Ohio Attorney General's
Law Enforcement
Bulletin

November 2015

## State v. Lawson, 2015 Ohio 4394

Question: Did a suspect unambiguously waive his right to remain silent when, during a custodial interrogation, he responded that "nothing was bothering him and that he had nothing else to say?"

Quick Answer: No. If a suspect's invocation of his right to remain silent is not unambiguous or unequivocal, or he makes no statement, police are not required to end the interrogation or ask questions to clarify whether the accused wanted to invoke his Miranda rights.

Facts: Lawson was suspected of killing his grandfather and taken into custody for questioning. Lawson was given Miranda warnings, signed a valid waiver, and initially denied being involved in the shooting. Approximately 45 minutes later, the detective prompted Lawson by saying, "[I]f you would tell us what happened…you would feel better….because it's got to be eating you up and bothering you…." Lawson replied, "There ain't nothing bothering me. Ain't nothing eating me up. I ain't got nothing else to say." Soon thereafter, Lawson admitted to killing his grandfather and planning to kill his father. Lawson challenged the use of the incriminating statements claiming that before he confessed, he asserted his right to remain silent by stating, "I ain't got nothing else to say." The court found that Lawson did not unambiguously invoke his right to remain silent. The court reasoned he did not say he was "done talking" or that he did not want to continue talking. He did not unequivocally indicate that he wished to remain silent and cut off all further questioning.

Keep in Mind: Once a suspect has received and understood Miranda warnings, law enforcement officers may continue questioning until and unless the suspect clearly invokes the right to remain silent. Invocation of the right to remain silent requires at minimum some statement that can reasonably be construed to be an expression of a desire to cease all questioning.

## State v. Carothers, 2015 Ohio 4569

Question: Can an officer order a suspect to remove his shoes after obtaining consent to go through the suspect's pockets?

Quick Answer: No. Consent must be voluntary and take into consideration the totality of the circumstances. An order by police to remove shoes was held to be nonconsensual and outside the scope of consent given to search a suspect's pockets.

Facts: Carothers was a passenger in a car stopped for crossing a double yellow line. While one officer dealt with the driver who was suspected of using narcotics, another officer sought to get consent from Carothers to search the car, which belonged to Carothers. Carothers consented to the search and officers had both occupants exit the car. Officers told Carothers they were going to pat him down for weapons and asked him if he had anything in his pockets they needed to know about. Carothers responded "no," and officers asked if they could go through his pockets in order to make sure. Carothers said "yes, that's fine." No contraband was discovered, but officers then ordered Carothers to take off his shoes. Carothers sought to suppress the drugs recovered in his shoe, claiming he did not give consent to the removal or search of his shoes. The court noted that consent to search must be voluntarily given and is determined based on the totality of the circumstances. Voluntariness is not demonstrated by a mere submission to a claim of lawful authority. The court concluded that the officer's order for Carothers to remove his shoes was outside of Carothers' consent to search and the drugs were therefore suppressed.

Keep in Mind: Consent can be limited or withdrawn by the person granting it. Unless another exception to the search warrant requirement is present that would allow continued searching, officers must be mindful and abide by such limitations or withdraws.

## State v. Mabry, 2015 Ohio 4513

Question: During a Terry pat down, can an officer unbutton a suspect's pants in order to retrieve suspected contraband from shorts worn underneath his pants?

Quick Answer: Yes. The doctrine of plain feel allows an officer to lawfully seize an object if he has probable cause to believe that the item is contraband.

Facts: While on patrol, an officer stopped two men for jaywalking in a high-crime area where several robberies had taken place as well as homicides and drug investigations. During the course of a lawful Terry pat down for weapons, the officer could see and feel bulges in Mabry's pants pocket. When the pat down search was complete, the officer asked Mabry if he could go into his pockets and remove the contents, to which Mabry responded, "yes." When the officer reached into Mabry's pants pocket he felt a cellphone, identification card, and a plastic bag containing gel capsules. He was unable to remove the bag of gel capsules as they were located in a shorts pocket worn beneath the suspect's pants. Based on his training and experience, the officer immediately recognized that the gel capsules were illegal contraband, specifically heroin. Mabry challenged the officer's retrieval of the capsules from his shorts that were underneath his pants. The court upheld the seizure, noting "[u]nder the plain feel doctrine, the physical features of the article which are revealed to the officer through his sense of touch must cause the identity of the article, and from that its criminal character, to be immediately apparent to the officer".

Keep in Mind: Officers need not be *absolutely positive* that the item is contraband. Instead, it must be probable. In other words, it is more likely than not that the article is contraband, and this determination must be immediately apparent to the officer.

## U.S. v. Brown, 801 F.3d 679 (6th Cir.2015)

Question: How long can officers rely on facts contributing to probable cause? In other words, when does probable cause become outdated or stale?

Quick Answer: Staleness is measured by the circumstances of the case, not by the passage of time alone.

Facts: DEA agents were investigating Brown's role in a drug trafficking network. After a series of controlled buys, several suspects, including Brown, were arrested. Brown provided a residential address that agents sought to search 22 days after his arrest. When applying for the search warrant, agents cited Brown's participation in the attempted delivery of heroin (*for which he was arrested 22 days prior),* Browns felony drug trafficking history, his residential address, and a positive drug dog alert on the car registered to Brown's address as a basis for probable cause. Agents averred that there was probable cause that Brown's house contained drugs, ledgers, drug packaging, money, certain cell phones, etc. Agents executed the search warrant and recovered items of evidentiary value. Brown sought to suppress the evidence arguing the information known to agents became stale in the 22 days between his arrest and the application for the warrant. The court disagreed and noted the crime being investigated suggested an ongoing drug trafficking conspiracy, of which Brown was a member. Also, Brown appeared to be entrenched in a secure operation at his residence. Finally, agents sought to recover records and documents likely to be retained for long periods of time. The court reminded that staleness is case specific and not tied to time alone.

Keep in Mind: Courts will examine several variables when considering "staleness," including the character of the crime (chance encounter or regenerating conspiracy?), the criminal himself (nomadic or entrenched?), the thing to be seized (perishable/easily transferable or enduring utility to the holder?), and the place to be searched (forum of convenience or secured operational base?).