ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellant, v. BRYAN LIETZAU, Appellee.	No. CR-19-0132-PR No. 2 CA-CR 2018-0011 Pima County Superior Court No. CR 20162952-001

Amicus Brief of Arizona Attorneys for Criminal Justice in Support of Petitioner-Appellee Bryan Lietzau

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Interests of Amicus Curiae

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief in support of Bryan Lietzau because legal standards mean something. If our system is to be seen as one that leads to reliable results, then our courts must follow the principles and guidelines announced in case law. Even if that means evidence is suppressed. Maintaining a system wherein appellate courts defer to a trial court's factual findings, interpret evidence in the light favorable to upholding suppression orders, and giving weight to all factors in a

totality of circumstances analysis is the only way to ensure an equitable system that treats defendants and the state alike.

Summary of the Argument

In *State v. Adair*, this Court announced a rule that was intended to guide trial courts in determining the reasonableness of probation searches. *State v. Adair*, 241 Ariz. 58, ¶ 25 (2016). This Court listed a number of factors the trial court can consider in a totality of the circumstances analysis. *Id.*

Here, the trial court reviewed and applied each *Adair* factor. Based on this review, the court found the probation search was not reasonable. The search was done for an improper purpose because the reason for the search had no connection to the reasons for probation revocation or arrest. The search was arbitrary because it was premised solely upon the supervising officer's belief that the search could be done. The officer even stated during an interview that he did not suspect anything incriminating would be on the phone. Further, Lietzau's prior conviction was a low-level, non-violent offense and the alleged conduct the prosecution raised after-the-fact to justify the search was

substantially different from the offense Lietzau was on probation for. Accordingly, the court found the totality of circumstances did not support the search and suppressed the fruits of that search.

The appellate court reversed. The court's decision was largely premised upon different factual assessments. In reaching their conclusion, the court failed to defer to the trial court and failed to interpret the evidence in the light most favorable to the prevailing party. The court then used their non-deferential interpretation of the facts to conclude the search was not arbitrary and was done for a proper purpose, while ignoring other *Adair* factors.

There are two reasons this Court should accept review. First, this Court should accept review to clarify the mixed standard that applies in Fourth Amendment cases. While there is a de novo component to that review, it cannot be used to disregard deference to the trial court's factual findings or ignore the duty to interpret facts in the light most favorable to the prevailing party. Second, this Court should accept review to clarify the factors announced in *Adair*, especially the "arbitrary, capricious, or harassing" factor.

Reasons this Court should grant review

1. This Court should accept review to clarify that appellate courts should not simply supplant their judgment and fact-finding for that of the trial court.

The core of the appellate court's decision was an improper implementation of its review function. The court correctly announced that Fourth Amendment suppression questions are mixed. Opinion, ¶ 6. The lower court's ruling is reviewed for an abuse of discretion, but the ultimate legal determination is reviewed de novo. *Id.*

However, this review standard does not give the lower court carte blanche to supplant their factual determinations for the trial court's. Rather, the lower court should defer to the trial court's fact-finding, and depart from those factual findings only when clearly erroneous. *State v. Garcia*, 224 Ariz. 1, ¶ 6 (2010). Moreover, appellate courts are supposed to view "the facts in a light most favorable to sustaining the trial court's ruling." *Adair*, 241 Ariz. 58, ¶ 9.

These standards work in concert. All factual determinations are meant to be drawn in favor of the prevailing party below. In this way, the de novo review is restricted to its traditional role as a review standard for legal questions. In essence, courts engage in a mental

exercise: Presuming all the facts found by the trial court and supporting affirmance are true, and all others are not, does the law compel a different result?

This process is akin to the one we see in Rule 20 motions for acquittal. In that context, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. West*, 226 Ariz. 559, ¶ 16 (2011) (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)) (emphasis original). The standard easily transfers to this context because the prosecution was simply the prevailing party in a Rule 20 review.

When an appellate court supplants its own factual judgment for that of the trial court, it ignores the scope of its review. The de novo standard does not allow the appellate court to make independent factual determinations; the court must presume the facts in the light most favorable to the prevailing party and reverse only if a de novo review of the law so demands.

The court of appeals, however, repeatedly deviated from this standard. The crux of their finding was that "the probation department

had a reasonable ground to suspect Lietzau might be engaged in an improper relationship with a minor, a serious offense and one that would be a patent violation of his probation." Opinion, ¶ 11.

This finding was only possible, however, because the court interpreted the facts in the light most favorable to the state—the opposite of the proper standard.

Key to this factual dispute, the trial court concluded the search was done in a proper manner, but not for a proper purpose because the search had nothing to do with "determining whether [Lietzau] was complying with probation obligations." Reporter's Transcript (RT) 12/11/2017, 11. The court also determined the search was arbitrary for the same reason. *Id.*

This finding is supported by the record. The supervising officer who conducted the search arrested Lietzau because Lietzau was living at a location other than the one listed with probation. Interview Transcript (IT) 6/3/2016, 23-24. The reason for the warrantless search boiled down to an exertion of authority—the supervising officer searched the phone because he believed he could: "I don't need a warrant. … 'Cause he's on probation, I don't need a warrant." *Id.* at 21.

While the officer said the probation department had received calls, the officer disavowed any suspicion. The attorney asked the officer, "did you suspect that there was text messaging between Bryan Lietzau and Savanna?" *Id.* at 26. The searching officer made clear he did not suspect Lietzau: "No. I didn't...I didn't know one way or the other." *Id.*

This didn't even make it in the appellate court's decision, however. Contrary to the review standard it should have followed, the court of appeals ignored this evidence. Instead, it made its own judgment calls and decided the facts separately.

While there is a de novo component to the mixed review standard in Fourth Amendment cases, that de novo component does not authorize appellate courts to ignore the trial court's factual findings or disregard their duty to interpret the facts in the light most favorable to the prevailing party. This case, however, makes it clear that clarification is needed. Accordingly, this Court should grant review to clarify the scope of review that is proper under the mixed standard for Fourth Amendment issues.

2. This Court should accept review to clarify the factors identified in *Adair*, especially the "arbitrary, capricious, or harassing" factor.

Based upon the appellate court's factual disagreement, they reached a different conclusion regarding two factors. But the court's conduct reveals a deeper issue: the factors this Court identified in *Adair* are not sufficiently clear to provide needed guidance to courts. This is particularly true for the "arbitrary, capricious, or harassing" factor.

Where the trial court found the search arbitrary, the court of appeals did not. This difference is due to the appellate court's failure to understand the meaning of arbitrary.

Arbitrary is defined as, "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." Black's Law Dictionary (10th ed. 2014), arbitrary.

The trial court's reasons for finding the search arbitrary were tied in with its analysis of whether the search was done for a proper purpose. *See* RT 12/11/2017, 11. The trial court concluded the search was done in a proper manner, but not for a proper purpose because the search had nothing to do with "determining whether [Lietzau] was

complying with probation obligations." *Id.* Tied in with this conclusion is the fact that the supervising officer said during the interview that he was arresting Lietzau because Lietzau was living at a location other than the one listed with probation. IT 6/3/2016, 23-24.

The court of appeals, however, found the supervising officer "had a well-founded, non-arbitrary reason to suspect Lietzau of committing another felony while on probation …." Opinion, ¶ 12.

While the state provided a separate reason as a post-hoc rationalization, the trial court, having considered the arguments and evidence, exercised its function to interpret the evidence as it saw fit and concluded the search was unreasonable. The supervising officer said during the interview he did not suspect there were text messages on the phone that would have corroborated the alleged offense raised in by the state. *Id.* at 26. Rather, the officer searched the phone simply because he believed he could. *Id.* at 21.

This is the definition of arbitrary. The search was wholly based on individual discretion. It was not guided by any policies or procedures. Moreover, it was a decision made without regard to facts. The search was not done for the purposes of finding evidence of residence. Nor was

it done because the officer believed he would find text messages regarding the claimed improper relationship. It was done because the officer felt like doing it.

Notably, the court of appeals never interpreted the phrase "arbitrary, capricious, or harassing." Rather, the court merely reached its decision in a conclusory fashion. The court also did not conclude the trial court had abused its discretion by making a factual determination that lacked support in the record. Instead, the court of appeals just reached a decision they preferred.

Accordingly, this Court should use this case as a vehicle to explain that the "arbitrary, capricious, or harassing" factor is a real limit, not just a phrase meant to be interpreted as needed to justify a search after the fact.

As the Supreme Court noted in *Terry v. Ohio*, for a search to be reasonable, it must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). In light of the appellate court's decision, this Court should take the opportunity to clarify that nothing in *Adair* changed this core standard. Instead, the

"arbitrary, capricious, or harassing" factor was meant to aid courts in determining whether a probation search is justified at the time of the search and whether it is related to the purpose for the intrusion.

This Court should further take the opportunity to clarify that other elements such as "proper purpose" and "nature and severity" are also meant to be real limits reflecting the core inquiries announced in *Terry*. These go to the totality of circumstances and courts cannot simply ignore them when they would prefer to rule against a defendant.

Conclusion

The appellate court abrogated its review duties in two manners. First, the court ignored its duty to defer to the trial court's factual findings and interpret the evidence in the light most favorable to affirming. Instead, the court supplanted its own interpretation of the facts for the trial court's interpretation. Second, the court then applied their non-deferential determination of the facts in a conclusory fashion to the *Adair* factors without regard to what the *Adair* factors meant.

This Court should grant review to clarify that the de novo component of the mixed review standard in Fourth Amendment cases is

not a license to disregard factual deference and the duty to interpret facts in the light most favorable to affirmance. This Court should further grant review to clarify the *Adair* standards—to ensure they are interpreted as meaningful limits upon search authority and not disregarded simply when they might lead to suppression.

RESPECTFULLY SUBMITTED this 15th day of July, 2018.

Arizona Attorneys for Criminal Justice

By /s/ Mikel Steinfeld
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