




Ohio Attorney General's Law Enforcement Bulletin



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Miranda Warnings: *State v. Duhamel*, 2015 Ohio 3145

Question: Are Miranda warnings required when police questioning takes place at the unarrested suspect's kitchen table as a search warrant is being executed in the suspect's home?

Quick Answer: No. Miranda warnings must be given in cases of custodial interrogation. If either element is missing, Miranda warnings are not required.

Facts: Detectives were investigating a child pornography case. Utilizing file sharing software and the IP address supplied by the service provider, investigators were able to connect directly to Duhamel's computer located at his residence. A search warrant was executed at Duhamel's residence and a video-recorded interview was conducted at the kitchen table. Before any questions were posed, Duhamel was advised he was not under arrest and that he was not required to answer any questions if he did not want to. This reminder was echoed throughout the interview. Duhamel spoke freely with police, and at times initiated conversation. Duhamel made statements that were utilized in the criminal case against him. Duhamel contends he should have been given Miranda warnings before the questioning because, although he was not under arrest, he was, for all intents and purposes, in police custody.

Importance: Custodial interrogation hinges on whether a reasonable person would feel free to leave the interview under the totality of the circumstances presented at the time. In this case, the Court concluded Duhamel was reminded several times that he did not have to answer any questions if he did not want to. The Court also noted that there was nothing accusatorial, threatening or overbearing. Duhamel was never handcuffed and did not appear overly nervous: in fact, he initiated conversation at times.

Keep in Mind: The determination of what constitutes "custody" does not depend on the subjective feelings of the accused or subjective, unarticulated goals of police. The focus is on the perception a reasonable person would have under the circumstances. Therefore, it is important to document relevant considerations such as where the conversation took place, who was present, and what the suspect was able to do (or not do).

Protective Sweeps: *U.S. v. McMillian*, Seventh Circuit Court of Appeals, May 22, 2015

Question: When a suspect is arrested on his porch, can officers conduct a protective sweep inside the home?

Quick Answer: Generally no. Protective sweeps are limited to those circumstances following an arrest *inside* a residence and are valid when officers reasonably believe that the area swept harbors an individual posing a danger to the officer or others.

Facts: Probable cause existed to arrest McMillian for a double homicide. Despite not having an arrest or search warrant, officers arrived at McMillian's home and arrested him on the porch when he came to the door. Tactical officers conducted a protective sweep of the house following McMillian's arrest and observed a rifle case in one of the bedrooms. Officers then obtained a search warrant citing (among other things) the observation of the gun case seen during the sweep. The government conceded that the protective sweep of McMillian's residence when he was arrested outside his door was a violation of the Fourth Amendment.

Importance: Since the protective sweep was what enabled officers to observe the rifle case, the Court held it was properly stricken from consideration when deciding whether the search warrant was supported by probable cause.

Keep in Mind: Officers may use other means to enter a suspect residence, including obtaining voluntary consent from the suspect or obtaining a search warrant.

Request for Counsel: State v. Cherryholmes, 2015 Ohio 3063 July 29, 2015

Question: What constitutes a suspect's request for counsel requiring an officer to terminate a custodial interrogation?

Quick Answer: A clear and unambiguous request for counsel.

Facts: Cherryholmes forced himself on his wife and compelled her physically to engage in sexual activity against her will. After the incident she contacted her brother who called the police, triggering an investigation. Upon being interviewed by a detective, Cherryholmes signed a Miranda waiver. During the interview, Cherryholmes responded to several questions saying "I'd rather not say right now, I'd rather wait for a lawyer." When asked if he wanted to stop the interview or was willing to answer some questions, Cherryholmes indicated he was willing to participate in some manner. Cherryholmes was indicted and charged with rape and kidnapping.

Importance: Police officers are required to honor an invocation to terminate questioning only if such invocation is unambiguous. Suspects are permitted to refuse to answer some questions without counsel present while agreeing to continue an interrogation and answer other questions.

Keep in Mind: In this case the Court determined Cherryholmes during the interview chose a "question-by-question" approach and, as such, did not make an unambiguous or unequivocal request for counsel and full invocation of his right to remain silent. In this particular case, the defendant's statement was recorded. A recorded statement provides the most accurate record in determining whether a suspect has made a clear invocation for counsel or has elected to remain silent.

Probable Cause: State v. Raphael, 2015 Ohio 3179

Question: Can an officer continue to detain occupants of a vehicle despite a canine's non-alert during an open-air sniff?

Quick Answer: Yes. The failure to alert is simply another factor to consider in analyzing the existence of the requisite suspicion. In this case, probable cause was satisfied by other factors despite the canine's failure to alert.

Facts: A deputy stopped a southbound vehicle on a known drug corridor at 1 a.m. for a traffic violation. The deputy observed eight large packages, shaped in blocks, wrapped with moving blankets, tightly taped, and filling the entire rear of the vehicle. The driver and passenger were both extremely nervous, shaking and avoiding eye contact. The passenger was unable to provide identification and the driver had prior drug charges. The stories given by the men did not match and the deputy requested a canine for an open-air sniff. The dog arrived but did not alert. This did not

lessen deputies' suspicion that the men were transporting drugs. When their request to search the vehicle was denied, deputies secured a search warrant and recovered more than 40 kilograms of marijuana from the vehicle.

Importance: The Court held that the lack of canine alert does not automatically negate other factors amounting to probable cause to search. As deputies had established probable cause, it was permissible to extend the detention of the traffic stop in order to search the vehicle.

Keep in Mind: The Court noted that given the facts known at the time the canine failed to alert, deputies could have searched the vehicle even without a warrant pursuant to the vehicle exception to the search warrant requirement. Specifically, deputies observed eight suspicious packages, wrapping and bundling consistent with drug couriers (not furniture as suggested by suspects), air fresheners in vehicle, five cell phones in the vehicle, the route the vehicle was taking, the driver's prior charges, and their inability to identify the passenger.