IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,
Appellant,

v.
CHARLES WILEY WORSHAM, JR.
Appellee.

CASE NO. 15-2733

REPLY BRIEF OF APPELLANT

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

MITCHELL A. EGBER
Assistant Attorney General
Florida Bar Number: 35619
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
(561) 837-5016
crimappwpb
@myfloridalegal.com

Counsel for Appellant

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PRELIMINARY STATEMENT

Appellant was the prosecution and Appellee was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the parties will be referred to as they appear before this court, except that Appellant may also be referred to as "the state". The following reference will be used in this brief: "T" for the transcript of the motion hearing.

SUMMARY OF ARGUMENT

The trial court abused it's discretion and erred in granting Appellee's motion to suppress. Appellant did not have a reasonable expectation of privacy in the SDM "black box" attached to his vehicle. Speed and braking were always exposed to the public on public highways; the box was not in a private area of the vehicle and was subject to other's possession and ownership to assess the speed of their vehicle. Jones is distinguishable from this case as there was no government trespass nor surreptitious monitoring of the device. Further, the state's argument below was that Appellant had no expectation of privacy and argued cases which postulated that the vehicle, under the facts of this case where Appellant was under the influence of alcohol and observed speeding, was an instrumentality of the crime which was proper subject for investigation, as the vehicle had been properly impounded and public policy mandate that officer's have the ability to investigate fatal accidents. Moreover, the police had applied for a warrant after the initial download had been done. The officer had probable cause as it was based on facts that would have had justified the issuance of a warrant, even though a warrant had not actually been obtained, though had been applied for. The information from the SDM would have been inevitably discovered. Finally, the officer warrantless search was based on good faith of binding judicial precedent. Accordingly, the trial court decision should be reversed.

ARGUMENT

THE TRIAL COURT ERRED GRANTING APPELLEE'S MOTION TO SUPPRESS

Appellee contends that under U.S. v. Jones, 565 U.S. --- , 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) as applicable to this case, Jones stands for the proposition that the obtaining informaton from the SDM is a search . The meaning of the term "search" is not the issue. The question is whether a warrant need be obtained prior to obtaining information from the SDM and the cases, particularly People v. Quackenbush, 88 N.Y.2d , 647 N.Y.S.2d 150, 670 N.E.2d 434 (1996) and People v. Christmann, (2004) 3 Misc.3d309, 315, 776 N.Y.S.2d 437 make clear that it does not. In People v. Diaz, (2013) 213 Cal.App.4th 743, 756, 153 Cal.Rptr.3d 90., distinguishing Jones, the court noted that the United States Supreme Court has long held that the expectation of privacy is diminished in an automobile. See Carroll v. United States, 267 U.S. 132, 133 (1925). The Court of Appeals determined in Diaz that, because Diaz's car was an instrument of the crime of vehicular manslaughter, it was an exception to the warrant requirement. Id. at 754. Id. At 756.

Again, under the facts of this case, there was no initial trespass by the government nor surreptitious monitoring –which was relevant issue in Jones – regarding the SDM box. See

As noted by the Court in Jones, 132 S.Ct. at 949:

> It is important to be clear about what occurred this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

The Court further observed:

> The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the Katz formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Kyllo, *supra*, at 34, 121 S.Ct. 2038. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. Katz did not repudiate that understanding.
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> Jones, 132 S. Ct. at 950.

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> The second "beeper" case, United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), does not suggest a different conclusion. There we addressed the question left open by Knotts, whether the installation of a beeper in a container amounted to a search or seizure. 468 U.S., at 713, 104 S.Ct. 3296. As in Knotts, at the

time the beeper was installed the container

> belonged to a third party, and it did not come into possession of the defendant until later. 468 U.S., at 708, 104 S.Ct. 3296. Thus, the specific question we considered was whether the installation "with the consent of the original owner constitute[d] a search or seizure ... when the container is delivered to a buyer having no knowledge of the presence of the beeper." Id., at 707, 104 S.Ct. 3296 (emphasis added). We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. See id., at 712, 104 S.Ct. 3296. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. Cf. On Lee v. United States, 343 U.S. 747, 751–752, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.
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> Jones, 132 S. Ct. at 952.

Unlike in Jones, there was no trespass here. Like in Jones, there is no indication from the evidence presented at the suppression hearing that the owner even knew of the existence of the SDM. Here, the trespass theory underlying Jones has no bearing on the

instant case.

Warrantless searches of automobiles are still reasonable if supported by probable cause when the offense is a crime that might yield physical evidence. See Brown v. State, 24 So.3d 671, 681 (Fla. 5th DCA 2009); Grant v. State, 43 So.3d 864 (Fla. 5th DCA 2010).

The SDM was an integrated not an extraneous or third-party device which had no relevance to the crimes charged. It was clearly relevant as to whether Appellant operated the vehicle in a reckless manner as to speed, while under th influence of alcohol. See e.g., State v. Abbey, 28 So. 3d 208 (Fla. 4th DCA 2010). Compare People Xinos, 192 Cal.App.4th 637 (2011).(held instant case is distinguishable from a case where police officer reasonably believe that a murder victim was transported in a particular vehicle and seize it and, consequently, have a reasonable basis for examining the vehicle's interior for trace evidence and then testing any trace evidence discovered; retrieval of raw data from a vehicle's SDM not believed by police to hold any evidence of crime is not a reexamination or closer look at areas of a vehicle already reasonably believed to be or contain evidence of a crime; it is a new and different intrusion) . Appellee contends the state argued below , particularly in citing cases cited both here and in Appellee's initial brief, that the SDM was subject to search without a warrant and that Appellant had no expectation of privacy which would comport with theories of inevitable discovery, public policy as well as the fact that probable cause

existed for issuance of a warrant, as argued in Appellee's initial brief. As the state argued below: “Based on these cases Diaz, Quackenbush, Christman] I would say that it's not an unreasonable search under the Fourth Amendment. And that while a warrant may be the ideal thing to obtain, is it legally necessary. And I would say that it's not .” (R T 33).

In Quackenbush, cited by the state in arguments below, the court found only a diminished expectation of privacy in the mechanical areas of the vehicle and further found that that diminished expectation must yield to the overwhelming state interest in investigating fatal accidents.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein and the Initial Brief, Appellant respectfully requests that this court reverse the trial court's order granting Appellee's motion to suppress.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

/s/Mitchell A. Egber
MITCHELL A. EGBER
Assistant Attorney General
Florida Bar Number: 35619
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
(561) 837-5016
crimappwpb
@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been e-mailed to: Jack Fleischman, Esq., at jf@ffjustice.com on September 6, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14-point type and complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

/S/Mitchell A. Egber
MITCHELL A. EGBER
Assistant Attorney General