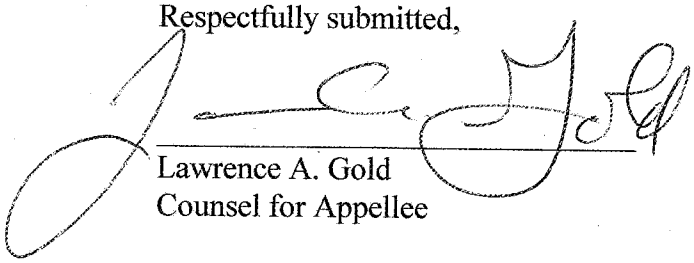
This Court has previously held that an arrest for a minor misdemeanor is a constitutional violation. On this basis, the Sixth District Court of Appeals decision is not aberrant or cut from whole cloth; it is in keeping with the facts and circumstances presented in this case. See *State v. Jones,* 88 Ohio St.3d 430, 2000-Ohio-374, 727 N.E.2d 886 (Ohio 2000), 99-613.

Lastly, exclusion of evidence is the correct remedy because *Brown* was decided correctly: Officer Clark's action violated the Ohio Constitution. It has been long established that exclusion of evidence is the proper remedy for a constitutional violation. *State v. Wilmoth*, 22 Ohio St.3d 251, 262-264, 490 N.E.2d 1236 (1986); *State v. Myers*, 26 Ohio St.2d 190, 196, 271 N.E.2d 245 (1971); *State v. Weideman*, 94 Ohio St.3d 501, 504, 2002-Ohio-1484.

Based on the foregoing argument Appellee prays that this Court uphold the Sixth

District Court of Appeals decision in this matter: *State v. Brown*, 6th Dist. Wood No. WD-12-070, 2013-Ohio-5351, 4 N.E.3d 452.

Respectfully submitted,



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Certification

This is to certify that a true and accurate copy of the foregoing was served on the offices of Paul Dobson and Thomas Matuszak, Wood County Prosecutor and Assistant Prosecutor respectively, at the Office of the Wood County Prosecutor, Wood County Courthouse, Bowling Green, Ohio on this 19th day of August, 2014 via first class U.S. Mail. Also provided with service: The Ohio Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Eric E. Murphy, State Solicitor, counsel for *amicus curiae* Ohio Attorney General Michael DeWine, Office of the Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; Seth Gilbert, counsel for *amicus curiae* Ohio's Prosecuting Attorney's Association, Franklin County Prosecutor's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215; Andrew T. French, counsel for *amicus curiae*, Montgomery County Prosecutor's Office, 301 West Third Street, 5th Floor, Dayton, Ohio 45422; Evy M. Jarrett, counsel for *amicus curiae*, Lucas County Prosecutor's Office, 700 Adams Street, Toledo, Ohio 43604; Robert L. Berry, counsel for *amicus curiae* Buckeye State Sheriff's Association, Law Office of Robert L. Berry LLC, 7582 South Goodrich Square, New Albany, Ohio 43054.

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