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JUL 24 2006

OREGON MUNICIPAL COURT

OREGON MUNICIPAL COURT
LUCAS COUNTY, OHIO

City of Oregon)	Case No. 06CRB00524
)	
Plaintiff,)	[Hon. Jeffery B. Keller]
)	
v.)	<u>DEFENDANT'S MOTION TO</u>
)	<u>SUPPRESS AND MEMORANDUM IN</u>
)	<u>SUPPORT</u>
Daniel A. Sayers)	
)	ANSPACH MEEKS ELLENBERGER LLP
Defendant.)	Daniel T. Ellis (0038555)
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)	
)	Counsel for Defendant
)	Daniel A. Sayers

Defendant Daniel A. Sayers moves the Court, pursuant to Ohio Crim.R.12(C)(3), to suppress evidence that was obtained from his warrantless search and seizure including:

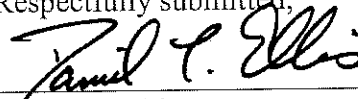
1. Any statements taken from or made by Sayers.
2. Any observations and opinions of the police officers who stopped and arrested Sayers.
3. Any physical evidence obtained by the police.

Sayers submits that the City of Oregon bears the burden of proof to justify his warrantless seizure and to show why the above evidence should not be suppressed for the following reasons:

1. The police had no lawful cause to stop and detain Sayers, nor did they have probable cause to arrest him without a warrant.
2. The police failed to satisfy the articulable suspicion requirement for a felony stop because Sayers was exercising his constitutional right to openly carry a firearm, and their reason for stopping him was that he was openly carrying a firearm. That is, they stopped him and pointed their firearms at for exercising his fundamental right to bear arms for the defense of self and property under Ohio Const. Art I, § 4 (1852).
3. The police failed to read Sayers his *Miranda* rights immediately following his apprehension for exercising his fundamental right to bear arms, or at any time throughout his arrest and processing.

A memorandum in support is attached and filed concurrently with this motion.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Introduction

Evidence flowing from an illegal stop, detention or arrest cannot be used to convict Mr. Sayers. *State v. Chatton* (1974), 11 Ohio St.3d 59, 463 N.E.2d 1237; *State v. Timson* (1974), 38 Ohio St.2d 122, 311 N.E.2d 16; *State v. Walters* (1985), Hamilton App. No. C-840413, 1985 WL 6718. Any time the driver of a moving vehicle is ordered to stop and is detained, even briefly, there is a seizure governed by the Fourth Amendment. *United States v. Dunbar* (C.A.2. 1979), 470 F.Supp. 704, 708 cited in *State v. King* (1999) 1999 WL 162452 at 2, (Ohio App. 1 Dist.). A routine traffic stop will be considered a reasonable seizure if the police officer has reasonable and articulable suspicion that a traffic violation has occurred. *Whren v. United States* (1996), 517 U.S. 806, 810; *State v. Chatton* (1984), 11 Ohio St. 3d 59, 61, 463 N.E.2d. 1237, 1239. When there is no reasonable and articulable suspicion that a traffic violation has occurred, probable cause must exist. *State v. Smith* (1996), 117 Ohio App.3d 278, 281-82, 690 N.E.2d 567 (Ohio App. 1 Dist.).

Facts

On May 30, 2006, Daniel Sayers entered a Sunoco Foodmart located at 1855 Woodville Road, openly carrying two 380 caliber pistols in holsters on his hips in plain view. After paying for his gas, checking his oil, and washing his automobile's windows, he drove away from the Sunoco Foodmart. While Mr. Sayers was pumping his gas, Oregon police were notified that a man with guns was at the Sunoco Foodmart and were dispatched to investigate.

After leaving the Sunoco Foodmart, Mr. Sayers noticed police approaching from behind with lights and sirens going, so he pulled over in the 1600 block of Woodville Road to permit the

police to pass. Mr. Sayers waited for the police to pass only to learn they were pursuing him. The police officers performed a “felony stop” by exiting their police cruisers, pointing their guns at him, instructing him to keep his hands in plain site and exit his vehicle. Mr. Sayers yelled that he was a concealed carry permit holder and that he did not do anything wrong.¹ The police yelled for him to exit his vehicle.

After the police finally determined that he could not unlock the door and he had to release his seatbelt, he was instructed to climb out the window. He climbed out the window and was ordered to lie face down on the ground. The police continued to point their guns at him, approached him and handcuffed him. After handcuffing him, they removed his firearms and placed him in the back seat of the police cruiser.

Law and Discussion

The People of Ohio have a Fundamental Right to Bear Arms for Their Defense and Security, and Doing so Openly Does not Give the Police a Reasonable Articulate Suspicion to Initiate a “Felony Stop”

Section 4, Article I of the Ohio Constitution states: “The people have the right to bear arms for their defense and security ...” This clause allows an individual to possess firearms for defense of self and property, and the Ohio Supreme Court has determined that Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms. *Arnold et al. v. City of Cleveland* (1993), 67 Ohio St. 3d 35, 47; 616 N.E. 2d 163; 1993 Ohio LEXIS 1608 (emphasis added).

¹ The police report states; “Due to the potential of weapons in the vehicle we conducted a felony stop. Officer Costanzo told the subject to keep his hands up and exit the vehicle. The subject started yelling back at officer Costanzo, we could not understand him.... As the subject exited the vehicle we were able to see in plain view a black semi automatic pistol in a holster on his right hip. ...”

In order to maintain an orderly and safe society, there must be some limitation on the right to bear arms. In deciding there is no constitutional right to bear "concealed weapons," the Supreme Court determined that every citizen of Ohio has right to bear arms "openly." *Klein et al. v. Sheriff, et al.* (2003), 99 Ohio St. 3d 537, 542; 2003 Ohio 4779; 795 N.E. 2d 633; 2003 Ohio LEXIS 2418. In *Klein*, the court upheld several laws which limited the manner in which firearms could be carried. However, the court was clear to say that the right to bear arms is fundamental. *Klein*, 99 Ohio St.3d at ¶ 7. The court upheld these laws because these laws regulated the manner in which weapons may be carried. *Id.* at ¶ 13. However, the statute in question in *Klein* "leaves open the ability to bear arms by openly carrying a firearm" as the state itself admitted in argument. *Id.* at 42 (J. O'Connor, dissenting). In other words, the state admitted that the restriction on carrying concealed weapons left open other means, carrying firearms openly, for people to exercise their fundamental right to protect themselves by bearing arms. Mr. Sayers was at all times relevant carrying his firearms openly within the enumerated constitutional right to bear arms.

Since Mr. Sayers was exercising his right to bear arms in a manner clearly permitted by law, the police lacked a reasonable articulable suspicion to initiate a "felony stop." A "felony stop" occurs when the police issue orders to the subject to exit his vehicle at gun point. *State of Ohio v. Carter et al.* (1994), 69 Ohio St. 3d 57, 60, 630 N.E. 2d 355, 359. The Oregon police initiated a "felony stop" because the police were sent to investigate an individual who was openly carrying firearms at the Sunoco Foodmart. The complaint filed against Mr. Sayers clearly states that he was "carrying two clearly visible handguns on his person in plain view." In other words, Mr. Sayers was exercising a fundamental constitutional right to bear arms openly. Furthermore,

Mr. Sayers did not act in a suspicious manner. He merely paid for his gas, checked his oil, and washed his automobile's windows while carrying his firearms in a legal manner. In other words, Mr. Sayers did nothing illegal and acted in a manner that could not have reached a reasonable articulable suspicion to initiate a felony stop. Since the police did not have a reasonable articulable suspicion to initiate a felony stop, the stop, detention, and arrest were all illegal, and all evidence resulting from this illegal stop must be suppressed. *State v. Chatton* (1974), 11 Ohio St.3d 59, 463 N.E.2d 1237; *State v. Timson* (1974), 38 Ohio St.2d 122, 311 N.E.2d 16; *State v. Walters* (1985), Hamilton App. No. C-840413, 1985 WL 6718; *United States v. Dunbar* (C.A.2 1979), 470 F.Supp. 704, 708 cited in *State v. King* (1999) 1999 WL 162452, at 2 (Ohio App. 1 Dist.); *Whren v. United States* (1996), 517 U.S. 806, 810. Therefore, the Court must suppress any statements made by Mr. Sayers, any observations and opinions of the police officers, and any physical evidence obtained by the police resulting from this illegal stop.

The Motion to Suppress Must Be Granted because the Police Failed to Read Mr. Sayers his *Miranda* Rights

The Court must grant Mr. Sayers' Motion to Suppress because the police failed to read Mr. Sayers his *Miranda* rights immediately upon taking him into custody during the "felony stop" or any time thereafter. Therefore, any statements made by Mr. Sayers cannot be used against him. Further, after the police removed Mr. Sayers from his automobile at gun point and handcuffed him, he was charged with violating Ohio Revised Code 2923.12 (B):

No person who has been issued a license ... to carry a concealed handgun under section 2923.125 ... of the Revised Code ... who is stopped for a law enforcement purpose, and who is carrying a concealed handgun shall fail to promptly inform any law enforcement officer who approaches the person after the person has been stopped that the person has been issued a license ... to carry a concealed handgun and that the person then is carrying a concealed handgun. (emphasis added)

Since the police had him in custody the moment they initiated the “felony stop,” Mr. Sayers’ *Miranda* rights went into effect immediately. The State claims Mr. Sayers was silent with respect to Ohio Revised Code 2923.12(B). Even if Mr. Sayers was silent and did not announce that he was carrying a firearm, his *Miranda* rights went into effect and his silence cannot be used against him. The opinion in *State v. Jordon* (2005), 2005 WL 1939801, at ¶¶ 24-38 (Ohio App. 2 Dist.), eloquently sets forth the proper standard regarding custodial interrogation and *Miranda*:

In *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the U.S. Supreme Court held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates use of procedural safeguards to secure the defendant's privilege against self-incrimination. “Custodial interrogation” means questioning initiated by the police after the person has been taken into custody or otherwise deprived of his freedom in any significant way. *State v. Steers* (May 14, 1991), Greene App. No. 89-CA-38....

The *Miranda* opinion declared that the warnings were required when the person being interrogated was ‘in custody at the station *or otherwise deprived of his freedom of action in any significant way*. 384 U.S. at 477, 86 S.Ct. At 1629. (Emphasis added).

In *State v. Estep* (Nov. 26, 1997), Montgomery App. No. 16279, we reiterated the controlling standard for deciding whether an individual is in custody:

“The determination whether a custodial interrogation has occurred requires an inquiry into ‘how a reasonable man in the suspect's position would have understood his situation.’ [T]he ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” Citing *State v. Biros* (1997), 78 Ohio St.3d 426, 678 N.E.2d 891. Neither an officer's subjective intent nor the defendant's subjective belief is relevant to this analysis. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 546, 679 N.E.2d 321.

The following factors have been used to assess how a reasonable person in the defendant's situation would have reacted to the questioning:

“1) Where did the questioning take place, i.e. was the defendant comfortable and in a place one would normally feel free to leave?

“2) Was the defendant a suspect at the time the questioning began (bearing in mind that *Miranda* warnings are not required simply because the investigation had focused);

“3) Was the defendant's freedom to leave restricted in any way;

“4) Was the defendant handcuffed or told he was under arrest;

“5) Were threats made during the interrogation;

- "6) Was the defendant physically intimidated during the questioning;
- "7) Did the police verbally dominate the interrogation;
- "8) What was the defendant's purpose for being at the place where the questioning took place;
- "9) Were neutral parties present at any point during the questioning;
- "10) Did the police take any action to overpower, trick, or coerce the defendant into providing any statement?" See, *State v. Smith* (June 3, 1997), Franklin App. No. 96AP10-1281, unreported, *State v. Evins* (Feb. 28, 1997), Montgomery App. No. 15827, unreported, and *State v. Brown* (1993) 91 Ohio App.3d 427, 632 N.E.2d 970.

While traffic stops are not normally subject to *Miranda*, the police in this case initiated a "felony stop," pulled their guns on Mr. Sayers, made him lay face down on the ground, and handcuffed him. See *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138. A "felony stop," however, is not a typical traffic stop. Indeed, the Supreme Court reasoned that typical traffic stops are not subject to *Miranda* because "the similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Id.* One could hardly call the "felony stop" in this situation noncoercive. Indeed, Mr. Sayers left Sunoco while exercising his fundamental right to bear arms. He saw police lights in his rearview mirror and pulled over to let the police by. The police instead pulled behind him, stepped out of their vehicles, pulled their guns on him immediately, made him climb out of the window of his car, made him lay on the ground, and immediately handcuffed him. Therefore, since the felony stop in question was coercive, it was subject to *Miranda*.

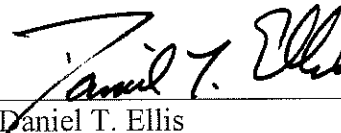
Further, Mr. Sayers was required to "comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic." R.C. 2921.331(A). His failure to do so is a misdemeanor of the first degree. R.C. 2921.331(2). After the police officers "seized" Mr. Sayers at gunpoint, he was required to follow and comply with all lawful

orders given by the police. When faced with the competing obligations of "complying with any lawful order" and "promptly informing police he is licensed to carry a concealed firearm and he is carrying a firearm," Mr. Sayers had no choice but to follow all lawful orders of the police.² To do otherwise would have risked being shot or face prosecution for a more serious charge.

The State should not be allowed to punish Mr. Sayers for his silence given the coercive nature of the "felony stop." The court must suppress any evidence resulting from statements or silence as a result of the "felony stop" because R.C. 2923.12 conflicts with both *Miranda* and R.C. 2921.331(A).

WHEREFORE, Defendant requests that the Court suppress evidence that was obtained by a warrantless search and seizure. A proposed Order is submitted herewith for the Court's convenience.

Respectfully submitted,



Daniel T. Ellis

(0038555)

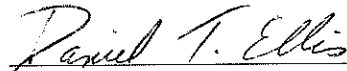
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Counsel for Defendant
Daniel A. Sayers

² Mr. Sayers will testify that he informed police he was licensed to carry a concealed firearm while he was still in his automobile. The police appear not have heard him, but were again informed before they placed him in the backseat of the police cruiser.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Defendant's Motion to Suppress and Memorandum in Support* has been served by ordinary United States Mail, postage prepaid, upon Thomas Dugan, Esq., Prosecutor, Oregon Municipal Court, 5330 Seaman Road, Oregon, OH 43616 this 17th day of July, 2006.


Daniel T. Ellis (0038555) (akw)
Attorney for Defendant