



Between the Lines

"Questioning and Interrogations for Criminal Traffic Offenses"

By C. Eric Restuccia*

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Over the Limit, Under Arrest
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One of the primary tools of the police in investigating criminal traffic offenses is the ability to question a suspect on the scene at a traffic stop. At these stops, the police may ask questions without providing the suspect his *Miranda* warnings. "So, where are you going?" "Why are you in such a hurry?" Or for more serious traffic offenses, "how many drinks did you have at the bar before leaving?" "Did you even see the red light before you entered the intersection and struck the other vehicle?" On-the-scene questions are a vital part of police investigation.

Questioning the Suspect on the Scene

The United States Supreme Court has recognized that traffic stops based on reasonable suspicion that there was a traffic violation do not require the provision of *Miranda* warnings because the suspect is "not 'in custody' for the purposes of *Miranda*." The obligation to provide the *Miranda* warnings only attaches once the suspect's freedom is "curtailed to a 'degree of association with formal arrest.'" In *Berkemer v. McCarty*, the police took two statements from a suspect after stopping him based on his erratic driving. The police initially asked the suspect whether he had been using intoxicants, and he admitted that he had had "two beers and had smoked several joints of marijuana a short time before." After the suspect's arrest and without providing the suspect his rights under *Miranda*, the police asked whether he had been under the influence while driving, the suspect admitted that he had ("I guess, barely"). In concluding that the first statement was admissible (but not the second), the Court determined that it was admissible because the questions were asked not "in-custody" interrogation. Even if not free to leave, a motorist who is not under arrest is not surprised by questions from the police that relate to the stop.

Questioning the Suspect After Arrest

Now, the U.S. Supreme Court has strengthened the ability of the police to ask questions even where the police arrest that suspect. In *Berghuis v. Thompkins*, the U.S. Supreme Court clarified that the police may ask questions of a suspect once that suspect

has been arrested in the absence of a waiver of the *Miranda* rights as long as the suspect has acknowledged these rights. The provision of the *Miranda* rights is the key.

In this way, if the police arrest a suspect on the scene and wish to continue questioning, the police must ensure that the suspect acknowledges his rights. As the Supreme Court has recognized, when the police provide a suspect these rights and they are fully comprehended, the inherently coercive setting of custodial interrogation is dispelled. But any voluntary statement given by a suspect after knowingly acknowledging his rights is admissible because it would constitute an implied waiver. This is because a suspect "waive[s] his right to remain silent by making a voluntary statement" where he understands that he need not make a statement. Significantly, the Court also clarified that a suspect must "unambiguously" invoke his right to remain silent. This is bright-line rule for police. Where a suspect only equivocally acts regarding his right to remain silent, there is no obligation to stop questioning. Rather, the suspect must make clear his intention that the questioning stop or that he does not want to talk to the police. This rule is now the same for the right to counsel from *Davis v. United States*. The suspect must act unambiguously in invoking his rights.

For the police, this is clear guidance. The police should inform the suspect of his four rights under *Miranda* prior to any questioning: "(1) that he has the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney; and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Regarding the third right, the Court in *Miranda* was clear that an individual held for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."

At the same time, however, there is no requirement to include an express waiver of these rights. As *Thompkins* makes clear, the police need not obtain such an express waiver before question-

* Eric Restuccia is Solicitor General for the Attorney General's Office in the State of Michigan

ing a suspect. The warnings themselves ensure that a suspect understands that he need not answer questions and may ask for an attorney at any time.

The facts of *Thompkins* are instructive. In *Thompkins*, the suspect was arrested and was provided his rights under *Miranda* but he refused to sign the notification form. *Thompkins* "understood his *Miranda* rights" and the police began to question him. *Thompkins* then remained "largely silent" for then next two hours and forty five minutes but did provide "sporadic answers." At this point, the police asked *Thompkins* whether he "believed in God," whether he "pray[ed] to God," and whether he asked for forgiveness "for shooting that boy down." *Thompkins* said "yes" to all three questions. By acting in a manner "inconsistent" with the exercise of his rights – when he knew he did not have to answer the questions – his conduct demonstrated that he was relinquishing his rights. The touchstone of admissibility once the rights are knowingly received by a suspect is voluntariness. This is the focal point of the Fifth Amendment. Consequently, for a suspect arrested on a scene by the police, the police may begin questioning once they have provided a suspect his rights under *Miranda*.

Invocation of Right to Remain Silent

Where a suspect invokes his right to remain silent, the police must scrupulously honor this invocation and stop questioning. A statement may be admissible where the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." The courts have disagreed about whether the police may then re-interview a suspect on the same subject after a significant period of time has passed, i.e., two-to-three hour interval.

Questioning a Suspect on the Scene – Questions Unrelated to the Stop

Of course, even before the police arrest a suspect at the scene of a traffic offense, the police may ask questions of a suspect even if they do not relate directly to the basis for the stop as long as the questions are reasonable under the circumstances. In *Ohio v Robinette*, the U.S. Supreme Court examined a traffic stop conducted by an police officer in which he stopped the defendant for speeding. Based on the stop, the officer obtained the defendant's license and ran a computer check on it, which indicated that the defendant had no prior violations. The officer then asked the defendant to step out of the car, turned on his mounted video camera, gave him a verbal warning, and returned him his license. At this point, the officer asked the defendant "[o]ne question before you get gone: Are you carrying any illegal contraband in your car?" The defendant answered no and then the officer asked for consent to search to the car and obtained it. Consistent with the consent, the officer found a small amount of marijuana in the car.

In finding that the consent search was illegal, the Ohio Supreme Court determined that continued detention was illegal because the motivation underlying the questions was "not related to the purpose of the original, constitutional stop." The United States Supreme Court reversed, noting that the subjective

intentions of the officer were irrelevant because the test for a seizure's constitutionality was whether the circumstances, viewed objectively, justified the action. The Court also stated that pursuant to the probable cause to stop the defendant for speeding, the officer was justified in asking the defendant to step from the vehicle. The question whether the consent was properly obtained turned on whether the consent was voluntarily given under the circumstances.

Conclusion

Thus, consistent with common sense, the police may ask questions of a person at a traffic stop and even obtain consent for a search as long as the questions are reasonable and the circumstances justify the action taken by the police.

¹ *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

² *Id.* at 440, quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam).

³ *Id.* at 423 - 424.

⁴ *Id.* at 441-442 ("we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody.").

⁵ *Thompkins*, 560 U.S. ____; 130 S. Ct. 2250, 2264 ("Thus, after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights.").

⁶ *Moran v. Burbine*, 475 U.S. 412, 427 (1986).

⁷ *Thompkins*, 130 S. Ct. at 2264.

⁸ *Thompkins*, 130 S. Ct. at 2260.

⁹ *Id.* ("Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police.").

¹⁰ 512 U.S. 452, 459 (1994).

¹¹ *Miranda v Arizona*, 384 U.S. 436, 479 (1966).

¹² *Miranda*, 384 U.S. at 471.

¹³ *Thompkins*, 130 S. Ct. at 2256, 2262.

¹⁴ *Id.* at 2256, 2262.

¹⁵ *Id.* at 2257.

¹⁶ See *id.* at 2261, 2262 ("[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.").

¹⁷ *Michigan v. Mosley*, 423 U.S. 96, 103 (1975).

¹⁸ *Id.* at 105.

¹⁹ Compare *Brown v. Caspari*, 186 F.3d 1011, 1015 (8th Cir. 1999) ("the fact that the second interrogation involved the same subject matter as the first interrogation did not mean that the second interrogation was unconstitutional") with *Commonwealth v. Walker*, 470 Pa. 534, 545 (1977) ("The crucial distinction between the facts of this case and those of *Mosley* is that in *Mosley*, once the accused exercised his "right to cut off questioning," he was never further questioned about the same crime. For this reason, the *Mosley* court concluded that the accused's rights had been "scrupulously honored" by the police. In the instant appeal, however, the subsequent interrogation by the police concerned the same crime about which Walker had previously refused to talk. . . . the police here failed to 'scrupulously honor' appellant's right to remain silent about the crime for which he had been arrested and was now being questioned") (emphasis in original).

²⁰ See *Ohio v. Robinette*, 519 U.S. 33 (1996).

²¹ *Id.* at 36.

²² *Id.* at 37-38.

²³ See *Robinette*, 519 U.S. at 38, citing *Whren v. United States*, 517 U.S. 806, 813 (1996).

²⁴ *Robinette*, 519 U.S. at 38-39, citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n. 6 (1977).

²⁵ *Robinette*, 519 U.S. at 40.

Contact Us

National Traffic Law Center

703.549.9222

trafficlaw@ndaa.org

Joanne E. Michaels

Program Director

703.519.1645

jmichaels@ndaa.org

Mark M. Neil

Senior Attorney

703.519.1641

mneil@ndaa.org

Kristen K. Shea

Senior Attorney

703.519.1644

kshea@ndaa.org



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