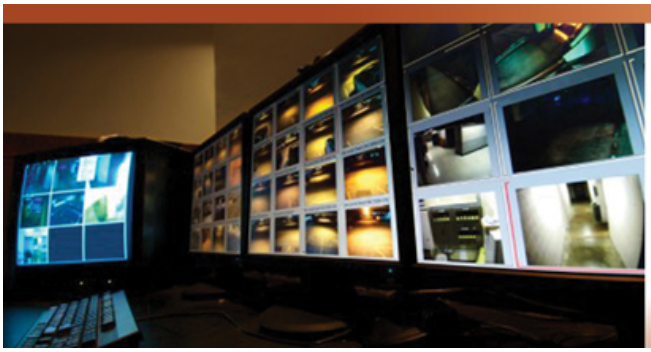

Ohio Attorney General's
Law Enforcement
Bulletin

December 2013

Interrogations (Secret Recordings and Privacy Rights): *State of Ohio v. Williams*

Question: Do suspects have a right to privacy in a law enforcement interrogation room?

Quick Answer: Typically no, but if a recording device is hidden and a reasonable person would believe the room was not monitored, the suspect may have an expectation of privacy.

State of Ohio v. Williams, Eleventh Appellate District, Trumbull County, Nov. 19, 2013

Facts: Jacquavis Williams turned himself in to police after a DNA hit linked him to a shooting and aggravated robbery. After arriving at the police station, Williams and his mother were taken to an interview room. Williams did not request an attorney, but wanted his mother present during questioning. The room contained a desk and a couple of chairs. There were no windows or mirrors, and nothing in the room would lead a person to believe there was a way to view into the room or that the room was monitored by a recording device. The room, however, contained an audio/video recording device hidden in the thermostat. The detective left Williams and his mother alone in the room, telling them he was going to get the *Miranda* waiver and case file. On his way out, he turned on the recording device. While alone, Williams admitted to his mother that he was at the location of the crime, but assured her he was innocent. The detective came back to the room and gave Williams his *Miranda* rights. Williams stated he did not know or remember if he was at the location on the day of the crime and denied being involved in the shooting. The recorded statement was used to show Williams was at the crime location. Williams filed a motion to suppress the statement made to his mother, arguing he was entitled to an expectation of privacy and the conversation had been secretly recorded.

Importance: The court determined that in a majority of cases, there is no reasonable expectation of privacy for conversations held anywhere in a police station. However, this case is different because the interrogation room contained no indication that the activity could be monitored or recorded. As a result, a reasonable person would expect that the room was not monitored and would have a reasonable expectation of privacy.

Keep in Mind: If your interview room suggests an environment of privacy, you may have a problem using a hidden monitoring device there. In this case, the device was hidden in the thermostat. A reasonable person would not believe a thermostat would be used for recording or monitoring. If the recording device was in the open or there was a notice saying a recording device may be in the room, a reasonable person would be put on notice that they may be monitored and would not have an expectation to privacy.

More on Interrogations

Foreign Nationals and Consulates. You are working a rape and burglary case. The main suspect is a Korean national. You conduct an interview, give *Miranda* rights, get a confession and make an arrest. You do not contact the Korean consulate. Does the confession stand? The court in *State of Ohio v. Oh* says yes. Although the terms of the Vienna Convention require an individual who is detained by authorities in a foreign country to be notified of his right to assistance and consultation from the consulate, failure to notify a suspect is not grounds for suppression. This is because the exclusionary rule only applies to constitutional rights, not rights created by treaties. ***State of Ohio v. Oh,*** First Appellate District, Hamilton County, Nov. 8, 2013

Oops, I forgot to tell you about *Miranda.* On patrol, you notice a vehicle towing a trailer with an expired sticker. You run the plate you find there is a warrant out for the owner in another county. You ask dispatch to make contact with that county. You make the stop, ask the driver to exit the vehicle, search him, cuff him, arrest him, and place him in your cruiser. The officer from the other county arrives and tells you he has been trying to serve a warrant on this guy in a domestic violence with a handgun investigation. You both walk over to the suspect and ask him about the gun. He tells you the gun is in the truck. Does the statement about the gun get suppressed? The court in *Jones-Bateman* says yes. It determined that Jones-Bateman was under arrest at the time of the question and any answer to the question would likely elicit an incriminating response. Once a person has been restrained by police, officers are not authorized to initiate questioning without giving *Miranda* warnings. ***State of Ohio v. Jones-Bateman,*** Sixth Appellate District, Wood County, Oct. 25, 2013

Terry Stops (Blocking the Path of Exit): *State of Ohio v. Goodloe*

Question: Is the act of blocking a path of exit to a suspect a minimally intrusive *Terry* stop or a seizure?

Quick Answer: The act of blocking a suspect's path of exit constitutes a seizure, unless a reasonable person would believe he was free to leave.

State of Ohio v. Goodloe, Tenth Appellate District, Franklin County, Nov. 7, 2013

Facts: Two officers in a marked car were stopped at an intersection when they observed Dwight Goodloe at the corner. Goodloe looked like he was going to cross the street, but when he saw the police cruiser, he hesitated. The officers noticed bulges on both sides of Goodloe's pants. They then drove past Goodloe and saw him cross the street and walk through a parking lot. The officers turned around and pulled closer to Goodloe as he walked down the sidewalk. The officers got out, parked on the street next to Goodloe, and blocked Goodloe's path by standing in front of and beside him. One of the officers asked Goodloe if he knew of anyone looking into cars in the parking lot Goodloe had just walked through. Goodloe replied that he did not know anything. Officers then asked Goodloe if he had a firearm on him. Goodloe did not respond, but sighed, dropped his shoulder, and put his head down. The officer took that action as an omission and immediately reached for the bulge on the right side and seized a gun.

Importance: The court determined that because one officer was blocking Goodloe's route on the sidewalk and the other was within a foot or two of him, Goodloe had been seized by police. This action occurred right after the cruiser had turned around, followed Goodloe, and pulled up right next to him. Additionally, the fact that officers asked about criminal activity when they approached could

cause a reasonable person to believe he was not free to leave. Because the officers seized Goodloe without a reasonable suspicion of criminal activity, the stop violated the Fourth Amendment.

Keep in Mind: Remember, a *Terry* stop is **not** a seizure of a suspect, but a tool to stop an individual for investigatory purposes. The test is whether a reasonable person would think he could walk away from you, and that is based on your conduct. If the officers had not followed the suspect, pulled up directly next to him, or blocked his path on the sidewalk, the court may have found their actions to constitute a valid *Terry* stop.

More on Terry Stops

But, I decided not to talk to you, so let me go. While on patrol, you are dispatched to a hit-skip accident involving a pedestrian. You identify a probable suspect during your investigation. You find him walking home and pull over to talk to him. He starts to walk up, but then begins to back away, saying he needs to get something from his apartment and starts messing around with something at his waistband. You decide this activity looks suspicious, call for back up, get out of the cruiser, point a Taser at the suspect, and order him to the ground. He complies and you conduct a pat-down, finding a loaded .380 semi-automatic in his underwear. Did you have a reasonable basis to detain him? The court in *Johnson* says yes. While the act of walking away from a police car or acting unusually would not justify a *Terry* stop, the stop is proper if a reasonable police officer would believe this activity could cause a risk of harm to him. ***State of Ohio v. Johnson***, Second Appellate District, Montgomery County, Oct. 25, 2013

I know you have done it before, so maybe you are doing it again. While on patrol, you see a car parked in front of a local business with two individuals inside. One is a known heroin user. You circle the block again, see the car is still there, and decide to investigate. You get to the car and ask for the driver's license, run the license and find it to be invalid. You go back to the car and have both the driver and passenger get out. You then notice the passenger is leaning over the cruiser weirdly and find he has his shoe halfway off. You ask him to remove his shoe and find a syringe of heroin. Have you conducted a proper *Terry* stop? The court in *Fox* says no. The officer did not see any potential criminal activity and only had suspicion because he recognized one of the individuals as a past heroin user. A person's past reputation or record alone does not equal a reasonable, particularized suspicion that the person is engaged in criminal activity. ***State of Ohio v. Fox,*** Fifth Appellate District, Richland County, Oct. 30, 2013

Investigations (Circumstantial Evidence): *State of Ohio v. Ruppert* and *State of Ohio v. Carver*

Question: Is circumstantial evidence enough to arrest someone when there is no hard evidence that the person committed a crime?

Quick Answer: Yes, circumstantial evidence can be used when it is inferred from reasonable and justifiably connected facts to support a finding of criminal activity.

State of Ohio v. Ruppert, Fourth Appellate District, Washington County, Oct. 30, 2013
State of Ohio v. Carver, Fifth Appellate District, Ashland County, Nov. 5, 2013

Facts in *Ruppert:* Theresa Ann Everson was awakened by her dogs barking and a call for help. About five minutes later, she heard the call for help again. She looked out the window to see Charles

Ruppert standing about 50 feet from her home. Everson called the police at 5:56 a.m. Deputy Jeremiah McConnell was dispatched to the Everson property and arrived a few minutes after 6 a.m. There he saw Ruppert walking toward him with his hands in the air. Ruppert told McConnell he was lost, and he seemed disoriented and confused, was staggering, and had a strong smell of alcohol. Ruppert told McConnell that he was driving and the next think he knew he was in the woods. McConnell found Ruppert's car parked down the hill, in a wooded area about 50 to 60 yards from the house. The hood of the car was still warm. McConnell conducted a field sobriety test and determined Ruppert was under the influence of drugs or alcohol. Ruppert was taken to jail, where he blew a .174 on the BAC test at 8:15 a.m. Ruppert was charged with OVI. He filed a motion to suppress, arguing that the BAC test was more than three hours from the time he operated the vehicle. The court determined that even with no hard evidence, the fact-driven situation allowed for a conclusion that the motor vehicle was operated within the three-hour time period.

Facts in *Carver:* Trooper Eugene Crum of the Ohio State Highway Patrol responded to the scene of a single-vehicle accident. He found a truck crashed into a tree, William Carver passed out in the back, and the keys on the floor. The area around the truck was muddy, and Crum did not notice any footprints around the vehicle. When he woke Carver up, Carver told him "Jason" was driving. He also mentioned Jason was bleeding from the accident. Crum looked inside the vehicle and found no blood. Carver was, however, bleeding slightly from his nose and claimed he hit the dash. Crum looked at the dash and saw no indication that someone hit it. Crum believed Carver's injury was more consistent with a driver hitting a steering wheel if not wearing a seat belt. Crum administered a field sobriety test, which indicated Carver was under the influence. Crum then went to the apartment where Carver said Jason lived, but was unable to locate anyone named Jason. Carver was charged with OVI, failure to control, and not wearing a seat belt. Carver appealed, arguing there was not sufficient evidence to show that he operated the truck. The court found that although there was no direct evidence that Carver was operating the vehicle, the circumstantial evidence was sufficient to conclude Carver was driving.

Importance: A large part of investigating crime is taking independent facts and adding them together to come up with a complete case theory. This theory can be based on circumstantial evidence, which is inferred from reasonable and justifiably connected facts. In the above cases, neither officer nor any witness observed the suspects operating the cars. But both officers were able to connect the facts in a way that led to a reasonable and justifiable conclusion.

Keep in Mind: The key to circumstantial evidence is logic. If you have to stretch one fact too far to make the pieces connect, that inference is probably not reasonable. For example, if in *Ruppert,* the officer found the hood of the car to be cold, it is probably unlikely the vehicle was driven within the three-hour window for the BAC test to be valid. Similarly, if the officer in *Carver* found footprints in the mud going away from the car, it may have been likely someone else had driven the vehicle. To brush up on crime scene investigations, check out the Ohio Peace Officer Training Academy's selection of crime scene courses.

Search of Vehicles (Fruit of the Poisonous Tree): *State of Ohio v. Thompson and State of Ohio v. Sarno*

Question: If your search and seizure of a suspect has been determined invalid, is the evidence you found still able to be used for a conviction?

Quick Answer: No, if the evidence is "fruit of the poisonous tree."

State of Ohio v. Thompson, Second Appellate District, Montgomery County, Nov. 1, 2013
State of Ohio v. Sarno, Second Appellate District, Montgomery County, Nov. 15, 2013

Facts in *Thompson*: Sgt. John Riegel had been driving his marked cruiser when he saw a car turn too fast for the road conditions, pass the cruiser, and turn into an alley without signaling. The car was being driven by Peter Thompson. Riegel activated his lights and followed Thompson into an apartment building parking lot. This particular lot had been the subject of previous complaints of drug activity. Riegel parked directly behind Thompson and walked rapidly toward him. When Riegel caught up to him, he asked if Thompson lived in the building and if he had a driver's license. Thompson only had a temporary permit. Riegel ran Thompson's information and discovered the temporary permit had been suspended. Riegel performed a pat-down, cuffed Thompson, and placed him inside the cruiser, noting that during the pat-down, Thompson was shaking so violently he was concerned for his safety. Riegel then stood outside Thompson's car, looked through the window, and noticed a single marijuana cigarette in the center console. During inventory of the car after a tow, marijuana, heroin, and cocaine were found in the center console.

Facts in *Sarno*: Trooper Kyle Pohlabel was on patrol looking for impaired drivers. He saw a van pass going the opposite direction with an estimated speed of 50 mph in a 40 mph zone. Pohlabel pulled out the radar and clocked the van at 49 mph and 47 mph. He made a U-turn and pulled the van over for speeding. Andrew Sarno was the driver of the van. When Pohlabel approached the van, he asked Sarno to get out for a field sobriety test. When Sarno got out of the van, Pohlabel noted the smell of raw marijuana. Pohlabel performed the horizontal gaze nystagmus test, and Sarno showed no indicia of impairment. Pohlabel had Sarno sit in the cruiser while he searched the van. Upon search, he found a plastic bag of cocaine under an ashtray and a marijuana pipe containing residue. Sarno moved to suppress the cocaine, arguing Pohlabel had no reason to ask Sarno to get out of the van as he lacked a sufficient basis for administering the field sobriety tests.

Importance: Evidence only discovered from knowledge law enforcement gain through an illegal search or seizure is referred to "fruit of the poisonous tree" and must be suppressed. In other words, the only reason you know about the evidence is because you have done something wrong in your search or seizure protocol. In the above cases, the criminals argued that officers had conducted an illegal search of each car. In both cases, the "fruit" was the drugs seized. The risk of creating "poison fruit" of essential evidence can be detrimental to your case. It may be suppressed, and a criminal could go free.

Keep in Mind: Where a search is done properly or based on a separate reason other than basis of the improper search, the "fruit" will not be poisoned. For example, in *Thompson,* the appellate court found the search was done based on plain view, not incident to the arrest, which was later deemed improper. Because of this separate source of probable cause, the "fruit" was not poisoned. And in *Sarno*, the court determined as long as the vehicle was pulled over on a lawful stop, an officer may ask anyone to exit a vehicle, for any reason, during a traffic stop. Since nothing was improper with the seizure in the first place, the "fruit" in that case was not poisoned.

More on Search of Vehicles

You can run, but you can't hide. You are checking registrations of parked cars at a rest stop and notice a car parked backwards. There is no front license plate, so you start to get out of your cruiser to walk around the car. The driver then turns the car on, pulls forward, and moves to another parking space at the other end of the parking lot. You get back in your cruiser and follow the car. The car then backs up and heads for the freeway entrance. You are able to see the plate, run it, and find the car is

not registered. You activate your lights and pull the car over. Did you have an articulable suspicion to pull the car over? The court in *Rice* says yes. Under the totality of the circumstances and based on years of experience, the trooper had enough reasonable suspicion of criminal activity to stop David Rice. Specifically, the fact that the driver parked the car the wrong way in the parking space drove the wrong way in the parking lot, seemingly attempted to avoid the officer by moving to a different parking spot, and the car was not registered provided enough reasonable suspicion of criminal activity. ***State of Ohio v. Rice***, Second Appellate District, Miami County, Nov. 15, 2013

Do sniffs prolong traffic stops? While on patrol with your canine, you see a car speeding and cross center on multiple occasions. You find it has expired tags. You pull the car over, approach, and note an open beer in the back seat. You do not, however, detect an odor of alcohol or observe any suspicious behavior of the driver. The driver admits he was driving erratically and says it was because he was on the phone having a heated fight with his girlfriend. Due to a significant drug problem in your county, you have your canine partner perform a sniff. The dog alerts, and you find 90 hydrocodone pills and two bags of heroin. You then write the traffic ticket. Did the sniff inappropriately extend the traffic stop? The court in *Brown* says no. It determined the dog sniff did not unconstitutionally prolong the stop. Based on the testimony, only five minutes had elapsed from the time of the stop to the walk-around, and Glenn Brown had not yet been issued a citation to conclude the traffic stop. ***State of Ohio v. Brown,*** Sixth Appellate District, Huron County, Nov. 8, 2013

Is my information stale? Based on a confidential source and a pattern of drug activity, you get a warrant to place a GPS on a suspect's car because the suspect will be traveling to Chicago in the next 30 days. The warrant allows for the GPS to remain on the car for that 30-day period; however, the suspect does not leave the city. You learn from the confidential source that the suspect was unable to leave the county due to pending civil charges, but those were cleared and he will be leaving in the next few weeks. As a result, you ask that the warrant be extended, but add no additional information to the affidavit. Has the information gone "stale"? The court in *Winningham* says no. It determined the information had not gone stale because the informant had given police the reason why Lawrence Winningham had not gone to Chicago. The informant also provided a new timeline and told police about a secret compartment in the car. As such, this was new information to establish probable cause for the second warrant. ***State of Ohio v. Winningham***, First Appellate District, Hamilton County, Nov. 6, 2013

Proper Protocol (Marking an Arrest): *State of Ohio v. Gordon*

Question: Have you made a valid arrest even though the prosecutor does not charge the suspect with the crime you arrested him for because the facts ultimately do not support the arrest?

Quick Answer: Yes, if the officer believes at the time of the arrest there is probable cause criminal activity is occurring.

State of Ohio v. Gordon, Ninth Appellate District, Nov. 13, 2013

Facts: Jack Gordon was a passenger in a vehicle that was pulled over on a traffic stop. During the stop, Office Timothy Wypasek approached the passenger side and noticed Gordon had a pill bottle in his hand. Gordon then stuffed the bottle between the seat and the center console. Wypasek, interpreting this as an attempt to hide contraband, arrested Gordon. Gordon appeared to be intoxicated and was not cooperative with the officers. After the arrest, Wypasek located the pill bottle, which was empty. After a search of Gordon, various pills were found in his pocket, along with the pill

bottle cap. Gordon moved to suppress the evidence, arguing the officer lacked probable cause to arrest him because he was not obstructing official business.

Importance: The court concluded that Gordon's arrest was not constitutional for obstruction; however, the proper question to ask was whether the officer had probable cause to arrest Gordon for any offense based on what he believed he witnessed. In this situation, the court is going to look to the reasonableness of your actions and how a reasonable law enforcement officer would have reacted. If, based on the conduct of the suspect, law enforcement believes criminal activity is occurring, an arrest is appropriate.

Keep in Mind: The officer in this case arrested the suspect for obstruction and tampering with evidence. The prosecutor determined it would not pursue those charges based on the final evidence. The arrest was still proper because there is no requirement that an arresting officer absolutely know, in fact, that the person arrested has committed the crime they suspect. The officer only needs probable cause.

More on Proper Protocol

Does the affidavit have enough for probable cause? While working on a drug case, you are requested to complete an affidavit for a search warrant. You include the addresses of the two properties and the fact the suspect was at both houses and state that there was a traffic stop made of a "buyer" who admitted purchasing from the first property and officers arranged for a successful confidential buy at the first property. You do not say anything about who owned either property, nor give any specific facts about drug activity at the second property. The warrant is issued and you search the second property. Was the affidavit supported by probable cause for the second property? The court in *Russell* says yes. Although the second property did not have specific facts stated in the affidavit, the affidavit contained enough information to indicate that there was a fair probability that contraband or evidence of a crime could be found there. The affidavit indicated that John Russell kept many cars at the second property, received telephone calls there, and departed from that house before engaging in both reported drug transactions. Although Russell completed the sale of drugs at a different location, common-sense says he may have held a supply at his starting location. Based on the totality of the circumstances, the affidavit provided a substantial basis for probable cause to issue the warrant. ***State of Ohio v. Russell,*** Ninth Appellate District, Summit County, Nov. 6, 2013

Another look at affidavits and probable cause. You are part of a team working on a drug case. Your face is too well-known by these suspects, so you monitor the progress of a confidential buy from a distance and through electronic monitoring. The buy was successful, and you write the affidavit for the search warrant. You include all of the facts pertaining to the buy, but not how you personally know of these facts. Is the affidavit sufficient? The court in *Hudson* says not on its face. Although hearsay may set the foundation of an affidavit, the issuing judge must be informed of some of the underlying circumstance of how the person writing the affidavit obtained the information and why that person believes the information to be reliable. The affidavit in this case did not contain that language. However, based on the testimony of the detective, the court concluded he did not make false statements in the affidavit and did have personal knowledge. As a result, the court found the affidavit fell within the good faith exception to the exclusionary rule and the evidence could be admitted. ***State of Ohio v. Hudson,*** Eleventh Appellate District, Trumbull County, Nov. 13, 2013