IN THE SUPREME COURT OF OHIO
2018

STATE OF OHIO,	Case No. 2017-1135
Plaintiff-Appellant,	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
-vs-	
JUSTIN WINTERMEYER,	Court of Appeals Case No. 16AP-381
Defendant-Appellee.	

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF THE FACTS

I. Trial court proceedings.

Defendant-Appellee ("Wintermeyer") generally accepts the State's factual summary stated in its Brief, but wishes to include a few additions/clarifications.

As the State points out, Wintermeyer was indicted on possession of heroin, a fifth-degree felony. R. 3.

Wintermeyer filed a motion to suppress. R. 27. As the State pointed out with much detail, Wintermeyer's motion set forth both a legal and factual basis to contest the warrantless search and seizure in violation of his Fourth Amendment rights giving notice to the State and to the Court.

In response, the State filed what looked to be a boilerplate memorandum contra asserting that an *evidentiary hearing* will establish that the evidence sought to be introduced by the state was obtained by Constitutionally valid means. (emphasis added). The State used a string cite and the only reference to standing in the memorandum contra was: "*Rakas v. Illinois*, 439 U.S. 128 (1978), followed by the parenthetical "(Standing)." *Id*." Nothing further was set forth regarding standing in the memorandum.

The trial court held a hearing on the defense's motion. Columbus Police Officer Ryan Wise ("Wise") was the only witness to testify at the hearing. Wise and another officer were dispatched to a residence having nothing to do with Wintermeyer or Carlson, the individual with Wintermeyer. Tr. 6–7. The officer saw Wintermeyer and Carlson walking in a nearby alley. Tr. 19. The officer did not know either of the individuals. *Id.* In fact, the two men were of no concern at that point because they were not doing anything unlawful. Tr. 9, 20.

Wintermeyer entered an unknown residence, while Carlson waited in the alley. Tr. 21. Again, Wise testified the actions of the two men did not amount to anything improper or illegal and there was no reason to detain either of the individuals. Tr. 21. Wise *suspected* that Wintermeyer may have purchased some narcotics inside the residence. Tr. 21.

Wise then saw Wintermeyer hand over to his companion what appeared to be a small plastic bag. Tr. 22-23. Although the trial court did not determine the exact point of detention, it is clear the trial court found that Wise detained both Wintermeyer and Carlson prior to seizing the plastic bag. *State v. Wintermeyer*, 2017-Ohio-5521, 93 N.E.3d 397, ¶ 20 (10th Dist.). Wise simply detained the two men and grabbed the object from Carlson. Tr. 25

Neither of them attempted to flee, made furtive movements, or acted nervous. Tr. 25. Wise could not recall any discussion prior to grabbing the drugs. Tr. 24.

At the evidentiary hearing, the trial court permitted the State to argue in closing argument. Tr. 28. The State argued the basis for the officer's reasonable suspicion to detain Wintermeyer. Tr. 28-30. The trial court also permitted the State to rebut defense counsel's argument. Tr. 34. The State never brought up standing and instead argued reasonable suspicion for the detention. Tr. 34-36.

After the hearing, the defense filed a supplemental memorandum. R. 37. The State did not file a post-hearing memorandum. The trial court then filed a decision and entry sustaining the motion to suppress. R. 39-40.

II. Appellate proceedings.

This Court is aware of the decision of the *State v. Wintermeyer*, 2017-Ohio-5521, 93 N.E.3d 397, ¶ 20 (10th Dist.), Wintermeyer adds nothing further in that regard.

ARGUMENT

Proposition of Law: Where the State fails to challenge a defendant's reasonable expectation of privacy, labeled by the State as standing, at an evidentiary hearing on a motion to suppress after the defendant has filed a legally sufficient motion to suppress for warrantless search and seizure, and instead elects to defend the reasonableness of the search and seizure, the State waives further challenge on the issue.

I. After a defendant files a legally sufficient motion to suppress for a warrantless search and seizure, the burden then shifts to the State to justify the warrantless search.

There is no dispute that Wintermeyer in challenging that a violation of his Fourth Amendment rights has the ultimate burden of justifying his motion. However, Fourth Amendment principals can involve shifting of burdens based upon the type of challenge. As such, that context is appropriate.

As the court is aware, in order for a search to be considered reasonable it must have been based on probable cause and executed pursuant to a valid warrant. *State v. Moore* (2000), 90 Ohio St.3d 47, 49. It is well settled in Ohio that searches conducted without a valid warrant are "*per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *State v. Kessler* (1978), 53 Ohio St.2d 204, 207 citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443; *see also*, *Xenia V. Wallace* (1988), 37 Ohio St.3d 216, 218; *State v. Roberts* (2006), 110 Ohio St.3d 71, 81-82; and *City of Athens v. Wolf* (1974), 38 Ohio St.2d 237, 239. Where a search is conducted without a warrant, the prosecution bears the heavy burden of proving the facts that justify the search under one of the recognized exceptions. *United States v. Jeffers* (1951), 342 U.S. 48, 51; *Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, 524 N.E.2d 889, syllabus.

Having the initial burden, it is the defendant's obligation to file "a motion to suppress [which] must 'state with particularity the legal and factual issues to be resolved,' thereby placing

the prosecutor and court 'on notice of those issues to be heard and decided by the court…'" *City of Columbus v. Ridley*, 10th Dist. No. 15AP-84, 2015-Ohio-4968, ¶ 23, 50 N.E.3d 934, quoting *State v. Shindler*, 70 Ohio St.3d 54, 58, 1994 Ohio 452, 636 N.E.2d 319 (1994). After a defendant files a motion to suppress and puts the ball into play' and serve notice that the defendant intends to have the state meet its legislatively mandated burden of demonstrating compliance with any and all challenged regulations and requirements, the burden then shifts to the State to justify its actions. See *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, ¶ 10, quoting *State v. Schindler*, 70 Ohio St.3d 54 (1994), syllabus.

This is the framework set forth in *Boyd*, which stated that once a defendant "establish[es] that a warrantless search took place and notif[ies] the prosecution of the factual and legal grounds on which the defendant's challenge rests," "the prosecution bears the burden of proving that the search was legal," and that "[o]ne way the state can satisfy its burden is by raising the defendant's lack of standing to contest the search." *State v. Boyd*, 2d Dist. No. 25182, 2013-Ohio-1067, ¶ 31 (quoting prior Second District case).

This is not to say that standing is presumed or automatic. Rather, it is the legal framework within which the parties must operate.

II. The State must raise standing in the trial court or they waive the issue.

The State in its Brief disagrees with the Tenth District's conclusion that the State failed to argue standing in the trial court. *Wintermeyer*, 2017-Ohio-5521, ¶ 10. They rely on their memorandum contra for that proposition.

However, a review of their memorandum further bolster's the argument that the State waived or forfeited the issue. As noted above, the State filed what looked to be a boilerplate memorandum asserting that an *evidentiary hearing* will establish that the evidence sought to be introduced by the state was obtained by Constitutionally valid means. As such, they were

absolutely required to further assert the argument if it was applicable. Instead, the State completely abandoned the argument by not raising it once during the hearing or even after the appeal despite Wintermeyer filing a supplemental memorandum after the hearing. The State was obviously aware of the argument because they used a string cited it in their memorandum. By not further advancing the argument they most certainly waived it.

The Tenth District's reliance on *Boyd*, as well as the other cases cited was appropriate. The state's failure to argue the issue of standing in the trial court constitutes a waiver of such issues for purposes of appeal. *Boyd*, 2013-Ohio-1067, ¶ 32 (finding the state waived the issue of whether the defendant had standing to challenge the constitutionality of search). *See also ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 16, 13 N.E.3d 1101; *State v. Neal*, 10th Dist. No. 15AP-771, 2016-Ohio-1406, ¶ 29; *Clemens v. Nelson Fin. Group, Inc.*, 10th Dist. No. 14AP-537, 2015-Ohio-1232, ¶ 27, citing *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34, 912 N.E.2d 595 ("Generally, a party waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings."); *Ridley* at ¶ 28. *Compare State v. Muldrow*, 10th Dist. No. 15AP-1119, 2016-Ohio-4774, ¶ 20, 68 N.E.3d 260.

"[A] motion to suppress must 'state with particularity the legal and factual issues to be resolved,' thereby placing the prosecutor and court 'on notice of those issues to be heard and decided by the court and, by omission, those issues which are otherwise being waived.'" *City of Columbus v. Ridley*, 10th Dist. No. 15AP-84, 2015-Ohio-4968, ¶ 23, 50 N.E.3d 934, quoting *State v. Shindler*, 70 Ohio St.3d 54, 58, 1994 Ohio 452, 636 N.E.2d 319 (1994). "In general, issues not raised by a party during a suppression hearing cannot be raised for the first time on appeal." *State v. Thomas*, 10th Dist. No. 14AP-185, 2015-Ohio-1778, ¶ 37, citing *State v. Bing*, 134 Ohio App.3d 444, 449, 731 N.E.2d 266 (9th Dist.1999).

This Court has set forth well-established precedent for the proposition a party waives on appeal issues not raised in the trial court. An "appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs*, 14 Ohio St.2d 56, 61, 236 N.E.2d 545, 549 (1968). "Where as here, the state fails to challenge appellant's standing to object and thereby preserve its record for appeal and instead elects to defend the reasonableness of the search and seizure, it also waives any right to challenge 'standing' on appeal." *State v. Morris*, 42 Ohio St.2d 307, 311, 329 N.E.2d 85, 89 (1975) (reversed on other grounds) citing *State v. Childs*, 14 Ohio St.2d 56, 61, 236 N.E.2d 545, 549 (1968).

Additionally, as the State pointed out, some federal courts have found that the prosecution may not raise a defendant's lack of standing for the first time on appeal because Fourth Amendment standing is not "jurisdictional." See, e.g., *United States v. Sheffield*, 832 F.3d 296, 304 (D.C.Cir.2016); *United States v. Noble*, 762 F.3d 509, 527 (6th Cir.2014); *United States v. Golson*, 743 F.3d 44, 55 (3rd Cir.2014), n. 9; *United States v. Ewing*, 638 F.3d 1226, 1230 (9th Cir.2011). It is true that Fourth Amendment standing is not the same as jurisdictional standing. *Byrd v. United States*, 584 U.S., _____ (2018) (Slip Op. at 14).

The problem, simply put, was that the State failed to raise the issue of standing and now they wish to go back and have a second bite at the apple. Policy dictates that what is good for goose should be good for the gander. If a defendant does not raise an issue at a motion hearing his or her issue is deemed waived and that even applies to constitutional rights. The State should be held to the same standard.

III. Wintermeyer met his burden that the evidence was obtained as a result of a violation of his or her own Fourth Amendment rights.

The State's reliance on *Rakas, Salvucci,* and *Padilla*, illustrates that Wintermeyer had standing or a reasonable expectation of privacy in the plastic bag even if this Court does not find the State waived the issue.

In most all of the cases cited by State the prosecutor raised the issue of standing, which was the case in *Rakas*. Not the case here. A review of *Rakas* demonstrates why this case is different and why this Court should overrule the State's assignment of error. The State in *Rakas* challenged standing and thereafter the defendants did not assert the vehicle, rifle, or shells was their property. Further, none of the property was on their person. In *Salvucci* and *Padilla,* again there were no facts directly indicating the defendants had an interest in the property at issue.

Wintermeyer actually possessed the property in this case, the plastic bag, which is not in dispute. For that, Wintermeyer was charged with possession of drugs in this case. Wintermeyer handed it to his companion and the two were immediately detained. Subsequent to the illegal detention his property was taken. Wintermeyer did not tried to flee. Thus, Wintermeyer had a reasonable expectation of privacy in the plastic bag. Wintermeyer had standing.

IV. The exclusionary rule is the appropriate remedy in this case.

Counsel would point out that this is not the proposition of law accepted by the Court. As such, the Court need not consider this issue. However, counsel will address the issue briefly if the Court is of the opinion that this issue is within this Court's purview.

The exclusionary rule operates to bar the state's use of evidence obtained in violation of a person's Fourth Amendment rights. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 (1914); *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961) (holding that "all evidence obtained by searches and seizures in violation of the

Constitution is, by that same authority, inadmissible in a state court"). The exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561(1974). The United States Supreme Court has held that the exclusionary rule applies to both "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939). *See also Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The Tenth District considered the conduct of the officer and even exceptions to the exclusion rule not raised by the State and came to the determination that exclusion was the appropriate remedy. The officer's conduct in this case was without justification. The officer detained the individuals without reason or just cause. The officer violated Wintermeyer's constitutional rights and as such exclusion is the appropriate remedy.

CONCLUSION

For the foregoing reasons, the Tenth District's judgment should be sustained.[1] If the Court is inclined to reverse on the issue raised, counsel would request the Court remand to allow for the record to be more fully developed on account of the Appellant's failure to raise the issue in the trial court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the forgoing was served via electronic mail this day, September 13, 2017, to Seth L. Gilbert, at sgilbert@franklincountyohio.gov

/s/Dustin M. Blake
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[1] If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170 (1988).