

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF ERIE

C. A. NO. E-88-45

State of Ohio

APPELLANT

-VS-

Daniel D. Griffin

APPELLEE

and

State of Ohio

APPELLANT

v.

Dean Koch

APPELLEE

APPEAL FROM

ERIE COUNTY COURT

NO. 88 CRB 083

NO. 88 CRB 099

DECISION AND
JOURNAL ENTRY

COPY

DATE October 27, 1989

This case is on appeal from a judgment of the Erie County Court.

The facts of this case are as follows. On April 26, 1988, Geno A. Barna, Merlin Chambers and William H. Booher, game protectors with the Ohio Division of Wildlife, conducted a surveillance operation of a commercial fishing ground operated by appellee, Dean Koch. Barna and Chambers concealed themselves behind rocks and trees to observe the commercial fishing operation, while Booher was stationed some distance away on the only road to the site.

Barna and Chambers observed Jerry Neidler, one of Koch's employees, throw walleye toward the shore. Barna and Chambers then observed appellee, Daniel D. Griffin, load the walleye into a bucket,

place them in the trunk of his automobile and drive away. Barna radioed Booher that a vehicle was leaving the fishing ground with walleye in the trunk. Booher stopped the Griffin vehicle and asked Griffin to turn off the engine and remove the ignition key. Booher then asked Griffin to step out of his vehicle and open the trunk. Griffin stated to Booher he had never done anything like this before and proceeded to open the trunk. Booher then confiscated the walleye and gave Griffin a receipt.

Booher attempted to inform Griffin of his Miranda rights; however, Griffin interrupted stating he was a former police officer and aware of his rights. Booher asked Griffin for a statement which was written down by Booher and signed by Griffin. Griffin was then permitted to leave.

On April 29, 1988, Griffin was served a summons and complaint for illegally possessing walleye in violation of R.C. 1533.63 and Ohio Administrative Code 1501:31-3-02(H). On May 9, 1988, a summons and complaint was served on Koch for failure to release walleye as required by R.C. 1533.63 and Ohio Administrative Code 1501:31-3-02(A) and taking walleye by aid of commercial fishing gear in violation of R.C. 1533.63 and Ohio Administrative Code 1501:31-3-02(H).

On August 22, 1988, Griffin filed a motion to suppress both the statements made by him and evidence of the walleye seized from his vehicle. On December 19, 1988, the trial court granted the motion as to both Griffin and Koch.

It is from this judgment appellant, the state of Ohio, raises the following three assignments of error:

"I. THE TRIAL COURT ERRED IN SUPPRESSING EVIDENCE RELATING TO THE SEIZURE OF THE WALLEYE.

"II. THE TRIAL COURT ERRED IN SUPPRESSING STATEMENTS MADE BY DEFENDANT GRIFFIN TO G. P. BOOHER

"II. WITH REGARD TO DEFENDANT KOCH, THE TRIAL COURT ERRED IN SUPPRESSING EVIDENCE OF THE WALLEYE AND MR. GRIFFIN'S STATEMENTS BECAUSE MR. KOCH LACKS THE STANDING NECESSARY TO CHALLENGE THE ADMISSION OF THAT EVIDENCE"

As the first assignment of error, the state argues the trial court erred in suppressing the evidence of the walleye seized on the grounds that the search of Griffin's vehicle was not made incident to a lawful arrest.

While the general rule is that warrantless searches are prohibited under the Fourth Amendment, such rule is subject to certain exceptions. See Katz v. United States (1967), 389 U.S. 347, 357. A warrantless search of an automobile made incident to arrest is recognized as one of these exceptions. New York v. Belton (1981), 453 U.S. 454, 460. However, a warrantless search of an automobile, where police officers have probable cause to believe such vehicle contains contraband, is also a well-recognized exception. United States v. Ross (1982), 456 U.S. 798, 809.

In the present case, there remains some question as to whether Griffin was under arrest at the time Officer Booher conducted the warrantless search of Griffin's vehicle. However, we find there is no question that Officer Booher had probable cause to believe the Griffin auto contained contraband, i.e., illegally caught walleye. Officers Barna and Chambers both observed Griffin remove the walleye from the commercial fishing operation and place such in his vehicle, an act prohibited by Ohio statute.¹ When Officer Barna informed Officer Booher that Griffin's vehicle, with the walleye in the trunk, was leaving the fishing operation, Officer Booher had probable cause to conduct a warrantless search of the trunk. Therefore, we find the

trial court erred in suppressing the evidence of the walleye obtained during the search of Griffin's vehicle. Accordingly, the state's first assignment of error is found well-taken.

As the second assignment of error, the state argues that the trial court erred in suppressing statements made by Griffin to Officer Booher immediately prior to and after the search of Griffin's vehicle.

The landmark case of Miranda v. Arizona (1966), 384 U.S. 436, 444, established that a suspect must be advised of his or her rights prior to a custodial interrogation. However, when statements are made on a suspect's "own initiative in the absence of questions or any other words or action likely to elicit an incriminating response," Miranda warnings are not required. Akron v. Milewski (1985), 21 Ohio App. 3d 140, 141; see Rhode Island v. Innis (1980), 446 U.S. 291, 300-302. Further, a suspect, once given Miranda warnings, may waive the right to remain silent or the right to counsel and choose to make a statement. North Carolina v. Butler (1979), 441 U.S. 369, 373.

In the present case, when Griffin was stopped by Officer Booher and asked to open his trunk, Griffin made a statement to the effect he had never done anything like this before. We find such statement was made on Griffin's own initiative without any attempt on Officer Booher's part to elicit an incriminating response.

After officer Booher confiscated the walleye from the Griffin vehicle, he attempted to advise Griffin of his Miranda rights. However, Griffin interrupted, explaining he was a former police officer and aware of his rights. Griffin then complied with Officer Booher's request to make a statement.

Given these circumstances, we find that Officer Booher need not have continued with the unnecessary recitation of Miranda rights

and that Griffin was well aware of such rights as a former police officer. We further find Griffin voluntarily and knowingly waived such rights when he chose to make his statement to Officer Booher.² Accordingly, the state's second assignment of error is found well-taken.

As the third assignment of error, the state argues the trial court erred in suppressing the statements made by Griffin and the evidence of the walleye seized as to co-defendant Koch, on the grounds that Koch lacked standing to challenge the admission of such evidence.

In United States v. Bruton (1969), 416 F. 2d 310, 312 certiorari denied (1970), 397 U.S. 1014, the court held a defendant has no standing to challenge, on constitutional grounds, the admissibility of illegally obtained statements made by a third party. Therefore, assuming arguendo that Griffin's statement was illegally obtained, we find Koch lacked standing to challenge the admissibility of such statement.

In Rakas v. Illinois (1978), 439 U.S. 128, 143, the court held that a defendant must have a legitimate expectation of privacy in the place searched in order to have standing to challenge such a search. The Rakas court found that a defendant has no legitimate expectation of privacy as a mere passenger in an automobile. Id. at 148. In the present case, Koch was neither the owner, nor even a passenger, in the Griffin vehicle at the time it was searched. As such, we find Koch had no legitimate expectation of privacy in such vehicle and, therefore, lacked standing to challenge such a search.

Accordingly, we find the state's third assignment of error well-taken.

On consideration whereof, the court finds that the state was prejudiced and prevented from having a fair trial, and the judgment of

the Erie County Court is, hereby, reversed. This cause is remanded to said court for proceedings not inconsistent with this decision. Costs of this appeal assessed to appellee.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J.

John J. Connors, Jr., J.

George M. Glasser, J.
CONCUR.

PRESIDING JUDGE

JUDGE

JUDGE

¹R.C. 1533.63 prohibits the taking of walleye by commercial fishing and reads, in pertinent part, as follows:

"No licensed commercial fishermen, or person required to have a commercial fishing license under section 1533.34 of the Revised Code, shall take walleye, sauger, whitefish, mooneye, cisco, burbot, sturgeon, blue pike; or brook, beown, rainbow, and lake trout; or coho, chinook and kokanne salmon; or other species protected by Chapter 1531. and 1533. of Revised Code, or division of wildlife order, from Lake Erie or its tributaries, or possess such fish aboard a boat used in commercial fishing when going to or returning from nets or other fishing decises. All such fish caught or taken from a commercial fishing device shall be immediately released with as little injury as possible while the fishing device is being lifted, pulled, or hauled." (Emphasis added.)

²Griffin also argues his statement was properly suppressed as fruit of an illegal search. In that we found the warrantless search of the Griffin vehcile to be proper under the first assignment of error, such argument is without merit.