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DEBORAH A. ...  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

<b>STATE OF OHIO</b>	:	
Plaintiff	:	<b>CASE NO. 2013 CR 00555</b>
vs.	:	<b>Judge McBride</b>
<b>KENNETH TODD HONAKER</b>	:	<b>DECISION/ENTRY</b>
Defendant	:	

D. Vincent Faris, Prosecuting Attorney, Lara A. Baron and Thomas W. Scovanner, Assistant Prosecuting Attorneys for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103;

W. Stephen Haynes, Public Defender, and James A. Hunt, Assistant Public Defender for the Defendant Kenneth Todd Honaker, 302 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of the motion to suppress filed by the defendant Kenneth Todd Honaker on October 19, 2015.

An evidentiary hearing was held on the motion to suppress on December 10, 29, & 30, 2015. The parties then were given an opportunity to submit written memoranda in support of their respective positions, and following oral argument which was held on February 1, 2016, the motion was taken under advisement.

Upon consideration of the motion to suppress, the record of the proceeding, 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.

### **STANDARD OF REVIEW**

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." A motion to suppress evidence "on the ground that it was illegally obtained" must be made prior to trial.<sup>1</sup>

A motion to suppress typically "presents mixed questions of law and fact."<sup>2</sup> In reviewing such a motion, "the court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses."<sup>3</sup>

### **SUMMARY OF TESTIMONY AND PROCEDURAL POSTURE**

The defendant Kenneth Todd Honaker was indicted on September 17, 2013 in the Clermont Court of Common Pleas on one count of aggravated robbery and three counts of robbery.<sup>4</sup> On September 10, 2012, the defendant is alleged to have entered a Check 'n Go, and while wearing a mask and brandishing a gun, he emptied the cash

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<sup>1</sup> Crim.R. 12(C).

<sup>2</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>3</sup> *Id.*

<sup>4</sup> Indictment, Sept. 17, 2013. Per the Amended Bill of Particulars, filed July 14, 2015, one count of robbery has been dismissed.

registers of \$5,825.<sup>5</sup> He is also alleged to have entered a Check 'n Go on December 19, 2012, and while wearing a mask, he removed \$4,817 from the cash registers.<sup>6</sup>

The defendant seeks an order suppressing the statements he made on August 4, 2013 in which he confessed to these robberies and others at multiple Check 'n Go locations in the state of Ohio.<sup>7</sup> The defendant asserts that the statements must be suppressed because he invoked his right to counsel during the interview with a law enforcement officer, and the officer nevertheless continued to interview him.<sup>8</sup>

The defendant was arrested on August 2, 2013 in Kenton County, Kentucky for robbery of Victory Bank the day before.<sup>9</sup> On August 4, 2013, Sergeant Sandy Spears of the Fairfield Police Department in Ohio came to the Kenton County jail to interview the defendant.

As of August 4<sup>th</sup>, the defendant's family was trying to retain an attorney for the defendant. They had been in contact with the attorney they sought to hire by August 4<sup>th</sup>, but they did not have the money to retain him until August 6<sup>th</sup>. The defendant knew his family was trying to obtain representation for him, because at his arraignment in Kentucky on August 2<sup>nd</sup>, his brother told the court that the family was in the process of securing an attorney.

Sergeant Sears did not record the interview with the defendant. She testified that there were multiple reasons why she did not record the interview. First, she was under the impression that the Kenton County Jail did not allow recording devices of any kind. A few months before Sergeant Sears's interview with the defendant, she had

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<sup>5</sup> Amended Bill of Particulars, July 14, 2015.

<sup>6</sup> Amended Bill of Particulars, July 14, 2015.

<sup>7</sup> Def.'s Mot., pg. 1.

<sup>8</sup> Def's Mot., pg. 1.

<sup>9</sup> State's Ex. 4.

interviewed a suspect in another case at the Campbell County Jail, which is also in northern Kentucky and neighbors Kenton County. The Campbell County Jail would not permit her to use a recording device. Mistakenly believing that this was the policy at the Kenton County Jail, she did not bring a recording device with her.

In addition, the policy of the Fairfield Police Department is to only record interviews that it is legally required to record, such as in homicides. Sergeant Sears's interview with the defendant was not within the ambit of this policy.

Sergeant Sears explained that she came to speak to the defendant because she learned that he had been arrested in Kentucky for a robbery, and he was now a suspect in several Check 'n Go robberies in Ohio. She advised him of his *Miranda* rights by reading the rights to him from a standard waiver form that the Fairfield Police Department uses. She showed him the *Miranda* rights waiver form that she read from and asked if he understood it or had questions. The defendant did not have questions and proceeded to sign the waiver.<sup>10</sup>

Sergeant Sears started the interview by asking the defendant questions about his background, heroin addiction, family, and experiences cashing checks at Check 'n Go locations in Eastgate and Fairfield Ohio. She then explained to him the types of information that she could retrieve from his cellular phone records, such as GPS tracking information.

At this point, Sergeant Sears observed that the defendant's demeanor changed and he began to look depressed and sickly. Up until his arrest, he had been using more than one gram of heroin per day. The defendant explained that at the time of his interview by Sergeant Sears he was "dope sick" as the result of abruptly ceasing to use

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<sup>10</sup> State's Ex. 1.

heroin. The defendant explained that during the entire interview he felt horrible physically and had been suffering from back pains, nausea, vomiting, and diarrhea due to his withdrawal.

At this point in the interview, the testimony from Sergeant Sears and the defendant diverged. Sergeant Sears testified that the defendant asked her if she could return the next day and bring a written deal from the prosecuting attorney with her. Sergeant Sears testified that she advised the defendant that she could not return, and that was not how this process "worked."

By contrast, the defendant testified that at this juncture he said "I believe my attorney will be here tomorrow. Can you come back then?"<sup>11</sup> He also indicated that he wanted her to return with a plea deal from a prosecutor.

On the first day of his testimony, the defendant testified that he also said to Sergeant Sears: "Look I don't think I want to talk to you anymore until my attorney is present." However, on his second day of testimony, he retracted this latter statement, and instead insisted he only said "I believe my attorney will be here tomorrow. Can you come back then?" The defendant testified that Sergeant Sears told him she could not do that, but that if he confessed she promised to inform the judge and prosecutors that the defendant had been cooperative in the investigation.

Sergeant Sears averred that the defendant never mentioned an attorney or any request or desire for counsel. She testified that if he had, she would have immediately stopped the interview.

Of note, less than two days earlier the defendant had been interviewed by a Kentucky law enforcement officer at the Highland Heights Police Department in

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<sup>11</sup> Throughout his testimony there were only slight variations on the wording of this request.

Kentucky. During the interview at Highland Heights, a Kentucky prosecutor met with the defendant and offered him a plea deal in exchange for his confession to the robbery of Victory Bank the day before.<sup>12</sup> The defendant testified that he had initially lied to the Kentucky law enforcement officer by denying involvement in the robbery. However, after the prosecutor met with him, he agreed to a plea deal and confessed to the robbery.

Both the defendant and Sergeant Sears agree that sometime after Sergeant Sears stated that she would not return with a plea deal, the defendant agreed to confess to multiple robberies. Sergeant Sears showed the defendant a binder with pictures from each of the robberies that she suspected that the defendant was involved in. He admitted that he committed all of the robberies with the exception of one. She wrote questions for him on a Fairfield Police Department Affidavit of Witness form, and he wrote answers detailing the robberies, including their dates, locations, his motivations, the disposal of his gloves and face masks, the vehicles he drove, etc.<sup>13</sup> The defendant testified that he fabricated the entire confession, and none of it had happened.

## **FINDINGS OF FACT AND LEGAL ANALYSIS**

Although the Constitution does not afford criminal suspects assistance from an attorney, a suspect is nevertheless "entitled to the assistance of counsel during

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<sup>12</sup> State's Ex. 4.

<sup>13</sup> State's Ex. 2.

custodial interrogation."<sup>14</sup> Once a suspect knowingly, intelligently, and voluntarily waives his/her *Miranda* rights, "law enforcement officers may continue questioning until and unless a suspect clearly requests an attorney."<sup>15</sup> If a suspect invokes the right to assistance at any time, law enforcement must immediately cease questioning until counsel is present.<sup>16</sup>

Determining whether the suspect actually invoked the right to counsel is an objective inquiry for courts to determine.<sup>17</sup> In doing so, the suspect must have made "some statement that can reasonably be construed to be an expression of a desire for an attorney's assistance."<sup>18</sup> If the suspect's request is "ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," then law enforcement is not required to cease questioning.<sup>19</sup> The request for counsel must be sufficiently clear such that "a reasonable police officer under the circumstances would understand the statement to be a request for an attorney."<sup>20</sup>

In the case at bar, the defendant moves to suppress all portions of his statement to Sergeant Sears made after the point at which he allegedly invoked his right to counsel. However, before being able to determine whether the defendant's words were

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<sup>14</sup> *Davis v. U.S.*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362, (1994), at paragraph one of the syllabus.

<sup>15</sup> *Id.* at paragraph one of the syllabus. See *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 328 (holding that law enforcement must immediately stop questioning a suspect who clearly asserted his or her right to have counsel present for the interrogation).

<sup>16</sup> *Edwards*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 328 (1981). See *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 1176 (1990) (holding that a suspect who invokes the right to counsel cannot be questioned regarding any offense unless counsel is actually present).

<sup>17</sup> *Davis*, 512 U.S. 452 at paragraph one of the syllabus.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 459.

an unambiguous and unequivocal request for an attorney, the court must decide whether the defendant in fact made such a request. As this is a motion to suppress, the court is the fact finder and determines the credibility of the witnesses.<sup>21</sup>

As a threshold matter, it is clear from the testimony of both Sergeant Sears and the defendant that the defendant knowingly, intelligently, and voluntarily waived his right to counsel. It is undisputed that Sergeant Sears gave him a *Miranda* warning and showed him the warning, he stated he understood it, and he signed the waiver. The issue then becomes whether he asserted his right to counsel at a later point in the interview.

After considering all the testimony and surrounding facts in the instant case, the court finds that the defendant did not make a request to Sergeant Sears to have counsel present for his interrogation. With the exception of Sergeant Sears conflating the Kenton and Campbell County courthouses, her testimony remained consistent throughout and corroborated her written narrative of the interview. In fact, aside from the defendant's averment that he requested counsel, he admitted that her report is largely "on point."

Multiple factors serve to diminish the defendant's credibility. First, he admitted that he lied to the Kentucky investigators and denied a robbery he committed. It was only after he was presented with a plea agreement that he told the truth. The fact that he admittedly lied to law enforcement officers in Kentucky tarnishes his credibility.

Second, the defendant had difficulties testifying about many details regarding what he told Sergeant Sears during his interview, the dates of various robberies, etc. Yet he claims to precisely recall stating: "I believe my attorney will be here tomorrow.

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<sup>21</sup> *Codeluppi*, 2014-Ohio-1574 at ¶ 7, quoting *Burnside*, 2003-Ohio-5373 at ¶ 8.

Can you come back then?" His selective memory of this one statement casts doubt upon its veracity and accuracy.

Third, the defendant had previously been using more than a gram of heroin per day and abruptly stopped when arrested, causing severe withdrawal symptoms. The defendant described his "dope sickness" as very painful throughout the interview and compared it to being ten times worse than the flu. He also admitted that heroin and withdrawal symptoms can affect his perception. His admittedly compromised capability for perception is cause for concern that he can accurately remember invoking his right to counsel.

Fourth, under the circumstances of this case, Sergeant Sears's testimony is more plausible than the defendant's. Less than two days before the interview with Sergeant Sears, the defendant had been interviewed by Kentucky law officers without invoking his right to counsel. Without counsel present, he even spoke with the prosecutor and agreed to a plea deal after receiving his *Miranda* warnings. Thus, it certainly is not the case that he was unfailingly unwilling to speak to law enforcement unless his counsel was present. Additionally, it would stand to reason that the defendant would ask Sergeant Sears if he could get a plea deal from the prosecutor for his Ohio robberies, as he had just been successful in doing so in Kentucky. Once it became clear that Sergeant Sears could not come back with a plea deal the next day, it is logical that the defendant would be willing to settle for the next best alternative, which would be to confess with the understanding that Sergeant Sears would write to the court and prosecutors saying that he was cooperative.

Fifth, his testimony about what he said to Sergeant Sears when invoking his right to counsel was inconsistent. Most often, he would say only slightly different variations of "I believe my attorney will be here tomorrow. Can you come back then?" What is more problematic is the major variation between his testimony from the first and second day. During the December 29, 2015 hearing, he testified that he also said: "Look I don't think I want to talk to you anymore until my attorney is present." Then on December 30<sup>th</sup>, he recanted that statement, instead testifying that he only ever said "I believe my attorney will be here tomorrow. Can you come back then?" This is a major discrepancy in his testimony that does not lend itself to his credibility.

Given the testimony and evidence presented to the court, the court cannot find that the defendant ever requested to have an attorney present during his interview with Sergeant Sears.

### CONCLUSION

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

A trial scheduling conference will be held on February 17, 2016 at 8:30 a.m.

**IT IS SO ORDERED.**

DATED: 2-12-16

  
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Judge Jerry R. McBride