[Cite as *State v. Brown*, 2001-Ohio-7073.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellant : C.A. CASE NO. 18972

v. : T.C. NO. 01 CR 1167

DALI JACQUES BROWN :

Defendant-Appellee :

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O P I N I O N

Rendered on the 28th day of December, 2001.

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WOLFF, P. J.

Dali Jacques Brown was arrested for jaywalking, a minor misdemeanor, and subjected to a custodial search of his person. The arresting officer found crack cocaine in Brown's pocket, and Brown was subsequently indicted for possession of crack cocaine.

Brown moved to suppress the crack cocaine on the authority of *State v. Jones*

(2000), 88 Ohio St.3d 430. The trial court overruled the motion on the authority of *Atwater v. City of Lago Vista* (2001), 121 S.Ct. 1536 but, upon Brown's motion for reconsideration, sustained the motion on the authority of *Jones*. (None of the exceptions to the "citation only" rule of R.C. 2935.26(A) apply).

The State appeals, advancing two assignments of error which involve the same issue and which we consider together:

> 1. THE TRIAL COURT ERRED WHEN IT FOUND THAT AN ARREST MADE FOR COMMISSION OF A MINOR MISDEMEANOR RISES TO THE LEVEL OF A CONSTITUTIONAL VIOLATION.
>
> 2. BECAUSE DEFENDANT'S ARREST FOR COMMISSION OF A MINOR MISDEMEANOR CONSTITUTED A STATUTORY VIOLATION ONLY, THE TRIAL COURT ERRED BY APPLYING THE EXCLUSIONARY RULE TO SUPPRESS THE EVIDENCE.

Brown correctly identifies the issue in this appeal.

> IS OHIO SUPREME COURT DECISION *STATE V. JONES* (2000), 88 Ohio St.3d 430, STILL CONTROLLING PRECEDENT IN THE STATE OF OHIO?

Jones holds as follows:

> Absent one or more of the exceptions specified in R.C. 2935.26, a full custodial arrest for a minor misdemeanor offense violates the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, and evidence obtained incident to such an arrest is subject to suppression in accordance with the exclusionary rule.

Essentially, the State argues that *Jones* is no longer controlling precedent because (1) Ohio's state constitutional search and seizure jurisprudence has traditionally tracked federal constitutional search and seizure jurisprudence and (2)

Atwater holds that an arrest for a minor misdemeanor - unless conducted in an extraordinary manner, unusually harmful to privacy or physical interests - does not violate the Fourth Amendment.

We reject the State's argument for the following reasons:

While the State is correct that Ohio state constitutional search and seizure jurisprudence generally tracks its federal counterpart and affords no greater protection than the federal jurisprudence - see *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-9 - it is also clear that Ohio's state constitutional search and seizure jurisprudence need not track the federal jurisprudence so long as it affords no less protection than Fourth Amendment jurisprudence. Indeed, our supreme court has said as much in *State v. Brown* (1992), 63 Ohio St.3d 349, 352.

> If *Belton* [*New York v. Belton* (1981), 453 U.S. 454] does stand for the proposition that a police officer may conduct a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule.
>
> As the United States Supreme Court stated in *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."

As can be seen from the *Jones* syllabus, quoted above, the decision rested on federal and state constitutional grounds. We are far from convinced that the supreme court would overrule *Jones*, a unanimous decision, on the strength of *Atwater*, a 5-4 decision.

Furthermore, we are not at liberty to depart from viable state supreme court

precedent until that court overrules that precedent. *Schlachet v. Cleveland Clinic Found.* (1995), 104 Ohio App.3d 160, 168.

Finally, having been affirmed by the supreme court in *Jones*, this court - even if at liberty to do so - would reject *Atwater*, believing that the citation only rule of R.C. 2935.26(A) does implicate Section 14, Article I of the Ohio Constitution.

The assignments of error are overruled.

The order appealed from will be affirmed.

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BROGAN, J. and FAIN, J., concur.

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