In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2016-0271
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
JOSHUA D. POLK,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14AP-787
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLANT

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INTRODUCTION

At its core, the Fourth Amendment is designed to protect an individual's reasonable and actual expectations of privacy. *See Smith v. Maryland*, 442 U.S. 735, 739-41 (1979); U.S. Const. amend IV. When there is no reasonable expectation of privacy, there can be no violation of the Fourth Amendment. *See Smith*, 442 U.S. at 739-41. And even when a Fourth Amendment violation *does* occur, that does not necessarily mean that any evidence that was discovered must be suppressed; "[t]he fact" of a Fourth Amendment violation standing alone "does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). Instead, exclusion is proper only if police misconduct is "sufficiently deliberate that exclusion can meaningfully deter it" and "sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id*. at 144. Ignoring these principles, the Tenth District Court of Appeals made three fundamental errors by holding that school officials violated Joshua Polk's Fourth Amendment rights when they searched a backpack that he had left behind on a bus and that, as a result, the trial court properly suppressed the evidence that they discovered.

First, the Tenth District overlooked the fact that Polk's backpack had been abandoned. It is, at this point, black-letter law that "[a] warrantless search of abandoned property does not violate the Fourth Amendment because any expectation of privacy is forfeited upon abandonment." *State v. Gould*, 131 Ohio St. 3d 179, 2012-Ohio-71, syl. ¶ 1. The appellate court's analysis therefore should have ended where the facts giving rise to this case began: with a backpack sitting by itself on a bus. Because Polk abandoned any reasonable expectation of privacy the moment he similarly abandoned his backpack, the appellate court should have rejected his Fourth Amendment challenge out of hand.

Second, the Tenth District failed to adequately consider the need to maintain security and order in a school setting and a student's reduced expectations of privacy while at school. *See*

New Jersey v. T.L.O., 469 U.S. 325, 339-42 (1985). In an academic setting, a student's privacy interest must be balanced against the interest of teachers and administrators in "the preservation of order and a proper educational environment." *Id.* at 339. Even assuming that Polk retained some expectation of privacy in his abandoned backpack, that expectation was diminished by the fact that he left it on a *school* bus. While the appellate court acknowledged that school officials had an interest in determining that the bag "did not pose a hazard," it took a cramped view of the scope of that interest. *See State v. Polk*, 2016-Ohio-28 ¶¶ 13-14 (10th Dist.) ("App. Op.").

Third, the Tenth District applied the exclusionary rule to searches performed by teachers and school officials, even though neither this Court nor the U.S. Supreme Court has yet determined whether the rule applies to such searches. The exclusionary rule "exacts a heavy toll on both the judicial system and society" and "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis v. United States*, 564 U.S. 229, 237 (2011). The Tenth District misinterpreted the U.S. Supreme Court's decision in *T.L.O.* when it cited that decision as the basis for concluding that the exclusionary rule applied in this case. *See* App. Op. ¶ 20. The appellate court's suggestion to the contrary, the U.S. Supreme Court in *T.L.O.* explicitly *declined* to decide whether or how the exclusionary rule should apply in an academic setting. *See T.L.O.*, 469 U.S. at 333 n.3 (stating that "we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities").

For these reasons, and the reasons that follow, the Court should reverse the decision of the Tenth District Court of Appeals and hold that the trial court erred in suppressing the evidence at issue in this case.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law officer, and has a keen interest in decisions that limit the ability to prosecute crime. The Attorney General's interest is especially acute here because he has made school safety a priority.

As part of his mission to protect Ohio families, the Attorney General has devoted an entire task force to school safety. The Attorney General's School Safety Task Force includes "public safety officials, school personnel, mental health professionals, and others," and has produced a set of recommendations about safety. *See* http://goo.gl/zlj7rb (last accessed July 26, 2016). Part of the Task Force's output has been the Attorney General's involvement in making sure that every public school in Ohio has a safety plan in place. *See* http://goo.gl/BM7AaH (last accessed July 26, 2016). The questions in this case intersect with those initiatives.

STATEMENT OF THE CASE AND FACTS

Joshua Polk, a student at Whetstone High School in Columbus, left his backpack on a school bus, and the backpack was discovered by the bus driver after all of the students had disembarked. R. 116, Hearing Tr. at 17 and 7. The driver gave the backpack to Robert Lindsey, the school's safety and security resource coordinator. *Id.* at 5-6. Lindsey was responsible for safety and security at the high school, but was not a law enforcement officer. *Id.*

Lindsey opened the backpack and observed a binder, notebooks, and papers, some of which bore Polk's name. *Id.* at 56. Consistent with school policies related to abandoned backpacks, Lindsey then proceeded to conduct a more thorough search of the bag. In the presence of a school administrator, Lindsey dumped out the contents of the backpack. *Id.* at 56-57. When he did so, several bullets fell out. *Id.* at 6-7. Although Lindsey testified that, because of rumors about Polk's gang affiliation, he had additional concerns when he first learned that the

bag belonged to Polk, *id.* at 9, the school's policies would have required a thorough search of the bag regardless of who owned it, *id.* at 9 and 22-23.

The discovery of the bullets in the abandoned backpack led to a search of another backpack that Polk had with him at the time. *Id.* at 10-14. That search found a gun. *Id.* at 13. At trial Polk moved to suppress the gun and bullets, claiming in part that Lindsey violated his Fourth Amendment rights when he dumped out the contents of the backpack. R. 79, Motion to Suppress. Among other things, Polk argued at the suppression hearing that school officials were required to have a reasonable suspicion of wrongdoing before they could do anything more than perform a cursory examination of the abandoned backpack. *See* R. 116, Hearing Tr. at 68-70. The common pleas court granted the motion. R. 111.

The Tenth District affirmed. It held that dumping out Polk's backpack as part of the "second search," although it "could have been justified at the outset," was illegal because school officials may have performed the more thorough search based on their belief about Polk's possible gang affiliation. App. Op. ¶ 16. The Tenth District upheld the exclusion, reasoning that the Fourth Amendment "exists to be enforced." *Id.* at ¶ 26. Judge Luper Schuster concurred in judgment only, while Judge Dorian concurred in part and dissented in part. *Id.* at ¶¶ 31-38. The State appealed and the Court accepted the case for review. *State v. Polk*, 145 Ohio St. 3d 1470, 2016-Ohio-3028.

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law No. I:</u>

> *A school official's search of a student backpack, justified at its inception, remains justified regardless of the official's motivation or a brief interruption of the search.*

Individuals seeking to invoke the protection of the Fourth Amendment's prohibition against unreasonable searches must be able to show that they had "a 'justifiable,' a 'reasonable,'

or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). That "expectation of privacy does not give rise to Fourth Amendment protection . . . unless society is prepared to accept [it] as objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 39-40 (1988). Polk in this case cannot claim a legitimate expectation of privacy in the backpack that he left on the school bus for at least two reasons. First, he forfeited any expectation of privacy when he left his backpack behind. And second, any residual privacy interest he may have had was further diminished by the fact that the search of his backpack occurred at school.

A. Individuals do not have a reasonable or legitimate expectation of privacy in abandoned property.

Individuals have no reasonable expectation of privacy in items that they have discarded. *Greenwood*, 486 U.S. at 40-41. That is why the Court has on several occasions held that "[a] warrantless search of abandoned property does not violate the Fourth Amendment because any expectation of privacy is forfeited upon abandonment." *State v. Gould*, 131 Ohio St. 3d 179, 2012-Ohio-71 syl. ¶ 1; *see also State v. Freeman*, 64 Ohio St. 2d 291, syl. ¶ 2 (1980) ("A defendant has no standing under the Fourth Amendment to the United States Constitution to object to a search and seizure of property that he has voluntarily abandoned."). Abandonment for purposes of the Fourth Amendment "is not abandonment in the strict property-right sense," but instead asks "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Freeman*, 64 Ohio St. 2d at 297.

Resolution of Polk's Fourth Amendment claim should have required little more than a straightforward application of *Gould* and *Freeman*. Because he abandoned his backpack when

he left it behind on the bus, Polk could claim no reasonable expectation of privacy in its contents. *Gould*, 131 Ohio St. 3d 179 at syl. ¶ 1. Without such an expectation of privacy, school officials were free to search Polk's backpack at will; "[t]here can be nothing unlawful in the Government's appropriation of such abandoned property." *Abel v. United States*, 362 U.S. 217, 241 (1960).

Rather than adhering to controlling precedent, which established that Polk lost any expectation of privacy once he left his backpack on the school bus, the Tenth District held that his expectation of privacy was merely *diminished*. *See* App. Op. ¶ 13. It suggested that identifying the backpack's owner was one of only two permissible reasons for school officials to search it, and held that once they had done so, their justification for a more thorough search disappeared. *See id.* at ¶¶ 13 and 14.

If the Tenth District was correct then the *Gould* and *Freeman* decisions would have come out the other way. In both cases, the Court upheld the warrantless searches of abandoned property even when the police knew to whom it belonged *before* they conducted their search. In *Freeman*, the police observed the defendant drop his bag before fleeing. *See Freeman*, 64 Ohio St. 2d at 297-98. And in *Gould*, the defendant's mother brought the police a hard drive the defendant had left with her because she was concerned that it might contain child pornography. *See Gould*, 131 Ohio St. 3d 179 at ¶ 9. The Court held in *Freeman*, and again in *Gould*, that there was no Fourth Amendment violation *not* because law enforcement had a sufficient justification for their searches, but because the Fourth Amendment is *entirely inapplicable* to searches of abandoned property. *See Gould*, 131 Ohio St. 3d 179 at syl. ¶ 1 and *Freeman*, 64 Ohio St. 2d 291 at syl. ¶ 2. The Tenth District's failure to do the same in this case by itself provides sufficient reason to reverse the decision below.

B. Students have a diminished expectation of privacy while they are at school.

"Fourth Amendment rights . . . are different in public schools than elsewhere"; "the nature of those rights is what is appropriate for children in school." *Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). What is appropriate for schools must account for educators' "obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). Indeed, the "government has a heightened obligation to safeguard students whom it compels to attend school." *Id*. at 353 (Blackmun, J., concurring).

Because "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," the U.S. Supreme Court has held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *Id.* at 340-41. School officials do not need to have a suspicion of wrongdoing before they may conduct a search. *Acton*, 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 342 n.8). Instead, the test for whether a search conducted at school was permissible under the Fourth Amendment has two parts. *First*, it asks whether "the action was justified at its inception," and second, whether the search "as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 342 (citations omitted). Both factors favor the State in this case.

As to the first factor, even the Tenth District recognized that school officials are justified in examining the contents of an abandoned bag. *See* App. Op. ¶ 16. The appellate court construed that interest too narrowly, however, when it held that the school officials in this case were limited to performing only a cursory examination the contents of Polk's backpack and that their interest dissipated once they determined "that the bag was not a bomb and that it was

owned by Polk." App. Op. ¶¶ 13-14. But if, as the appellate court admitted, safety considerations are sufficient to justify a search, then they are sufficient to justify a *thorough* search. This case proves the point. Although school officials were able to quickly determine that Polk's backpack did not contain a bomb, it was only after they examined the backpack's contents more carefully that they discovered that it *did* contain several bullets. And bullets, no less than a bomb, can raise safety concerns in a school setting.

As to the second factor, it does not matter for Fourth Amendment purposes that the search of Polk's backpack was actually conducted in two stages. The difference between a search that takes place at a single time and in a single location and one that is conducted in multiple stages is not constitutionally significant. A "reasonable delay in effectuating [a search] does not change the fact [a defendant is] no more imposed upon than he could have been at the time and place" that the reasons justifying the search first arose. *United States v. Edwards*, 415 U.S. 800, 805 (1974). And a "warrantless search" of a package is "not unreasonable" merely because officials took it to another location "rather than immediately opening [it]." *United States v. Johns*, 469 U.S. 478, 486 (1985).

C. Any concerns that school officials may have had about Polk's gang affiliation are irrelevant for Fourth Amendment purposes.

As a general rule, if circumstances objectively justified a search, then the search was reasonable regardless of any subjective intent that may have motivated the officials who conducted it. *Ashcroft v. al-Kidd*, 563 U.S. 731, 739-40 (2011). In most instances "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Whren v. United States*, 517 U.S. 806, 814 (1996). "Special needs" searches, which include searches conducted at schools, *see Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001), fall into a narrow exception to this general rule,

Ashcroft, 563 U.S. at 736-37. In some instances, a court may consider whether the search was pretextual. *See id.* at 739-40. But in most cases, what matters is the intent of a *program*, not an individual; the inquiry into motivation "is directed at ensuring that the purpose behind the *program* is not 'ultimately indistinguishable from the general interest in crime control.'" *Brigham City, Utah v. Stewart*, 547 U.S. 398, 405 (2006) (*quoting Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (emphasis in original)).

In this case, there was no evidence that the school's policy requiring a search of all abandoned backpacks was improper, nor was there evidence that Lindsey's reasons for searching the backpack were pretextual. Polk therefore has no basis to claim that the search of his backpack violated the Fourth Amendment. *See Whren*, 517 U.S. at 811-12. The only evidence of Lindsey's motivation demonstrated that he was driven exclusively by the school's policies and the safety concerns underlying those policies. *See* R. 116, Hearing Transcript at 20-23. At the suppression hearing, Lindsey testified *repeatedly* that it was school policy to search all abandoned bags and that he would have thoroughly searched Polk's backpack even had he not been aware of Polk's possible gang affiliation. *Id.* at 8-9, 22-23, and 42-43. In light of that policy, Lindsey testified, he would have been delinquent in his duties had he *not* searched the abandoned backpack even after he discovered that it belonged to Polk. *Id.* at 13-14. Thus even if the Tenth District were correct that Lindsey's motivation for the search could be relevant in some instances, it was not here.

Amicus Curiae Ohio Attorney General's Proposition of Law No. II:

The exclusionary rule does not apply to searches by school officials of students in school.

"[T]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). "Suppression of evidence . . . has always been [a] last resort, not [a] first impulse." *Hudson v.*

Michigan, 547 U.S. 586, 591 (2006). The purpose of the exclusionary rule is to deter future Fourth Amendment violations. *Davis v. United States*, 564 U.S. 229, 236-37 (2011). Its application "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring v. United States*, 555 U.S. 135, 137 (2009). Exclusion is called for "only where its deterrence benefits outweigh its 'substantial social costs.'" *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)). The exclusionary rule therefore does not apply "when law enforcement officers [act] . . . in objective good faith or their transgressions [are] . . . minor, [because] the magnitude of the benefit conferred [by the exclusionary rule] on . . . guilty defendants offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908; cf. *State v. Wilmoth*, 22 Ohio St. 3d 251, syl. ¶¶ 1-2 (1986) (applying *Leon* to good faith reliance on a warrant).

Therefore, even if the search of Polk's backpack violated the Fourth Amendment, it does not necessarily follow that the evidence discovered as a result must be suppressed. To begin with, neither this Court, nor the U.S. Supreme Court, has ever held that the exclusionary rule applies to searches conducted by school officials in the same way that it applies to searches conducted by law enforcement. In fact, the U.S. Supreme Court has explicitly *declined* to answer that question. *See T.L.O.*, 469 U.S. at 333 n.3 (stating that "we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities"). There are good reasons to conclude that it does not or that, at the very least, that it does not apply in *this* case.

First, the rationale behind the exclusionary rule—deterrence of *police* misconduct—does not apply because school officials are neither members of law enforcement nor, in most cases, are they acting on law enforcement's behalf. It was differences between the roles played by

teachers and police officers that first led the U.S. Supreme Court to conclude in *T.L.O.* that "school officials need not obtain a warrant before searching a student who is under their authority." *See T.L.O.*, 469 U.S. at 340. Among other things, it noted that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures," and that there is "value of preserving the informality of the student-teacher relationship." *Id*. By eliminating the need to get a warrant, the Court wanted to free teachers from worrying about the "niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id*. at 343.

The same concerns that animated the *T.L.O.* decision suggest that the exclusionary rule should not apply to teachers and school administrators in the same way that it applies to law enforcement officers. After all, teachers would not be free from worrying about "niceties of probable cause" if they remained concerned that a good-faith mistake when carrying out their academic duties would mean that probative and valuable evidence of a defendant's guilt might be lost.

Second, at the very least, the good faith exception should apply in this case. When Lindsey dumped out Polk's abandoned backpack he was doing nothing more than following established school policy, a policy that would have required him to do the same thing regardless of the bag's owner. R. 116, Hearing Tr. at 9. He acted in good faith by adhering to the school's neutral search protocols and any resulting violation of the Fourth Amendment was at most negligent. Under the circumstances, it cannot be said that Lindsey's actions resulted in the type of "purposeful or flagrant violation of [Polk's] Fourth Amendment rights" that would warrant suppression of the evidence at issue here. *See Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (declining to apply the exclusionary rule where a police officer "made two good-faith mistakes"

and was "at most negligent"). Any deterrent benefit to be gained by applying the exclusionary rule in this case therefore would not outweigh the costs. *See Leon*, 468 U.S. at 909-10 and 920-22. That is true particularly in the absence of a clear statement from this Court or the U.S. Supreme Court that the exclusionary rule applies to school officials. Without such a statement even diligent teachers who were well versed in the niceties of the Fourth Amendment would not know that good-faith mistakes could result in the suppression of valuable and probative evidence of a defendant's guilt.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Tenth District.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant was served on July 26, 2016, by U.S. mail on the following:

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