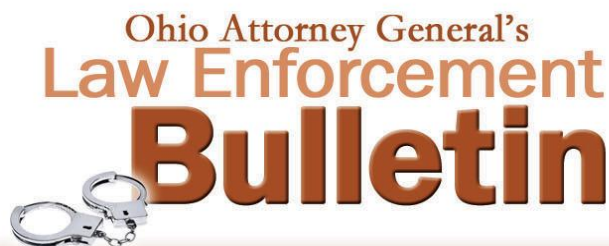


## October 2014

### Search and Seizure (Community Caretaking Exception): *State v. Barzacchini; State v. Hendrix; and State v. Leveck*

**Question:** When is the community caretaking exception to a warrant applicable?

**Quick Answer:** Only when you have a reasonable, objective belief immediate assistance is needed to protect life or prevent serious injury.

***State of Ohio v. Barzacchini***, **Fifth Appellate District, Stark County, Aug. 11, 2014**

***State of Ohio v. Hendrix***, **Ninth Appellate District, Summit County, Aug. 20, 2014**

***State of Ohio v. Leveck***, **Sixth Appellate District, Fulton County, Aug. 1, 2014**

**Facts in *Barzacchini*:** An officer noticed Matthew Barzacchini driving with his window down, playing loud music, yelling, and turning with exaggerated arm movements. Because the officer believed an assault was occurring and could not see in the back compartment, he initiated a traffic stop. At that point, Barzacchini had not violated a traffic law or exhibited evidence of impaired driving or speeding. After the officer activated the overhead lights, Barzacchini committed a lane violation. He also failed to immediately stop, instead he pulled into a private driveway and attempted to get out of the car. The officer ordered him back into the vehicle. Upon doing so, he noted a strong odor of alcohol on Barzacchini's breath, blood shot eyes, slurred speech, and delayed movements. Barzacchini explained that he was having a verbal argument with his wife on the phone. A field sobriety test was given and Barzacchini failed. He moved to suppress the OVI evidence, stating the officer did not have articulable suspicion of criminal activity to lawfully stop the vehicle. The officer claimed he made the stop under the community care taking exception.

**Facts in *Hendrix*:** After responding to a call that a garage door was left open for several days, police arrived on the scene to find nothing else out of the ordinary. Although they were aware of a rash of daytime burglaries in town, none had occurred in this neighborhood. The officers did a perimeter sweep of the home and found no signs of forced entry. The police then entered the home and found a marijuana grow operation in an upstairs bedroom. Andre Hendrix and Delisa Scott, residents of the home, were charged with possession, illegal cultivation, and trafficking marijuana. Hendrix and Scott filed a motion to suppress the

evidence because police lacked a warrant. The officers argued they were acting under the community care taking exception.

**Facts in *Leveck:*** An officer responded to a noise complaint, and upon arrival observed loud music and voices. After knocking several times and announcing police presence, Mikeal Leveck opened the door. The officer recognized him from past drug arrests. He also saw numerous beer cans and a young female running toward the bedroom area. After the young female declined to come outside and believing crimes and destruction of evidence were occurring inside the apartment, the officer entered and found evidence of underage drinking. Leveck filed a motion to suppress the evidence. The officer argued he was acting under the community care taking exception.

**Importance:** In all of these cases, the judge found the stops unconstitutional. Here's why:

● *Barzacchini:* The officer was not properly acting as a community caretaker because the only evidence of an assault was exaggerated arm movements and loud talking. The officer did not hear what was said or even see another person in the vehicle. Therefore, he was not justified in making the stop based on a generalized concern for safety because there were no actual signs of distress coming from the car.

● *Hendrick:* The officers were called to the property because the garage door was open. No reports of suspicious activity were made. When officers walked around the house, nothing was unusual and they were unable to see inside the windows. The mail carrier told them the mail had not been picked up from the day before, but that it was not uncommon. Nothing based on the circumstances, viewed from an objective reasonable officer, would lead to the belief indicated that anyone in the house needed immediate aid. A mere possibility that someone may have needed help was not enough.

● *Leveck:* The officer was concerned that underage drinking and drug use was occurring in the home, thereby creating an emergency situation. The court determined the circumstances would not give an objective reasonable officer the same concern. The fact a juvenile ran away after seeing the officer was not probable cause of underage drinking, even though alcohol was visible. Even if it did, the court determined the exception did not apply to misdemeanor crimes, like underage drinking. Likewise, the officer's knowledge that the suspect had prior drug arrests did not support his concern that the juvenile was fleeing to hide evidence of drugs.

When you engage in community caretaking, you are acting under a warrant exception. That exception only applies when there is an *immediate* need to protect life or prevent serious injury. While you don't need ironclad proof of a serious or life-threatening event, there must be a reasonable and objective presumption that one exists, and it must be more than just a hunch.

**Keep in mind:** The test—a reasonable objective standard—means the court gets to dissect the situation after the fact. You, however, must make a decision within moments based on your knowledge and skill. The Ohio Supreme Court said, "[T]he business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process." In other words, sometimes you may make a call that leads to the exclusion of evidence, but on the other hand, it could also save a life.

**Another look:** Consider the following examples of when the community caretaking/emergency aid exception did apply:

● **Prevention of suicide:** In this case, officers received a report of an alleged armed and suicidal individual with an imminent plan to kill himself after arriving at the home of his soon-to-be ex-wife. Stopping a person on the street is considerably less intrusive than police entering the home, so the officers chose to perform a traffic stop to prevent the man from harming himself before he reached the home. The court found this was reasonable under the community-caretaking/emergency-aid exception to the Fourth Amendment warrant. *State of Ohio v. Dunn,* Ohio Supreme Court, Montgomery County, Mar. 15, 2012

● **Explosives:** Police officers were justified under the community-caretaking exception to call the bomb squad during a search of a suspect's home. They entered the home to check for intruders following an armed robbery. Once inside, the officers discovered bomb-making supplies. The officers had a reasonable belief that an immediate danger could exist and were justified in seizing the supplies without a warrant. *State of Ohio v. Telshaw,* Seventh Appellate District, Mahoning County, June 29, 2011

● **Missing child:** After a juvenile was reported missing, police questioned a suspect who was the last person to see the child. Although the stop was consensual, the court determined that it also fell under community-caretaking because the officer was responding to a distress call rather than investigating a criminal complaint. The stop was justified because it permitted the officer to stop a key eyewitness before harm came to the child. *United States v. Brown,* Sixth Circ., Northern District Ohio, Jan. 6, 2012

## More on Search and Seizure

**Inventory search, search incident to arrest, or neither?** After three separate calls are received about a suspicious individual and broken garage door, you drive to the neighborhood to find a suspect walking down the street matching the eyewitness' description. You stop the suspect and arrest him, then search his vehicle, which is near the arrest location. You find a criminal tool used to break into the garage. The vehicle is then towed. Was the search of the vehicle proper? The court in *Kozic* said no. In this case, the vehicle could not be searched incident to arrest because the vehicle was not in the suspect's immediate control, as he was not in or near the vehicle at the time of arrest.

Additionally, the inventory search after tow was improper because there was no evidence the vehicle was lawfully impounded by the police. Only in a lawful impoundment can an inventory search be performed. The records and testimony did not prove the car was parked illegally, abandoned, or towed by police department policy. *State of Ohio v. Jamie Kozic*, Seventh Appellate District, Mahoning County, August 27, 2014

**Meanwhile in California — Investigatory stop or arrest?** A 911 call comes in that a man is shooting at passing cars. Near the scene is a man who matches the description of the suspect. With guns drawn you approach and apprehend him. Once you cuff and frisk him, you find a gun. The man is arrested, but you determine he is not the individual who was shooting at the cars. Was the seizure an investigatory stop or an arrest? The court in *Edwards* says investigatory stop. Even though the suspect was held at gun-point, it does not necessarily mean he was arrested. Here, Reginald Edwards matched the description of the shooter and could have been armed and dangerous; the officers had a legitimate safety concern that justified their on-the-spot decision to use more intrusive measures to stabilize the situation before investigating. Once stabilized, the investigation revealed Edwards was not the correct suspect and did have an illegal weapon. *United States of America v. Reginald Edwards*, Ninth Circuit, Cali., July 31, 2014

## *Miranda* (Public Safety Exception): *State v. Brown*

**Question:** If there is a public safety concern that a loaded weapon used to commit a crime is publicly accessible, can you ask a suspect about it without first giving *Miranda* warnings?

**Quick Answer:** Yes, if you have an objectively reasonable need to protect yourself or the public from an immediate danger associated with a weapon and your questions are related to the danger and reasonably necessary to secure public safety.

***State of Ohio v. Brown*, Second Appellate District, Montgomery County, July 25, 2014**

**Facts:** Deputy John Eversole of the Montgomery County Sheriff's Office was dispatched to investigate a shooting that occurred the night before at a local apartment complex. After searching the complex and speaking to the manager, Eversole went to the last known location of the suspect, Decenta Brown. On arrival, Eversole and his partner immediately saw Brown. As they approached, Brown fled. Eversole chased him through the apartment complex where he attempted to escape through a hole in a broken section of a fence. Brown was unable to get through, made an underhand throwing motion through the hole, and ran along the fence. Eversole ordered Brown to stop, and he was apprehended. After securing Brown in the cruiser, Eversole went back to the hole in the fence and found a smartphone, a bag of gel capsules containing heroin, and a magazine from a .40 Glock handgun containing 14 live rounds.

Eversole, believing the gun may have been discarded along the foot chase, called for backup. As this occurred, numerous people were outside including several children. One of the officers who arrived was Deputy Victoria Dingee. Eversole informed Dingee of the circumstances and Dingee went to talk to Brown. She spoke to Brown through the open window of the cruiser. When Dingee later took the stand at trial, she said the following conversation occurred between herself and Brown:

Q: Okay. Tell us about the conversation that you had with Mr. Brown.

A: It was a pretty short conversation. I said to Mr. Brown, I said, "Where is the gun?" I said, "There are a lot of kids and people walking around. It's dangerous." And I said, "The problems that you have right now are going to be very small if compared to what it's going to be like if a child picks up that gun and shoots himself or someone else in this apartment complex."

Q: Okay. Did you say anything else to him?

A: No. I said – I think I said that twice and [Brown] said, "I don't have the gun." He said, "I haven't seen the gun since last night." And he said, "I just had the magazine."

Q: Okay. And are you –

A: I said, "That doesn't make sense." I said, "You understand that doesn't make sense." And he said, "I know. People probably lie to you all the time, but I don't have the gun."

The conversation was also recorded by the video system in the cruiser. No handgun was recovered during the search of the area where Brown was arrested. Brown filed a motion to suppress his statements to Dingee claiming he was not given his *Miranda* warnings in violation of the Fifth Amendment.

**Importance:** As a general rule, an individual under custodial interrogation must be given *Miranda* warnings under the Fifth Amendment prior to the start of questioning. However, under the public safety exception to *Miranda,* law enforcement, under certain circumstances, are able to temporarily forgo advising a suspect of *Miranda* rights in order to ask questions necessary to securing their own immediate safety or the public's safety. In order to properly use the exception, you must have (1) an *objectively* reasonable need to protect yourself or the public, (2) from an *immediate* danger, (3) associated with a weapon, and (4) your questions are related to the danger and reasonably necessary to secure public safety.

**Keep in Mind:** The public safety exception is a narrow exception and does not apply to situations when a suspect is believed to have used a weapon while committing a crime. Each case is fact specific. In this case, the deputies had an objectively reasonable need to protect the public and police from immediate danger associated with the missing weapon. In

particular, Eversole's belief that Brown was armed and dangerous was reinforced when he observed Brown discard, among other things, a magazine from a .40 caliber Glock handgun. Eversole also counted 14 live rounds of ammunition in the magazine, leading to a concern that the handgun, which may have been discarded during the chase, contained a live round. With approximately 20-30 people in the nearby vicinity of the incident, including children, it was a major concern that the gun could be picked up and used to harm others.

The exception, however, does not permit law enforcement to ask questions unnecessary to securing the safety of themselves or the public. Dep. Dingee's custodial interrogation was proper under the exception because it was limited in scope and length. She specifically asked Brown to tell her the location of the gun and expressed that if it was still loaded, the gun posed a grave threat to people in the area. The questions Dep. Dingee asked were directly related to that danger and reasonably necessary to secure public safety.

## More on *Miranda*

**Inmate "custody" for *Miranda:*** An inmate was charged with violating institutional rules and Ohio Revised Code when he made two seven-inch shanks. Due to the seriousness of the incident, the matter went before two administrative bodies within the prison. During the hearing, the inmate admitted to making the shanks. He was not given *Miranda* warnings during the hearings. You then conduct an investigation under R.C. 2923.131(B) for possession of a deadly weapon under detention. You interview the inmate at the institution. He again admits that the shanks belonged to him. *Miranda* warnings are given and the inmate requests an attorney. Should the inmate have been mirandized at the administrative hearings prior to your interview? The court in *Platt* said no. It seems unusual to say that someone in prison isn't "in custody," but they are not for *Miranda* purposes. The term "custody" is a term of art that specifies circumstances where someone is at risk to be coerced. The environment of questioning must present the same inherent coercive pressure as a police station. In this case, Platt argued that because he was restrained as an inmate, he was in custody. The court determined the environments of questioning in the administrative process and by OSHP was not coercive and *Miranda* was not necessary. *State of Ohio v. Platt,* Twelfth Appellate District, Warren County, Aug. 11, 2014

**Mental Health and Confessions:** You are investigating an alleged sexual battery, and the suspect is now located at a V.A. hospital to receive treatment for suicidal thoughts. Upon arrival, you are taken to a conference room, and the suspect arrives escorted by hospital police. You give *Miranda* warnings and the suspect signs a waiver form. The interview takes about two hours, ending when the suspect writes a three page detailed confession. Are the statements voluntary even though the suspect is being treated at a hospital for a mental health condition? The court in *Maresh* said yes. The mental condition of a suspect is only one factor considered in the totality of the circumstance test to determine voluntariness. In this case, Michael Maresh presented himself as alert and lucid, the officers received no

evidence from the V.A. that he was not competent, he wrote a three page statement, which was clear and understandable, and intelligently waived his *Miranda* rights. Even though Maresh was receiving active mental health treatment in a hospital, the totality of the circumstances showed his confession was voluntary. *State of Ohio v. Maresh,* Eighth Appellate District, Cuyahoga County, Aug. 7, 2014

## Proper Protocol (Sting Operation, Receiving Stolen Property): *Young v. Owens*

**Question:** Do you have probable cause for a Receiving Stolen Property arrest warrant if it is based on a sting operation in which you didn't tell the buyer the goods were stolen?

**Quick Answer:** Yes, but only if there is a reasonable non-verbal inference that the property was explicitly represented as stolen to the buyer—such as a seller's offer of an unrealistically low price, goods in original packaging, or the presence of a store security feature on an item.

***Young, et. al. v. Owens, et. al.,*** **Sixth Circuit, Southern District of Ohio, Aug. 15, 2014**

**Facts:** The Colerain Township Police Department (CTPD) received information that a local second-hand store was receiving stolen property and one of its owners, Tyler Young, was being watched by two other police departments on suspicion of trafficking in stolen electronics. After several weeks of surveillance, CTPD set up a controlled sale using a confidential informant. Taking legitimate goods from the Home Depot, the informant sold Young unopened tools, some with store security devices, for less than a third of their retail value. The informant, however, did not explicitly say the merchandise was stolen. Based on this sting, CTPD obtained a search warrant for the second-hand store and Young's residence. They found 23 items that were later claimed by owners as having been stolen. Young was arrested for receiving stolen property. The owners of the second-hand store s sued the CTPD police officers in federal court for illegal arrest.

**Importance:** This case turned on whether Young should have known the goods were stolen, even though the officers never explicitly said they were. If you don't explicitly tell the purchaser the property is stolen, they can raise the defense that they didn't know they were buying stolen goods. (R.C. 2913.51(B)) Here, although the informant did not say, "these goods are stolen." the court looked at all of the factors — the unopened packages, the security tags, the well-below market sales — to determine the information gave a reasonable, nonverbal inference to Young that the goods were stolen. When performing a sting under R.C. 2913.51, it is much easier to say the words rather than rely on a court to interpret what knowledge the suspect actually had, especially when the suspect can claim they had no idea.

**Keep in mind:** This case was brought under Federal Law § 1983, which allows citizens to sue state actors who violate their civil rights while performing job duties for a government

agency. Each day you perform your job through and under the law, you are a state actor. If a citizen believes you did not follow the law when performing your job, such as a search, seizure, or arrest — and that action deprives them of a civil right — they may bring an action against you in Federal Court. In many cases, your qualified immunity will be an absolute defense to this kind of claim.

### More on Proper Protocol

**A not so "hot" pursuit:** While on patrol in the early morning, you clock a driver going 50 mph in a 25 mph residential zone. Before you can activate your lights or turn your car around, the driver pulls into a driveway just to the rear of your vehicle. You then turn around and pull behind, blocking the car in the driveway. The driver gets out and starts to unload his car. You identify yourself and ask to speak with him about his speed. He agrees, but asks to first put his things on the front steps due to the snow. At this point, you notice slurred speech and believe he is under the influence. You go to your vehicle to run the plates. While waiting, you notice the driver ran up the front steps inside the house. You knock on the front door and the driver tells you to get a warrant. After discussion with a supervisor, you force entry into the home and arrest the driver. Does this warrantless entry fit within the hot pursuit exception? The court in *Collins* said no, determining the situation was neither hot nor a pursuit. Asking the driver to talk about speeding after he had entered his driveway, turned off his car, and was blocked by the police car was not "hot." There was no foot chase or pursuit of the driver. Additionally, the officer had already identified the driver's name, plates, and address, and the driver who later failed his OVI test, had stopped driving and was not causing an immediate threat of harm to the public. In this situation, there was time for the officer to obtain a warrant. *City of Berea v. Joshua Collins,* Eight Appellate District, Cuyahoga County, Sept. 4, 2014

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