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Steps can help limit civil liability

Because of the inherent danger and quick decisions law enforcement officers face every day, civil liability is a real concern for officers and their agencies.
Nearly every arrest, detention, use of force, pursuit, and collision an officer is involved in creates the potential for litigation. Add to that the fact that cell phones routinely capture interactions between law enforcement and the public, and it's easy to see the reason for concern.
While no public servant can prevent someone from filing a lawsuit, officers and their agencies can take several proactive steps to limit potential liability. John Green, an attorney with the Ohio Peace Officer Training Academy (OPOTA), offers these suggestions:

- Review policies and procedures to ensure they reflect proper constitutional standards.
- Know, follow, and train according to your agency's policies and procedures.
- Conduct training according to accepted standards.
- Prepare detailed reports that accurately reflect incidents.
- Be prepared to intervene during high-risk activities such as uses of force or vehicle pursuits.
- Maintain your professionalism at all times, and assume everything you say and do is being recorded.
- Take responsibility for your training, and ensure it is up to date. Visit www.OhioAttorneyGeneral.gov/OPOTA for information on free online and regional trainings.
- Read law enforcement publications to stay abreast of trends and recent court decisions. The Attorney General's Criminal Justice Update at www.OhioAttorneyGeneral.gov/CriminalJusticeUpdate is one good resource.

Lawsuits can have a demoralizing effect on agencies and their officers. Working together to minimize exposure to liability is mutually beneficial to both.

For more information: OPOTA's Mobile Academy frequently offers regional trainings on ways to limit civil liability. Courses are listed at www.OhioAttorneyGeneral.gov/OPOTA.

State v. Vaughn, Second District Court of Appeals (Champaign, Clark, Darke, Greene, Miami, Montgomery), Dec. 31, 2012

Question: Can a peace officer search a suspect without probable cause when another officer present has probable cause to do so?

Quick Answer: No, unless the officer with probable cause ordered the search or communicated his knowledge to the searching officer.

Facts: Police received an anonymous tip that suspect Latasha Vaughn was selling drugs in her home, so an officer drove to Vaughn's home. The officer knew drugs were prevalent in Vaughn's neighborhood, and he had arrested others for drug possession after they had left Vaughn's house. He watched as a car pulled up to the house and honked three times. Vaughn and another woman came outside, got into the car, and it drove away. The officer followed the vehicle and made a traffic stop. A second officer arrived and assisted in making the stop. The officers based the stop on a city ordinance that prohibits honking a car horn for any reason other than to warn of danger.

The first officer asked Vaughn for an ID while the second officer spoke with the driver. Noticing a wad of money in Vaughn's sweatshirt pocket, the first officer asked Vaughn to step out of the car. He watched Vaughn press her hand against her shirt pocket as she stepped out of the vehicle, concealing the wad of money. The first officer alerted the second officer about the wad of money. Vaughn heard this and pulled out the money, showing both officers that it was 11 one-dollar bills rolled up together. The second officer then saw a plastic sandwich bag, knotted at the top, sticking out of her shirt pocket. He knew that drugs often are packaged in plastic bags, so he asked her about it. Vaughn told the second officer that the bag was nothing, and she started to go for her shirt pocket again. The second officer grabbed Vaughn's hand and reached into her pocket to grab the bag, which contained crack cocaine. She was arrested and later filed a motion to suppress based on an unreasonable search.

Why this case is important: The court held that, from looking at the totality of the circumstances, the second officer had no probable cause to believe that the bag in Vaughn's sweatshirt pocket contained drugs. It was the first officer who knew about several tips that Vaughn sold drugs and that drugs were common in the neighborhood. The first officer also had arrested individuals for drug possession after they had left Vaughn's home. But there was no evidence that *the second officer* knew this information.

The second officer knew he was responding to a call of suspicious drug activity, knew about Vaughn's wad of money, and saw the plastic bag, but the court determined that those facts didn't support probable cause that the bag contained drugs. Because the first officer never communicated his knowledge to the second officer or ordered the second officer to remove the bag from Vaughn's pocket, the second officer's actions weren't supported by probable cause.

The second officer also wasn't justified in reaching into Vaughn's pocket on the basis of officer safety, based on these facts, because Vaughn had already reached into her pocket once to retrieve the money, and the officer didn't initiate a pat-down at that time.

Keep in mind: It's important to communicate with other officers when responding to dispatch calls, when practical, because another officer may have information you need to secure probable cause to search. However, don't forget that probable cause may be assumed between law enforcement officers when one peace officer has probable cause but orders another officer to conduct a search.

Visit the Second District Court of Appeals website to view the entire opinion.

State v. Leet, Second District Court of Appeals (Champaign, Clark, Darke, Greene, Miami, Montgomery), Dec. 28, 2012

Question: If a suspect waives his *Miranda* rights during an interrogation, can law enforcement use his incriminating statements against him up to the point that he requests an attorney?

Quick Answer: Yes, unless the suspect demonstrates that he never understood his rights in the first place.

Facts: After executing a search warrant for Gregory Leet's house and vehicle, police took Leet to the police station for questioning on two recent homicides. The investigating detective read Leet his *Miranda* rights before questioning him, and Leet waived each of those rights orally. The detective then began taping the interrogation.

At one point during questioning, Leet requested that his rights again be read to him. The detective again went over each right, but when he explained that Leet had a right to an attorney, Leet asked, "You can have a lawyer with you during the questioning?" And after again reading the waiver portion of the *Miranda* form, he stated, "I do want a lawyer . . . if I can have one during questioning." Leet acknowledged that, even though he signed the *Miranda* waiver form before the interrogation began, he didn't know he was allowed to have an attorney present while being questioned. He then requested an attorney, if one was available.

The detective told Leet that he could provide an attorney "at a later date." Leet asked if the detective could use all the statements Leet made before requesting an attorney against him in court. The detective explained that the statements would be used and that Leet's statements were recorded, so Leet then told the detective, "Guess I'll talk." Leet later filed a motion to suppress all his statements.

Why this case is important: The court held that Leet's statements should be suppressed. A suspect can waive his *Miranda* rights, but his waiver must be made with full awareness to both the nature of the right he is giving up and the consequences of giving up that right. And courts look to the totality of the circumstances to see if the suspect's waiver was voluntary, including the suspect's age, mentality, and criminal history as well as the circumstances surrounding the interrogation. Here, Leet's responses to the detective show that he didn't understand he had a right to counsel during his interrogation. Then Leet twice requested counsel, which demonstrates that he probably didn't understand that right when he first waived it. Once he understood, he unequivocally requested counsel. And Leet didn't successfully waive his rights when he later told the detective, "Guess I'll talk." The detective used a tactic of telling Leet that he wouldn't get an attorney until "a later date" as an attempt to continue the interrogation. Therefore, all of Leet's statements were suppressed.

Keep in mind: If during an interrogation a suspect later shows that he may not have understood his *Miranda* rights, you probably should review those rights with him again to make sure you have obtained a valid waiver from him. Otherwise, any incriminating statements likely will be suppressed.

Visit the Second District Court of Appeals website to view the entire opinion.

State v. Miller, Fifth District Court of Appeals (Ashland, Coshocton, Delaware, Fairfield, Guernsey, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark, Tuscarawas), Dec. 26, 2012

Question: Can a peace officer make a traffic stop if the officer hears the suspect revving his car engine at a stop light and then believes the car is speeding based on a visual estimation?

Quick Answer: No, these are not specific, articulable facts that criminal activity is afoot.

Facts: While responding to another call, two police officers heard someone revving a car engine while waiting at a stop light a block away. The officers believed the driver revved the engine for two seconds. One of the officers walked into the roadway as the car drove toward him. The officer visually estimated that the car was traveling slightly over the speed limit, so he signaled for the car to pull over. When the officer approached the vehicle, the car's driver, Anita Miller, told the officer she didn't have a license with her. At that point, the second officer walked over to speak with Miller, and based on the interaction with that officer, Miller was arrested for OVI. She filed a motion to suppress based on no reasonable suspicion for the stop.

Why this case is important: The court suppressed the evidence of OVI because revving the engine of a vehicle by itself isn't "suspicious activity" that would justify stopping the vehicle. And because Ohio law prohibits officers from charging a suspect for low-level speeding based only on a visual estimation of the suspect's speed, officers may not use their estimations to make a traffic stop.

Keep in mind: In most cases, visual speed estimation is no more than a hunch that criminal activity may be occurring. Even though you may think something is "off" with a driver's behavior, such as revving the engine and appearing to drive slightly above the speed limit, these behaviors don't give you reasonable suspicion to stop the vehicle. However, these peculiar behaviors should flag you to take notice of the car and perhaps further investigate to get the reasonable suspicion needed for a lawful traffic stop.

Visit the Fifth District Court of Appeals website to view the entire opinion.

State v. Price, Sixth District Court of Appeals (Erie, Fulton, Huron, Lucas, Ottawa, Sandusky, Williams, and Wood), Jan. 18, 2013

Questions: (1) May a peace officer search a car incident to arrest even though the recent occupants of the car are handcuffed and sitting in the back of the officer's vehicle? (2) May the officer search the trunk of the car without a warrant even though the officer could secure the car and go get a warrant?

Quick Answers: (1) Yes, but only if the officer has reason to believe that the car contains evidence relevant to the arrested occupants' crimes. (2) Yes, if the officer has probable cause to believe that the trunk contains evidence of a crime, the automobile exception permits a warrantless search.

Facts: A police officer stopped a vehicle for speeding. The driver didn't have his license, but gave the officer his social security number and date of birth. The officer believed the driver had an outstanding warrant, so he asked him to get out of the car. The officer handcuffed and patted down the driver, finding $1,175 in cash. He also noticed that the driver and the vehicle smelled like burned marijuana, and the driver's breath smelled of alcohol. The officer had the driver perform field sobriety tests and arrested him for OVI, placing him in the back of the patrol car. The officer asked the passenger, Lawrence Price, if he had permission to drive the car, and Price answered that he did. However, the officer learned that the car wasn't registered to either the driver or Price, so he asked Price to step out of the vehicle.

The officer quickly patted down Price and found no weapons. Price was acting very nervous and fidgety, though, so the officer asked Price if he had anything illegal on him. Price replied, "Well, I'll empty out my pockets." He began removing items from his pants pockets, including a cellophane plastic wrapper. The officer knew that cellophane wrappers were a common way to carry drugs, so he asked Price what it was. Price told him, "That's nothing, that's a piece that I didn't smoke earlier" and reached for the wrapper. The officer stopped Price and arrested him for suspicion of having drugs. The officer then searched the vehicle and found a small bag of marijuana. He also searched the trunk, which had a strong odor of raw marijuana. The officer found digital scales and a black bag. He felt the outside of the bag and believed some type of vegetative matter was inside. The officer called to have the vehicle impounded and again searched the passenger compartment. Price moved to suppress the evidence from the officer's search.

Why this case is important: The court held that the officer's search of the passenger compartment and trunk was constitutional. For a search incident to a lawful arrest, law enforcement may search the passenger compartment of a suspect's vehicle when it is reasonable to believe that the vehicle contains evidence of the arresting offense. Here, the officer smelled burned marijuana, the driver had a large amount of money in his pocket, and Price insinuated that the cellophane from his pocket involved drugs. These facts gave the officer probable cause to search the vehicle incident to Price's arrest.

The search of the trunk was justified under the automobile exception. If an officer has formed probable cause to believe that a crime has been committed, a vehicle may be searched without a warrant because (1) a vehicle is mobile, which creates a potential exigency that makes it difficult to obtain a search warrant, and (2) a there is a lessened expectation of privacy of a vehicle because it is frequently exposed to the public. In this case, when searching the passenger compartment of the car, the officer found a small amount of marijuana and noticed a strong smell of marijuana coming from an empty bag inside the car. This evidence gave the officer probable cause to search the trunk. There was no need to get a warrant even though it was possible for the officer to secure the car and obtain a warrant because the automobile exception doesn't have an exigency requirement that must be met.

Keep in mind: The evidence you discover from exercising one warrant exception may provide you with the probable cause to exercise another exception.

Visit the Sixth District Court of Appeals website to view the entire opinion.

State v. Frazier, Third District Court of Appeals (Allen, Auglaize, Crawford, Defiance, Hancock, Harding, Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca, Shelby, Union, Van Wert, Wyandot), Jan. 22, 2013

Question: Can peace officers collect a suspect's DNA after he has requested an attorney during questioning at the officers' station?

Quick Answer: Yes, but only if the suspect voluntarily consents to providing the sample.

Facts: Police were called to survey a specific neighborhood for a burglary suspect: a man in a camouflage jacket and stocking hat whom the victim saw running in the opposite direction of her home. One officer saw David Frazier, a man matching the description, run out of a wooded area next to the victim's neighborhood. Police later drove to Frazier's house and asked him to come to the police station for questioning. After answering some questions, Frazier requested an attorney. The detective stopped questioning him about the burglaries but asked to collect a DNA sample from Frazier. Frazier consented. He was charged with burglary. He later moved to suppress the DNA sample based on a violation of his Fifth Amendment right against self-incrimination. He argued that the officers repeatedly questioned him after he requested an attorney and that he only provided a DNA sample because he didn't believe they would let him leave without doing so.

Why this case is important: The court determined that Frazier wasn't in custody when he was questioned at the police station. Just because a suspect is taken to the police station for questioning doesn't mean that he is in police "custody." And in some Ohio jurisdictions, a suspect's right to an attorney doesn't attach unless the person is in custody. Here, the trial court determined that no handcuffs were used to transport Frazier, he was told he was free to leave at any time, and the detectives thought Frazier's behavior seemed relaxed. He was never in "custody," so even when Frazier requested counsel, the officers didn't have to stop questioning him as long as any persistent questioning didn't provoke involuntary statements.

Also, other Ohio jurisdictions have found that physical evidence, such a DNA sample, is not discovered as a result of a suspect's incriminating statement, so requesting a suspect's consent to take a DNA sample isn't an interrogation under *Miranda*. A suspect's consent to give the sample is valid as long as it's voluntary.

Keep in mind: Two things are important here: (1) If a suspect isn't under arrest or handcuffed, and he is told and made to feel that he is free to leave, he doesn't have a Fifth Amendment right to counsel. (2) When a suspect voluntarily provides his DNA (even if he requests an attorney during a true custodial interrogation), it's not a violation of his Fifth Amendment right against self-incrimination.

Visit the Third District Court of Appeals website to view the entire opinion.