IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

STATE OF OHIO	:	**CASE NO. 20-CR-00177**
Plaintiff,	:	**Jonathan P. Hein, Judge**
vs.	:	
STEPHEN M. BURGHY, II	:	
Defendant.	:	**JUDGMENT ENTRY - Defendant's Motion to Suppress**

This matter came before the Court for hearing on April 26, 2021 upon the Defendant's Motion to Suppress as filed March 31, 2021. The State of Ohio was represented by Deborah S. Quigley, the Assistant Prosecuting Attorney. The Defendant was present and represented by Alexander S. Pendl, Esq.

Case Facts

The facts of the case are straight-forward. On January 8, 2020, the Defendant was arrested by Dep. Jackie Barton of the Darke County Sheriff's Office after his uncontroverted driving while under suspension and driving with expired registration. After being placed under arrest on the side of Sweitzer Street, Dep. Barton asked the Defendant whether he possessed any weapons or contraband. The Defendant admitted that there was suboxone in his wallet. Since this is a controlled substance available by prescription, Dep. Barton took the suboxone from

inside his wallet and instructed the Defendant to provide her with his prescription so she would know that it was not illegally possessed. The Defendant was then taken to the Darke County Jail where he was incarcerated for the misdemeanor offenses.

In the next few months, Dep. Barton did not receive any prescription verification from the Defendant. On one occasion, she went to his last known address to inquire but found the house to be subject to an eviction notice with no one answering the door when she knocked.

In October, 2020, the Defendant was indicted for Aggravated Possession of Drugs (suboxone), in violation of R.C. 2925.11(A), (C)(2)(a), a fifth degree felony. The Defendant was eventually arrested and appeared; since then, he has made court appearances and participated in his defense.

The pending motion asks the Court to suppress evidence of the controlled substance due to a violation of the Defendant's Fifth Amendment rights under the United States Constitution and comparable provisions of Article I, Section 10 of the Ohio Constitution.

During the suppression hearing, Dep Barton admitted that *Miranda*[1] rights attached to the Defendant when she placed him under arrest.[2] She further admitted that the Defendant's admission to possessing suboxone was an incriminating statement resulting from her questioning and that his statement led her to search the contents of his wallet and discover the controlled substance.

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[1] *Miranda v. Arizona*, 384 U.S 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] Dep. Barton's thorough understanding of both Fourth and Fifth Amendment jurisprudence was readily apparent from her testimony. Although it was not her intention to formally interrogate the Defendant about drug possession, she quickly recognized that her oft-used question nonetheless invoked *Miranda* protections.

The position taken by the State of Ohio was that suppression of evidence was not warranted since the evidence would have been inevitably discovered when the Defendant was processed into the jail.

Analysis

The Privilege Against Self-Incrimination

The Defendant's motion asks the Court to exclude evidence as the result of a violation of the Defendant's *Miranda* rights. The complex constitutional question of whether the exclusionary rule should apply was settled in *State v. Farris*, 109 Ohio St.3d 519, 849 N.E. 2d 985, 2006-Ohio-3255:

> {¶ 45} Pursuant to the Fifth Amendment [of the U.S. Constitution], then, the physical evidence seized by the troopers in this case was admissible. We must now consider whether the evidence was admissible pursuant to Section 10, Article I of the Ohio Constitution.
>
> {¶ 48} To hold that the physical evidence seized as a result of unwarned statements is inadmissible, we would have to hold that Section 10, Article I of the Ohio Constitution provides greater protection to criminal defendants than the Fifth **996 Amendment to the United States Constitution. We so find here.
> {¶ 49} Only evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded. We believe that to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution. In cases like this one, where possession is the basis for the crime and physical evidence is the keystone of the case, warning suspects of their rights can hinder the gathering of evidence. When physical evidence is central to a conviction and testimonial evidence is not, there can arise a virtual incentive to flout *Miranda*. We believe that the overall administration of justice in Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda,* not in defiance of it. We thus join the other states that have already determined after *Patane* that their state constitutions' protections against self-incrimination extend to physical evidence seized as a result of pre-*Miranda* statements. *State v. Knapp* (2005), 285 Wis.2d 86, 700 N.W.2d 899; *Commonwealth v. Martin* (2005), 444 Mass. 213, 827 N.E.2d 198. Thus, the physical evidence obtained as a result of the unwarned statements made by Farris in this case is inadmissible pursuant to Section 10, Article I of the Ohio Constitution.

In short, the United States Constitution does not require suppression of tangible evidence for *Miranda* violations, but the Ohio Constitution does require suppression of tangible evidence resulting from a violation of Article I, Section 10 constitutional rights against self-incrimination. Under this analysis, the evidence must be suppressed.

The Privilege Against Unreasonable Searches

In this case, based on the arguments of counsel, the Court is called to determine whether violations of rights against self-incrimination can be rectified when the evidence would otherwise later be lawfully obtained pursuant to a recognized exception to the prohibition against unlawful searches under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

This question focuses on the scope of the exception to the suppression requirement for evidence that would eventually be discovered. The foundations for the "inevitable discovery" exception are traced to *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.3d 377 (1985) and *State v. Perkins*, 18 Ohio St.3d 193, 480 N.E.2d 763 (1985).

State v. Pearson, 119 Ohio App. 3d 745, 754, 696 N.E.2d 273, 278 (1997) provides a helpful understanding of the inevitable discovery doctrine:

> The inevitable-discovery rule allows the admission of illegally obtained evidence where "it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins* (1985), 18 Ohio St.3d 193, 18 OBR 259, 480 N.E.2d 763, syllabus, adopting the rule set forth in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377. The state bears the burden of showing "within a reasonable probability that police officials would have discovered the derivative evidence apart from the unlawful conduct." *State v. Perkins*, 18 Ohio St.3d at 196, 18 OBR at 261–262, 480 N.E.2d at 767. Proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Nix v. Williams*, 467 U.S. at 444, 104 S.Ct. at 2509, 81 L.Ed.2d at 388, fn. 5.

> If the state does demonstrate, by a preponderance of the evidence, that the evidence would have been discovered by lawful means, the deterrence of police misconduct has such little basis that the evidence should be allowed. *Nix v. Williams*, 467 U.S. at 443–444, 104 S.Ct. at 2508–2509, 81 L.Ed.2d at 387–388.

An instructive case which is factually similar to the one at bar is *State v. Sincell,* (2nd Dist. Montgomery No. 19073), 2002-Ohio-1783, where the Defendant's purse was searched at the scene of her arrest for prostitution. Drug paraphernalia was discovered and eventually tested as a controlled substance; Sincell was later indicted for felony drug possession. Upholding the validity of the inevitable discovery, the Court of Appeals held:

> We next note that the unrefuted record establishes that the purse would have been properly subjected to an inventory search once Sincell was booked into the jail as part of the routine booking. "Following a lawful arrest, it is reasonable for police to search the personal effects of the arrestee as a part of routine booking procedures." State v. Edwards (Nov. 12, 1999), Montgomery App. No. 17735, unreported. "Where a routine inventory search would inevitably lead to the discovery of certain evidence, the trial court should not suppress that evidence notwithstanding police error or misconduct." Id. This " 'inevitable discovery' exception to the exclusionary rule permits the state to introduce evidence that would have been discovered by lawful means without reference to police error or misconduct." Id., citations omitted.

Thus, the doctrine of inevitable discovery permits the seizure of evidence provided there is an inventory policy that would either permit or require the search at the point of the search.

However, in this case, the testimony and evidence did not provide proof of any inventory policy, notably its particular terms regarding the scope of the inventory. The evidence presented to the Court was Dep. Barton's opinion that the inventory policy would permit the jail staff to conduct a search of the Defendant's wallet; this opinion was based on past experience and practices and not her personal knowledge of the policy. Indeed, in the State's oral argument, the necessity of an inventory search as legal justification for the search was disclaimed.

Now the Court is guided by the authority of *State v. Harris* (Sept. 29, 1989), Montgomery App. No. 11309, 1989 WL 113134, at *6 (2nd Dist.):

> In its brief, the State argues that the search of Harris's satchel can be separately justified under the "inevitable discovery" doctrine. The State cites authority for the proposition that evidence seized as the result of an illegal search will not be suppressed if it would inevitably have been discovered anyway, and contends that the discovery of the drugs in Harris's satchel would have been an inevitable result of a routine inventory of Harris's personal effects following his arrest. The one problem we have with this argument is that there is no evidence in the record tending to establish the Dayton Police Department's routine procedures following arrest. **We imagine that the inventory described by the State is probably routine following arrest, but there is simply no evidence in this record to establish that fact.** * * * [Emphasis added.]

See also *State v. Keith*, No. 07-CR-1936, 2007 WL 4856840 (Ohio Com.Pl. Sep. 25, 2007, Langer, Judge): "the absence of evidence showing routine procedures following arrest would prove fatal to the State's claim that evidence would have been inevitably discovered."

Conclusion

The controlled substance obtained at the time of the roadside arrest was unconstitutionally seized from the Defendant's wallet as result of a custodial questioning.

Under the facts presented, the State has failed to provide a sufficient factual basis to substantiate its claim that the controlled substance would inevitably have been discovered at the time of booking into the Darke County jail. The testimony of Dep. Barton did not establish the terms of the inventory policy, merely that she believed the policy would permit an inspection and inventory of the contents of the Defendant's wallet. Such opinion does not rise to the level of reliable evidence.[3]

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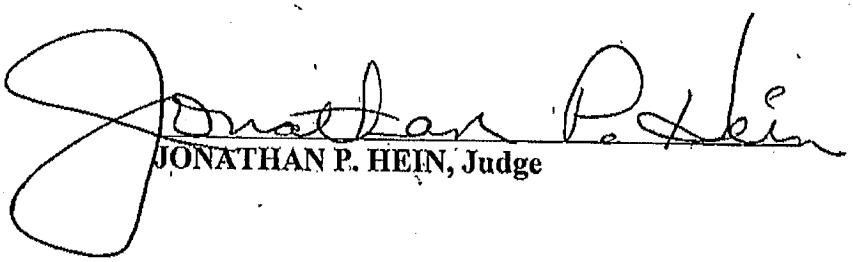
[3] Presuming such a policy exists, providing a certified copy to the Court as an exhibit would have solved the lack of evidence. The absence of this exhibit calls into question the scope and extent of the inventory when a person is incarcerated in the jail. The absence of this exhibit prevents the Court from determining the reasonableness of the search; the existence of an over-broad or intrusive policy would still need to be analyzed.

IT IS, THEREFORE, ORDERED AND DECREED that the Defendant's motion to suppress is granted.



JONATHAN P. HEIN, Judge

cc: Prosecuting Attorney's Office
Alexander S. Pendl, Attorney for Defendant (via email)

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