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In the

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v. No. 75-76

DONALD OPPERMAN,

Respondent.

Washington, D. C.
March 29, 1976

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SOUTH DAKOTA, Petitioner,	:	
v.	:	No. 75-76
DONALD OPPERMAN, Respondent.	:	

Washington, D. C.,

Monday, March 29, 1976.

The above-entitled matter came on for argument at 2:15 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM J. JANKLOW, ESQ., Attorney General of South Dakota, Pierre, South Dakota; on behalf of the Petitioner.

ROBERT C. ULRICH, ESQ., Box 514, Vermillion, South Dakota; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in South Dakota v. Opperman.

Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM J. JANKLOW, ESQ.,

ON BEHALF OF THE PETITIONER

MR. JANKLOW: Mr. Chief Justice, and members of the Court:

This is the case of the State of South Dakota v. Opperman. It comes here on a writ of certiorari to the Supreme Court of the State of South Dakota. Basically, what we have in this case is a question of an inventory procedure of an automobile that was taken pursuant to lawful ordinance of the City of Vermillion, South Dakota. I think the facts are particularly important with respect to this particular case. They are very brief.

In the early morning hours of December 10, 1973, there was a car parked on the street in Vermillion, South Dakota, which is a small college town, the seat of the University of South Dakota. The ordinances in the City of Vermillion prohibit parking there from 2 a.m. to 6 a.m. in the morning. This vehicle was parked there during that period of time, received a ticket from the police officer. The next morning, it was still there at approximately 10 a.m. The meter maid, in

making her rounds, put a ticket on the car, shortly thereafter, when she completed her rounds, she reported it to the police department, at which time one of the police officers, Officer Frank, went over, looked at the car, examined the two tickets, and had the car towed away to the impoundment lot in Vermillion. The impoundment lot in Vermillion is an unguarded lot and, as the record clearly establishes, they have had trouble there previously with respect to having cars broken into and vandalized when they have been put in the impoundment lot.

As he looked through the window of the automobile, the windows were locked -- I should say rolled up, and the doors were locked, and as he proceeded to look into the automobile, he could see a wrist watch and other items on the back seat. He had the tow truck operator open the door latch, and he proceeded, pursuant to the standard procedure of the Vermillion Police Department, with a standard procedural form to go through and inventory the contents of the automobile for valuables. The standard inventory consisted of things such as the outside, the exterior condition of the car, the dashboard, the seats, the floors, and things of that nature.

QUESTION: I notice how carefully you have drawn the distinction. What is the difference between an inventory and a search?

MR. JANKLOW: I think in our brief we attempted to draw a distinction between an inventory and a search, because,

frankly, we no longer do that. I don't draw that distinction. I do draw a distinction in the word "search" between criminal searching type conduct and normal inventorying type of thing, but I will get into that, Mr. Justice Marshall. But we don't attempt at this point before the Court to say that an inventory is not an intrusion, which is the Fourth Amendment type of search situation.

QUESTION: Mr. Janklow, does the record show what the police standard procedure is with respect to ascertaining the ownership of the vehicle and where the owner might be?

MR. JANKLOW: It does not, Your Honor. And since our office did not handle it, I don't know. I only know what the record shows, and the record does not show that.

QUESTION: It is silent, for example, on whether there was a license on the car or anything like that?

MR. JANKLOW: As far as I --

QUESTION: I haven't seen any, I just wanted you to confirm that.

MR. JANKLOW: I --

QUESTION: Does the practice variate depending on whether or not the car doors are locked?

MR. JANKLOW: It does not, Your Honor, because of the fact that after -- they have had several instances where the cars have been vandalized. The Vermillion Police Department is a small police department in a college town. The impoundment

lot is not secure or guarded at any time, and they have had past instances of people breaking into cars. So as a result of that particular procedure, they have started inventorying cars for the valuable contents.

As a matter of fact, in our particular case, the respondent Opperman has never contested at any point in these proceedings, including in the briefing stages before the Supreme Court, that the police officer did not follow a proper procedure and was doing nothing wrong in violation of any amendment, including the Fourth Amendment, when he entered the locked car to search for the -- I shouldn't say to search, to secure, retrieve and to put into safety the contents, the watch and things of that nature. There has never been any argument that the police officers have done anything that was not in fact correct.

So basically what we come down to is during the point of the time that the officer was retrieving the items from inside the body of the car, he checked the glove compartment, he opened the glove box, it was closed but it was not locked, and opened it up. In it he found a checkbook, an installment loan contract or installment loan papers, blank checks, some keys and, for the purposes of this case, less than an ounce of marijuana. All of these --

QUESTION: What is the practice, Mr. Janklow, do they take it out of the car then, these items, or do they leave them

in?

MR. JANKLOW: No, sir, they are taken out of the car and they were in this case, all of these items, to the Vermillion Police Department, after they are filled out on an inventory sheet. And at approximately 5 p.m. of the same afternoon, Mr. Opperman, respondent Opperman came to the Vermillion Police Department, picked up his belongings, his valuables, received them back with the exception of the marijuana, where a warrant was served on him, a citation was issued, and that brought about the reason for this case.

QUESTION: Counsel, does the record tell us what the standard procedure would have been if there had not been a valuable article such as the watch in plain view?

MR. JANKLOW: My understanding, Mr. Justice Stevens, is that all of the cars that are impounded by the Vermillion Police Department involve having the contents inventories for the protection of --

QUESTION: So you don't rely particularly on the fact that they saw the watch on the back seat or whatever it was?

MR. JANKLOW: No.

QUESTION: I see.

MR. JANKLOW: I don't.

QUESTION: I wanted to be sure.

MR. JANKLOW: The reason for that, again, is I think we are involved basically with three particular issues when we

are talking about safety of property. The first issue is the safety of the individual who owns the car's property. Opperman obviously left his watch on the dash. An argument I think could be made that, by leaving his wrist watch on the dash, he could care less whether or not somebody took his watch. But he left it out on the main street of Vermillion, South Dakota, where it is well lit, and it was moved to a different place pursuant to legitimate or lawful police activity under the ordinance of the City of Vermillion Police Department.

QUESTION: What about the trunk, Mr. Janlow, was the trunk --

MR. JANKLOW: The trunk was not searched in this particular automobile.

QUESTION: The practice of the police department does not include opening the truck?

MR. JANKLOW: It does not. I had to ask opposite counsel, but it does not.

QUESTION: Even if it were unlocked?

MR. JANKLOW: Even if it is locked, it does not --

QUESTION: Even if it were unlocked?

MR. JANKLOW: If it were unlocked, I can't answer that because I don't know, sir.

QUESTION: Mr. Attorney General, since I don't know, how much is an ounce, is that enough for one cigarette?

MR. JANKLOW: No, a package of cigareetes weighs

approximately an ounce, and the standard I always get is you could probably get about 20 joints from an ounce, is the standard that I usually hear.

QUESTION: Not that it matters. I was just wondering.

QUESTION: For the purposes of this case, the constitutional issues are no different from what they would be if it were heroin or some other substance?

MR. JANKLOW: They are not, Your Honor.

QUESTION: Would you explain for me once again the difference between going into the glove compartment on the one hand or lifting the hood up on the other?

MR. JANKLOW: I frankly don't see any difference. I think if I had to put them in orders of priority, one, glove boxes have locks on them. When anybody ever breaks into a car, I can't imagine anybody breaking into a car to take anything and not go into the glove box, because I think, as a matter of common sense, we realize that people always go into there. And because Opperman concedes that we could be in the car under plain view to secure the watch, it was just a matter of checking the glove box, and it opened up and out came the contents. I think also frankly that with respect to the trunk and under the hood, there are certain areas of this country, frankly, in our state, some areas more than others, where things like car batteries disappear quite often. I am not familiar that engines come out of cars very often when they are vandalized,

but certainly car batteries do. The same is true with respect to items in the trunk, spare tires and jacks and things of that nature in variably come out of trunks.

The State of South Dakota is not contending that everything that is there has a right to be gone through. For example, we are not arguing for a moment that we could go inside the wrist watch just to look for things. The respondent's brief raises questions about suitcases and things of that nature, and cites the loss of suitcases, the Lawson case, I should say, from the Eighth Circuit, but we have got a different situation there, because in the Lawson case you are dealing with a trunk that was entered. We didn't have any trunk that was entered. We feel that the scope of the search or the scope of the intrusion or whatever characterization the activity should be given, whatever terminology it should be given, is one -- enough activity to, one, secure the item, and, two, to be able to reasonably identify it for the purpose of safekeeping and inventory, and if that --

QUESTION: Mr. Janklow, you have stated that the purpose, the primary purpose in any event of an inventory search is to safeguard valuables. Would you say that a secondary purpose of the search would be to discover evidence of crime?

MR. JANKLOW: No, sir, I would not, because there is absolutely nothing in our record that would indicate that. I am

not aware of any other case in Vermillion that has arisen with respect to the discovery of anything for a crime. I am familiar with the amicus brief that was filed for Americans for Effective Law Enforcement, I believe is the name of the organization, and they cite statistics dealing with other areas of the country which show that in fact a very small portion of the automobiles in those sample areas that are inventoried involve the recovery of any property that deals with criminal activity, and, frankly, it would be the most unproductive, assuming that these statistics that have been submitted are true, it would be the most unproductive type of police activity that you could imagine, and it would certainly be wasteful in that there are better things that police could do with respect to protection of the people and property in the community. And so for those reasons, we don't feel that that is a secondary motive at all, Mr. Justice Powell.

We think that one of the key things that we have here is that we certainly are not in the particular situation like some of the more large states are, the more populous states are. Where you take states such as New York, Illinois, Michigan and places like that that have the larger police departments, that have the facilities, impoundment lots with high wire fences around them, guards around them, and things of that nature, and, you know, I don't know that we would be here if we were representing one of those states and faced with that

problem. But we are dealing with Vermillion, South Dakota, where, frankly, we don't have the resources. I think it is more than just the protection of the individual's property that we are talking about when we talk about this inventorying procedure, because we have also got the protection of the law enforcement officers.

Now, our Supreme Court attempted to minimize that particular problem by stating that, because the individual had left his car and that it had lawfully come into the custody of the law enforcement community by reason of the fact that the ordinance provided that it would be impounded, that it be taken away for the improper parking, that the law enforcement community then at that point became a gratuitous bailee, and as a result their liability, if any, was very slight. But I don't think that, frankly, the Fourth Amendment -- an interpretation of the Fourth Amendment is ever turned on what the financial obligations are or responsibilities are of any of the particular parties involved in the proceeding.

And the one additional thing which --

QUESTION: Mr. Janklow, I suppose, regardless of the standard imposed by South Dakota ss to what kind of a bailee, you can still get into arguments about whether something was or was not in fact in the glove compartment, if someone comes along later and says it was stolen.

MR. JANKLOW: I think that is correct, Mr. Justice

Rehnquist, except we worked from the premise basically that all people are honest. We presuppose that they are going to be honest, and that if the first individual that has the interior contact or the contact with the automobile inventory, it is a question of that one person's word against anybody else's one and two, you've got the situation where once the community knows that impounded automobiles are inventories, it is certainly not going to make a lot of sense, once the word is out, for them to go vandalizing and breaking into cars any longer that have no valuables in them, because they have been taken out, so I think that there is a third category here of protection, and that is protection of people from not being encouraged, especially young people, juveniles, to go and burglarize and vandalize cars when they realize there won't be any fruits there. And so I think we are not only talking about protection of the law enforcement community, we are also talking about protection of the individual whose got possession or originally had possession of the vehicle or at least whose property is in the vehicle, as well as the general public. So I think there are three areas of protection that we are dealing with with respect to this particular case.

QUESTION: Does the record show when these standard procedures were adopted by the police department? It does show some vandalizing. I just wondered if vandalizing was before or after the standard procedures.

MR. JANKLOW: It does not show that, Your Honor.

We feel that, with respect to the Court's decision in Cady v. Dombrowski, that basically although it didn't come down in exactly the same issue, it was awful close, that the language of that could be controlling, could be governing. The parallels that could be drawn from a rural community in Wisconsin with Vermillion, South Dakota are certainly there. With respect to the activity of the law enforcement officers, the parallel is there, other than the fact that in Dombrowski they were dealing with looking for a firearm for generally either protection of the general public at large -- we are dealing with an automobile in both instances that lawfully came into the control of the law enforcement community. And I think one of the most important things is there has never been an allegation at any time in our case, as the same is true in Dombrowski, that the law enforcement officers were looking for, one, any criminal evidence, that they were conducting any criminal investigation, that they were involved in any way in pursuing the criminal law. No allegations have ever been made that there was any attempt at subterfuge -- or I should say that there was a subterfuge being used in this inventory process to pursue the criminal law or any criminal prosecution. As a matter of fact, the record is clear, at least as far as the trial transcript is concerned -- I believe the page number is 27,

where the law enforcement officer was asked -- he said that until he was in the process of doing this inventory and came across the items in the glove compartment, he had no reason to suspect anything improper with respect to that particular motor vehicle.

We think the key -- there aren't a lot of cases in this area, especially at the Supreme Court level. I think the Supreme Court's cases of Cooper, Harris and Dombrowski are basically the three key cases.

Dealing with the Cooper case first, I should say, then the Harris case, and then of most recent nature the case of Dowbrowski in 1973. The Preston case is discussed a lot in all these various cases, but the Preston case, we submit, is not involved in our issue here, the 1964 Preston decision, for the reason that Preston dealt with an attempt by the state to say that a car was taken pursuant to an arrest, pursuant to a valid arrest, even though the search I should say was conducted pursuant to a valid arrest, when in fact that was not the case. Individuals were arrested for vagrancy there, and the issues, the holding in Preston has been on many occasions referred back to as the fact that it is confined specifically to the facts that you had in Preston, and that we don't have here with this particular case at all. Law enforcement officers were not in any legal custody of the Preston vehicle and, as a matter of fact, they attempted in subsequent argument, or I should say in

further argument, to say that the car might have been stolen, and that is the reason they were looking at it from that standpoint. So we feel that the Preston case is not controlling.

There is an additional case, other than those that have been cited in the briefs. The Fourth Circuit, I have been informed, has recently come down with a decision dealing with this particular type of Fourth Amendment question. I frankly don't know the name of the case. I was only made aware of it yesterday, and I don't have a copy of it.

QUESTION: If you wish to draw attention to that, send us a memorandum and send it to your friend.

MR. JANKLOW: I certainly will. I would like to reserve the additional time that I have, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney General.

Mr. Ulrich.

ORAL ARGUMENT OF ROBERT C. ULRICH, ESQ.,

ON BEHALF OF RESPONDENT

MR. ULRICH: Mr. Chief Justice, and may it please the Court:

Turning to the factual situation that Mr. Janklow has portrayed to be the elements, such a factual situation involving this particular case, although I basically agree with the facts as presented and feel that it is imperative for proper analyziation of this case that certain facts which are contained

in the record again be brought to your attention.

Those are that the record clearly shows that this particular vehicle bore current South Dakota license plates at the time that the initial seizure from the streets of Vermillion occurred, and the record also clearly established the fact that the officer towing the vehicle or the officer who had the vehicle towed made no attempt to contact the owner, made no attempt to ascertain who the owner of the vehicle was prior to the time which he discovered in the closed glove compartment, after he had broken into the automobile by the use of a tool, after --

QUESTION: What duty did the policeman have to look him up? He left the car.

MR. ULRICH: Well, I think the argument to that, Mr. Justice Marshall, would be that --

QUESTION: Do you know of any place where they do any more than to check to see whether it is a stolen car?

MR. ULRICH: No, but there was --

QUESTION: Because of all the cars that are seized in New York, they would be busy all day on that.

MR. ULRICH: I think perhaps the scope of this decision would get into areas where perhaps the owner would be present at the time the initial seizure occurred. And the argument that I wish to make -- and I feel that this particular fact should be known -- that if Mr. Opperman were present when they

had towed his car, he should have been given the opportunity or preference, at least some choice of whether he wanted his automobile searched.

QUESTION: Well, he shouldn't have left it on the street.

MR. ULRICH: Well, the automobile was --

QUESTION: It is illegal.

MR. ULRICH: The automobile was left there due to a malfunction in the automobile. It was not there by choice. It was there as a result of a bad battery.

QUESTION: That is not the police's problem.

MR. ULRICH: No, I understand that, Mr. Justice Marshall. We are not --

QUESTION: It could very well be an abandoned car.

MR. ULRICH: Mr. Justice Marshall, we are not arguing a position that the initial seizure in this case was improper. We concede that the initial seizure under the ordinance of the city was proper.

QUESTION: I am trying to find where you get the idea that they should have notified him, or going to look for him.

MR. ULRICH: Well, I think perhaps --

QUESTION: Do you insist that that is in this case?

MR. ULRICH: No, I don't insist that it be done. I only wanted to bring it to the attention for the Court's purpose that if the situation does occur, where the owner is

present at the time of the initial seizure, that he should be given some type of preference as to whether he wants his automobile searched, and that is the only reason why I raise that fact.

QUESTION: If you come onto an abandoned car, may the police go in the glove compartment and see to whom it belongs?

MR. ULRICH: I don't believe so. I don't think there would be a necessity for that. Now, I am somewhat at a loss to that answer because --

QUESTION: Well, they would have to go into my glove compartment to find out to whom my car belongs.

MR. ULRICH: Our state law doesn't --

QUESTION: That is where I keep my registration.

MR. ULRICH: Our state law doesn't require that you keep your registration in your vehicle, it only requires that you have it in your person or in your presence at the time the vehicle is being operated.

QUESTION: So you could keep it in your wallet then?

MR. ULRICH: Yes, that is correct. That's correct.

QUESTION: Well, suppose this was a car with a Pennsylvania license tag on it, you wouldn't think they had an obligation to pick up the phone and call Pennsylvania and see who owns that car?

MR. ULRICH: No. I only brought that fact to light, again, Mr. Chief Justice, for the Court's attention that if the

situation would arise as a result of this holding or rule of law which will be established by a holding of this case, that if the owner is present, perhaps the best way to handle this protection of his privacy and the protection of his property argument would be to give him the preference.

QUESTION: But going back to the situation as it was here, an apparently an abandoned car or at least a car left long over time, do you say that they had no power to search the car for whatever records or papers might indicate the identity of the owner?

MR. ULRICH: Yes, that is my position, Mr. Chief Justice. The record also establishes in this case that the identity of the owner was detected after the time of the seizure occurred, the seizure of the criminal evidence, not of the automobile. It was very easy for the Vermillion Police Department to detect who the owner of this automobile was.

QUESTION: By doing what?

MR. ULRICH: Pardon?

QUESTION: By calling --

MR. ULRICH: They radioed the State Bureau of Motor Vehicles, and it takes them about three minutes to determine who the registered owner of that vehicle would be.

QUESTION: But if they can find the ticket, the card, the ownership card or the driver's license in the car, you say they have no right to take that easier step?

MR. ULRICH: I am saying they have no right to take that step, because they would have no expectation of finding this particular document in the automobile. It is not required to be present in the automobile.

QUESTION: That doesn't there would be no expectation. It isn't required in many places, but in many places that is where you would find it.

MR. ULRICH: Well --

QUESTION: As Justice White suggested, that is where you would find it in his car, and that is where you would find it in my car.

MR. ULRICH: Well, I think the better argument would be, rather than to break into the automobile with the use of a tool, and perhaps going one more step farther in this argument, if the glove compartment is locked, also breaking into that particular closed area, that it would be much easier to pick up the radio on the police unit and radio in to the department of motor vehicles and have your answer back in three minutes.

QUESTION: Well, why should they do that before they tow the car away? How far are you going to go on that?

MR. ULRICH: I --

QUESTION: If they have got that much duty, to notify after they tow it, why don't they have to notify him before they tow it?

MR. ULRICH: I didn't argue the point, Mr. Justice

Marshall, that there is a duty to notify.

QUESTION: Well, what is it? If it is not a duty, what is it? It would just be nice if they did it?

MR. ULRICH: Yes, that would be --

QUESTION: Well, we are discussing the constitutional or statutory rights here, we are not talking about niceties.

MR. ULRICH: Well, I think this is what the state's argument goes to. They are saying that the entry into the closed area of this compartment, an area which we argue which was an area of expectation of privacy, was done to be nice.

QUESTION: It wasn't locked. It was unlocked.

MR. ULRICH: The closed compartment --

QUESTION: The glove compartment was unlocked.

MR. ULRICH: Well, this is an area that the record is unclear on. I don't even know if this automobile was capable of locking the console. I know in my automobile I can't lock my console. I don't have a lock on it.

QUESTION: Well, I can lock mine, so we are even there. I mean, what are you working on, theories?

MR. ULRICH: Well, I don't see any distinction between a --

QUESTION: I don't see any reason why you keep emphasizing that they had some kind of a duty to notify him that they had towed his car away. The normal procedure is, when your car is gone, you call the police and the police say "Did you pay

your last installment?" And you say yes, and they say, well, we will go look and see if we towed it. Is that the usual procedure in Vermillion?

MR. ULRICH: Well, rather --

QUESTION: Is that the usual procedure there?

MR. ULRICH: I think it would be, yes.

QUESTION: Well, that is what they were doing.

MR. ULRICH: I agree. But for purpose of that argument or the addition of that fact was only for the point, Mr. Justice Marshall, to notify the Court that perhaps in further situations if the individual is present, he should have been given an opportunity or the choice, which particular means he would wish to exercise to protect his property, and that is the only limited purpose, again, for bringing that to the Court's attention.

QUESTION: Mr. Ulrich, you keep referring to the desirability of giving him a choice if he had been present. But isn't the typical situation one in which the owner is not present, and that is why the problem arises?

MR. ULRICH: Yes, I agree that it is.

QUESTION: Well, now, assuming he is not present, what exactly is the obligation of the police under your theory of the case before they may make a thorough search of the car, including the glove compartment?

MR. ULRICH: My position is the only way that they

could make a thorough search of the car, after the initial seizure, would be to follow one of the proscribed exceptions, automobile exceptions to the warrant requirement or a consent search. Now, if the individual is present, if the police officer did ask him what would be your preference, and the individual consented to the entry and seizure of any items within the automobile, that would be the only two areas where my argument would allow police to enter and search.

QUESTION: Assume they are unable, by looking at the license plates or seeing any other indicia of ownership in plain view, assume they are unable to identify the owner. Would you say that then it would be reasonable or unreasonable to make a complete search of the car?

MR. ULRICH: I think in this particular case it would be unreasonable.

QUESTION: So that if they get an abandoned car and they cannot identify the owner, you say the police may never go into the private areas of the car?

MR. ULRICH: No, I think it would depend on a time element. If no one showed to claim the impounded automobile within a reasonable time, that the police under somewhat of an argument presented in the Cooper decision, time element or the police were allowed to search a car after they had custody of it for one week, this time element argument would then come into play. It would give them, it would give the police department

some reasonable justification at that time perhaps to enter the automobile and search it.

QUESTION: Would you say the same thing if it was apparent that the vehicle had been stolen and then abandoned on the street --

MR. ULRICH: I think --

QUESTION: -- that it still could not be searched?

MR. ULRICH: I think in the stolen vehicle type argument, perhaps it could still not be searched. In those arguments, the police are going to notify the owner of the recovery of his automobile, he should then be given the preference whether the automobile be searched. Now, again, there are all kinds of extensions in this area that would allow a search, but I don't wish to comment on those.

QUESTION: Basically, you are saying, I think, that no search, if you know the owner, without first notifying the owner?

MR. ULRICH: Yes, I guess that is basically what my argument is.

QUESTION: There is affirmative duty to contact the owner?

MR. ULRICH: Yes. But pursuing the matter of the cases which have been referred to by the state in the matter, the state in their argument does place reliance upon a decision of this Court in Cady v. Dombrowski. And my argument as to the

interpretation of that case, and the proper interpretation of that case would be to examine the factual situation contained in Cady, the factual situation where the individual was intoxicated, later unconscious and hospitalized, his automobile in an accident, constituting a nuisance, the automobile being impounded, the police officer impounding the vehicle, pursuant to somewhat of a police regulation which would require them to conduct an inventory -- the record on that case, I am not quite familiar with what their regulations state, but the regulation was present -- and the motive of the inventorying officer in that case, which is absent in this case, was that he had a reasonable belief that the vehicle contained a weapon which would be dangerous either to himself or to members of the general public. And in this case, we have no motive or no reasonable grounds or probable cause existing to believe that this vehicle contained anything other than the items in plain view that were contained in the interior that the officer could observe from the window.

When he entered the glove compartment, this officer did not know whether the glove compartment contained any items of value.

QUESTION: Mr. Ulrich, doesn't the notion of probable cause almost not lend itself, when you depart from the idea of a search with the object of taking incriminating evidence? I mean, does it make any sense in Cady v. Dombrowski to talk

about probable cause, to believe that there was a gun in the trunk, when you are not talking at all in terms of pursuit of criminal evidence? Don't you have to analyze it in some other terms of reasonableness?

MR. ULRICH: I don't believe you would have to. I believe that the Fourth Amendment isn't only applicable in the area of searches with the intent to seize criminal evidence, but --

QUESTION: I wouldn't doubt that you are right. All I am suggesting is that perhaps the line of analysis should be reasonableness, which is the language of the amendment, rather than probable cause, when you get outside the area of searching for criminal evidence.

MR. ULRICH: Yes, I agree with your position. The elements should be reasonablenss. I think if I did state the issue of probable cause, it was error on my behalf and I am proceeding to analyze this as a reasonable measure. But I think reasonableness in this case, the automobile was seized and searched right around noon, in broad day, this is a very small rural community, the --

QUESTION: What is the population of Vermillion, about 10,000?

MR. ULRICH: The standing population is 5,000. When the --

QUESTION: How about when the college --

MR. ULRICH: When the university is in session, the population will be in the neighborhood of 10,000. But it is a small community.

The owner did arrive at the police station sometime around 3 p.m. Mr. Janklow's facts stated that he did return at 5:00. He did return at 3 p.m. to claim his automobile. The automobile was only in police custody for a period of three hours, in broad daylight, in a small rural community, and --

QUESTION: But it may have been there for three days or three weeks, is that not so?

MR. ULRICH: Pardon?

QUESTION: It may have been there three days or three weeks.

MR. ULRICH: Yes, there is a possibility of this happening, but I think in those particular cases, search or entry into the automobile may be justified under some time element reasoning, which exists in Cooper.

QUESTION: Let me ask you another hypothetical question. They did not enter the truck in this case, is that correct?

MR. ULRICH: No, they did not.

QUESTION: Suppose they did enter the trunk and they found inside the trunk some incriminating evidence, you say that would similarly be subject to suppression and exclusion?

MR. ULRICH: That would be my view.

QUESTION: Suppose when they opened the trunk they found a small child, bound and gagged, the victim of a kidnapping, that fact would not be admissible in evidence then, if he is tried for kidnapping?

MR. ULRICH: That would be my position, that evidence would not be admissible. It would be entry into the closed compartment of the vehicle without any justification, without any basis of reasonablenss, would offend Fourth Amendment standards.

QUESTION: I suppose this hypothetical kidnap victim were 10 or 12 years old and vigorous enough to kick on the trunk of the car and make a little noise, do you think that then might alter the situation?

MR. ULRICH: Yes, it would definitely alter the situation. It would give the officer --

QUESTION: How would it alter it, because it gave some probable cause to --

MR. ULRICH: It would give a reasonable foundation to the officer to believe that a vehicle did contain something which should be removed immediately, and he would be justified.

QUESTION: He would have a right to go in, in your view then, to see whether it was just a hunting dog or a kidnap victim?

MR. ULRICH: Yes, in my view, that would constitute reasonableness under Fourth Amendment standards.

QUESTION: But if they just stumbled on it by accident, then they could not use that evidence against him?

MR. ULRICH: Well, my answer to that question would be yes, however, under the facts of this case, I don't feel that they did stumble on evidence by accident. I think it was by design.

QUESTION: What in the record do you suggest supports that?

MR. ULRICH: Just from the mere fact that the entry was gained into an area of privacy with no foundation of reasonableness.

QUESTION: Well, there is no claim in this case that it is like the Harris case, in that this was a plain view case. There is no such claim at all, is there?

MR. ULRICH: Well, the state seems to make that argument.

QUESTION: That it is a plain view case?

MR. ULRICH: No. The state seems to make the argument that Harris is applicable here.

QUESTION: Well, Harris is a relevant decision, that is one thing. To say that is one thing, but I didn't understand that there was any claim that this was in plain view because in fact it was in the glove compartment.

MR. ULRICH: No, this case is completely different than Harris. The language in Harris may be helpful, but the

rule of law expounded by Harris, in my opinion, is not applicable in this case, and I do share your opinion that Harris is a plain view case.

QUESTION: Do you think the watch on the dashboard being in plain view, supplied the element of reasonableness that you mentioned?

MR. ULRICH: I would like to answer that question. Mr. Janklow's position was that Opperman did concede the initial entry into this automobile. That has never been my position. That was the holding of the Supreme Court of South Dakota that the initial entry to remove articles in plain view was reasonable. My argument was that even the initial entry of this automobile, where the windows were rolled up and the doors were locked, and the owner had taken all precautions that he could to protect his items of value in the confines of his automobile, that the initial entry of breaking the close, entering the automobile was unreasonable. That was my initial argument.

However, this decision now, the decision of the Supreme Court of South Dakota has modified that by its decision of stating that they are not of the opinion that any seizure of items in plain view would be unreasonable.

QUESTION: Suppose, instead of a wrist watch on the dashboard there had been a beautiful diamond broach, would that have made any difference, would that have justified entry to

protect it?

MR. ULRICH: I think perhaps the better argument between the initial entry and the alternative argument of no entry at all, I think the better argument is that that would justify an entry into the automobile, only dealing with the area of plain view within the automobile, which is an area -- which is an area in order to come within the automobile exception.

QUESTION: A fortiori if it were a gun in plain view?

MR. ULRICH: Excuse me, Mr. Justice?

QUESTION: A fortiori if it were a gun in plain view?

MR. ULRICH: Yes. Yes.

Pursuant to the state's additional argument, their argument also runs to the lower court's decisions citing both state and federal court decisions. About half of the state court decisions that the government relies on in this case did not analyze an inventory procedure to be a search. Now, the state has conceded this to be a search for purposes of this argument.

Now, the additional half of these cases proceed with the analysis of reasonableness in light of the Fourth Amendment. The argument as to civil liability or the argument of bailments, in my opinion, is applicable in the analysis of reasonableness, maybe not just for the fact that it is there, but any analysis of reasonableness has to deal with motive, what is the motive

in my opinion of the officer that is entering into the closed confines of the automobile.

The state attempts to justify this entry in that the officer's motive was to protect the police department. Well, in the analysis of his motive, it is obvious that under the state laws of which he was operating, that he would not be liable for the entry to the automobile or he would not be liable for any articles within the automobile that were in the absence of his plain view. The only --

QUESTION: Has the Supreme Court ever decided that in a decision on precisely that point, or did they just announced it incidentally in this case?

MR. ULRICH: This was announced incidentally inthis case. There has been an additional decision since that time, which I don't have the citation to. I will be happy to send it. to you, where the arrest occurred on the open highway and the automobile was left by the police officer on the open highway. The individual who was arrested was taken into the station house, and during the time the station house procedure was occurring, the automobile was vandalized. Our Supreme Court stated that the officer was under no liability for any vandalism that occurred to the automobile on the open highway.

QUESTION: An officer or a municipality might have to go all the way to the Supreme Court, as this case now demonstrates, to get that decided. Don't you think they have a

right to take some precautions and have procedures that will protect them even against the likelihood of defending a suit?

MR. ULRICH: This is a matter of statute also. Certainly, there may be some question as to statutory interpretation, but I think the statute in this case is quite clear. In South Dakota, they are known or termed as gratuitous depositories, and they are only held to a slight standard or a slight degree of care. So I think that there may be a problem of statutory interpretation, but I can find no slight or degree of care than rolling the windows and locking the doors on an automobile to protect any property in it, and in this case the automobile was already locked.

QUESTION: Mr. Ulrich, what if you win here and the South Dakota legislature decides it doesn't like the result very much and so it passes a statute saying that policemen impounding cars shall be subject to the highest degree of care? Ought that to change the result for Fourth Amendment purposes?

MR. ULRICH: No, I don't believe it should, but it may go to an analysis of motive, what the officer's motive was when he entered the automobile. But in this case, the state has attempted to justify the entry as a police protection argument, that that was the motive of the officer, one of the motives of the officer entering the vehicle, to protect the police department, and I don't see how that motive can be justified in light of the state statute only defining them as

gratuitous depositories and slight degree of care.

QUESTION: What else is there in the record to give you motive?

MR. ULRICH: Excuse me, Mr. Justice?

QUESTION: What else is there in the record to give you a contrary motive on behalf of the police?

MR. ULRICH: There is nothing in the record to give me a contrary motive.

QUESTION: Then that means that the only thing that will be deterred, the only conduct that will be deterred, if the case were decided your way, would be inventorying contents of cars?

MR. ULRICH: That would be correct. Now --

QUESTION: It wouldn't be deterring constitutional violations, but simply here --

MR. ULRICH: It would be deterring constitutional violations because, in my argument, an entry into the closed confines of the automobile and the console would be a breach of --

QUESTION: Well, that is the question in this case.

MR. ULRICH: Yes, but returning to the question of Mr. Justice Marshall as to is there anything in the record to indicate any bad faith or any bad motive, I think an analysis of the Court of Special Appeals of Maryland on this issue in their latest case involving an inventory procedure is helpful.

The name of the case is Dixon v. State. The Justice writing that opinion begins with the statement that nothing has affectad the yawning credibility gap between the officer's testimony in the area of inventory searches since the Dropsey case, and I think this is one of the dangers that are present by allowing this type of procedure and allowing the officer to testify that he had no bad motives, that it was strictly a good faith effort. I don't think the constitutional --

QUESTION: Mr. Ulrich, to the extent that you rely on the fact that police officers are possibly sometimes guilty of not telling the truth, I suppose they are also on occasion guilty of breaking into cars and stealing property of the citizen who abandoned it there. Is it a possible legitimate interest to the state to regularize the procedure by which these inventories are taken in order to minimize the danger of theft by the police officers?

MR. ULRICH: I don't know if I can answer that particular question as to regard to state policy. I think that the holding in this case by the State Supreme Court would certainly organize or stabilize these procedures. It certainly would give direction, this holding, and I think since this holding has been expounded in South Dakota, that the standard has been reached on the inventory searches after this holding.

So as the conclusion of this argument, my position is -- and I feel that it would be the better position -- that in

the absence of any reasonableness, the entry into an area protected by the Fourth Amendment has to be found unreasonable, in violation of the Fourth Amendment.

The state's arguments as to the police protection and the argument as to the protection of the owner of the property, in my opinion, are without merit. The owner is given no more protection by having his inventory, the items in his automobile inventoried. If an individual is going to make false claim, he is going to be the type individual who is going to make them anway, whether the items are inventoried or whether they are not inventoried.

QUESTION: If they are inventoried and carried to the police and put in the police safe, they are a little bit safer than sitting out there in the car, aren't they?

MR. ULRICH: I would say that just because an inventory sheet is presented by a police officer, that that is not --

QUESTION: No, this is more than an inventory sheet. They took the materials and took them to the police and put them in a safe for keeping.

MR. ULRICH: Those materials -- yes, those materials would be safe.

QUESTION: Well, isn't that protection for the man?

MR. ULRICH: Yes, that would be protection.

Concluding the argument, I could still find no reason why an entry into an area protected under the Fourth Amendment

of the Constitution, standard of reasonableness, I can find no reasonableness as to the entry into this closed confine. In the absence of any reasonableness, the evidence should be excluded as violations of the Fourth Amendment.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Attorney General?

ORAL ARGUMENT OF WILLIAM J. JANKLOW, ESQ. --REBUTTAL

MR. JANKLOW: A couple of things, Mr. Chief Justice, and members of the Court.

With respect to the respondent's contention that he can compare this case with Cady, Opperman with Cady, the state will submit that that is their case also. Cady was unconscious and here Opperman wasn't even around. He might well have been unconscious because he wasn't around. From the time in the early morning hours when he first discovered that his car wouldn't start, according to the record, until late the next afternoon, he never bothered to call the police department, which everybody concedes is in a community of approximately 5,000 to 10,000 people, yet an argument is now made that there was some expectation the police should go running around looking for him, when the obvious thing would have been, had he cared, was to get a hold of the police department.

Second of all, in Cady there was a nuisance with the car parked. Here there was a nuisance with the car parked.

There is a legitimate ordinance -- there is no argument but that there is a legitimate ordinance that provides that cars that break the law with respect to parking have to be removed between 2 and 6 a.m.

With respect to the impoundment, in Cady a car was impounded, in here the car was impounded. In Cady, it happened to be seven miles from the police station, out in the rural country of Wisconsin. Here we happen to have had it taken inside the community of Vermillion, but also not at the police station and also in a place where it was unprotected. In Cady, they talked about motive, in here we talk about motive. In Cady, the motive was to search for the weapon to protect the general public. There was no argument but that what the police in Cady were doing was to look for the weapon, one, and, two, their contact with the car was a non-criminal contact because the car was a nuisance and they legitimately had it.

Here in Opperman, we have non-criminal contact. There was no suspicion and nobody has ever made the allegation that there was any police suspicion of any criminal violation. We've got the protection of the public, the protection of the police officer, and the protection of Mr. Opperman with respect to the property --

QUESTION: Should you be able to look under the floor mat, Mr. Attorney General?

MR. JANKLOW: I would say yes, because I think anybody

frankly -- people put their keys under the floor mat a lot of times, that is where they place the ignition key. Out in our country, you look in the ashtray, over the visor, and under the floor when you are looking for keys.

QUESTION: Under the floor mat in the backseat?

MR. JANKLOW: No, not under the floor mat in the backseat. But if you are going to do the proper inventory procedure, the state would submit --

QUESTION: How about in the trunk? How about a locked trunk?

MR. JANKLOW: No, you don't park the keys there, but the --

QUESTION: But how about searching a locked trunk?

MR. JANKLOW: We think that that would be proper, just because trunks are broken into just like glove boxes are broken into. This particular case we have here, Mr. Justice White, respondent concedes we are in the key and he would have us just stop and look at the glove box and not even check to see if it is open. But we would submit that the legitimate areas of concern for the protection on the balancing test, under what is reasonable -- and we would submit that the reasonableness standard, the objective standard of Terry v. Ohio, that was set forth by the Court in Terry v. Ohio, would certainly be the one that would be applicable and could be applicable with respect to these inventory procedures, that the interior

of the car, the body of the car, I should say, under the hood and in the trunk. That doesn't mean you tear off the door panels, it doesn't mean you tear the seats apart, it doesn't mean you go up under and behind the dash, and those kinds of things.

QUESTION: Under the seats?

MR. JANKLOW: Looking under the seat, yes, sir.

QUESTION: What do you, break open the glove compartment, if it is locked?

MR. JANKLOW: I would say the answer to that would be yes, just because a thief that would go in there would break open the glove box, but I would also submit that if that was our facts, I would be in a completely different situation. My argument I think would be less tenuous, or I should say more tenuous than it is now. But we submit that reasonableness is in fact the standard under the Fourth Amendment. Clearly, the Fourth Amendment demands reasonableness and the standard of Terry v. Ohio on the objective test is the one that would be appropriate.

The last point that the state would suggest is what had, when he found the wrist watch on the dash, had he opened the glove box to put it in there, to get it out of plain view and seen the marijuana, would the respondent be then arguing that for some reason the law enforcement officer had also made a mistake.

But the key thing, I think the facts in our case are unique and they lay us basically, other than for the gun situation, they put squarely within the reasoning and the logic and the propositions that were laid forth with respect to Dombrowski, also the arguments put forth of Cooper and Harris clearly apply, that the automobile is of a different nature than somebody's house. It is mobile, but not only is it mobile, but also because of the police contact in a non-criminal nature, that there is so much of. This is the only reasonable thing that these officers could have done other than to just leave the car in an area where they knew that it was broken into in the past and where it could be broken into now, and then face the arguments, this whole argument about bailment, gratuitous bailees.

Frankly, although there is a statute on it in South Dakota, it doesn't pertain to police officers. It is a statute on gratuitous bailments, and it took our Supreme Court to decide that issue and even, as respondent says in his argument, even after this case, there is another case before our Supreme Court to decide whether or not a law enforcement officer was a gratuitous bailee, and we submit that the protection of people's property shouldn't depend on whether or not people are gratuitous bailees or not. And for those reasons, we would request that the decision of the South Dakota Supreme Court be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:06 o'clock p.m., the above-entitled case was submitted.]

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