

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 J. LEAK, : Court of Appeals Case No. 2014-CA-0072
Defendant-Appellant. :

MERIT BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO

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Statement of the Case

The Richland County Grand Jury returned a two-count indictment against the Appellant 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, claiming that: 1) the arrest warrant was invalid, 2) the vehicle was parked on private property, and 3) the search incident to arrest exception was not applicable. An evidentiary hearing was held on that motion on April 4, 2013. At that hearing, the evidence was uncontested that the vehicle was parked on a public roadway and that Officer Anschutz testified that a valid Domestic Violence warrant existed and was valid. The Trial Court thereafter denied the Motion to Suppress Evidence, finding “[s]o it sounds as if it was a search incident to arrest - - - an inventory search incident to towing the car.” [ST 16, lines 17-20.] On June 13, 2013, the Appellant entered a No Contest plea and was ultimately sentenced to 30 months of community control with one year of prison on each count, consecutive, suspended should he violate the terms of his community control, and 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 regarding sentencing errors and were granted, reversing the trial court’s sentence and remanding the case to the trial court to fix these issues. The first assignment of error alleged a new, and previously unraised, issue that the Trial Court erred in denying the motion to suppress because the impound and inventory search of the Appellant’s vehicle were pretextual. *Leak*, at ¶ 10. The Appellate Court disagreed, ruling that the decision to tow the vehicle was not pretextual,

and that the inventory search of the vehicle was valid as part of the impound. *Leak*, at ¶ 8-20. The Appellant failed to appeal the Trial Court's finding that a valid search incident to arrest occurred to the Court of Appeals.

The Appellant requested jurisdiction of this Honorable Court regarding the impound and inventory search of the vehicle in case number 14-1273. Again, the Appellant failed to seek review of the Trial Court's finding that the officer conducted a valid search incident to arrest. The Appellant instead suggested that the Mansfield Police Department has a per se "automatic impound policy" that is unconstitutional, that the search was pretextual, and that the vehicle was not owned by the Appellant. This Honorable Court accepted jurisdiction for this appeal.

The Appellant has failed to argue in their merit brief that the Mansfield Police Department has a per se invalid automatic impound policy and likewise failed to brief that the Appellant was not the owner of the vehicle. By not raising these arguments in his merit brief, the Appellee respectfully believes that these issues have been waived. S.Ct.Prac.R. 16.02(B)(4); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17; citing *State v. Carter*, 27 Ohio St.2d 135, 139, 272 N.E.2d 119 (1971).

Statement of the Facts

The Appellant filed a Motion to Suppress Evidence seeking to suppress the discovery of a loaded 9 mm handgun found in a vehicle and to suppress the Appellant's statements regarding that handgun. The Appellant's motion to suppress asserted three issues: 1) the warrant upon which the Appellant was arrested was not valid, 2) the vehicle was parked on private property, and 3) the search incident to the arrest exception to the Fourth Amendment was not applicable. The State briefed these issues, specifically the law on a search incident to arrest. At that suppression hearing, Officer Ryan Anschutz of the Mansfield Police Department testified that on August 8, 2012, he was dispatched to assist the Richland County Sheriff's Office in locating the Appellant, Quayshaun Leak, pursuant to an arrest warrant for domestic violence issued earlier that day. [Suppression Transcript (ST) 4.] Specific information of the Appellant's residence the make, model, color, and out-of-state license plate number of the Appellant's vehicle were provided electronically to Officer Ryan Anschutz. [ST 4.]

Officer Anschutz located the Appellant in this vehicle seated in the front, passenger seat on a public roadway near the Appellant's known address. [ST 4-5.] The Appellant was removed from the passenger seat and arrested on the domestic violence warrant. [ST 5-7.] Officer Anschutz located a loaded 9 mm handgun under the passenger seat where the Appellant had previously been seated. The Appellant admitted ownership of the firearm. [ST 6.] Officer Anschutz testified that the vehicle was ultimately impounded and an inventory search was executed prior to impound pursuant to the policies of the Mansfield Police Department. [ST 6-7, 10-11.]

On cross examination, the Appellant's trial counsel suggested to Officer Anschutz that her client was not the owner of the vehicle. The Appellant's trial counsel also focused on the

fact that officer Anschutz did not have a physical, paper warrant on him when he arrested the Appellant. Indeed, most of trial counsel's theory throughout cross examination centered on the belief that, absent possession of a physical, paper warrant, information available via computer was insufficient to justify a valid arrest. [ST 7-14.] No evidence was presented that contradicted the State's evidence that the vehicle was parked on a public roadway.

At the conclusion of the suppression hearing, the Trial Court ruled, "[s]o it sounds as if it was a search incident to arrest - - - an inventory search incident to towing the car." [ST 16, lines 17-20.] The Trial Court therefore overruled the Appellant's motion.

Argument of Appellee, State of Ohio

RESPONSE TO PROPOSITION OF LAW:

The arrest of the owner of a vehicle can trigger impound of that vehicle under the community caretaking function, allowing for an inventory search under the both the United States and Ohio Constitutions.

The Appellant did not argue in his motion to suppress that the impound of the vehicle was in violation of the United States and Ohio Constitutions. Since this issue was not argued with particularity in his motion to suppress, it has been waived. Even if this Honorable Court were to consider the Appellant's argument, the Appellant has argued that he does not own the vehicle in question, which removes his standing to contest the search of the vehicle. Finally, assuming arguendo that this Honorable Court chooses to hear the Appellant's argument, the impound and inventory search of the vehicle was reasonable under the community caretaking function of the Mansfield Police Department. Alternatively, since the Appellant does not contest the Trial Court's finding that the search of the vehicle was a valid search incident to his arrest, this separate and independent search of the vehicle incident to the Appellant's arrest stands as proper.

Under Ohio law, a motion to suppress evidence shall be made pre-trial, in writing, and shall "state with particularity the grounds upon which it is made." Crim.R. 12(C); Crim.R. 47. "In order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 10; quoting *State v. Shindler*, 70 Ohio St.3d 54, 636 N.E.2d 319 (1994), at syllabus. "Failure to include or particularly state the factual and legal basis for a motion to suppress waives that issue." *Codeluppi*, 2014-Ohio-1574, ¶ 10; citing *Defiance v. Kretz*, 60

Ohio St.3d 1, 573 N.E.2d 32 (1991). In this case, the Appellant has not argued the impound and subsequent inventory, so it would be waived.

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 a person given permission to drive the vehicle. *See Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978); *applied by State v. Otte*, 74 Ohio St.3d 555, 660 N.E.2d 711 (1996). “A defendant bears the burden of proving not only that the search was illegal, but also that he had a legitimate expectation of privacy in the area searched.” *State v. Dennis*, 79 Ohio St.3d 421, 426, 683 N.E.2d 1096 (1997); *citing Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556 (1980). The Appellant has argued as recently as his jurisdictional memorandum that he is not the owner of the vehicle. If the Appellant is not the owner of the vehicle, then he would not have standing to argue the search of the vehicle.

Assuming arguendo that this Honorable Court chooses to entertain this new argument, Officer Anschutz did not violate the Appellant’s rights by impounding the vehicle as it was part of his community caretaking function.¹ The Appellant suggests in his merit brief, assuming that he is the owner of this vehicle, that the impounding of his vehicle is unconstitutionally violative of the community caretaking function.

An inventory search of a vehicle, pursuant to impound, is a well-accepted exception to the warrant requirement. *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988). Inventory searches are intended to “(1) protect an individual’s property while it is in police custody, (2) protect police against claims of lost, stolen, or vandalized property, and (3) protect

¹ The State reasserts that the Appellant should not be able to argue ownership in the alternative. The Appellant should be required to assert actual error below, rather than suggest “what ifs” for this Court’s consideration.

police from dangerous instrumentalities.” *State v. Mesa*, 87 Ohio St.3d 105, 109, 717 N.E.2d 329 (1999); citing *South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S.Ct. 3092 (1976).

An inventory search must be “conducted in good faith and in accordance with reasonable standardized procedures or established routine.” *State v. Hathman*, 65 Ohio St.3d 403, 604 N.E.2d 743 (1992). Once the inventory search is found as proper, the next consideration is whether the search was pretextual. To determine this, the reviewing court looks at whether the search was done “in good faith pursuant to standard police policy” or whether it was a pretext for an evidentiary search. *State v. Kemp*, 8th Dist. Cuyahoga No. 95802, 2011-Ohio-4235, ¶ 14. The State asserts as a matter of Ohio Law that a valid search incident to arrest obviates the pretextual prong and the good faith prong of a subsequent inventory search.

The touchstone of the Fourth Amendment is reasonableness. *See Opperman*, 428 U.S. at 369-370. As long as the impound is reasonable under the community caretaking function, it satisfies the Fourth Amendment regarding a subsequent inventory search. The Ninth District Court of Appeals found that it is reasonable that a “vehicle can be lawfully impounded when the *occupant* of the vehicle is arrested.” *State v. Goss*, 9th Dist. Lorain No., 2012-Ohio-857, ¶ 8 (emphasis added); citing *State v. Robinson*, 9th Dist. Summit No. 19905, 2000 Ohio App. LEXIS 4920, *3 (Oct. 25, 2000). The Tenth District Court of Appeals found that, even without a specific law providing the exact reason for impounding a vehicle, an impound may be constitutional if it is reasonable. *City of Columbus v. Brown*, 10th Dist. Franklin No. 76AP-793, 1977 Ohio App. LEXIS 9257, *5-6 (March 3, 1977).

In this case, the impound of the vehicle was reasonable under the community caretaking function. Under the reasoning of the Ninth and Tenth District Courts of Appeals, the impound in this case is valid. The trial court likewise upheld the discovery of the loaded firearm as a valid

search incident to arrest. The subsequent impound and removal of the vehicle from the roadway is proper. Since the car was legally impounded under the reasonableness standard of the Fourth Amendment, the ensuing inventory search did not violate the Appellant's Fourth Amendment or his Ohio Constitutional rights. The Appellant does not now contest that the inventory search was a pretext to search for evidence, so that issue has been waived.

Regardless of whether the Appellant has a valid argument here, the Appellant has also failed to appeal or argue the finding of the Trial Court that the handgun was found as valid search incident to arrest. The Appellant raised this issue in his motion to suppress and the Trial Court overruled that motion finding that "it was a search incident to arrest - - - an inventory search incident to towing the car." [ST 16, lines 17-20.] This finding, specifically that the search of the vehicle was a valid search incident to the arrest of the Appellant, has not been contested by the Appellant on his initial appeal or in his merit brief now. This provides an alternate and independent means to the discovery of this handgun. Thus, the Appellant's argument in his merit brief is moot because suppression would not be proper in this case even if the impound and subsequent inventory search of the vehicle was unconstitutional.

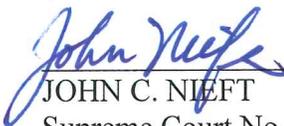
Conclusion

Wherefore, for the foregoing reasons, the State respectfully requests this Court reject the proposition of law of the Appellant and affirm the appellate court's decision.

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 Eric Hedrick, Counsel of Record, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio, 43215, by regular U.S. mail, this _____ day of February, 2015.



CLIFFORD MURPHY (Counsel of Record)
Assistant Prosecuting Attorney

RICHLAND COUNTY
CLERK OF COURTS

FILED

IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

2013 JAN 28 PM 3:20

STATE OF OHIO,

Plaintiff,

vs.

QUAYSHAUN LEAK,

Defendant.

LINDA H. FRANK
CLERK OF COURTS

Case No.: 12 CR 0568

JUDGE JAMES HENSON

MOTION TO SUPPRESS EVIDENCE

Now comes Defendant, by and through counsel, and moves this Court to suppress any and all evidence that may have been obtained as a result of the illegal and unconstitutional search and seizure of the defendant and vehicle. Defendant submits that the burden is upon the State to justify the seizure of the Defendant and evidence obtained from the Defendant and to show why the above evidence should not be suppressed or excluded from his upcoming jury trial.

Defendant while sitting in a parked car on private property was arrested and questioned without being read his Miranda rights. Officers then searched the vehicle claiming an "inventory search", even though the car was never towed and was parked legally on private property. Officers claimed to have an arrest warrant for domestic violence.

A bright line rule was stated by the Supreme Court in Arizona v. Gant, 129 S.Ct. 1710, 1723-24 (2009):

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be

unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

In any even, an inventory search is forbidden if it is “motivated by an officer’s desire to investigate and seize evidence of a criminal act.” United States v. Cherry, 436f.3d 769, 776-77 (7th Cir. 2006) (Posner, J., dissenting)

An inventory search is lawful if (1) the individual whose possession is to be searched has been lawfully arrested, and (2) the search is conducted as part of the routine procedure incident too incarcerating an arrested person and in accordance with established inventory procedures. United States v. Jackson, 189F.3d 502, 508-09 (7th Cir. 1999). “Both the decision to take the car into custody and concomitant inventory search must meet the strictures of the Fourth Amendment.” United States v. Dugay, 93 F.3d 346, 351 (7th Cir, 1996.) (“[T]he decision to impound (the seizure’) is properly analyzed as distinct from the decision to inventory (the “search”). 93 F.3d at 351.

In addition the overruling of the motion to suppress was improper as evidenced by recent decisions by the United States Court of Appeals for the Sixth Circuit, United States v. McCraney, 674 F.3d, 614 (6th Cir. 2012). In McCraney the court considered a similar situation where the government contended that a search was permissible as an incident to an arrest or is the search based on reasonable suspicion. In McCraney defendant was stopped by a police officer because the police officer saw the vehicle approaching without dimming its high beams, which was a traffic violation. As the officer followed the vehicle he observed both the driver and passenger lean over toward the floor of the car, which the officer believed, from his experience, which led to the discovery of firearms or other contraband. When the vehicle was stopped the occupants were told to show their hands and they complied. When asked for identification and insurance on of the occupants explained that they were lost and provided

Ohio ID identification and asked for directions to Interstate 77. At that point the defendant attempted to get out of the vehicle twice and complied when he was told to be back into the vehicle as one of the occupants did not have a valid driver's license the defendant's license was suspended this was cause for an arrest. Other officers arrived and the defendants were patted down, instructed to stand near the rear of the vehicle while other officers proceeded to search the passenger compartment and a firearm was found under the driver's seat.

The Court of Appeals ruled that order granting suppression was proper because this was not a search incident to a lawful arrest, relying on Arizona v. Gant, 556 U.S. 332 (2009). Moreover, the court also ruled that this was not a proper protective search of the inside of the vehicle based on reasonable suspicion:

Rather, the Buick came to the attention of the officer because the driver failed to dim the headlights. This provided probably cause to make a traffic stop, but not a basis for reasonable suspicion that the occupants might be armed and dangerous. See Graham 483 F. 3d at 436 ("it is hard to imagine how suspicion of a parking violation, itself, could ever justify a protective search of a suspect's person."). Nor would the existence of probable cause to arrest Ammons for driving with a suspended license and McCraney for unlawful entrustment arose reasonable suspicion to believe they were dangerous. Finally, the fact that McCraney tried to get out of the Buick twice while Ricker was checking the driver's identification does not add to the suspicion that the occupants were armed. According to Ricker's description, it was not an attempt to flee, but an attempt to get Ricker's attention, and was no accompanied by otherwise suspicious behavior.

Examining the factors, taken together, the district court did not err in concluding that the officer did not have reasonable suspicion to justify a protective search of the vehicle. 674 F.3d at 621. (Opinion at pp.8-9).

The court of Appeals for Cuyahoga County ruled that an inventory search exception could not be used as a justification for searching a vehicle. In State v. Hamilton, Case No. 95720, 2011-Ohio-2835, the defendant was stopped after receiving information that there was a struggle involving a number of individuals and that certain females were witnesses to a shooting in Maple Heights, Ohio. The vehicle pulled up to where the police were stopped quickly backed up and drove off. An officer went after the vehicle and stopped the vehicle.

Before the vehicle was stopped an officer noted that the driver was leaning over towards the passenger side. After there was stop a back-up officer was called to the scene. The trial court granted a motion to suppress. This court affirmed relying on Arizona v Gant, 556 U.S. 332 (2009). The court noted that police officers may search a vehicle incident to an arrest only where the suspect is within reaching distance of the vehicle, or there is reason to believe evidence of the offense for which the arrest was made would be present in the vehicle. In Hamilton, relying on its prior case, State v. Thomas, Case No. 91891, 2009-Ohio-3461, this court affirmed the suppression order:

{ 15} in agreeing with Gant that the motion to suppress should have been granted, the supreme Court reasoned that because Gant had been arrested, handcuffed, and detained in a patrol car, he had no possibility to regain access to his vehicle. Id. Further, Gant was arrested for driving with a suspended license, for which no related evidence of this conduct could be found inside the vehicle. Id. A The court held the search to be invalid. Id. {16} Similarly, in Thomas, police officers observed Thomas failed to use his turn signal and arrested him for driving without a license., handcuffed him and placed him in the back of the patrol car. The officers the searched the vehicle and found two backs of crack cocaine in the glove box. Id. Following the reasoning outline in Gant, this Court held that because the officers handcuffed and placed Thomas in a patrol car where he no longer posed a risk to officer safety, and because there would be no evidence of the offense of driving with a suspended license present in the vehicle, the search of Thomas's vehicle was illegal. Id.

Therefore defendant's motion to suppress should be granted

Respectfully Submitted,

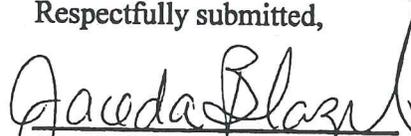


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Suppress was duly served upon the Richland County Prosecutor by hand delivery, on this the 25th day of January 2013.

Respectfully submitted,


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