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CLERMONT COUNTY, OHIO**

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**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2017 CR 00072**  
vs. : **Judge McBride**  
**MATTHEW J. PAYTON** : **DECISION/ENTRY**  
Defendant :

Matthew E. Wiseman, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Greg Hoffman, assistant public defender and counsel for the defendant Matthew J. Payton, 302 East Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of a motion to suppress filed by the defendant Matthew J. Payton on April 26, 2017. The court held an evidentiary hearing on the motion on May 18<sup>th</sup>. On May 26<sup>th</sup>, the defendant filed a supplemental memorandum, and the state filed its reply memorandum on June 2nd. The court heard oral arguments on the motion on June 7<sup>th</sup>. At the conclusion of the arguments of counsel, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

### FINDINGS OF FACT

On February 2, 2017, the defendant Matthew J. Payton was indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree.

The charge in this case arises from an incident that occurred between November 11th and December 8th of 2016. The defendant, along with a codefendant, is alleged to have entered a residence at 6905 Shiloh Road, Goshen, Ohio without permission, and the defendant is alleged to have removed an electric drill and keys from the residence.

Captain Don Hampton of the Goshen Township Police Department interviewed the defendant regarding the burglary.<sup>1</sup> Captain Hampton went to the defendant's residence, and the defendant met and first spoke to Captain Hampton at the door of his home.<sup>2</sup>

Captain Hampton informed the defendant there was a knife found at a burglary scene and that the defendant's fingerprints were on the knife. Initially, the defendant claimed he had owned the knife but lost it a long time ago. Captain Hampton asked the defendant: "Better get your shoes on and jacket and we can get this thing worked out, what do you think?"

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<sup>1</sup> It is unclear from Captain Hampton's testimony and from the recording of his interview with the defendant, Defs. Ex. A, what day the interview took place, but it did occur in the early afternoon.

<sup>2</sup> Captain Hampton's interaction with the defendant is audio recorded from the time he knocks on the defendant's door until the interview ends. See Defs. Ex. A.

The defendant went inside to get his shoes and then finished smoking his cigarette. Captain Hampton asked the defendant if he had any weapons on him, to which the defendant responded that he did not. At no point was the defendant restrained or handcuffed.

Captain Hampton then drove the defendant to the Blanchester Police Department for questioning. Captain Hampton chose to go to the Blanchester Police Department instead of going to the Goshen Police Department because the former was only one to two minutes away from the defendant's residence.

The defendant, while in the cruiser en route to the Blanchester Police Department, asked "When was this?" Captain Hampton told the defendant that they could discuss it when they arrived at "the office."

Once at the police station, Captain Hampton went with the defendant into an interview room. It is unclear whether the door was open or closed, but if it was closed, it was left unlocked. Captain Hampton interviewed the defendant for less than 20 minutes. He started by telling the defendant: "Matthew, I can go about this two ways, okay? I can read you your rights. Do kind of an investigatory detention, if you will. Your DNA's all over a knife that was left at the burglary scene, right? Or I can tell you you're free to leave at any time and, you know, you're not under arrest and continue on with my investigation and ultimately, probably, file charges on you, ok?"

Throughout the interview, Captain Hampton reiterated that, in light of the DNA evidence on the knife, he believed that the defendant was in the house and left the knife behind. Captain Hampton also encouraged the defendant to tell the truth, "man up," and "fess up" throughout the interview. For the first half of the interview the defendant

continued to deny that he was the person who left the knife at the burglarized home. Captain Hampton then told the defendant that there is video footage of the burglary, but that he had not viewed it yet. There was, in fact, no such footage. Captain Hampton said "I can jam you up with all kinds of charges here. You go easy with me, I go easy with you. I'll send you home today. I won't even take you to jail. That's how fair I am."

The defendant told Captain Hampton that he could not afford any more criminal legal troubles, as he had some troubles in Clinton County at the time. Captain Hampton told the defendant, "Let's get a resolution to this thing. I'll send you home today." Captain Hampton continued to encourage the defendant to "come clean" and told the defendant that, after he reviewed the video footage, "I'm gonna come back and jam you up on everything I can get on you. Period." Captain Hampton also reiterated that he was not going to take the defendant to jail that day.

The defendant then agreed with Captain Hampton that he went into the Shiloh house through the open garage door. Captain Hampton asked, "Was that hard?," to which the defendant replied, "No." Captain Hampton then said "I'm still going to send you home today, ok? I appreciate you being honest with me Matthew, ok? I know you came with me on your own accord today. I told you, you weren't under arrest, right? You were free to go." Then Captain Hampton read the defendant his *Miranda* rights and told him that he will still be able to go home.

Captain Hampton asked the defendant if he understood his rights. Silence followed, and Captain Hampton stated "okay." The defendant started to deny involvement in the burglary again, stating that he "knows how this thing goes. I've already been in trouble before." Captain Hampton responded by telling him that he had

already admitted to being inside the house, so "it doesn't matter at this point." Captain Hampton said: "Listen Matthew, I can take you to jail right now. \* \* \* I'm not doing that \* \* \* I'm going to tell the prosecutor that you were very, very cooperative. That looks very good for you \* \* \* You can help me help you."

At that point, the defendant stated that he had been walking on Shiloh Road and saw the garage door of the house open for a couple days in a row. The defendant went into the house and used his knife to open the jewelry box. He also walked out of the garage with a red tool box, but the hinges broke. When it broke, the defendant dropped the box just outside the door and left. Captain Hampton again told the defendant that he would be going home that day.

Near the end of the interview, Captain Hampton asked the defendant if anyone else was with him during the burglary. He continued the conversation and said, "Because if I find out you've been lying to me, I'm going to tack on some additional charges." The defendant admitted that his roommate Tommy Coogan was with him, and that it was his idea to stop at the Shiloh house. Captain Hampton then took the defendant back home. The entire encounter lasted approximately 30 minutes.

## **PROCEDURAL LAW**

A motion to suppress is defined as "a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self-incrimination), or the Sixth Amendment (right to assistance of counsel, right of

confrontation, etc.) of the United States Constitution.”<sup>3</sup> When a defendant’s motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.<sup>4</sup>

Pursuant to Crim.R. 12(C), before trial “any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue.”<sup>5</sup> A motion to suppress evidence “on the ground that it was illegally obtained” must be made prior to trial.<sup>6</sup> “[W]hen a defendant’s motion to suppress attacks the validity of a search conducted under a warrant, the defendant bears the burden of proof.”<sup>7</sup>

A motion to suppress typically “presents mixed questions of law and fact.”<sup>8</sup> In reviewing such a motion, the trial court is trier of fact and “is in the best position to resolve factual questions and evaluate witness credibility.”<sup>9</sup>

## LEGAL ANALYSIS

The defendant claims that his confession was involuntary and failed to comply with *Miranda v. Arizona*, 348 U.S. 436, 86 S.Ct. 1602 (1966). “[T]he two issues of voluntariness of a confession and compliance with *Miranda v. Arizona*, 348 U.S. 436, 86

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<sup>3</sup> *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).

<sup>4</sup> *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.

<sup>5</sup> Crim.R. 12(C).

<sup>6</sup> *Id.*

<sup>7</sup> *State v. Wilson*, 8th Dist. Cuyahoga No. 94691, 2011-Ohio-707, ¶ 21, citing *State v. Wild*, 10th Dist. Franklin No. 2009 CA 83, 2010-Ohio-4751.

<sup>8</sup> *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8.

<sup>9</sup> *State v. Fridley*, 12th Dist. Clermont No. CA2016-05-030, 2017-Ohio-4368, ¶ 13, citing *State v. Harsh*, 12th Dist. Madison No. CA2013-07-025, 2014-Ohio-251, ¶ 9.

S.Ct. 1602 (1966), are analytically separate inquiries.”<sup>10</sup> Therefore, a “confession may be involuntary when *Miranda* warnings are given. Conversely, when *Miranda* warnings are not required, a confession may be involuntary if on the totality of the circumstances, the defendant’s will was overcome by the circumstances surrounding the giving of the confession.”<sup>11</sup> The court will review each of the defendant’s grounds for the motion to suppress in turn.

## I. CAPTAIN HAMPTON’S COMPLIANCE WITH *MIRANDA*

The Fifth Amendment to the United States Constitution prohibits any person in a criminal case from being compelled as a witness against himself.<sup>12</sup> To protect this Fifth Amendment right, “statements resulting from custodial interrogations are admissible only after a showing that the procedural safeguards set forth in *Miranda v. Arizona*, 348 U.S. 436, 86 S.Ct. 1602 (1966) have been followed.”<sup>13</sup> This encompasses two distinct concepts, those of custody and interrogation.<sup>14</sup> In the present case, it is undisputed that Captain Hampton interrogated the defendant. The issue is whether the defendant was in custody before the defendant’s *Miranda* rights were read to him.

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<sup>10</sup> *State v. Fille*, 12th Dist. Clermont No. CA2001-08-066, 2002-Ohio-3879, ¶ 15, citing *State v. Chase*, 55 Ohio St.2d 237, 378 N.E.2d 1064 (1978).

<sup>11</sup> *Fille*, 2002-Ohio-3879 at ¶ 15, citing *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000).

<sup>12</sup> *State v. Johnson*, 12th Dist. Warren No. CA2015-09-086, 2016-Ohio-7266, ¶ 75.

<sup>13</sup> *Johnson*, 2016-Ohio-7266 at ¶ 75, citing *State v. Zylko*, 8th Dist. Cuyahoga No. 89949, 2008-Ohio-3032, ¶ 13. See *Fridley*, 2017-Ohio-4368 at ¶ 35, quoting *State v. Hernandez-Martinez*, 12th Dist. Butler No. CA2011-04-068, 2012-Ohio-3754, ¶ 8 (explaining that in order for a defendant’s statements made during a custodial interrogation to be “admissible as evidence,” the defendant “must be advised of his *Miranda* rights and make a knowing and intelligent waiver of those rights.”).

<sup>14</sup> *State v. Robinson*, 12th Dist. Clermont No. CA2015-01-013, 2015-Ohio-4533, ¶ 11, quoting *State v. Staley*, 12th Dist. Madison No. CA99-08-019, 2000 WL 553512, \*3 (May 8, 2000).

For a defendant to be in custody, there must be a formal arrest or a restraint on the defendant's freedom of movement "of the degree associated with formal arrest."<sup>15</sup> Stated differently, the defendant must be either under arrest or "otherwise deprived of his freedom of action in any significant way."<sup>16</sup> Accordingly, if a defendant is not in custody, then he is not entitled to have been administered *Miranda* warnings.<sup>17</sup>

To determine whether a defendant was in custody for *Miranda* purposes, the "court must examine the totality of the circumstances surrounding the interrogation."<sup>18</sup> Several relevant factors include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning."<sup>19</sup> Courts may also consider the number of law enforcement officers present and their conduct and demeanor.<sup>20</sup>

The court's determination hinges "on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."<sup>21</sup> Therefore, when "judging whether an individual has

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<sup>15</sup> *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 47, quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, (1983).

<sup>16</sup> *Fridley*, 2017-Ohio-4368 at ¶ 36, citing *State v. Vansickle*, 12th Dist. Fayette No. CA2013-03-005, 2014-Ohio-1324, ¶ 54.

<sup>17</sup> *Fridley*, 2017-Ohio-4368 at ¶ 8, citing *State v. Byrne*, 12th Dist. Butler Nos. CA2007-11-268 and CA2007-11-269, 2008-Ohio-4311, ¶ 10.

<sup>18</sup> *Fridley*, 2017-Ohio-4368 at ¶ 36, citing *Robinson*, 2015-Ohio-4533 at ¶ 12.

<sup>19</sup> *State v. Brantley*, 9th Dist. Wayne No. 27466, 2016-Ohio-4680, ¶ 53, quoting *State v. Lerch*, 9th Dist. Summit No. 26684, 2013-Ohio-5305, ¶ 8.

<sup>20</sup> *State v. Magnone*, 72 N.E.3d 212, 2016-Ohio-7100, ¶ 23 (2d Dist.).

<sup>21</sup> *Fridley*, 2017-Ohio-4368 at ¶ 36, quoting *State v. Henry*, 12th Dist. Preble No. CA2008-04-006, 2009-Ohio-434, ¶ 13.

been placed into custody the test is whether, under the totality of the circumstances, a reasonable person would have believed that he was not free to leave."<sup>22</sup>

"Police are not required to administer *Miranda* warnings to everyone they question."<sup>23</sup> Furthermore, police are not required to administer *Miranda* warnings "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."<sup>24</sup> Even if the police tell the defendant during an interrogation at a police station that he is "a prime suspect," such statement is "not dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest."<sup>25</sup> Moreover, "a person is not in custody simply because they [s/c] are transported to the police station by a police officer."<sup>26</sup>

If a defendant is deemed to be in custody during his interrogation, he must be informed of his *Miranda* rights and then make a knowing and intelligent waiver of those rights in order for his following statements to be admissible.<sup>27</sup> If the defendant subsequently challenges his confession as involuntary, then the state must prove that

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<sup>22</sup> (Internal citation omitted.) *Robinson*, 2015-Ohio-4533 at ¶ 12, quoting *State v. Gumm*, 73 Ohio St.3d 413, 429, 653 N.E.2d 253 (1995).

<sup>23</sup> *Lynch*, 2003-Ohio-2284 at ¶ 47, citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711 (1977).

<sup>24</sup> *Lynch*, 2003-Ohio-2284 at ¶ 47, quoting *Mathiason*, 429 U.S. at 495. See *Robinson*, 2015-Ohio-4533 at ¶ 15, citing *State v. Durham*, 2013-Ohio-4764, 999 N.E.2d 1233, ¶ 17 (12th Dist.).

<sup>25</sup> *State v. Smith*, 12th Dist. Fayette No. CA20060-08-030, 2009-Ohio-197, ¶ 12, quoting *State v. Huysman*, 12th Dist. Warren No. CA2005-09-107, 2006-Ohio-2245, ¶ 16.

<sup>26</sup> *Smith*, 2009-Ohio-197 at ¶ 12, citing *State v. Warren*, 2d Dist. Montgomery No. 15202, 1996 WL 612858, \*8 (Oct. 25, 1996).

<sup>27</sup> *State v. Campbell*, 12th Dist. Butler Nos. CA2014-02-048 and CA2014-02-051, 2014-Ohio-5315, ¶ 36, citing *State v. Hernandez-Martinez*, 12th Dist. Butler No. CA2011-04-068, 2012-Ohio-3754.

he made a knowing, intelligent, and voluntary waiver by a preponderance of the evidence.<sup>28</sup>

In *State v. Vansickle*, 12th Dist. Fayette No. CA2013-03-005, 2014-Ohio-1324, the Twelfth District Court of Appeals found that a defendant, who was interrogated in a police station, had not been in custody for *Miranda* purposes.<sup>29</sup> In that case, two officers visited the defendant's home one morning to investigate a complaint that the defendant engaged in unlawful sexual conduct with a minor.<sup>30</sup> One officer was in plain clothes and an unmarked car, while the other was uniformed and drove a police cruiser.<sup>31</sup> One of the officers told the defendant, along with his companion, that they were free to come to the Sheriff's Annex to discuss the matter, and the officers transported the defendant to the Annex.<sup>32</sup> Before coming with the officers, the officers had not threatened the defendant, told him he was under arrest, or handcuffed him.<sup>33</sup>

At the Annex, the defendant was interviewed in a small room with the door closed but unlocked.<sup>34</sup> The defendant spent approximately 44 minutes total with the officers, and his interview lasted 15 minutes.<sup>35</sup> The defendant was told that he could leave, and he was not read his *Miranda* rights before he made a statement.<sup>36</sup> After his statement, a deputy transported the defendant home.<sup>37</sup> Upon considering these facts, the appellate court found that, under the totality of the circumstances, the defendant had

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<sup>28</sup> *Campbell*, 2015-Ohio-4533 at ¶ 15, citing *State v. Vunda*, 12th Dist. Butler Nos. CA2012-07-130, CA 2013-07-113, 2014-Ohio-3449.

<sup>29</sup> *Vansickle*, 2014-Ohio-1324 at ¶ 58.

<sup>30</sup> *Id.* at ¶ 55.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at ¶ 56.

<sup>35</sup> *Id.* at ¶ 58.

<sup>36</sup> *Id.* at ¶ 56.

<sup>37</sup> *Id.*

not been in custody.<sup>38</sup> As such, the fact that he had not been administered his *Miranda* rights before his statement did not warrant suppressing his incriminating statement which was made to the officers.<sup>39</sup>

The case of *State v. Magnone*, 72 N.E.3d 212, 2016-Ohio-7100, ¶ 23 (2d Dist.) also dealt with the issue of whether the defendant was subject to custodial interrogation before making a confession. The defendant argued that he was subject to custody requiring *Miranda* warnings because he was: (1) confronted by detectives at the place of his employment, (2) questioned at the police station, (3) transported to the station in a police cruiser, (4) patted down before entering the cruiser, (5) taken to a small interview room and positioned in a manner that prevented him from leaving, and (6) never told he was free to leave the interview.<sup>40</sup>

Upon reviewing the circumstances of the case, the Second District Court of Appeals concluded that the defendant was not subject to custodial interrogation.<sup>41</sup> In drawing this conclusion, the court cited multiple facts that would have led a reasonable person to believe that the defendant was free to terminate the interview and leave. In this regard, the defendant voluntarily agreed to be questioned; he chose to be interviewed at the police station; he did not object to being transported in a police cruiser; he never asked if he could drive himself; he was patted down only as part of a routine safety procedure; he was not handcuffed, arrested or otherwise physically

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<sup>38</sup> Id. at ¶ 58.

<sup>39</sup> Id. See *Fille*, 2002-Ohio-3879 at ¶¶ 19-21 (finding that three interviews with the defendant at a police station were not done while the defendant was "in custody" because the defendant voluntarily came to the police station, he was told he was not under arrest and could leave, he was not handcuffed, and the door was shut but unlocked).

<sup>40</sup> *Magnone*, 2016-Ohio-7100 at ¶ 29.

<sup>41</sup> Id. at ¶ 38.

detained; he was not coerced; and the interview only lasted 24 minutes.<sup>42</sup> Because the defendant was not in custody during his questioning, the court held that he was not entitled to receive *Miranda* warnings before making incriminating statements during his interview.<sup>43</sup>

In turning to the case at bar, the defendant argues that multiple facts indicate that he was in custody and therefore entitled to *Miranda* warnings before he confessed: Captain Hampton told the defendant that “he better” come to the station; Captain Hampton drove the defendant to the station; Captain Hampton implied that he would not arrest the defendant if he cooperated; and Captain Hampton suggested that he would send the defendant home if he cooperated.

In reviewing the totality of the circumstances, the court finds that a reasonable person in the defendant's position would not have believed that he was not free to leave. Several factors compel this conclusion. Captain Hampton asked, not commanded, that the defendant go to the police station to discuss the Shiloh burglary. The defendant did not say that he did not want to accompany Captain Hampton or otherwise indicate an unwillingness to go. The defendant requested that he finish his cigarette before the two left, which Captain Hampton permitted.<sup>44</sup> Captain Hampton did not pat down or search the defendant, handcuff the defendant, or otherwise restrain him before driving the defendant to the police station. The defendant never asked if he could use his own transportation to drive to the police station.

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<sup>42</sup> Id. at ¶¶ 38-40.

<sup>43</sup> Id. at ¶ 40.

<sup>44</sup> Id. at ¶ 31 (noting that a defendant, who was deemed not in custody after being transported to the police station for questioning, was allowed to have a few minutes to finish what he was working on before leaving with the detectives).

Once at the police station, the defendant was interviewed by only one detective, Captain Hampton. Again, the defendant was not searched or restrained in any way. It is unclear whether the door to the interview room was open or closed, but it is undisputed that, if the door was closed, it would have been unlocked. Furthermore, the interview itself was very short, concluding after less than 20 minutes.

Although Captain Hampton never explicitly told the defendant that he was not under arrest and was free to leave *before* issuing the *Miranda* warning, the defendant also never asked to stop the interview or to leave.<sup>45</sup> Moreover, Captain Hampton told the defendant at multiple points throughout the interview that the defendant would be able to return home that day. And, in fact, the defendant was not arrested that day and was allowed to return home.

When viewing the totality of the circumstances, a reasonable person in the defendant's position would have believed that he was free to leave.<sup>46</sup> Accordingly, the defendant was not entitled during his interview with Captain Hampton to receive a *Miranda* warning. Although the defendant was provided a *Miranda* warning near the end of his interview with Captain Hampton, "the mere giving of *Miranda* warnings by a law enforcement officer does not convert a noncustodial setting into a custodial setting."<sup>47</sup> Because a *Miranda* warning was not required at any point during the

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<sup>45</sup> See *Robinson*, 2015-Ohio-4533 at ¶ 15 (in finding that the defendant was not in custody, the court noted " \* \* \* while it may be true that Detective Bradford never explicitly told Robinson he was free to leave, Robinson also never asked to leave during the approximately 40 minutes he was being questioned."); *Brantley*, 2016-Ohio-4680 at ¶ 61 (noting that the defendant never requested to leave, and the detectives never told him that he was under arrest or that he could not leave.");

<sup>46</sup> (Internal citation omitted.) *Robinson*, 2015-Ohio-4533 at ¶ 12, quoting *Gumm*, 73 Ohio St.3d at 429.

<sup>47</sup> *State v. Coleman*, 12th Dist. Butler No. CA2001-10-241, 2002 WL 745322, \*3 (April 29, 2002), citing *United States v. Owens*, 431 F.2d 349 (5th Cir. 1970).

interview, none of the defendant's statements should be excluded due to a lack of *Miranda* warning.

## II. VOLUNTARINESS OF THE DEFENDANT'S CONFESSION

Although *Miranda* warnings were not required, the defendant's confession, to be admissible, must have been voluntarily made. The Due Process Clause of the United States Constitution requires an additional inquiry into "whether the defendant's will was overborne by the circumstances surrounding the giving of his confession."<sup>48</sup> In other words, whether a defendant's statements were voluntary is a separate issue from whether the defendant had been properly administered his *Miranda* rights.<sup>49</sup> This analysis is triggered when "the interrogators" employ an "inherently coercive tactic (e.g. physical abuse, threats, deprivation of food, medical treatment, or sleep) \* \* \*,"<sup>50</sup> or, alternatively, when the defendant challenges the voluntariness with a motion to suppress.<sup>51</sup> The state must prove, by a preponderance of the evidence, that the confession was voluntary.<sup>52</sup>

A statement is voluntary when "it is 'the product of an essentially free and unconstrained choice by its maker.'"<sup>53</sup> To determine whether a statement is involuntary,

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<sup>48</sup> *Johnson*, 2016-Ohio-7266 at ¶ 76, quoting *State v. Kelly*, 2d Dist. Greene No. 2004-CA-20, 2005-Ohio-305, ¶ 10.

<sup>49</sup> *Johnson*, 2016-Ohio-7266 at ¶ 76, quoting *State v. Chase*, 55 Ohio St.2d 237, 246 (1978).

<sup>50</sup> *Johnson*, 2016-Ohio-7266 at ¶ 77, quoting *State v. Clark*, 38 Ohio St.3d 252, 261 (1998).

<sup>51</sup> *State v. Hensley*, 12th Dist. Clermont No. 99-03-24, 1999 WL 1037812, \*2 (Nov. 8, 1999), citing *Lego v. Twome*, 404 U.S. 477, 489, 92 S.Ct. 619 (1972).

<sup>52</sup> *Fille*, 2002-Ohio-3879 at ¶ 22, citing *Colorado v. Connelly*, 479 U.S. 157, 167-168, 107 S.Ct. 515 (1986).

<sup>53</sup> *State v. Liso*, 12th Dist. Brown No. CA2012-08-017, 2013-Ohio-4759, ¶ 11, quoting *State v. Wiles*, 59 Ohio St.3d 71, 81 (1991).

which is to say that it “\* \* \* has been elicited by means that are unconstitutional, [the] court looks to the totality of the circumstances concerning whether a defendant’s will was overborne in a particular case.”<sup>54</sup> The totality of the circumstances includes “the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.”<sup>55</sup>

Courts have deemed several interrogative tactics unproblematic and permissible. An interrogator can repeatedly tell a defendant that the interrogator believes the defendant is lying and may question his credibility.<sup>56</sup> Likewise, an interrogator’s use of leading questions is not coercive.<sup>57</sup>

A “promise of leniency” from police and “threats of prosecution *can* be objectively coercive.”<sup>58</sup> So too, a promise of “immediate release” can also be “so attractive as to render a confession involuntary.”<sup>59</sup> However, “[u]nder the totality of the circumstances standard, the presence of promises does not as a matter of law, render a confession involuntary.”<sup>60</sup> Instead, “a promise of leniency must be coupled with other factors to

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<sup>54</sup> *U.S. v. Johnson*, 351 F.3d 254, 260, 2003 Fed.App. 0406P (6th Cir. 2003), quoting *United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999).

<sup>55</sup> *Lynch*, 2003-Ohio-2284 at ¶ 54, quoting *State v. Mason*, 82 Ohio St.3d 144, 154, 694 N.E.2d 932 (1998).

<sup>56</sup> *In re M.J.C.*, 12th Dist. Butler No. CA2014-05-124, 2015-Ohio-820, ¶ 18, citing *In re N.J.M.*, 12th Dist. Warren CA2010-03-026, 2010-Ohio-5526, ¶ 25.

<sup>57</sup> *In re M.J.C.*, 2015-Ohio-820 at ¶ 18, quoting *State v. Lewis*, 7th Dist. Mahoning No. 03 MA 36, 2005-Ohio-2699, ¶ 15.

<sup>58</sup> (Emphasis added.) *Johnson*, 351 F.3d at 216. *But see State v. Jackson*, 12th Dist. Butler No. CA2002-01-013, 2002-Ohio-5138, ¶ 14 (Citation omitted.) (“Promises that a defendant’s cooperation might be considered in the disposition of the case or that a confession would be helpful will not invalidate an otherwise legal confession.”).

<sup>59</sup> *Johnson*, 351 F.3d at 216, quoting *U.S. v. Wrice*, 954 F.2d 406, 210-411 (6th Cir. 1992).

<sup>60</sup> (Internal quotations omitted.) *In re N.J.M.*, 2010-Ohio-5526 at ¶ 25, quoting *State v. Edwards*, 49 Ohio St.2d 31, 41, 358 N.E.2d 1051 (1975).

render a confession involuntary under the totality of the circumstances test.”<sup>61</sup> Moreover, a promise of leniency is not coercive if it is not broken or not illusory.<sup>62</sup> “The line to be drawn between permissible police conduct and conduct deemed to induce or tending to induce an involuntary statement depends upon the nature of the benefit to be derived by a defendant if he speaks the truth.”<sup>63</sup>

“Similarly, assurances that a defendant’s cooperation will be considered or that a confession will be helpful do not invalidate a confession.”<sup>64</sup> So too, a “mere suggestion that cooperation might result in more lenient treatment is neither misleading nor unduly coercive, as people ‘convicted of criminal offenses generally are dealt with more leniency when they have cooperated with the authorities.’”<sup>65</sup> “Likewise, an investigator’s offer to help if a defendant confesses is not improper.”<sup>66</sup>

Additionally, whether the police use deception bears upon voluntariness.<sup>67</sup> However, the presence of deception is not dispositive of whether a confession was

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<sup>61</sup> *Hensley*, 1999 WL 1037812 at \*2, citing *Edwards*, 49 Ohio St.2d 31, 41 (1976).

<sup>62</sup> *Johnson*, 351 F.3d at 262. In *Johnson*, the Sixth Circuit Court of Appeals found that a promise to the defendant not to prosecute his sister was not coercive because the police did not prosecute the sister, and therefore the promise was unbroken.

<sup>63</sup> *State v. Mason*, 12th Dist. Butler Nos. CA2004-06-164, CA2004-06-164, 2005-Ohio-2918, ¶ 50, citing *State v. Arrington*, 14 Ohio App.3d 111, 115, 470 N.E.2d 211.

<sup>64</sup> *Huysman*, 2006-Ohio-2245 at ¶ 22, citing *State v. Loza*, 71 Ohio St.3d 61, 67, 1994-Ohio-409.

<sup>65</sup> *Huysman*, 2006-Ohio-2245 at ¶ 22, quoting *State v. Stringham*, 2d Dist. Miami No. 2002-CA-9, 2003-Ohio-1100, ¶ 16. See *Mason*, 2005-Ohio-2918 at ¶ 51, citing *Arrington*, 14 Ohio App.3d at 115 (“Improper inducements are not present, however, when the only benefit pointed out to a suspect is that which flows naturally from a truthful and honest course of conduct.”).

<sup>66</sup> *Huysman*, 2006-Ohio-2245 at ¶ 22, citing *Stringham* at ¶ 16. See *Fille*, 2002-Ohio-3879 at ¶¶ 25, 36 (finding that a defendant’s confession was voluntary when the interviewers made frequent remarks to the defendant to help him and stated that they could “probably work this thing out” if the defendant had, in fact, committed the crime he was being questioned for, raping a baby).

<sup>67</sup> *Lynch*, 2003-Ohio-2284 at ¶ 61, citing *Schmidt v. Hewitt*, 573 F.2d 794, 801 (3d Cir. 1978).

voluntary.<sup>68</sup> Furthermore, a defendant's "will is not overborne simply because he was led to believe that the government's knowledge of his guilt is greater than it actually is."<sup>69</sup>

For instance, the Twelfth District Court of Appeals considered a fact pattern involving potential promises or deception in *State v. Liso*, 12th Dist. Brown No. CA2012-08-017, 2013-Ohio-4759. In that case, the defendant argued on appeal that his confession at a police station was involuntary because, prior to his confession, two detectives discussed the possibility of charging him with less than a first degree felony if the alleged sexual contact the defendant had with his child victim was not forced.<sup>70</sup> The appellate court acknowledged that deception is a factor considered in assessing voluntariness, but it found significant that the detective never "promise[d] Liso that he would not be charged with a serious crime or would not be subject to long-term imprisonment."<sup>71</sup> The court found that other factors weighed "heavily" in favor of finding the statement to be voluntary, including the fact that there was no evidence of physical abuse or deprivation, the defendant had ample free movement and received a restroom break, the record did not reflect that the defendant had any cognitive deficits, the defendant voluntarily went to the police station for an interview, and this was his second interview.<sup>72</sup>

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<sup>68</sup> *Lynch*, 2003-Ohio-2284 at ¶ 61, quoting, *State v. Wiles*, 59 Ohio St.3d 71, 81, 571 N.E.2d 97 (1991). See *Liso*, 2013-Ohio-4759 at ¶ 15, quoting *Lynch*, 2003-Ohio-2284 at ¶ 61 ("While police deception is 'a factor bearing on voluntariness \* \* \* this factor, standing alone, is not dispositive of the issue.'").

<sup>69</sup> *In re N.J.M.*, 12th Dist. Warren, 2010-Ohio-5526 at ¶ 26, quoting *State v. Bays*, 87 Ohio St.3d 15, 23, 716 N.E.2d 1126 (1999).

<sup>70</sup> *Liso*, 2013-Ohio-4759 at ¶ 13.

<sup>71</sup> *Id.* at ¶ 15.

<sup>72</sup> *Id.* at ¶¶ 13-14.

The Twelfth District Court of Appeals also examined potential deception and promises in *In re N.J.M.*, 12th Dist. Warren No. CA2010-03-026, 2010-Ohio-5526. The defendant appealed on the basis that his confession was involuntary.<sup>73</sup> During the police interview the detective told the defendant: "If you're honest with me and you say yeah this is what happened and you tell me everything that happened and honestly, what do you think your chances are of staying out of jail? Quite a bit better, quite a bit better."<sup>74</sup> The court found that "this does not rise to the level of an implied promise of leniency or benefit in order to induce appellant to make an inculpatory statement."<sup>75</sup> The court noted that the defendant's interview was not lengthy, intense, or frequent, as it only lasted 35 minutes.<sup>76</sup> Further, it was unproblematic that the detective repeatedly told the defendant throughout the interview that he was not being truthful, because admonitions to tell the truth are permissible.<sup>77</sup>

Next, the court examined whether deception was used when the detective told the defendant that he had physical evidence linking the defendant to the crime when, in fact, testing failed to reveal the defendant committed an offense.<sup>78</sup> However, because a defendant's will is not overborne because interrogators lead him to believe that they have more evidence of the defendant's guilt than they actually do, the detective's statement to the defendant regarding physical evidence was not problematic.<sup>79</sup> The court found that the defendant's confession was not involuntary although he was only 13 at the time he was interviewed, had no prior criminal experience, had an IQ of 67,

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<sup>73</sup> *In re N.J.M.*, 12th Dist. Warren No. CA2010-03-026, 2010-Ohio-5526.

<sup>74</sup> *Id.* at ¶ 24.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at ¶ 25.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at ¶ 26.

<sup>79</sup> *Id.*

was found to have delayed cognitive and emotional development, and the detective made the above statements to him.<sup>80</sup>

In *State v. Huysman*, 12th Dist. Warren No. CA2005-09-107, 2006-Ohio-2245, the Twelfth District Court of Appeals again examined whether a defendant's confession to a detective at a police station was involuntary. While interviewing the defendant, the detective told the defendant that he could file one charge against the defendant, "or let it go to five separate charges within two counties."<sup>81</sup> The appellate court found that the detective did not deceive the defendant by telling him that he could file only one theft charge because he did, in fact, only file one count of theft against the defendant.<sup>82</sup> Moreover, the detective's statements to the defendant that he did not believe the defendant and that this was the defendant's one chance to avoid multiple felony charges was "merely" an admonishment to the defendant to "tell the truth."<sup>83</sup> The court also considered that the defendant was not physically threatened or harmed or deprived of food, medical treatment or sleep, and the interview took place in under 45 minutes.<sup>84</sup> Upon reviewing the totality of the circumstances, the court concluded that the detective's interrogation tactics were not so improper or coercive that the defendant's will was overborne or that his capacity for self-determination was critically impaired as a result.<sup>85</sup>

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<sup>80</sup> Id. at ¶¶ 28-29.

<sup>81</sup> *Huysman*, 2006-Ohio-2245 at ¶ 5.

<sup>82</sup> Id. at ¶ 24.

<sup>83</sup> Id.

<sup>84</sup> Id. at ¶ 23.

<sup>85</sup> Id. at ¶ 25. See *State v. Ross*, 12th Dist. Butler No. 82-01-0003, 1982 WL 3267, \*1-3 (Nov. 3, 1982) (finding the defendant's statement voluntary even though the detective told the defendant that if he could put the defendant's accomplices into the detective's hands then he would only be charged with complicity to aggravated robbery as opposed to aggravated murder).

In the present case, the defendant claims that his statements were involuntary because Captain Hampton told the defendant that he would “jam up” the defendant on additional charges if he did not cooperate and that he would take the defendant home that day if he cooperated, and he lied to the defendant about having video footage of the burglary.

The instances of potential promises and deception in the defendant’s interview cause pause. However, upon reviewing the totality of the circumstances, the court finds that the defendant’s will was not overborne and that his statements were voluntary. The defendant was an adult at the time of his confession, and there is no indication that the defendant lacked the cognitive ability to completely understand the nature of the circumstances or the significance of his statement to Captain Hampton. Additionally, the defendant has previous criminal experience, as he explained this was not the only criminal trouble plaguing him at the time of the interview. The interview itself only occurred once and was short, lasting under 20 minutes.<sup>86</sup> Further, Captain Hampton did not mistreat or otherwise physically deprive the defendant.

As discussed, leading questions and admonishments to be truthful are not coercive. Thus, although Captain Hampton did use leading questions, repeatedly pressed the defendant to tell the truth and “man up” or “fess up,” and told the defendant that he was lying, he was not coercing the defendant in doing so.

As explained, a promise or deception is not, in and of itself, dispositive of whether a confession was voluntary. Captain Hampton told the defendant that there

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<sup>86</sup> See *Liso*, 2013-Ohio-4759 at ¶ 13 (noting the fact that the interview with the defendant was less than two hours as a factor weighing in favor of finding that his confession was not involuntary); *Huysman*, 2006-Ohio-2245 at ¶ 23 (opining that the defendant’s interview, which lasted 45 minutes, was “not particularly lengthy”).

was video footage of the burglary waiting for his review, although no such footage exists. However, a defendant's "will is not overborne simply because he was led to believe that the government's knowledge of his guilt is greater than it actually is,"<sup>87</sup> which is exactly the case here.

As to potential inducements, Captain Hampton did not coerce the defendant by telling him that he would benefit if he told the truth now instead of after Captain Hampton reviewed the video footage.<sup>88</sup> So too, Captain Hampton's offer to "help" the defendant and his willingness to try to "work this thing out" with the defendant is not considered coercive.<sup>89</sup> There are multiple instances in which Captain Hampton implies that he will charge the defendant with more crimes if he does not tell the truth about the burglary during the interview. However, a promise of leniency is not coercive if it is not broken.<sup>90</sup> Captain Hampton did, in fact, only charge the defendant with one count of burglary. As such, Captain Hampton's statement that he would not "jam up" the defendant with additional charges was not broken, and therefore, was not coercive either. Contrary to the defendant's argument, Captain Hampton never implied that, by being honest, the defendant could avoid any and all criminal charges. When viewing the totality of the circumstances in this case, the court finds that the defendant's will was not overborne, and his confession was voluntary.

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<sup>87</sup> *In re N.J.M.*, 2010-Ohio-5526 at ¶ 26, quoting *Bays*, 87 Ohio St.3d at 23.

<sup>88</sup> *Huysman*, 2006-Ohio-2245 at ¶ 22, citing *Loza*, 71 Ohio St.3d at 67. See *Mason*, 2005-Ohio-2918 at ¶ 51, citing *Arrington*, 14 Ohio App.3d at 115.

<sup>89</sup> *Huysman*, 2006-Ohio-2245 at ¶ 22, citing *Stringham* at ¶ 16. See *Fille*, 2002-Ohio-3879 at ¶¶ 25, 36 (finding that a defendant's confession was voluntary when the interviewers made frequent remarks to the defendant to help him and stated that they could "probably work this thing out" if the defendant had, in fact, committed the crime he was being questioned for, raping a baby).

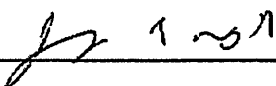
<sup>90</sup> *Johnson*, 351 F.3d at 262. See *Huysman*, 2006-Ohio-2245 at ¶ 24.

**CONCLUSION**

For the foregoing reasons, the defendant's motion to suppress is not well-taken and denied.

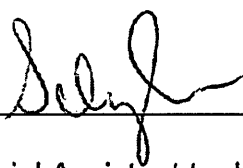
**IT IS SO ORDERED.**

DATED: 7-21-17

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Decision/Entry were sent on this 21st day of July 2017 by e-mail to Matt Wiseman, Assistant Prosecuting Attorney, at [mwiseman@clermontcountyohio.gov](mailto:mwiseman@clermontcountyohio.gov), and to Greg Hoffman, Attorney for the Defendant, at [ghoffman@clermontcountyohio.gov](mailto:ghoffman@clermontcountyohio.gov).

  
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Judicial Assistant to Judge McBride