



# Ohio Attorney General's Law Enforcement Bulletin



**October 2013**

## **The “Reality” of Cold Cases**

With the craze of reality TV, shows like “Cops” have become a social phenomenon. Now reality TV has set out to solve cold cases with “Cold Case Files” on A&E and “Cold Justice” on TNT.

In Ohio, estimates put the number of unsolved homicides at more than 5,000, many of which are considered cold. These cases require time, money, skill, technology, and sometimes a little luck to solve. Once DNA technology became common in police investigations, many cold cases were solved by this new science. Today’s cold cases are often those with no evidence of DNA.

“This stuff is really hard. The science or evidence is just not there in these cases,” said Ben Suver, a special agent supervisor with the Attorney General’s Bureau of Criminal Investigation (BCI). Suver coordinates the Ohio Unsolved Homicides Initiative that Attorney General Mike DeWine launched last fall.

While reality TV shows can offer time, money, and resources for cold case investigations, a break is more likely to come from a new piece of evidence or witness. TV shows are looking for solvable cases that can deliver big drama and ratings. For example, in its first show, “Cold Justice” got a confession from a long-lost killer.

But before considering inviting cameras into an investigation, law enforcement should call the local prosecutor to discuss ethical and procedural implications.

“When bringing in the media, even to outline a case on the news, there are issues that should be discussed because of potential impact on the investigation,” Suver said. “The last thing an investigator wants is for a defense attorney to stand up and tell a jury that the police department made a mockery of the investigation because a TV crew was involved, even if everything was done correctly and by the book.”

With the help of local agencies, BCI maintains a database of unsolved homicides in Ohio at [www.OhioAttorneyGeneral.gov/OhioUnsolvedHomicides](http://www.OhioAttorneyGeneral.gov/OhioUnsolvedHomicides). The database provides details and photos related to unsolved crimes and gives the public an opportunity to submit tips.

Since the initiative was launched last year, more than 1,640 cases have been added to the database. The Attorney General’s Office also routinely features a case from the database on its website, bringing increased visibility.

BCI also can be a second set of eyes on cold cases and help smaller departments review, clean up, and digitize case files. This process can include reviewing and retesting evidence, contacting and interviewing witnesses, and running old fingerprints.

“Even if a reopened investigation doesn’t solve the crime, the review is valuable to investigators to make sure the case is exhausted,” Suver said.

**For more information:** To request that an unsolved homicide be included in BCI’s statewide database, visit [www.OhioAttorneyGeneral.gov/OhioUnsolvedHomicides](http://www.OhioAttorneyGeneral.gov/OhioUnsolvedHomicides), contact BCI at 855-BCI-OHIO (224-6446), or e-mail [OhioUnsolvedHomicides@OhioAttorneyGeneral.gov](mailto:OhioUnsolvedHomicides@OhioAttorneyGeneral.gov).

On Nov. 12–13, 2013, BCI will host a training on Unsolved Homicide Investigative Strategies and Resources at Bowling Green State University. For more information or to register, visit [www.OhioAttorneyGeneral.gov/OPOTAcourses](http://www.OhioAttorneyGeneral.gov/OPOTAcourses) and search for “unsolved homicides.”

**Additional Reading:** National Public Radio profiles TNT’s “[Cold Justice](#).”

**Jennifer Anne Adair**  
**Senior Assistant Attorney General**  
**Deputy General Counsel for Law Enforcement Initiatives**

## **Search and Seizure (Scent of Marijuana is Reasonable Suspicion): *State of Ohio v. Harris* and *State of Ohio v. Green***

**Question:** If you smell marijuana while at a suspect’s home or vehicle, do you have probable cause for a search?

**Quick Answer:** Yes.

[State of Ohio v. Harris](#), Eighth Appellate District, Cuyahoga County, Aug. 29, 2013  
[State of Ohio v. Green](#), Eighth Appellate District, Cuyahoga County, Aug. 29, 2013

**Facts in *Harris*:** Cleveland Police Officer Hodous and his partner were patrolling in an area of high drug activity. They pulled into a parking lot and noticed five to six men standing around a white Chevy. As the officers drove closer to the vehicle, a man exited the passenger side and ran. Officers noted a strong smell of fresh marijuana as they got closer to the vehicle. Quaison Harris had remained in the Chevy and was asked to exit the car. He was patted down, and a small bag of marijuana was found in his pants pocket. The officers searched the car and found a prescription of codeine cough syrup, which did not belong to Harris, and a bag of heroin in the passenger side door. Harris filed a motion to suppress on the grounds the search violated his constitutional rights.

**Facts in *Green*:** Police arrived at Gregory Green’s home after receiving an anonymous tip on an open warrant. Detective Riegelmayr took the police canine around the back of the house. The detective could smell a strong odor of marijuana coming from the house, but the canine did not alert because his command was to be alert for a possible bite-order, not narcotics. Sgt. Sharpe and Detective Robinson also went around the back of the house and confirmed the smell of marijuana. The officers saw an exterior ventilation system coming from the second floor with one air conditioner that was on (it was 6:30 a.m. and cool outside). The house had covered windows and drawn shades. The officers believed it was a grow house and sought a search warrant. The search warrant was received, and the police performed a protective sweep and search of the home. They obtained 122 plants, 14 large and 31 small vacuum-sealed bags of marijuana, and a firearm. Green argued that police did not smell

marijuana coming from inside the house because the air conditioner was not connected to the basement (where the plants were), and his neighbors testified they had not smelled the marijuana.

**Importance:** In both cases, the court found sufficient evidence for probable cause because the officers were qualified to recognize the odor of marijuana. In *Harris*, the distinct scent of marijuana allowed the police to search a motor vehicle under the automobile exception to the warrant requirement, and in *Green*, it allowed the officers to obtain a search warrant even though neighbors said they had not smelled marijuana. If you approach a car or a house and smell marijuana, you have probable cause for a search as a qualified person who recognizes the smell.

**Keep in Mind:** The key is that you are the qualified person. You will have to outline your qualifications in the search warrant affidavit or in your police report. In addition, you should be prepared to defend your qualifications to a defense attorney, judge, or jury. This could mean discussing any training, classes, or field experience that gives you the skill to identify the scent of marijuana.

### ***More on Search and Seizure***

**But he said I could look in here:** You pull a car over with several passengers and ask the driver to get out. After some discussion, you ask the driver if he consents to the search of the car. The driver says “yes,” and you find several guns, a mask, gloves, and an ID badge belonging to none of the individuals in the car. After the search is complete, one of the passengers pipes up and says the car is his and he did not give you permission to search. Is the search invalid? In *Saleem*, the court said no, finding that a third party who has the same control over and relationship to the property may give consent. In this case, the driver was controlling the car, voluntarily consented to the search, and could have also gotten in trouble as a result of the findings of the search. And since the true owner heard everything and did not say no before the search was done, the driver’s consent was valid and the search was proper. [\*State of Ohio v. Saleem\*](#), Eighth Appellate District, Cuyahoga County, Aug. 29, 2013.

**You may want to find a new hiding spot for your drugs.** When performing a search of a vehicle, you note an open cigarette box under the passenger seat. You cannot make out exactly what is in it, but you know it is not cigarettes. You reach under the seat, open the box, and find heroin pills. Did the act of taking the cigarette box from under the seat to open it constitute an illegal search? The court in *Webb* said no. The officer had reasonable, articulable suspicion to conduct the search in the first place. When he looked under the seat, the cigarette box was in plain view. Based on experience and training, he knew it was common for people to hide drugs in cigarette packages. The court said it was proper for the officer to then open the cigarette package and look inside. [\*State of Ohio v. Webb\*](#), Second Appellate District, Montgomery County, Sept. 6, 2013.

## **Proper Protocol (How to Weigh Marijuana): *State of Ohio v. Flachbart***

**Question:** If you find a brick of marijuana, what parts of the plant are accounted for in the final weight?

**Quick Answer:** Anything contained in the marijuana brick can be weighed if that was the way you received it.

[\*\*State v. Flachbart\*\*](#), Eighth Appellate District, Cuyahoga County, Sept. 5, 2013.

**Facts:** Cleveland police found a large amount of marijuana after executing a search warrant on Randy Flachbart. Flachbart argued the police failed to precisely weigh the marijuana seized using the definition of “marihuana” in [Ohio Revised Code \(ORC\) 3719.01\(O\)](#) because the measurement included the seeds and stems to arrive at 5,172 grams. The portion of the definition Flachbart relies on says marijuana does not include mature stalks or sterilized seeds incapable of germination.

**Importance:** The general rule is that drugs can be weighed as they are packaged when you receive them. In this case, the bricks had seeds and stems that were not broken down or removed when police found them. It was not necessary to pick out the stems or the seeds prior to taking the measurement. It is important to provide an accurate weight in order to correctly charge the offender.

**Keep in Mind:** The court explained that the intent of the definition is to exclude parts of the plant already separated from the portions that can be counted toward the weight. For example, if the stalk has been separated from the leaves, the stalk would be excluded. Alternatively, if the entire plant was found whole, only the mature stalk would be excluded. But, if only mature stalks or sterilized seeds were found, all would be excluded. The condition in which you find the marijuana will determine what can be weighed.

### ***More on Proper Protocol***

**Photo arrays and red shirts:** You have been charged with putting together the photo array for a robbery suspect. The computer system automatically generates photos with like physical characteristics of the suspect and you add the suspect’s photo. Of the bunch, he is the only one wearing a red shirt. You give the photos to the blind administrator, who then takes the photos to the victim. The victim identifies the suspect. What you did not know is that the suspect wore a red shirt to cover his head during the robbery. Is the fact the suspect’s photo had him wearing a red shirt suggestive? The court in *Mitchell* said no. Because the lineup was made by someone other than the arresting officer, the red shirt was barely visible and not distinctive in the photo array, the blind administrator gave the array to the victim, and the victim said he made the identification based on the suspect’s eyes, the court found the lineup was not impermissibly suggestive. The court also determined the Dayton Police Department complied with [ORC 2933.83](#). [\*\*State of Ohio v. Mitchell\*\*](#), Second Appellate District, Montgomery County, Aug. 30, 2013.

**Public Records and the Law Enforcement Exception:** You receive a public records request about a pending case. The person has asked for video recordings, audio records, and reports involving a specific traffic stop. While you turn some records over, the prosecutor writes to the other side saying some records will not be turned over because it is investigatory work product, but does not explain further. Has your agency just violated Ohio Public Records Law? Maybe. The Ohio Supreme Court in *Miller* said that the Ohio State Highway Patrol had to explain, more specifically, why the records fell in the exception. In general, a public record is a record kept by any public office. In this case, the OSHP attempted to use the confidential law enforcement investigatory record exception found in [ORC 149.43\(A\)\(1\)\(h\)](#). A confidential law enforcement investigatory record is any record that pertains to a law enforcement matter and can be excluded only if its release would create a high probability of disclosing specific confidential investigatory techniques, procedures, or work product. Citizens have the right to inspect or copy public records unless they fit under an exception. You and your agency are not able to say no to inspection or copying unless there is an exception. For more information, consult the [Ohio Sunshine Law Manual](#) or visit [www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov). [\*\*State Ex Rel. Miller v. Ohio State Highway Patrol, et al. al.\*\*](#), Ohio Supreme Court, Clermont County, Sept. 3, 2013.

## ***Miranda* and Confessions (Confession by Individual with Mild Mental Retardation): *State of Ohio v. Noles***

**Question:** When you ask an individual with mild mental retardation questions and he confesses to a crime, is that a legitimate confession and did you need to give him *Miranda* warnings?

**Quick Answer:** A confession is legitimate if it is voluntary and you can show the individual understood the situation and consequences of making the confession. As you know, *Miranda* only needs to be given in situations in which the individual is in custody. In this type of situation, the individual needs to understand he is not in custody.

[\*State of Ohio v. Noles\*](#), Sixth Appellate District, Lucas County, Sept. 20, 2013.

**Facts:** After being accused of child rape, Billie Noles was interviewed by Detective Shelli Kilburn of the Toledo Police Department. Noles, an individual with mild mental retardation, was questioned at the police station for 48 minutes. At the beginning of the interview, Detective Kilburn told Noles he was able to leave at any time. Noles asked one time if he needed a lawyer, but Kilburn did not respond. During the interview, Noles admitted to sexual contact with the minor. At the end of the interview, Noles was released to go home. Noles later argued that statements and admissions made in the interview should be suppressed because he was not given his *Miranda* rights.

**Importance:** Peace officers often deal with people who are intoxicated or mentally impaired. Their mental state could impair their understanding of the situation and their legal rights. As an officer, sometimes you have to gauge what the suspect is capable of understanding in order to move forward with questioning. In this case, the court determined that Noles, although mildly mentally retarded, had full understanding of what was going on. Kilburn had explained Noles could leave at any time and stop the questioning. Noles listened, answered questions, and posed questions back concerning the legal system and his rights. The court determined that based on the totality of the circumstances, Noles' confession was voluntary and a *Miranda* warning was not required.

**Keep in Mind:** During the interview, Noles asked Kilburn if he should get a lawyer. Kilburn did not answer him. A statement to trigger *Miranda* must be unambiguous or unequivocal, such as "I want a lawyer," not "Do you think I need a lawyer?" In this case, the court determined that Noles did not invoke *Miranda*.

### ***More on Miranda and Confessions***

**Should I say it again?** During an interrogation session, you properly *Mirandize* the suspect, talk to him, and place him back in the holding cell. About three hours later, members of another police agency arrives to ask him questions. They ask him if he was read his *Miranda* rights in the booking area, he says, "yes." They say that applies to the questions they will ask him. Are they correct? Yes. In the case of *Maurent*, the court looked to determine when a *Miranda* warning had gone stale. In making the determination you should consider 1) the length of time between the first warning and second interrogation; 2) whether the warnings and second interview were done in two different places; 3) whether the first interview and second interview were conducted by the same officers; 4) whether the statements in the second interview are different than the first interview; and 5) the intellectual and emotional state of the suspect. In *Maurent*, based on a totality of the circumstances, the court determined the *Miranda* warnings had not gone stale after three hours. [\*State of Ohio v. Maurent\*](#), Fifth Appellate District, Delaware County, Aug. 23, 2013.

**Mine, Mine, Mine. ... It's all mine.** After you obtain a search warrant for a home, the suspect assumes full responsibility for everything found in the house, which includes a large quantity of drugs, drug paraphernalia, packaging for distribution and cash. After you find a jacket on the couch with a bottle of pills, he changes his story and says the pills are not his. Can you state in the report the pills were in the suspect's possession? In *Flachbart*, the court says yes. The statement "it's all mine" gives you, a reasonable peace officer, the belief that every illegal drug in the house belongs to the suspect. You have circumstantial, but strong, evidence to include the pills in the report. The suspect will have the ability in court to prove they do not belong to him. [State v. Flachbart](#), Eighth Appellate District, Cuyahoga County, Sept. 5, 2013.

## **OVI Tests (Impact of a Lip Ring): *State of Ohio v. Gibbs***

**Question:** Can you have an OVI suspect perform a breath test with a lip ring in the mouth?

**Quick Answer:** Yes, if the lip ring was not inserted in the mouth/lip less than 20 minutes before the test.

[State of Ohio v. Gibbs](#), Fourth Appellate District, Washington County, Aug. 27, 2013.

**Facts:** Janet Gibbs was pulled over for an OVI and was taken in for a breath test. She had a lip ring, which after several attempts could not be removed. Officers gave her the test with the ring in her mouth. Gibbs argued the test results should be thrown out because under [Ohio Administrative Code \(OAC\) 3701-53-02](#), she had an "oral intake" prior to taking the test. The court determined the lip ring, which had been in her mouth the entire time, was not considered "oral intake." The court held that the rule was followed by the police department and Gibbs had not shown either the ring or the piercing would cause any residual alcohol to remain in her mouth.

**Importance:** It is important to follow the rules or drunk drivers will be let go and not held accountable for their criminal behavior. The rules say you have to watch the suspect for 20 minutes to make sure there is no oral intake. Oral intake, although not defined in the rule, has been interpreted by courts to mean orally ingesting an object or substance in a manner that would cause digestion, passage into the blood stream, or receipt into the respiratory system. So if you see a suspect put something in his mouth before the test, have him spit it out and wait 20 minutes to do the test. The wait time helps to ensure your results are not compromised.

**Keep in Mind:** The concern about foreign substances in a suspect's mouth is the potential for the substances to absorb and retain alcohol, which could falsely elevate the breath alcohol concentration. A number of studies have shown that a 15- to 25- minute waiting period during which nothing is placed in the mouth allows sufficient time for any mouth alcohol to dissipate.

### ***More on OVI Tests:***

**A little too late.** If your BAC DataMaster printouts show the Radio Frequency Interface checks were done more than 192 hours apart, you may have a problem. The rules require the instrument check be performed at any time up to 192 hours after the last instrument check, which is equal to about eight days. You must have actual documentation of the checks to prove compliance. If not, you may have not complied with [OAC 3701-53-04\(A\)](#) and your results may be thrown out, as they were in *Boss*. [State v. Boss](#), Fifth Appellate District, Licking County, Sept. 16, 2013.

**Is an access card to Intoxilyzer 8000 the same as a permit to use Intoxilyzer 8000?** You may have an access card give to you to use the Intoxilyzer 8000, but the statute says you have to have a permit from the Ohio Department of Health. Can you still run the tests? The *Walsky* court says yes. The decision of ODH to require an access card and not a permit is okay and consistent with what the legislature's intent. Having an access card means you have been trained to perform the test and have the ability to ensure operator error does not cause a compromise in results. In essence, your access card is your permit. [State of Ohio v. Walsky](#), Eleventh Appellate District, Portage County, Sept. 23, 2013.

## **Traffic Stops (Turn Signals on, but no Turn is Made): *State of Ohio v. Coyle***

**Question:** Do you have reasonable suspicion to pull a car over when the signal is on for 10 seconds, but the car does not turn?

**Quick Answer:** No.

[State of Ohio v. Coyle](#), Fifth Appellate District, Ashland County, Sept. 12, 2013.

**Facts:** Ryan Coyle's vehicle approached a trooper in the opposite lane of travel. The trooper testified that the operator was not driving in a straight line within his lane of travel, but he admitted he could not see the lane lines due to weather. The trooper turned around and caught up to Coyle's vehicle, observing him tap his brakes, slow down, and turn on his left turn signal. When the vehicle did not turn, the trooper activated his lights. Coyle testified that while driving, he saw the trooper's lights, slowed down, and put his left turn signal on to turn into a parking lot. He said he did not stop on the right because the berm was narrow due to the guardrail. Coyle was charged with an OVI as a result of the stop. The court found that the trooper lacked a reasonable suspicion of criminal activity to justify the stop.

**Importance:** It can be the little things that make the biggest difference in a case. Here, the court determined that Coyle did not commit a marked lane or signal violation. They even checked the video to see how long the signal was on — only 10 seconds, some of that time while the trooper's lights were activated. No suspicion equals a result of no OVI evidence, which means a drunk driver goes free.

### ***More on Traffic Stops***

**You aren't from here, so you must be up to something.** One of your co-workers has an off-duty security job at a small market. He gives you a call because there are two people in the store who have purchased lye and some candy. You both know that lye is an ingredient in making meth, and he has made several of these calls to you in the past. You head over, see the suspects' car, and start to follow them. You run the plates and conclude the car is registered in the next county, about 40 minutes away. Based on these circumstances, you believe these suspects make meth and pull them over. Did you just make a legal stop? The court in *Taylor* says no. Buying candy and lye is not criminal, nor is driving outside your own county. The officer did not see a traffic violation or any other criminal behavior. As a result, the officer violated *Terry* when he pulled this car over. [State of Ohio v. Taylor](#), Ninth Appellate District, Summit County, Sept. 11, 2013.

**Medical situation vs. investigation of criminal activity.** You are on a traffic stop and over the radio here dispatch reporting a possible impaired driver. A few minutes later, a car drives by matching the description from dispatch, although you see nothing out of the ordinary regarding the car or the driving. After you finish up the traffic stop, you continue to patrol the area. Up ahead you see the same car parked strangely at a bank driveway with part of the car in the roadway. You stop, get out, and walk to the car. You see a woman who has clearly been sick inside the car. You also have a concern that another car may hit her car based on how it is parked. Is this a traffic stop? In *Weese*, the court says no. The court found that he officer did not pull the woman over, but instead was acting as a community caretaker. As a result, the Fourth Amendment was not triggered, and he did not need reasonable suspicion to approach the car or the individual. [\*State of Ohio v. Weese\*](#), Tenth Appellate District, Franklin County, Sept. 19, 2013.