



## **POLICE'S REMOVAL OF THE DEFENDANTS' CAR'S INTERIOR PANEL AS PART OF AN INVENTORY SEARCH EXCEEDED PERMISSABLE SCOPE**



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In *United States v. Torbert*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 4920741 (S.D. Ohio. Sept. 15, 2016), Defendants Oscar Torbert III and Jeno Daniel Moore were charged in a four-count indictment with various firearm and drug trafficking offenses. The charges arose from evidence that two City of Norwood, Ohio, police officers obtained during a traffic stop and subsequent search of the Defendants' car. The Defendants moved the District Court to suppress the evidence that the police officers discovered in their car. After conducting a two-day evidentiary hearing, the District Court granted the Defendants' motion to suppress, finding that the search violated the Defendants' Fourth Amendment rights. The relevant facts are as follows.

On May 30, 2015, Defendant Torbert was driving in Norwood, Ohio. Defendant Moore was in the front passenger's seat. The vehicle caught the attention of Officer Ryan Strunk of the Norwood Police Department ("NPD") who first observed the vehicle while it was stopped at a red light on Northcutt Avenue, facing eastbound, preparing to make a left turn onto Section Avenue. At the time, Officer Strunk was in his police cruiser in a parking lot directly across the street. Officer Strunk noted that he could not see into the interior of the vehicle, which, based upon his observations, he believed to be the result of unlawful tinting on the windshield and side windows.

Accordingly, Officer Strunk began following the vehicle and activated his emergency lights in order to effectuate a traffic stop. However, the vehicle did not stop immediately. Instead, the driver of the vehicle made a left turn at the next intersection onto Andina Avenue and began accelerating in speed. Officer Strunk, then, activated his sirens and communicated by radio that he was attempting to pull over a vehicle that was refusing to stop. However, the vehicle ultimately pulled to the curb after approximately one and a half blocks and parked in a residential neighborhood. During the suppression hearing, both officers confirmed that the vehicle was legally parked and could have remained in that location without incurring a parking ticket.

Officer Strunk exited his police cruiser and began approaching the vehicle from the driver's side. Officer Strunk testified that he had not run a check on the vehicle's license plate number prior to approaching, and therefore, he had no information regarding the registered owner of the vehicle or

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the vehicle's potential occupants. As Officer Strunk was approaching, the driver's side door of the vehicle opened, and Defendant Torbert leaned out to announce that he could not roll down his car window. Officer Strunk instructed the driver to remain inside the car. Once near the vehicle, Officer Strunk also observed an individual sitting in the front passenger's seat later identified as Defendant Moore.

Officer Strunk explained to Defendants that he had stopped the vehicle for excessive window tints. He then inquired as to why Defendant Torbert had not immediately pulled over. Officer Strunk noted that Defendant Torbert became nervous and could not offer a direct answer. Officer Strunk then asked the Defendants where they were going. Defendant Torbert stated that they were on their way to a barbershop and indicated that it was located back on Section Avenue. This response prompted Officer Strunk to question Defendant Torbert as to why he had turned off of Section Avenue and was now driving in the wrong direction. Defendant Torbert replied that he was just driving around.

Officer Strunk then asked Defendant Torbert for his identification. As Defendant Torbert was producing his identification, Officer Strunk noticed Defendant Moore was not wearing a seatbelt and asked him for his identification as well. Officer Strunk then returned to his vehicle and ran both Defendants' identifications using his mobile data computer. As a result, Officer Strunk learned that Defendant Torbert was under a non-compliance suspension and that Defendant Moore only had an Ohio identification card; neither had a valid driver's license.

While Officer Strunk was running Defendants' identifications, his partner, Officer Chadwick Webster, arrived on the scene to assist. Officer Strunk testified that Officer Webster arrived approximately two to three minutes after the stop was initiated. Further, Officer Strunk testified that Officer Webster's arrival was pursuant to NPD policy that calls for available units to be dispatched immediately as back-up at the scene of any traffic stop.

Upon his arrival and before approaching the stopped vehicle, Officer Webster went to Officer Strunk who was still seated in his police cruiser. Officer Strunk advised Officer Webster that Defendant Torbert was "suspended." In response, Officer Webster told Officer Strunk to "get him [Defendant Torbert] out in cuffs, search him real good."

Officer Webster then asked about the passenger of the vehicle, to which Officer Strunk replied, "He's good. Doesn't have anything." Finally, Officer Webster asked Officer Strunk who the registered owner of the vehicle was, and Officer Strunk replied "Jasmine [Moore]." Officer Webster then told Officer Strunk, "Make sure you keep good control of this guy," presumably referring to Defendant Torbert.

Officers Strunk and Webster approached the vehicle from the driver's side and passenger's side, respectively. Officer Strunk immediately asked Defendant Torbert to exit the vehicle and placed him in handcuffs. Concurrently, Officer Webster engaged Defendant Moore and asked whether he had a valid driver's license. Defendant Moore stated that he did not have a valid license but explained that he could have "his girl" come pick up the car or that he could simply leave the car parked.

Officer Webster then asked Defendants "Whose car is this?" to which Defendant Torbert replied, "His [Defendant Moore's] sister's." Officer Webster then asked Defendant Moore for his sister's name, and Defendant Moore responded, "Jasmine Moore." Officer Webster did not hear the response and,

accordingly, repeated the question which appeared to have confused Defendant Moore prompting the officers to repeat the question again. Despite these difficulties, however, the owner of the vehicle was identified to the officers as Defendant Moore's sister, and her name, Jasmine Moore, was repeated by one or both of the defendants no less than three times during the brief fifteen-second exchange with the officers.

Officer Strunk walked Defendant Torbert to the rear driver's side door of Officer Strunk's police cruiser and proceeded to conduct a search of Defendant Torbert's person. Officer Webster followed and left Defendant Moore seated in the car. While Officer Strunk conducted the search, Officer Webster went to the front passenger's side of Officer Strunk's cruiser and checked the computer data system. Thereafter, Officer Webster walked toward Officer Strunk who was concluding his search of Defendant Torbert. Officer Strunk commented on the amount of cash Defendant Torbert had (presumably in Defendant Torbert's pockets). Upon completing his search of Defendant Torbert, Officer Strunk placed Defendant Torbert, still handcuffed, in the back of his police cruiser.

Officers Strunk and Webster then walked to the rear of the police cruiser and discussed how they intended to proceed. Officer Webster suggested to Officer Strunk that he should have the vehicle towed based on Defendant Torbert's FRA suspension as well as the Defendants' alleged difficulty in communicating the registered owner of the vehicle. Officer Webster then informed Officer Strunk, "I don't know if you realized it, but there's a sandwich bag thing right in the middle there." Officer Webster then clarified that they were in the center console area. Officer Webster further elaborated during his testimony that he specifically saw, in the center console of the vehicle, one box of sandwich bags and that the box was open such that Officer Webster could see the smooth surface of the unused bags inside. Moreover, Officer Webster testified that none of the sandwich bags were strewn about the vehicle and that, other than the mere presence of a box of sandwich bags, he did not observe anything else that caught his attention.

Officer Webster told Officer Strunk to get Defendant Moore out of the car and "try to get consent to search him . . . and then we're going to do an inventory search." Officer Webster further instructed Officer Strunk to notify Defendant Moore that the car would be towed because no licensed driver was present. At the suppression hearing, Officer Webster confirmed that the officers did have options available to them short of towing the vehicle, including leaving the car parked or contacting the registered owner of the vehicle. Officer Webster testified, however, that the decision was made to forego any alternative options entirely because the officers wanted to conduct an inventory search of the car.

As instructed by Officer Webster, Officer Strunk approached the vehicle and asked Defendant Moore to step outside. Officer Strunk twice assured Defendant Moore that he was not in any trouble. Officer Strunk obtained Defendant Moore's consent to search his person. Unlike Defendant Torbert, Defendant Moore was not placed in handcuffs for the search. Officer Strunk immediately proceeded to reach in and empty Defendant Moore's pockets. Officer Strunk asked Defendant Moore how much money he had on him and noted that Defendant Moore was in possession of three cellular telephones. While Officer Strunk conducted his search of Defendant Moore, Officer Webster proceeded to walk around the perimeter of the stopped vehicle. Notably apparent are the darkened windows and front windshield of the vehicle.

After Officer Strunk finished searching Defendant Moore, he asked Officer Webster to begin arranging a tow of the vehicle. Officer Webster walked to his police cruiser to obtain the necessary paperwork, leaving Officer Strunk and Defendant Moore standing on the sidewalk next to the stopped vehicle. Upon finding the paperwork in his cruiser, Officer Webster walked back toward the vehicle and took Officer Strunk's place on the sidewalk next to Defendant Moore while Officer Strunk began the inventory search of the vehicle.

Officer Strunk testified during the suppression hearing that the search of the vehicle was conducted under the authority of an inventory search. During their testimony, both officers confirmed that the NPD conducts impoundment and inventory searches according to the NPD policy. The officers further acknowledged that the NPD tow policy specifies its purpose as protecting the Norwood Police Department from unwarranted claims of lost property.

For approximately three minutes, Officer Strunk searched the vehicle while Officer Webster stood on the sidewalk with Defendant Moore. During that time, Officer Strunk's search focused solely on the driver's seat area of the vehicle. Thereafter, a third officer, Officer Kenneth Devers, arrived on the scene to assist. Upon Officer Devers' arrival, Officer Webster joined Officer Strunk to search the vehicle.

Officer Webster began searching the interior of the vehicle from the passenger's side while Officer Strunk continued his search on the driver's seat. Officer Webster utilized a flashlight during his search and checked the center console, checked the cup holders, pulled up on the center paneling, and searched through the glove compartment. Officer Webster confirmed during his testimony that his search was specifically focused toward locating hidden contraband.

During the search, Officer Strunk expressed to Officer Webster his belief that the Defendants were likely engaged in drug trafficking. Officer Strunk attributed his belief to the amount of cash the Defendants had on hand as well as Defendant Torbert's initial reluctance to stop the vehicle. Officer Webster noted that the presence of the box of sandwich bags alone gave him pause. Officer Webster then reached into the box and removed two knotted, torn off sandwich bags, before proceeding to pull out all of the sandwich bags (most of which were intact), thereby revealing an additional torn bag. Officer Strunk testified that Officer Webster's thorough search of the sandwich bag box was done in furtherance of the inventory search.

Next, Officer Webster reached under the front passenger's seat, but found nothing. He then moved to the interior paneling along the side of the front passenger's leg area. Officer Webster ran his hand along the bottom of the paneling and pulled up, causing it to come off in his hand. Upon removing the panel, Officer Webster announced, "Here it is, right here." He then pulled out a small plastic bag containing a substance presumed to be heroin. Officer Webster told Officer Strunk to handcuff Defendant Moore. While Officer Strunk was placing Defendant Moore under arrest, Officer Webster continued his search and also found a firearm and a scale in the same hidden panel compartment.

Officer Webster then asked Officer Devers, who had arrived at the scene just minutes earlier, to take pictures of the evidence. As to the evidence, Officer Webster informed Officer Devers, "I popped that panel off. It's in there." Officer Webster later explained to Officer Devers that the panel "came off real easy." He also told Officer Strunk that he ran his hand along the panel because it appeared to be sticking out and was slightly "ajar" which caught his attention. During his testimony at the suppression

hearing, Officer Webster confirmed that the location behind the interior plastic paneling is not an area where individuals typically store personal property unless their intent is to conceal the items.

While taking pictures, Officer Devers noticed a second firearm and more drugs in the hidden compartment. Officer Webster inspected both firearms at the scene, confirming that they were both loaded and had one round in the chambers. Additional items were also found in the vehicle prior to impoundment, including cash and cellular telephones. Ultimately, the drugs, the scale, and both firearms were found in the hidden panel compartment; the sandwich bags were found in the center console area of the vehicle; at least seven cellular telephones were found in Defendants' pockets and in the driver's side door storage area; a large amount of cash was found in Defendants' pockets and in between the car seats; and the keys to the vehicle were found on Defendant Moore's keychain.

Officer Devers completed the vehicle impound report which he confirmed with Officers Webster and Strunk before finalizing. The final impound report was signed by Officer Webster. Under "Reason for Impoundment," the officers listed "Driver Arrested." Moreover, under "Remarks & Inventory of Personal Property in Vehicle," the officers listed "2 Pistols, Digital Scale, 2 Bag Containing Brown Substance, Sandwich Baggies." The officers did not list any other "personal property" contained in the vehicle such as the charging cables, clothing, sports equipment, wallet, CDs, or the subwoofer. The impound report also noted, without specificity, pre-existing exterior damage to the vehicle stating simply: "Back Bumper" and "Front (L) (R) Side." Nothing was said about the damaged interior panel or the driver's side window (which would not roll down, as Defendant Torbert had informed Officer Strunk at the beginning of the stop).

At Officer Webster's instruction, Officer Strunk administered Miranda warnings to the Defendants at the scene. Both Defendants stated at various times that they had no knowledge of the drugs or firearms. The vehicle was ultimately impounded, and Defendants were taken to the Justice Center for booking. A citation was also issued to Defendant Torbert for driving under a non-compliance suspension as well as excessive window tints.

The District Court began its analysis of the Defendants' motion to suppress by holding that the initial traffic stop of the Defendants' car was proper. Specifically, the District Court noted that the window tinting on the Defendants' car violated Ohio law, that the Ohio window tinting law was not unconstitutionally vague, and that, therefore, the vehicle stop did not violate the Defendants' Due Process rights under the Fourteenth Amendment because Officer Strunk had sufficient probable cause to believe that the Defendants were in violation of Ohio law.

However, the District Court held that the officers' subsequent search of the vehicle violated the Defendants' Fourth Amendment rights. In reaching this conclusion, the District Court found that the officers' decision to impound the Defendants' vehicle was in direct contravention of the NPD tow policy and, thus, was improper. Moreover, the officers' decision to impound the vehicle was improper because the decision to do so was a mere pretext to gain access to and to search the vehicle. Indeed, Officer Webster admitted during the suppression hearing that the decision to impound the car was merely a pretext designed to provide an allegedly legal reason for the officers to search the vehicle under the guise of an inventory search. Because there was no valid basis for to tow or to impound the car, the officers' actions were improper.

Finally, the District Court held that the scope of the search was impermissibly overbroad. The District Court noted that, in conducting an inventory search, officers are permitted to exercise a reasonable degree of discretion as to how to conduct the search. However, an inventory search does not give an officer carte blanche; instead, the search must be tailored to produce only an inventory of items.

The District Court found that the officers exceeded the scope of a permissible inventory search when they searched the Defendants' car. Although the officers acknowledged that the purpose of an inventory search is to secure personal property and to note pre-existing damage on a vehicle, they did not list a single item belonging to the Defendants on the impound report other than contraband, and they admitted during the suppression hearing that their search was for the purpose of locating contraband. Accordingly, the District Court held that the officers' search of the Defendants' vehicle far exceeded the permissible scope of an inventory search and was conducted in violation of the Defendants' Fourth Amendment rights. Accordingly, the District Court suppressed the evidence that the officers obtained as a result of the unlawful search of the Defendants' vehicle.

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**Note:** *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*