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COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Feb. 17, 2021 Case No. 20CR102385

STATE OF OHIO
Plaintiff

Paul Griffin
Counsel

VS

DINO GRONDIN
Defendant

Mitch Yelsky
Counsel

This matter is before the Court on Defendant's Motion To Suppress, filed October 6, 2020; Defendant's Supplemental Memorandum In Support, filed October 22, 2020; the State's Objection, filed November 17, 2020; the State's Supplement To Objection, filed January 25, 2021; and, the Defendant's Supplemental Brief In Support Of Suppression, filed February 11, 2021.

Hearing had January 20, 2021.

The Motion is not well-taken and hereby DENIED.

See Judgment Entry.

IT IS SO ORDERED.

Judge D. Chris Cook

cc: Griffin, Asst. Pros. Atty.
Yelsky, Esq.

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I. INTRODUCTION

This matter is before the Court on Defendant's Motion To Suppress, filed October 6, 2020; Defendant's Supplemental Memorandum In Support, filed October 22, 2020; the State's Objection, filed November 17, 2020; the State's Supplement To Objection, filed January 25, 2021; and, the Defendant's Supplemental Brief In Support Of Suppression, filed February 11, 2021.

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II. STATEMENT OF PERTINENT FACTS

The facts at issue in this matter are not particularly contested.

During the weeks leading up to January 31, 2020, the Lorain Police Department ("LPD") had received calls, tips, and complaints about drug abuse, weapons possession, and child abuse occurring at Defendant, Dino Grondin's ("Grondin") residence ("The Residence"). LPD had not yet taken any action to investigate these allegations but intended to.

On January 31, 2020, Emily Grondin ("Emily"), Grondin's wife, contacted LPD to assist her in removing some personal property from The Residence. Grondin had previously obtained a Temporary Protection Order against Emily thus she was prohibited from returning to The Residence.

Detectives went to The Residence in order to assist Emily and to investigate the allegations that had come to light. The detectives met Grondin outside of his residence and told him that they were there to assist Emily in retrieving her property. Grondin then went back into The Residence at which time the detectives inquired if they could come inside and wait for Emily's arrival. Grondin allowed the detectives into The Residence.

Shortly after entering The Residence, the detectives advised Grondin that in addition to assisting Emily, they were also there because they had received information that there was "suspected drug activity, weapons possession, and child abuse, taking place inside the home."

The detectives then asked Grondin if they could look through the house – Grondin agreed as long as the detectives did not "touch anything" and the officers began to visually inspect The Residence. About this time, Emily arrived.

One of the detectives, Det. Camarillo ("Camarillo"), entered the basement of The Residence and observed in plain view a digital scale and suspected marijuana "roaches." Camarillo also observed boxes of ammunition. Another detective present observed a box of open baggies, a digital scale, and a pipe with residue on it. Also located in the basement were two locked gun safes. Knowing Grondin was a felon who was under a firearm disability, Camarillo asked Grondin if he would open the safes, which he ultimately did. Prior to obtaining consent to open the safes, Camarillo advised Grondin that if he did not give consent to open the safes, Camarillo would seek a warrant to access them.

Grondin then opened the "Winchester" safe and Camarillo observed numerous controlled substances therein. Towards the end of the encounter and seizure of contraband, Grondin executed a written "Lorain Police Department Consent To Search" form. Grondin was thereafter charged and ultimately indicted.

During the encounter, Grondin was not placed in handcuffs or placed under arrest. His movements throughout the home were monitored by the detectives and on one occasion his movements were restricted but otherwise, he was free to move about the home. And, at no time during the encounter did Grondin attempt to terminate the search or request that the detectives leave The Residence.

Emily testified that the safe Grondin opened, the "Winchester" safe where the drugs were found belonged to her, not Grondin; that she bought it before she and Grondin were married; and, that Grondin did not have permission to use the "Winchester" safe.

The interaction with law enforcement lasted approximately four hours and fifteen minutes (4:15 min.) but the first hour or so was devoted to assisting Emily in retrieving her belongings.

The parties agree that at no time during the encounter was Grondin *Mirandized*.

III. LAW AND ANALYSIS

THE RIGHT TO A HEARING

If a defendant in a criminal case files a motion to suppress that complies with Crim. R. 47 by setting forth sufficient factual and legal basis for the challenge of evidence obtained as a result of a warrantless seizure, the court must afford the defendant a hearing.

"We therefore hold that in order to require a hearing on a motion to suppress evidence, the defendant must state the motion's legal and factual [basis] with sufficient particularity to place the prosecutor and court on notice of the issues to be decided." *State v. Shindler,* 70 Ohio St.3d 54 (1994).

"We have held that "[i]n order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual [basis] with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *Shindler,* syllabus. Failure to include or particularly state the factual and legal basis for a motion to suppress waives that issue. *See Defiance v. Kretz,* 60 Ohio St.3d 1, 573 N.E.2d 32 (1991); *State v. Codeluppi,* 139 Ohio St.3d 165, 2014-Ohio-1574, at ¶ 10.

STANDARD OF REVIEW – *MIRANDA*

In *Miranda v. Arizona,* 384 U.S. 436 (1966),[1] the United States Supreme Court fashioned a set of rules governing custodial interrogations and confessions under the Fifth Amendment Privilege against self-incrimination, now incorporated into the Fourteenth Amendment Due Process clause.[2]

Decided under a Sixth Amendment right to counsel analysis, the United States Supreme Court affirmed the existence of an absolute right to remain silent and the need for police to advise a suspect of that right. *Escobedo v. State of Ill.,* 378 U.S. 478 (1964).[3]

Over the years since *Miranda* was decided, a panoply of decisions have emerged at both the federal and state levels addressing the never-ending factual scenarios implicated by the decision.

Ohio is no exception.

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[1] String citations omitted.
[2] See: *Malloy v. Hogan,* 378 U.S. 1 ((1964), string citations omitted.
[3] String citations omitted.

While certainly not the first case in Ohio to address *Miranda,* the Ohio Supreme Court noted in the matter of *State v. Dailey,* 53 Ohio St.3d 88 (1990),[4] the following,

> In *Miranda, supra,* the court indicated that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 86 S.Ct. at 1612. The court indicated that in the absence of *other effective measures* the following procedures to safeguard the Fifth Amendment privilege must be observed:
>
> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

A few years later, in the matter of *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, the Ohio Supreme Court addressed the specifics of a *Miranda* warning,

> *Miranda v. Arizona* (1966), 384 U.S. 436 * * * requires that before questioning a suspect in custody, law-enforcement officials must inform the suspect (1) that he or she has the right to remain silent, (2) that his or her statements may be used against him or her at trial, (3) that he or she has the right to have an attorney present during questioning, and (4) that if he or she cannot afford an attorney, one will be appointed.

And of course, the number of decisions released by the Ninth District Court of Appeals addressing *Miranda*, confessions, and custodial interrogations are legion. See: *State v. Copley,* 170 Ohio App.3d 217, 2006-Ohio-6478,[5] and its progeny.

ANALYSIS

In the case at bar, Grondin posits three arguments in support of his Motion: 1) that as he was in custody and interrogated, he should have been Mirandized; 2) that Grondin's consent to search his residence was involuntary; and 3) the search of Grondin's residence exceeded the scope of his consent.

[4] *Dailey* is instructive for other reasons germane to this decision which will be discussed *infra.*

[5] This case is also applicable for other reasons and will be discussed *infra.*

WAS THE DEFENDANT SUBJECTED TO A CUSTODIAL INTERROGATION IN HIS HOME WHERE HE WAS NOT UNDER ARREST SUCH THAT HE SHOULD HAVE BEEN PROVIDED *MIRANDA* WARNINGS

In support of this position, Grondin argues that as he was in custody and interrogated, he should have been Mirandized.

This argument lacks merit as the Defendant was not in custody.

The Ohio Supreme Court discussed the concept of custody in a relatively recent decision, *City of Cleveland v. Oles,* 152 Ohio St.3d 1, 2017-Ohio-5834. The Supreme Court held that a trooper's questioning of a suspect in the front seat of a patrol car during a traffic stop did not rise to the level of custodial interrogation requiring *Miranda* warnings. *Oles, syllabus.*

It seems to me to logically follow that if *Miranda* is not required where a person is locked in a police car, not free to leave, and questioned as a suspect about driving while intoxicated - it is not required when a person invites the police into his home and voluntarily allows them to "look around."

In *Oles,* the Supreme Court reiterated the long-standing principle regarding the constitutional requirements that trigger *Miranda,*

> What are now commonly known as *Miranda* warnings are intended to protect a suspect from the coercive pressure present during a custodial interrogation. *Miranda* at 469, 86 S.Ct. 1602. A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, 86 S.Ct. 1602. If a suspect provides responses while in custody without having first been informed of his or her *Miranda* rights, the responses may not be admitted at trial as evidence of guilt. *Id.* at 479, 86 S.Ct. 1602.

Oles, at ¶ 9.

Citing *Berkemer v. McCarty,* 468 U.S. 420 (1984),[6] the Supreme Court in *Oles* further noted,

[6] String cites omitted.

> Ultimately, in *Berkemer,* the court held that the only relevant inquiry is how a reasonable person in the suspect's position would have understood his or her situation. 468 U.S. at 442, 104 S.Ct. 3138, 82 L.Ed.2d 317. Because the motorist in *Berkemer* was not able to demonstrate that he had been subjected to "restraints comparable to those associated with a formal arrest," the court concluded that he had not been taken into custody for purposes of *Miranda. Berkemer* at 441–442.

Oles, at ¶ 13.

Finally, in *Oles* the Supreme Court reiterated the *Berkemer* and *Farris*[7] test for determining custody,

> Drawing from *Berkemer, Farris,* and subsequent decisions of our courts of appeals, we identify the following factors that may provide guidance: questioning a suspect during a traffic stop in the front seat of a police vehicle does not rise to the level of a custodial interrogation when (1) the intrusion is minimal, (2) the questioning and detention are brief, and (3) the interaction is nonthreatening or nonintimidating.

Oles, at ¶ 24.

While *Oles, Berkemer,* and *Farris* all involved automobile stops, the rationale and constitutional analysis is nevertheless enlightening.

The United States Supreme Court determined that Berkemer was not in custody because he could not demonstrate that, "he had been subjected to 'restraints comparable to those associated with a formal arrest' and that he had not been taken into custody "for purposes of *Miranda.*" *Berkemer,* at 441-442.

As for Farris, the Ohio high court found that he was in custody where, "the trooper's treatment of Farris – patting him down, taking his keys, instructing him to sit in the police vehicle, and telling Farris that he was going to search the car due to the smell of marijuana - permitted a reasonable belief that Farris could not leave and would be detained long enough for the officer to conduct the vehicle search." *Farris,* at ¶ 13-14.

And in *Oles,* the Ohio high court noted that in applying the three-part *Berkemer* test "a reasonable person in Oles's position would not have understood himself or herself to be in custody." *Oles,* at ¶ 30. This is so despite the fact that Oles was placed in the front seat of a police vehicle during an OVI investigation and was not free to leave.

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[7] *State v. Farris,* 109 Ohio St.3d 19, 2006-Ohio-3255, string cites omitted.

The Supreme Court held,

> Oles contends that his belief that he was not free to leave should be dispositive . . . But the relevant inquiry is whether a reasonable person in the suspect's position would have understood himself or herself to be in custody . . . **not free to leave and in custody are distinct concepts**.

Id., emphasis added.

The Ninth District Court of Appeals has also addressed the nature of custodial interrogations. In the matter *State v. Perry,* 9th Dist., Summit No. 17754, 1996 WL 577653, the court stated,

> *Miranda* does not apply outside the context of inherently coercive custodial interrogations for which it was designed. *State v. Brewer* (1990), 48 Ohio St.3d 50, 59. *Miranda* warnings are required only when *both* custody *and* interrogation coincide. *State v. Wiles* (1991), 59 Ohio St.3d 71, 83.
>
> It is the *custodial* nature of the interrogation which triggers the necessity for adherence to the specific requirements of its Miranda holding. *Beckwith v. United States* (1976), 425 U.S. 341, 346, 48 L.Ed.2d 1, 7. (Emphasis in original.) See, also, *State v. Gumm* (1995), 73 Ohio St.3d 413, 428. A suspect is entitled to *Miranda* warnings only when there is a restraint on freedom of movement of the degree associated with a formal arrest. *California v. Beheler* (1983), 463 U.S. 1121, 1125, 77 L.Ed.2d 1275, 1279. A determination of whether a particular individual was "in custody" during police questioning and, therefore, whether *Miranda* applies, does not depend upon the subjective analysis of either the questioner or the person being questioned. *Berkemer v. McCarty* (1984), 468 U.S. 420, 442, 82 L.Ed.2d 317, 336. The test used to judge whether an individual has been placed into custody is "whether, under the totality of the circumstances, a reasonable person would have believed that he was not free to leave." *State v. Gumm,* 73 Ohio St.3d at 429.

The facts in *Perry* are very similar to the facts at hand. In *Perry,* officers went to the defendant's home with an arrest warrant for drug trafficking. Before advising Perry that they had a warrant, Perry invited the officers into his home and made incriminating statements. Finding that Perry was not in custody, the Ninth District held,

> We do not find that the initial statements made by Defendant when conversing with the detectives in his den prior to his arrest, were made in a "custodial" context. Defendant voluntarily returned home to talk to the detectives when his wife paged him. He accompanied the detectives into his home and den without coercion. Although two police officers were standing beside him in the room, Defendant's freedom was not restrained. A query posed to a person sitting on a sofa in the den

of his own home is not coercive questioning of "[a]n individual swept from familiar surroundings into police custody." *Miranda,* 384 U.S. at 461, 16 L.Ed.2d at 716.

Finally, as noted by the State, numerous courts have held that consensual interactions in a person's home does not elevate the encounter to custodial even where the police went to the defendant's house with the express purpose of attempting to elicit a confession. *State v. Martinez*, 8th Dist., Cuyahoga Nos. 103572 and 103573, 2016-Ohio-5512; *State v. Chenoweth,* 2nd Dist., Miami No. 2010CA14, 2011-Ohio-1276; *State v. Hopfer,* 112 Ohio St.3d 521, (2nd Dist. 1996).

In the case at bar, almost none of the traditional indicia of arrest are present. For instance, Grondin was not a suspect in any particular crime, the police had a legitimate, unrelated reason to be at his home, the encounter occurred in Grondin's residence after he voluntarily admitted the police into the home, his freedom of movement was not restricted except for a time when he wanted to use the bathroom, he was not handcuffed or made to remain in one place, he was not under arrest, threatened or intimidated in any way, and he never made any effort to terminate the encounter.

Applying the *Berkemer* factors, this Court finds that 1) the intrusion was minimal; 2) the encounter was neither brief nor excessively long; and 3) that the interaction was nonthreatening and nonintimidating.

Considering the facts in their totality, a reasonable person in the same situation in his or her own, home who voluntarily invited the police inside, would not have understood themselves to be in custody.

WHAT "STATEMENTS" DOES THE DEFENDANT SEEK TO SUPPRESS

As the State succinctly notes in its brief[8] and the Court inquired at the beginning of the hearing, what specific statements does Grondin seek to suppress? He fails to identify a single specific statement in his motion except to request ". . . that this Honorable Court issue an Order suppressing **any and all statements elicited and obtained by Lorain Police** . . . " (Emphasis added.)

Does he wish to suppress the statements that he made outside of The Residence when the police first arrived? The statement inviting the police inside? What other statement(s) did Grondin make that in any way implicates him?

[8] See State's Objection, Page 4.

The Ohio Supreme Court has addressed this issue directly,

> Similarly, when a defendant makes stipulations or narrows the issues to be decided at a suppression hearing, the prosecution need not "prove the validity of every aspect of the search." *State v. Peagler*, 76 Ohio St.3d 496, 500, 668 N.E.2d 489 (1996). Arguments not made by the defendant at the suppression hearing are, therefore, deemed to have been waived. *See Wallace* at 218, 524 N.E.2d 889.

State v. Wintermeyer, 158 Ohio St.3d 513, 2019-Ohio-5156, at ¶ 19.

As this issue was not developed in either his brief or at the hearing, it would seem to be abandoned by Grondin. And, if it is not, it remains wholly unclear what statements he seeks to suppress as there are none that the Court can identify that appear to be incriminating.

WAS THE DEFENDANT'S INVITATION OF LAW ENFORCEMENT INTO HIS HOME AND THE CONSENT HE GAVE TO SEARCH INVOLUNTARILY OBTAINED

In Grondin's second argument in support of his motion, he urges that the consent he gave law enforcement to search his house was constitutionally invalid as it was 1) obtained by deception and false pretense; and, 2) it was coerced.

These arguments also lack merit.

Grondin first points to the fact that the warrantless entry by law enforcement agents into his home is "*per se* unreasonable."

This subheading, however, does not address the facts at hand as there was no "warrantless entry" as that term is understood in a Fourth Amendment context. The Ninth District Court of Appeals has addressed this very issue,

> A warrantless search of a person's home is presumed unreasonable unless an exception to the warrant requirement is shown. *State v. Cooper,* 9th Dist. No. 21494, 2003-Ohio-5161, at ¶ 7. "The state bears the burden to demonstrate that the warrantless search falls within one of the established exceptions." *Id.* The recognized exceptions are: "(a) [a] search incident to a lawful arrest; (b) **consent signifying waiver of constitutional rights**; (c) the stop-and-frisk doctrine; (d) hot pursuit; (e) probable cause to search, and the presence of exigent circumstances; * * * (f) the plain view doctrine[;] or (g) an administrative search[.]" (Internal quotations and citations omitted.) *State v. Price* (1999), 134 Ohio App.3d 464, 467, 731 N.E.2d 280.

State v. Angelo, 9th Dist., Summit No. 24751, 2009-Ohio-6966, at ¶ 10, emphasis added.

By framing the issue as a "warrantless entry" Grondin implies that law enforcement officers entered The Residence of their own volition without a warrant or exigent circumstances but this is not what the evidence demonstrates. Instead, the evidence is uncontroverted that Grondin invited members of LPD into his home to wait for Emily to return and when he learned that they were also there to investigate the drugs, weapons, and abuse allegations, he did not withdraw his consent for their presence.

Angelo also addressed the standard of review that the court must apply when determining whether or not consent was freely given,

> In order to demonstrate that an individual consented, "the state must show by 'clear and positive' evidence that the consent was 'freely and voluntarily' given based on the totality of the circumstances." *State v. Hetrick,* 9th Dist. No. 07CA009231, 2008-Ohio-1455, at ¶ 23, quoting *Cooper* at ¶ 12, quoting *State v. Posey* (1988), 40 Ohio St.3d 420, 427, 534 N.E.2d 61. " 'Clear and positive' evidence is equivalent to clear and convincing evidence." *Hetrick* at ¶ 23, quoting *Cooper* at ¶ 12. Consent may be expressed or implied. *Cooper* at ¶ 9.

Angelo, at ¶ 11.

In the case at bar, the only facts in evidence regarding the events leading up to law enforcement's entry into The Residence is that two detectives approached Grondin, who was standing outside of his home. The officers advised Grondin that they were there to assist Emily retrieve some possessions and inquired if they could wait for her inside. Grondin consented to this request. He was under no duress, coercion, force, or pressure nor was he in any way compelled to let them in. The police asked if they could wait inside and Grondin *voluntarily* let them in.

Grondin also argues that law enforcement's entry was facilitated ". . . through false statements and deception, on the false pretense of assisting in a Civil Protection Order respondent's request for a police escort to collect personal items."[9] This is a strange, if not outright misleading statement as on the very next page of his motion, Grondin writes, "On January 31, 2020, Emily Grondin requested a Lorain Police escort, to obtain her personal property, having been removed from . . . by operation of law."

So, in one breath, Grondin accuses law enforcement of subterfuge and in the next, concedes that they were at his residence because Emily requested their presence.

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[9] See Defendant's Motion, Page 1.

Grondin further argues that in fact the "real" reason that law enforcement was at his residence was to investigate the allegations of drugs, weapons, and abuse – but so what? Law enforcement had every right to come to his home to investigate possible criminal activity, after all, that is their job, and Grondin had every right to deny them entrance.

Moreover, immediately upon entering the home, the detective told Grondin that they were also there to investigate the allegations of drugs, weapons, and abuse. As such, Grondin was on notice almost from the start of their dual purposes for being there. Most importantly, Grondin at any time could have terminated the interaction and demanded that the detectives (and any other law enforcement personnel) leave The Residence. He did not and in fact expanded his consent from allowing the officers to enter the home to letting them visibly search it.

Clearly, there was no deception or false pretenses employed by law enforcement to gain access into Grondin's home. The police were there for two perfectly valid reasons: 1) to assist Grondin's estranged wife (at her request) retrieve some property; and, 2) to investigate possible criminal activity. Grondin was advised of both reasons for the officers' presence and nevertheless, without force, compulsion, duress, or subterfuge, invited them into The Residence and granted them permission to visibly search it.

LAW ENFORCEMENT'S CONSENSUAL ENTRY INTO THE RESIDENCE WAS NOT COERCED NOR WAS THEIR REQUEST TO SEARCH IT

Grondin next argues that the consent he gave the officers to enter The Residence and search it was coerced.

I disagree.

In a very recent decision, *In Re M.H.,* 2020 WL 7061616, 2020-Ohio-5485, (12/3/2020), the Ohio Supreme Court discussed in great detail the constitutional constructs of *Miranda* warnings, custodial interrogations, confessions, and coercion.

While the case primarily deals with custodial interrogations, the analysis is pertinent herein. Regarding coerced confessions, particularly as analyzed under federal due-process standards, the Ohio Supreme Court noted,

> In cases decided before and after the Fifth Amendment protection against self-incrimination was first applied to the states, the United States Supreme Court has analyzed the admissibility of a confession under the rubric of due process. * * * We have therefore explained that "[c]onstitutional principles of due process preclude the use of coerced confessions as fundamentally unfair, regardless of whether the confession is true or false." * * *

M.H., at ¶ 23.

> However, in defining the protections due process affords against coerced confessions, the Supreme Court has held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." * * * "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." * * *

M.H., at ¶ 24.

And finally, with regard to the standard of review that a trial court is to employ when deciding *Miranda* based suppression issues, the Ohio Supreme Court observed,

> The Supreme Court has applied the Due Process Clause of the Fourteenth Amendment to examine "the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary." * * * The court established a procedural safeguard to ensure that "tactics for eliciting inculpatory statements * * * fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." * * * Confessions obtained using interrogatory techniques that offend the standards of fundamental fairness under the Due Process Clause may not be used in court against the accused.

M.H., at ¶ 38.

> An interrogator's use of " 'an inherently coercive tactic (*e.g.*, physical abuse, threats, deprivation of food, medical treatment, or sleep)' " triggers the due-process analysis of the totality of the circumstances. * * * Those circumstances include "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." * * *

M.H., at ¶ 39.

Recall that in the case at bar, there is a serious, unanswered question as to what statements, exactly, Grondin seeks to suppress and keep in mind that Grondin was not in custody. As such, this Court will limit the analysis to Grondin's consent for the police to enter the residence and his consent for them to search it.

The Ninth District Court of Appeals has adopted a similar standard as *M.H.* and applied the following test,

> "[W]e will not conclude that a waiver was involuntary 'unless there is evidence of police coercion, such as physical abuse, threats, or deprivation of food, medical treatment, or sleep.'" (Emphasis sic.) *Id.* at ¶ 107, quoting *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, ¶ 35.

State v. Jackson, 9th Dist. Summit No. 28691, 2018-Ohio-1285, 4/4/2018, at ¶ 11.

So the question becomes, what evidence of police coercion is present in this case such that Grondin's consent was rendered involuntary?

The answer is none.

Grondin urges that his consent to allow law enforcement into The Residence and to search was borne of deception, ". . . a large police presence . . . he was not free to leave his home . . ."

None of these arguments are persuasive.

First, as noted above, there was no deception of any nature regarding law enforcement's presence at Grondin's home. Law enforcement was at The Residence for two perfectly valid reasons and promptly advised Grondin of both reasons before conducting any search.

Second, there is a factual dispute as to just exactly how many police officers were present at The Residence. Det. Camarillo testified that he and Det. Sedivy approached Grondin outside of The Residence while Det. Franco went to Walgreens to meet Emily. On this issue, the following exchange occurred during the hearing,

> Mr. Yelsky: And at that point in time, it was just you and Detective Sedivy in the house, correct?
>
> Det. Camarillo: Correct.
>
> Mr. Yelsky: And there did come another time that another uniformed officers and other, you know, detectives showed up as well; is that accurate?

Det. Camarillo: A couple more detectives showed up later on. I don't remember if any uniformed patrols showed up.[10]

So based upon this exchange, it appears that only Det. Camarillo and Det. Sedivy were present when Grondin gave consent for law enforcement to enter and later search The Residence. Hardly a "large police presence that dominated Mr. Grondin's environment," at least at this time during the encounter.

Later, if Det. Franco and another detective appeared ("a couple more detectives") there would be four law enforcement officers present.

It is worth noting that Det. Camarillo's Incident Report lists a total of six detectives "present for search" so it is possible that as many as six officers were at one time present.[11] And, Emily testified that when she arrived at The Residence she observed five police vehicles and that the home was "riddled with police officers."

The Court agrees that the presence of six police officers in one's home, if they were all present when Emily was there, might appropriately be described as "riddled."

Nevertheless, the mere presence of police officers who were voluntarily admitted to Grondin's residence, cannot be seen as so coercive that his free will was overcome as again, at any time, he could have withdrawn his consent and terminated the encounter. Moreover, he was not under arrest, handcuffed, or in any significant way restrained.

Finally, in reliance on United States Supreme Court precedent, the Ninth District Court of Appeals noted,

> Voluntariness is to be determined from the totality of the circumstances. *Bustamonte,* 412 U.S. at 226.[12] Among the circumstances to be considered are the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment. *Id.*

State v. Dettling, 130 Ohio App.3d 812 (1998, 9th Dist. Summit No. 19133), at ¶ 5. See also: *State v. Williams,* 9th Dist. Summit No. 24731, 2009-Ohio-6955, at ¶ 15.

In the case at bar, applying the *Bustamonte/Dettling* test, the length of the detention was a non-factor as Grondin was not "detained" but free to move about (while monitored) in his

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[10] Transcript of Proceedings, Page 40, Lines 1-8.
[11] Transcript of Proceedings, Page 67, Lines 1-8.
[12] See: *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, sting cites omitted.

own residence. While the encounter did last a bit over four hours, the first hour was spent addressing Emily's needs. As such, a three-hour, consensual encounter that Grondin could have terminated at any time was not unreasonable.

Second, there was absolutely no "repeated or prolonged" questioning. In fact, there only appears to be three specific questions put to Grondin by law enforcement: 1) may we come inside; 2) may we look around; and, 3) will you open the safe?

And third, there was clearly no "use of physical punishment" of any nature.

Looking at the facts at hand during the encounter between Grondin and law enforcement at his residence, they do not reveal any evidence of coercion, pressure, undue influence, threats, or intimidation that overroad Grondin's free-will or ability to give informed, voluntary consent. And moreover, law enforcement did nothing that was so unfair or unreasonable that fundamental fairness under the Due Process Clause was implicated.

THE THREAT OF A WARRANT DID NOT RENDER THE CONSENT INVOLUNTARY

In Grondin's next argument, he urges that Det. Camarillo's threat to obtain a warrant to search the safe was coercive and rendered his consent involuntary.

Again, I disagree.

First, it should be noted that Grondin did not brief this issue in either his motion to suppress or his supplemental motion but raised it *de novo* during the hearing.[13] As such, the State did not have an opportunity to address it in its opposition brief.

Regardless, in the interest of fairness to Grondin, the Court will address it anyway despite the obvious waiver.[14]

The Ninth District has also addressed this issue in the matter of *State v. Simmons,* 61 Ohio App.3d 514 (1989, 9th Dist. Summit No. 13790). In *Simmons,* the court noted,

> Voluntariness is a question of fact to be determined from all the circumstances. * * * The question is whether the officers used coercive tactics or took unlawful advantage of the arrest situation to obtain consent. In other words, was there a use of coercive tactics by the arresting officers such that the duress present in a particular case exceeds the normal duress inherent in any arrest?"

[13] Transcript of Proceedings, Page 54, Lines 13-15.

[14] Or as Justice Fischer might prefer, forfeiture. *Wintermeyer,* at ¶ 32, Fischer, J., dissenting.

> Simmons states that the threat of a search warrant placed him in a bargaining situation. The record reveals no evidence that a search warrant was employed as a threat. This case is clearly distinguished from one where consent to search is obtained after a false police assertion that a valid warrant is in their possession. The detective informed Simmons of the need to conduct a search either with his cooperation and consent or with a search warrant. All the conversation took place after Simmons received *Miranda* warnings. Clear and positive evidence was presented that Simmons's consents were voluntary. The trial court did not err in refusing to grant the motion to suppress evidence produced from the consent searches.

Simmons, at ¶ 1.

While the facts in *Simmons* are somewhat different than in this case, the issue implicated by the threat of obtaining a search warrant and its effect upon voluntariness is identical. Clearly, the case stands for the proposition that as long as the officer does not lie about having a warrant when he or she does not, it is not coercive to seek cooperation and consent to search or inform the suspect of the alternative, the need to request a warrant.

In a case with a similar issue regarding the threat of obtaining a warrant in order to compel consent, the Eighth District Court of Appeals in *State v. Riedel,* 8th Dist. Cuyahoga No. 104929, 2017-Ohio-8865, at ¶ 40, the Eighth District Court of Appeals found the following,

> At the conclusion of the suppression hearing, the trial court made the following findings . . . that [Sergeant Ross] told Mr. Riedel that they were going to get a search warrant for the home regardless.

The Eighth District held,

> In light of the evidence presented at the suppression hearing, we find Riedel cannot prevail on his argument that he did not knowingly or voluntarily consent to have his home searched.

Riedel, at ¶ 43.

In reaching this conclusion, the Eighth District relied upon the *Simmons* case, *supra,* and made the following observations,

> As stated, Riedel was under arrest when he signed the consent form. However, the fact of arrest does not necessarily render a consent involuntary. "The fact of custody alone has never been enough in itself to demonstrate a coerced confession

> or consent to search." *United States v. Watson*, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). The question becomes whether the duress present in a particular case exceeds the normal duress inherent in any arrest. *State v. Simmons*, 61 Ohio App.3d 514, 573 N.E.2d 165 (9th Dist.1989).

Riedel, at ¶ 42.

In the case at bar, unlike Riedel, Grondin was not under arrest when he allowed the officers access to The Residence, consented to their search, and opened a safe containing contraband. Moreover, as noted above, there was no duress employed by law enforcement except perhaps, the presence of four to six police officers.

DID THE BREADTH OF THE LAW ENFORCEMENT SEARCH EXCEED THE SCOPE OF CONSENT THAT WAS GIVEN

Grondin's next argument is that even if there was initial consent to access The Residence and search, the officers exceeded the scope of the consent. He urges that "Mr. Grondin did not consent to a search of his home that exceeded "looking through the residence." Grondin also alleges that the officers opened cabinets and closets, went through containers, and touched items that Grondin never consented to.

This argument lacks merit as well.

First, there was no evidence adduced at the hearing to support Grondin's allegations that Det. Camarillo or any other member of law enforcement did anything other than exactly what Grondin consented to – that is, look around The Residence. There was no testimony that officers opened cabinets and/or closets, went through containers, or touched anything until they collected the contraband in the safe.

In fact, the only testimony elicited regarding opening or searching anything was the request by Camarillo to open the safe, which Grondin voluntarily did.

THE WRITTEN CONSENT TO SEARCH FORM

The final argument raised by Grondin deals with the timing of his execution of the LPD "Consent To Search" form. The evidence was clear that Grondin was presented with and signed the form *after* the search of the safe was completed.

According to Grondin, this nullifies the validity of the written consent Grondin gave.

This may, or may not, be accurate but in the grand scheme of things, it is irrelevant. It is of no legal accord because the written consent form was superfluous given that Grondin had already voluntarily consented to the search of the home and opened the safe. Put another way, law enforcement did not need to obtain Grondin's "written" consent because he had already provided it verbally and by his actions.

That noted, it is interesting to observe, parenthetically if for no other reason, that a similar situation also arose in the *Riedel* matter. In *Riedel,* after explaining his rights after arrest, the police presented Riedel with a written consent form which he signed. He later tried to argue that his written waiver was invalid,

> During the suppression hearing, Riedel acknowledged that he believed it would be in his best interests to consent to the search and that he signed the consent to search form presented to him. The fact that Riedel signed a written waiver is strong proof that the waiver was valid. *See State v. Jackson*, 5th Dist. Richland No. 2012-CA-20, 2012-Ohio-5548, 2012 WL 5989511, ¶ 35 (**determining that defendant's signing of a written consent form was "strong proof" that she voluntarily gave police officers consent to search a house**).

Riedel, at ¶ 43, emphasis added.

Here, Grondin did not testify at the suppression hearing so we have no idea why he signed the waiver and whether he thought it was in his best interest to do. Regardless, Grondin was certainly under no obligation to sign the waiver form just as law enforcement was under no obligation to request it.

In any event, the fact that Grondin signed a written waiver form, even after the fact, lends credence to the State's position that Grondin's consent, in all of its facets, was voluntary.

DOES THE DEFENDANT HAVE STANDING TO CHALLENGE THE SEARCH OF THE SAFE THAT YIELDED THE CONTRABAND THAT FORMED THE BASIS OF HIS ARREST[15]

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[15] Normally, this Court would address the issue of standing first as it is, in and of itself, dispositive of the motion. However, given that the standing issue was raised at the end of the hearing and argued in post-hearing briefs, the Court will address it in the order in which it was presented. See *Wintermeyer, supra,* Fourth Amendment standing is not jurisdictional in nature. *Byrd,* —— U.S. ——, 138 S.Ct. at 1530, 200 L.Ed.2d 805. Consequently, it need not be decided at the outset of a hearing; rather, the trial court is free to consider substantive matters in any order it chooses—for example, the court may elect to decide the issue of probable cause or the applicability of an exception to a warrant requirement before reaching the question of standing (or without reaching the standing question at all). *Id.* at 1530-1531. *Wintermeyer,* at ¶ 22.

As noted *supra,* during the course of the suppression hearing, Emily testified that the safe Grondin opened, the "Winchester" safe where the drugs were found belonged to her, not Grondin; that she bought it before she and Grondin were married; and, that Grondin did not have permission to use the "Winchester" safe.

At the conclusion of the hearing, based upon Emily's testimony, the State raised the issue of standing and the Court gave the parties the opportunity to brief the issue.

Like *Miranda* cases in general, issues surrounding challenges to standing have generated a copious amount of caselaw. For instance, relative to raising the issue of standing, the Ohio Supreme Court has said,

> When a defendant moves to suppress evidence on the grounds that a search or seizure violated his Fourth Amendment rights, the state may defend against that claim by challenging the defendant's standing to contest the admission of the evidence seized. Once the state raises the issue, the defendant must establish that he has a cognizable Fourth Amendment interest in the place searched or item seized. But when the state fails to dispute the defendant's standing in the trial court, it is foreclosed on appeal from attacking the trial court's judgment on those grounds.

Wintermeyer, supra, at ¶ 3.

The high court further noted,

> Before we get into our analysis, it is important to clarify what we mean when we talk about Fourth Amendment standing. The concept is distinct from jurisdictional standing, which may never be waived. *See Byrd v. United States*, —— U.S. ——, 138 S.Ct. 1518, 1530, 200 L.Ed.2d 805 (2018). Rather, the word "standing" in the Fourth Amendment context is merely "shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched." *Id.*; *see also State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, ¶ 16. In other words, has the person claiming the constitutional violation " 'had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge' "? *Byrd* at 1526, quoting *Rakas v. Illinois*, 439 U.S. 128, 133, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Because Fourth Amendment standing is not a jurisdictional question, it need not be addressed before other aspects of a Fourth Amendment claim. *Id.* at 1530.

Wintermeyer, at ¶ 9.

In addition, in *State v. Emerson,* 134 Ohio St.3d 191, 2012-Ohio-5047, the Ohio Supreme Court held,

> "'Fourth Amendment rights are personal rights which * * * may not be vicariously asserted.' " *Rakas v. Illinois,* 439 U.S. 128, 133–134, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), quoting *Alderman **791 v. United States,* 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). "In order to have standing to challenge a search or seizure, the defendant must have a reasonable expectation of privacy in the evidence seized." *State v. Jackson,* 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 6 citing *Alderman* at 171–172, 89 S.Ct. 961, 22 L.Ed.2d 176. To determine whether a defendant has a reasonable expectation of privacy, it first must be determined whether "the individual manifested a subjective expectation of privacy in the object of the challenged search." *California v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.CT. 2577, 61 L.ED.2d 220 (1979). Then, a court must decide whether society is willing to recognize that expectation as reasonable. *Id.*

Emerson, at ¶ 16.

Regarding this issue, the State's position is clear – the safe that contained the contraband was owned by Emily, was premarital property, and Grondin had no authority or permission to use it. As such, he had no cognizable Fourth Amendment interest in what might (or might not) be in the safe because he had no reasonable expectation of privacy in its contents.

This argument advanced by the State has merit.

In his reply relative to standing, Grondin first urges that the Court not need address the standing issue because ". . . the entire January 31, 2020 . . . encounter was so tainted, by the failure to Mirandize Dino Grondin . . ." and that the exclusionary rule ". . . relieves this Court from having to reach the standing issue." And, he argues that ". . . before the Court can even consider the standing issue, the State must first overcome the fundamental, constitutional Miranda violations . . ."

This argument is an inapposite statement of the law.

As the Court noted above, the Ohio Supreme Court recently held in the *Wintermeyer* case that,

> **Once the state raises the [standing] issue, the defendant must establish that he has a cognizable Fourth Amendment interest in the place searched or item seized.**

Id. at ¶ 3, emphasis added.

Similarly, the Ninth District Court of Appeals has made exactly the same determination,

> A person charged with crimes of possession may only claim the benefits of the exclusionary rule if his own Fourth Amendment rights have been violated. *United States v. Salvucci* (1980), 448 U.S. 83, 85 (overruling the automatic standing rule of *Jones v. United States* (1960), 362 U.S. 257). Thus, "[i]n order to challenge a search or seizure on Fourth Amendment grounds, a defendant must possess a legitimate expectation of privacy in the area searched, **and the burden is upon the defendant to prove facts sufficient to establish such an expectation."** *State v. Steele* (1981), 2 Ohio App.3d 105, 107 (citing *Salvucci, supra*) (further citations omitted).

State v. Burton, 9th Dist., Summit No. 13408, 1988 WL 54219, emphasis added.

And, numerous sister appellate districts have reached the same conclusion including the Second District Court of Appeals,

> Moreover, **the person challenging the search bears the burden of proving standing.** *State v. Williams,* 73 Ohio St.3d 153, 1995–Ohio–275. That burden is met by establishing that the person has an expectation of privacy in the place searched that society's prepared to recognize as reasonable. *Id.; Rakas v. Illinois,* supra. Property ownership is only one factor to be considered. *U.S. v. Salvucci* (1980), 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619; see, also, *State v. Nevins* Montgomery App. No. 24070, 2011–Ohio–389.

State v. Shaw, 2nd Dist. Miami No. 10-CA-23, 2011-Ohio-3331, at ¶ 24, emphasis added.

Clearly, once the State raised the issue of standing, the burden became Grondin's to establish a reasonable expectation in the place that was searched, to wit: his wife's Winchester safe.

This he has failed to do.

Grondin failed to address the standing issue after it was raised at the hearing and fails to address it in his Supplemental Brief. Grondin has posited no evidence and made no argument that he had *any* expectation of privacy in his wife's safe or any Fourth Amendment rights in the safe at all.

Quite simply, if Grondin fails to claim, argue, or allege, any reasonable expectation of privacy in the contents of his wife's safe, he lacks standing to complain about the seizure of its contents.

In essence, instead of arguing that he has standing, Grondin reverts to his previous argument that because he was not Mirandized, his statements and the seized evidence should be suppressed.

As noted above, however, there was no requirement that Grondin be given Miranda warnings because 1) he was never in custody; and 2) the entire encounter with law enforcement was consensual. And, as before, it is wholly unclear what "statements" Grondin even wants suppressed.

Finally, Grondin urges that the State's standing argument presents ". . . an illogical contradiction . . ." because if he has no standing ". . . to open his wife's safe . . ." how can he be prosecuted for the drugs that were found inside.

First, Grondin focuses on the wrong issue; the question is not whether he can "open his wife's safe" but whether he had a reasonable expectation of privacy in its contents. Since the safe was his wife's and he did not have permission to use it, he could not possibly have had any expectation of privacy in what it contained. As such, whether he could access or open it is of no accord.

Second, this Court fully concedes that it is an interesting, if not counterintuitive paradox that Grondin can be arrested, indicted, and criminally liable for contraband found in his wife's safe – a safe that he had no permission to use and at the same time no standing to protest the seizure of its contents.

The United States Supreme Court addressed this issue on point in a possession case where it acknowledged that requiring a defendant to prove standing in possession prosecutions allowed the government to maintain contradictory positions, subjecting the defendant to penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. *Jones v. U.S.*, 362 U.S. 257 (1960)[16] (overruled by, *U.S. v. Salvucci*, 448 U.S. 83 (1980).[17]

This conundrum however, has been resolved by *Salvucci* and a previous case, *Rakas v. Illinois*, 439 U.S. 128 (1978).[18] Now, a defendant must have a possessory interest in the items seized *and* also an expectation of privacy in the area searched, for the government to charge a defendant with a possessory crime but assert that he lacks standing to challenge the legality of the search is not contradictory. (See also: *Rawlings v. Kentucky*, 448 U.S. 98 (1980).[19]

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[16] String cites omitted.
[17] String cites omitted.
[18] String cites omitted.
[19] String cites omitted.

Moreover, numerous cases have affirmed convictions in possession cases where there are questions of standing and ownership, of example, in *State v. Carson,* 9th Dist., Summit No. 12555, 1987 WL 6061, (defendant convicted of possession of stolen property found in his apartment affirmed); *State v. Mack,* 9th Dist., Summit No. 22580, 2005-Ohio-5808, (defendant found guilty of possession of drugs and weapons found in home despite not residing there); and, *State v. Henshaw,* 9th Dist., Medina No. 08CA0078-M, 2009-Ohio-2515, (conviction of possession of drugs found on seat of vehicle with multiple people inside car affirmed.)

In summation, whether or not the weight and sufficiency of the evidence in this case will be enough to convict is a separate and distinct issue that is not relevant to the issue of standing or for that matter, suppression.

For the foregoing reasons, this Court finds that Grondin does not have standing to contest the evidence seized by law enforcement from his wife's safe because he lacked permission or consent to access it and thus, he could not have had a reasonable expectation of privacy in its contents.

IV. CONCLUSION

This Court has carefully considered the parties briefs and arguments, the testimony and exhibits in evidence, the applicable law, and the audio CD of law enforcement and Grondin's interaction.

In the case at bar, law enforcement came to Grondin's home for two perfectly valid reasons: 1) to assist his estranged wife collect some of her property; and 2) to investigate allegations of drugs, weapons, and child abuse occurring at the home.

The police advised Grondin why they were there, were invited into his home, and were given consent to search the premises. At no time was Grondin arrested, constrained, handcuffed, or otherwise pressured or forced to give consent. Eventually, after identifying indicia of drug activity and ammunition, detectives saw a safe and asked Grondin to open it, which he voluntarily did. The safe contained narcotics which were seized after which Grondin voluntarily signed a written consent to search form.

The safe that contained the narcotics was Grondin's wife's and that he had no permission or authority to access it and thus, no reasonable expectation of privacy in its contents.

Given the totality of these facts, Grondin was never in custody such that law enforcement was required to Mirandize him,[20] he was not coerced in any way to give consent to let them into the home or to search it, and most importantly, he lacks standing to even challenge the contraband found in his wife's safe.

The Motion To Suppress is without merit and DENIED.

JUDGE D. CHRIS COOK

[20] Recall that it is still unclear exactly what statement Grondin wants suppressed as this Court cannot glean from the record that he made any inculpatory statements to begin with.