Supreme Court of Ohio Clerk of Court - Filed October 04, 2016 - Case No. 2016-0271

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

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ARGUMENT

Joshua Polk left his backpack on the school bus. When school officials searched it, they discovered that it contained live ammunition. In his earlier amicus brief, the Attorney General explained that the search did not violate the Fourth Amendment because, among other reasons, Polk abandoned the backpack when he left it behind on the school bus and he therefore had no reasonable expectation of privacy in it at the time of the search. In response, Polk argues that the backpack was not abandoned and that, even if it was, the State waived the issue of abandonment. He is wrong on both counts.

A. Polk forfeited any reasonable expectation of privacy in his backpack when he left it behind on the school bus.

A defendant alleging a violation of his or her Fourth Amendment rights must first demonstrate "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). Without a reasonable expectation of privacy, there is no basis to challenge a search. It is for that reason that "[a] warrantless search of abandoned property does not violate the Fourth Amendment." *State v. Gould*, 131 Ohio St. 3d 179, 2012-Ohio-71 syl. ¶ 1. In such cases, "any expectation of privacy is forfeited upon abandonment." *Id.*

Significantly, abandonment under the Fourth Amendment differs from abandonment for property law. Property may be abandoned under the Fourth Amendment even when it is still "owned" in the property-law sense; "what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein." *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975). The "mere ownership of property does not establish a legitimate expectation of privacy unless the owner vigilantly protects the right to exclude others." *Gudema v. Nassau Cty*, 163 F.3d 717, 722 (2d Cir. 1998). Instead, intent to abandon must be determined

objectively by examining the facts known at the time of a search. *See Gould*, 131 Ohio St. 3d 179 at syl. ¶ 2; *see also United States v. Rem*, 984 F.2d 806, 810-12 (7th Cir. 1993) (finding that defendant who failed to retrieve a suitcase from a train's publicly accessible luggage rack had abandoned it).

Polk argues that in this case his backpack was lost, not abandoned. *Mislaid* property, he claims, should be treated differently for purposes of the Fourth Amendment than *abandoned* property. Polk is both wrong that there is a distinction between types of property left behind and, even assuming a distinction, wrong that he did not mislay *and* abandon his backpack.

Neither this Court, nor the U.S. Supreme Court, has ever recognized the distinction for which Polk now advocates. And other courts have rejected it. For example, the Iowa Supreme Court found that a defendant who had "inadvertently" left his journal at a restaurant had abandoned it. *State v. Barrett*, 401 N.W.2d 184, 189-90 (Iowa 1987) (finding that the journal had been abandoned in light of "the public nature of the place where [it] was discovered and examined"). Other courts have reached similar conclusions. *See United States v. Alewelt*, 532 F.2d 1165, 1168 (7th Cir. 1976) (no expectation of privacy in jacket left unattended in a public place); *Fitzgerald v. Caldera*, 34 F. Supp. 2d 1299, 1307 (N.D. Okla. 1999) ("[C]ourts have held that no legitimate or reasonable expectation of privacy exists as to an article of clothing left in a public building or place."); *People v. Juan*, 175 Cal.App.3d 1064 (Cal. Ct. App. 1985); *see also People v. Ford*, No. H037151, 2012 WL 5993775, at *9 (Cal. Ct. App. Nov. 30, 2012) ("It is objectively *unreasonable* to maintain *any* expectation of privacy in personal property such as a wallet that is openly left in a public place or business.")

Polk's cited cases show that, at most, courts are divided on whether to treat lost property differently than abandoned property under the Fourth Amendment. It is true that some courts

have discussed a distinction between abandoned property on one hand and mislaid property on the other. *See State v. May*, 608 A.2d 772 (Me. 1992) and *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015) (rejecting "finders keepers" analysis). But many of the cases that Polk cites do not actually support that distinction. For example, he cites *United States v. Garzon*, but contrary to his claim, *see* Ape. Br at 16, there *was* evidence in that case that the defendant left his bag on the bus for a reason other than inadvertence; he sought to avoid an illegal search. *See United States v. Garzon*, 119 F.3d 1446, 1450-52 (10th Cir. 1997). It is well-settled that the abandonment of property is involuntary if prompted by impermissible police action. *See United States v. Flynn*, 309 F.3d 736, 738 (10th Cir. 2002) ("In order to be effective, abandonment must be voluntary. It is considered involuntary if it results from a violation of the Fourth Amendment."). Polk's citation to *Rios* is similarly unavailing. In that case, the defendant did not have the opportunity to either mislay *or* abandon the property at issue; he dropped the package at issue on the floor of a taxi cab while still riding in it. *Rios v. United States*, 364 U.S. 253, 255-57 (1960).

The Court need not take sides in this debate in this case. Even assuming the validity of Polk's distinction between lost and abandoned property, school officials did not violate the Fourth Amendment here when they searched the backpack that he left on the school bus. Even Polk's own cases recognize that he had a reduced expectation of privacy in the backpack. *See State v. Ching*, 678 P.2d 1088, 1092 (Haw. 1984) ("owners of lost property must expect some intrusion by finders"), *Wolf v. State*, 663 S.E.2d 292, 295 (Ga. App. 2008) (an individual's "reasonable expectation of privacy in a lost item is diminished to the extent that the police may examine the contents of that item as necessary to determine the rightful owner"), and *United States v. Nealis*, No. 14-CR-149-GKF, 2016 WL 1464573 (N.D. Okla. Apr. 14, 2016) (same).

That expectation was further diminished by the fact that he left it on a school bus; it is well-established that "Fourth Amendment rights . . . are different in public schools than elsewhere." *Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). Searches at school are measured by a reasonableness standard. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). The combination of the two relaxed Fourth Amendment standards applicable here shows that Polk's expectation of privacy in this case was minimal at best. *Cf. Gudema*, 163 F.3d at 723 (noting that several Fourth Amendment principles permitting warrantless searches "converg[ed]" and holding that search of mislaid property was reasonable).

Furthermore, Polk's doubly reduced expectation of privacy was overcome by the school's important interests in maintaining security and order. *See T.L.O.*, 469 U.S. at 339-42. Viewed objectively, the search of Polk's backpack was reasonable in light of the facts known to school officials at the time. First, testimony at the suppression hearing established that the school had a neutral policy of searching all unattended bags. R. 116, Hearing Tr. at 8-9, 20-23, and 42-43. Second, even if the goal was ultimately in reuniting the backpack with its owner, school officials *still* had an interest in ensuring that it did not contain anything that would pose a threat to staff or other students. *See T.L.O.*, 469 U.S. at 339-40. As this case shows, it was reasonable to conclude that only a *thorough* search was adequate to protect that interest; it was only after conducting a second (and more complete) search that school officials discovered the bullets in Polk's bag. *See Veronia School Dist.*, 515 U.S. at 665 ("[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.").

This case also demonstrates why Polk's distinction between lost and abandoned property is unworkable in practice. A defendant's expectation of privacy must be judged by objective

facts known when a search occurs. *See Rem*, 984 F.2d at 810-12. In many cases, however, there will be no facts that objectively distinguish lost property from abandoned property. That was certainly the case here. When school officials discovered the backpack sitting on the bus, they had no way to tell whether it had been intentionally abandoned or merely forgotten. It was entirely possible that Polk, realizing that he was about to bring live ammunition to school with him, intentionally chose to leave it on the bus. *Cf. United States v. Hargrove*, 855 F.2d 887 (D.C. Cir. 1988) (defendant who attempted to conceal bag containing cocaine had abandoned it). Or, as Polk now claims, he may have simply inadvertently left it behind. But school officials had no way of knowing at the time which it was; Polk had done nothing that would objectively demonstrate that he had a continuing expectation of privacy in the backpack. Accepting his proposed distinction therefore would provide no objective standard against which school officials could measure their conduct in future.

B. The issue of abandonment cannot be waived because it is part of the threshold Fourth Amendment inquiry into whether a defendant had a reasonable expectation of privacy.

The threshold question of whether an individual has a reasonable expectation of privacy is a necessary component of any Fourth Amendment merits analysis and is therefore "more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978); *see also Minnesota v. Carter*, 525 U.S. 83, 87-88 (1998). Thus although courts have continued to rely on the term "standing," they have explained that "to say that a party lacks [F]ourth [A]mendment standing is to say that his reasonable expectation of privacy has not been infringed." *See United States v. Taketa*, 923 F.2d 665, 669 (9th Cir. 1991).

The centrality of a reasonable expectation of privacy to a Fourth Amendment challenge, and the need to identify the privacy interest at issue before considering that challenge, shows why the issue of abandonment cannot be waived. Because a Fourth Amendment violation occurs only when a "disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect," *Rakas*, 439 U.S. at 140, a court must *define* the relevant privacy interest before it can determine whether that interest was *infringed*. Whether property is abandoned is essential to that analysis. At least one court has held that it had "an obligation to consider whether the record showed abandonment" sua sponte, even if the issue was not raised by the parties. *See Sparks*, 806 F.3d at 1341 n.15; *but see State v. Morris*, 42 Ohio St. 2d 307, 311 (1975) (challenge to standing to contest legality of a search was waived).

Challenging a defendant's expectation of privacy is therefore sufficient to preserve all related arguments—including arguments based on abandonment. And there can be no doubt that the State challenged Polk's expectation of privacy here. It has consistently maintained that school officials did not impermissibly infringe on Polk's reasonable expectation of privacy when they searched the backpack that he left on the school bus. Significantly, their justification for searching Polk's backpack—the school's neutral policy of searching all unattended bags—is inextricably intertwined with the issue of abandonment. Fourth Amendment abandonment principles merely provide additional support for why the search was reasonable under the circumstances; they show that however diminished Polk's expectation of privacy in his backpack was at school, it was *further* diminished when he left it behind on the bus.

CONCLUSION

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

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