THE CONVICTION

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A Note from the Prosecutor:

Welcome to the latest edition of The Conviction, where we will address recent court decisions that are of particular interest to law enforcement. We are also continuing our series called **Search Warrant Exceptions: A Primer**, where we will discuss the various exceptions to the search warrant requirement. In this issue, we will discuss inventory searches. As always, I welcome any suggestions for future topics.

MAT HECK, JR.

U.S. Supreme Court recognizes a new ground for reasonable suspicion to make a traffic stop.

***Kansas v. Glover*, 140 S.Ct. 1183 (2020)**

A Kansas deputy sheriff ran a license plate check on a pickup truck and discovered that the registered owner, Charles Glover, had a revoked driver's license. The deputy pulled the truck over because he assumed that Glover was driving; the deputy saw no other traffic infractions. Glover was in fact driving and was arrested for driving as a habitual violator. The case eventually made it to the Kansas Supreme Court, which held that any evidence seized during the stopped should be suppressed because the deputy only had a "hunch" that Glover was driving the truck, and a hunch is not enough to create reasonable suspicion. But the United States Supreme Court reversed and held:

When an officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's license has been revoked is reasonable under the Fourth Amendment.

- The deputy's "commonsense inference" that the owner of a vehicle is most likely the driver of the vehicle was enough reasonable suspicion to justify the stop. And simply because it's possible that someone other than the owner is driving does not negate the reasonableness of that inference.

- But the court made it clear that **the scope of the decision is narrow:**

    - The inference that the owner is driving is weaker (and likely not enough for reasonable suspicion) if the information available to the officer is that the owner's license is merely **suspended**, rather than **revoked**.

    - The inference is obviously gone if the registered owner is an elderly male and the officer can clearly see that the driver is a young woman.

    - If the vehicle has more than one registered owner and only one owner's license is revoked, the inference is significantly weaker (and likely not enough for reasonable suspicion).

A warrant allowing law enforcement agents to intercept and listen in on telephone conversations may be issued by a judge in the county where the phone is located or where the agents are located, says the Ohio Supreme Court.

State v. Nettles, Slip Opinion 2020-Ohio-768 (March 5, 2020)

R.C. 2933.53(A) says that a search warrant allowing law enforcement to intercept and listen in on telephone conversations may be issued by a common pleas court judge in the county "**in which the interception is made.**" Back when wiretaps and landlines were the means by which to intercept telephone calls it was easy to figure out where the calls were being "intercepted" because the phone never moved. But when intercepting cell phones, which are constantly moving, applying R.C. 2933.53(A) became much more complicated. **But not any more!!!**

WHAT HAPPENED? A Sandusky County judge issued a search warrant that allowed DEA agents to listen in on the cell phone calls of drug dealer Keith Nettles. The agents obtained the warrant in Sandusky County because Nettles lived in Sandusky County. But the agents listened in on the calls at their Toledo office in Lucas County. After Nettles was arrested and indicted on drug-trafficking charges, he challenged the warrant on the basis that R.C. 2933.53(A) requires that the warrant be obtained from a judge in the county where the interception takes place, yet the agents "intercepted" (i.e. listened to) his calls in Lucas County. According to Nettles, the interception warrant obtained from a judge in Sandusky County was no good. The trial court, court of appeals, and Ohio Supreme Court all disagreed.

WHAT DID THE SUPREME COURT SAY? For purposes of R.C. 2933.53(A), interception of cell phone calls takes place both (1) at the location of the cell phone and (2) at the location of the government agent listening to the call.

- "Intercept" means "the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of an interception device." R.C. 2933.51(C).
- "Aural" means "relating to the ear." So Lucas County, where the DEA agents were when they were listening to the call, had jurisdiction to issue the interception warrant.
- But "interception" also includes "other acquisition" of the contents of the call. The way an interception warrant works is the suspect's cellphone company captures the contents of incoming and outgoing calls and then redirects the calls to the law enforcement agent. So because Nettles's calls were being "captured" in Sandusky County where the calls were made and received, Sandusky County also had jurisdiction to issue the interception warrant.

Can police order a female passenger to leave her purse in the car, then search the purse after a canine alerts to the presence of drugs? The court of appeals says yes.

State v. Raslovsky, 2d Dist. Clark No. 2019-CA-55, 2020-Ohio-515

In a recent Clark County decision, our court of appeals held that when removing a person from a vehicle before conducting a canine sniff, **it is not unreasonable to ask the person to leave behind property** (such as a purse or bag) **that is not on their person at the time of the traffic stop**.

- The court made it clear that this rule applies only to property not on the occupant's person at the time they are removed from the vehicle. For example, if a female is holding her purse, she is permitted to take it with her when she exits the vehicle. But if the purse is sitting on the center console and she tries to pick it up, the officer can order her to leave the purse in the vehicle.
- If the canine alerts to the presence of narcotics in the vehicle, the officer then has probable cause to search anywhere in the passenger compartment where drugs could be hidden, including the purse.

A person must know that an officer is conducting "official business" before their conduct can rise to the level of obstructing official business.

State v. Johnson, 2d Dist. Montgomery No. 28426, 2020-Ohio-2742

Officers saw a car with excessively-tinted windows that they believed had fled from them a week earlier. By the time they flipped the cruiser around to follow, the car was out of sight. 15 to 20 minutes later they came upon the car again when it was parked on a neighboring street. The suspected driver, Dorian Johnson, was spotted standing on the porch of the nearby house. One of the officers approached Johnson on the porch and, suspecting that he was about to flee, grabbed Johnson by the waistband. Johnson broke away from the officer momentarily, but was taken to the ground and handcuffed before he was able to get off the porch. Johnson was arrested for obstructing official business and, during a search incident to arrest, heroin was found.

The court of appeals reversed the conviction. A majority of the court had no problem with the officer grabbing Johnson by the waistband to prevent him from trying to flee, but they found that Johnson should not have been arrested for obstructing official business. **WHY?**

- As the officer was approaching, he never explained to Johnson why he was there or the purpose of the investigation. So when the officer grabbed Johnson's waistband, Johnson had no reason to believe that the officer was conducting "official business."
- Approaching a suspect without telling them why the officer needs to speak to them could be seen as a consensual encounter. And a person is under no obligation to stop and speak to police during a consensual encounter.
- Since Johnson had no reason to believe that he was obstructing the officer in any official way, he should not have been arrested for obstructing official business and should not have been searched incident to arrest.

THE TAKEAWAYS

1. A person must be aware that they are being stopped or seized before their actions in preventing, obstructing, or delaying the stop can be deemed obstructing official business. They don't necessarily need to immediately know the exact reason why they are being stopped, only that they are being detained for "official" police business.

2. When an officer needs to close the gap between the officer and the suspect before grabbing the suspect in order to prevent the suspect from fleeing, it is sometimes necessary for officer to deceive a suspect into believing they are not being stopped. That's fine. But in those situations, be aware that if the suspect tries to flee or otherwise obstruct your attempts to detain them, they cannot be arrested for obstructing official business.

Court of appeals reminds us that reasonable suspicion that a traffic offense has occurred, and not probable cause, is all that is needed to make a traffic stop.

State v. Burns, 2d Dist. Montgomery No. 28633, 2020-Ohio-2848

Most of the time when an officer makes a traffic stop, it's because they witnessed the driver commit a traffic violation–in other words, the officer has probable cause to believe an offense has been committed. But the court of appeals recently reminded us that under *Terry v. Ohio*, 392 U.S. 1 (1968), reasonable articulable suspicion that a traffic violation may have occurred is all that is needed to allow the officer to pull the car over so that the officer can investigate further their suspicion that a traffic offense may, or may not, have occurred.

A motorist can leave the scene of an accident after waiting a reasonable amount of time, says Ohio Supreme Court.

State v. Bryant, Slip Opinion 2020-Ohio-1041

Following a traffic accident, if the driver gives his name, address, and license plate number to the other motorist and any person injured in the accident, but leaves the scene before the police arrive, he is not guilty of fleeing the scene of an accident under R.C. 4549.02(A)(1) if he is unaware that the police have been or will be called. That was the holding of the Ohio Supreme Court in a case out of Cincinnati.

WHAT HAPPENED: Michael Bryant side-swiped a car as he was trying to pass the car on the left. He and the other driver pulled into a parking lot and conversed for about an hour, during which time Bryant gave the other driver his name and telephone number. He told the other driver that he didn't have a driver's license but let her take a picture of his state I.D. and his license plate. He also told the other driver that he'd been drinking, was a drug dealer, and had drugs on him; he offered her money not to call the police. She refused the money, but nevertheless did not immediately call the police. After Bryant left, the other driver called a tow truck and the police.

WHAT'S THE LAW: R.C. 4549.02(A)(1) states that when there is a motor vehicle accident on a public road, the vehicle operators with knowledge of the accident must stop at the scene. The vehicle operator must remain at the scene until the operator has given the operator's name, address, and the "registered number" of the motor vehicle to (a) anyone who is injured; (b) the owner, operator, or attendant of any vehicle damaged; and (c) the police officer at the scene.

WHAT DID THE SUPREME COURT SAY ?

- Since the police are not called to every motor vehicle accident, after exchanging the information as required by R.C. 4549.02(A)(1)(a) and (b), the driver does not need to wait around unless the police are on scene OR the police have been called OR they know the other motorist plans on calling the police.
- Bryant remained on scene for an hour and the police did not show up, the police had not yet been called, and there was no evidence that Bryant knew the other driver intended to call the police. Consequently, Bryant was not guilty of leaving the scene of an accident.
- R.C. 4549.02(A)**(2)** is different: It explicitly provides that the driver him or herself must call the police and must wait for the police to arrive in the event that an injured person is unable to comprehend or record the information required to be given under division (A)(1).

And in case you were wondering . . . a vehicle's "registered number" is its license plate number.

DID YOU KNOW?

Vehicles are required to have views to the rear, but not rear-view mirrors.

R.C. 4513.23(A) requires every motor vehicle to have (1) a mirror so located as to reflect to the operator a view of the highway to the rear of the vehicle; (2) a clear and unobstructed view to the front of the vehicle; and (3) a clear and unobstructed view to both sides of the vehicle. But a view to the rear of the vehicle can be accomplished by side mirrors alone (like on motorcycles and box trucks).

So the next time you see a car driving down the road with its rear-view mirror dangling by a wire, know that might not by illegal.

NOW YOU KNOW!

Search Warrant Exceptions: A Primer

In the fourth of a five-part series, we will be highlighting the various search warrant exceptions and the legal requirements for each. We continue the series by discussing inventory searches.

Inventory Search Exception

The purpose of allowing an inventory search of a lawfully-impounded vehicle is to promote the public policy of 1) protecting an owner's property while in police custody; 2) insuring against claims of lost, stolen, or vandalized property; and 3) guarding the police from danger. *South Dakota v. Opperman,* 428 U.S. 364 (1976). **It is a search done as part of the police department's caretaking function** and is not intended as an investigatory search for evidence.

To satisfy the inventory search exception

1. The vehicle must be lawfully impounded.
2. The search must be performed pursuant to reasonable standardized procedures.
3. The search must not be a pretext to an evidentiary search.

Things to Remember

- The police department must have a written standardized, routine policy that addresses specifically:
    - Under what circumstances will a vehicle be towed
    - Under what circumstances will the contents of an impounded vehicle be inventoried
- The tow and inventory policy should be written in such a way as to limit, as much as possible, the officer's discretion in deciding when to impound a vehicle or perform an inventory.
- Closed containers can be opened only if the department's policy specifically governs the opening of such containers.
    - Some policies provide that only unlocked containers should be opened and inventoried.
    - Some policies provide that all containers, locked or unlocked, including glove compartments, should be opened and their contents inventoried.
- The officer's testimony that an inventory search was done pursuant to the police department's policy **is not sufficient** to prove that the warrantless search was reasonable under the inventory-search exception. Instead, **the evidence presented at a suppression hearing must demonstrate and include:**
    1. That the department has a standardized routine policy;
    2. A copy of the policy must be entered into evidence; and
    3. How the officer's conduct conformed to the relevant portions of the policy