IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 12 567160**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
BRYAN T. HOWARD	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Defendant Bryan T. Howard was indicted on October 9, 2012, for crimes allegedly committed on September 19, 2012. The indictment charges him with seven crimes: aggravated robbery (count 1), felonious assault (2), assault on a peace officer (3), assault (4), drug trafficking (5), drug possession (6) and possession of criminal tools (7). The state also seeks the forfeiture of an automobile, money, a cell phone and other property. Howard was arraigned on October 23 and thereafter, on February 19, 2013, filed a motion to suppress evidence. The plaintiff opposed the motion with a brief filed February 27 and a hearing on the motion was held on February 28. This entry follows.

STATEMENT OF FACTS

On September 18, 2012, late in the morning, a United States Postal Service carrier in Shaker Heights attempted to deliver a package sent via Express Mail and addressed to "Brian Thomas/care of UPS Store" at 16781 Chagrin Boulevard, Shaker Heights. Because no person named Brian Thomas rented a delivery box at the store, The UPS Store refused to accept delivery of the package. The carrier therefore retained the package and marked it

"undeliverable as addressed" and entered that status into the post office's tracking database. It is not certain from the hearing testimony whether the carrier kept the package on a truck with the intention of returning it to the main post office or returned it to the Shaker Heights branch office. However, the usual practice for a package marked as undeliverable as addressed is to return it to the main post office at 2400 Orange Avenue, Cleveland.

In the meantime, the defendant had the parcel's delivery number – EI 316333786 US – and was tracking the package through the post office's web-based database. Once he found out the package was considered undeliverable he went to 2400 Orange Avenue to get it.[1]

At the main post office the defendant was agitatedly inquiring of branch manager Valerie Thompson about his prospects of obtaining immediate delivery of the package when he was overheard by Postal Inspector Bryon J. Green. Green's job is to investigate and prosecute the shipment of illegal drugs, and proceeds from illegal drug transactions, through the U.S. mail. Green's attention was caught not only by Howard's urgent manner, but also by the fact that Howard was describing a parcel addressed with the words "care of UPS Store" because Green had only the night before seen that same phrase on a package of what he suspected were proceeds from illegal drug sales.

Utimately, Thompson was unable to give the defendant the package because it was not yet at the main branch and Howard left. He was followed by Green, who copied the license plate of the Toyota driven by Howard. Green then determined that the car belonged to Myrna[2] Howard and further discovered, through the use of a Nexis database, that Bryan Howard lived

[1] The defendant did not testify at the hearing, so his exact attempts to get the package are not known, but he might have first gone to the Shaker Heights branch and been told he would have to go to the main post office to get the package.
[2] Or Myra; Green wasn't sure.

at the same address. He found a picture of Bryan Howard through a separate database and thus identified the defendant by his real name.

Green, through inquiry at the post office, then found out that the package had been shipped from Santa Rosa, California, but had a written return address of Craig Larry, 6720 West Central Avenue, Toledo, Ohio. A database inquiry revealed no person named Craig Larry associated with that address. Upon learning these facts Green placed what amounted to a hold on the package and advised the Orange Avenue branch manager to direct Howard to call a particular phone number if he made further inquiries about the package. The phone number was an undercover line for the postal inspectors.

In the evening of September 18, after the package was returned to the main branch, it was subjected to a drug sniff by Daisy, a Cleveland police dog trained in the detection of illegal drugs. According to Daisy's handler, patrolman Patrick Andrejcak, the dog positively alerted to the package in question.

By this time Green believed he had developed probable cause to support the issuance of a search warrant by a federal judge that would allow him to open and search the box. However, he testified that he could not get the warrant after hours on September 18 and that he was required on the morning of September 19 to be at the Cuyahoga County Court of Common Pleas for a separate case. Therefore, no warrant had been sought by that morning when he received a call from Thompson that Howard was back at the main post office demanding the package.

Green hurried back from court to the post office and donned a postal clerk's shirt. He got the parcel addressed to "Brian Thomas" and took up a station behind a closed door near the main branch's lobby. Howard was directed to the door to claim the package. Green's intent

was to deliver the package to Howard and then, before the defendant left the post office, have his postal inspector colleague Mark Cudley briefly detain Howard and seek consent to search the package. But Howard took an unexpected route out of the building, forcing Green to follow him. Noticing that, Howard threw the box to the ground and ran. Green tried to stop Howard but Howard hit him, dislocating Green's shoulder and disabling him from further pursuit.

Howard was still confronted with Cudley and Cleveland police detective Joseph Bovenzi. As those two tried to restrain him Howard continued to thrash and tried to grab Bovenzi's gun. He was eventually subdued and arrested.

Howard had driven the Toyota and parked it in the post office's lot on the day he was arrested. Andrejcak testified that after Howard was arrested his car was identified in the lot and found to be giving off a strong odor of marijuana. According to Andrejcak, the car had to be towed because it was on a "public lot" and "no one was associated with it." Andrejcak therefore ordered a tow and, before the tow, searched the car to inventory its contents. Those contents included a zipped backpack that held a plastic bag of marijuana, money located in the center console, a sealed cardboard box labeled for shipment that was in the car's trunk, and miscellaneous papers and postal labels – some pre-addressed to California – from the console.

The defendant has now moved to suppress at trial any evidence of: the Express Mail package and its contents, the box found in the trunk of the Toyota, the marijuana found in the backpack in the car, the money from the car, and the papers discovered in the car.

LAW AND ANALYSIS

Howard argues that all of the evidence should be suppressed as having been seized in contravention of the Fourth Amendment to the United States Constitution and Article I, Section

14, of the Ohio Constitution. The state denies any constitutional violations and argues that the evidence is admissible at trial.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 14 of the Ohio Constitution has a similar provision, and its protections have been found to be coextensive with those of the Fourth Amendment. *State v. Robinette*, 80 Ohio St. 3d 234, 245 (1997). A pre-trial motion to suppress is a proper means to bring the question of a search's constitutionality before the court, and evidence that is obtained in violation of these constitutional provisions will generally be prohibited from trial under the exclusionary rule. *State v. McKiry*, 8th Dist. No. 88446, 2007-Ohio-2762, ¶11.

However, a defendant's capacity, or standing, to claim the protection of the Fourth Amendment depends upon whether the defendant has a legitimate expectation of privacy in the place searched or item seized. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Ownership is sufficient to prove standing to contest a seizure, but not necessary. Nevertheless, the person objecting to the seizure must have some legal possessory or proprietary interest in the item seized since a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's property has not had any of his Fourth Amendment rights infringed. *Id.*, at 134.

In this case, the package was addressed to "Brian Thomas" and the defendant stipulated that his name is "Bryan T. Howard." Since the box was not addressed to the defendant's home, the only evidence that he had any protectible interest in it – besides his misspelled first name and his middle name being on it – was that he knew the package's tracking number. A person

who challenges a search bears the burden of proving a privacy expectation in order to show that he has standing to challenge the legality of that search. *State v. Peterson*, 166 Ohio App.3d 112, 2006-Ohio-1857, ¶9 (2d Dist.). Howard did not meet that burden, despite the fact that the post office surrendered the box to him, since no evidence was offered about what quantum of proof of identity, if any, the postal service requires of a person claiming a parcel. Indeed, the United States Supreme Court has declined to use possession of a seized good as a substitute for a factual finding that the possessor of the good had a legitimate expectation of privacy in the thing searched. *United States v. Salvucci*, 448 U.S. 83, 92 (1980). For this court to allow "Bryan T. Howard" to assert a possessory interest in a package addressed to "Brian Thomas" without additional evidence of a right to the package would place a judicial imprimatur on a drug trafficking tactic that, it can be inferred, was used here to give, on the one hand, Howard – or any possessor other than "Brian Thomas" – the chance to deny that the package was intended for him, while, on the other hand, preserving his ability to claim the package as his for the purpose of suppression from evidence.

The same analysis does not apply to Howard's claim that the car was illegally searched. Evidence was admitted that the car was owned by another person with the last name of Howard who has the same home address as the defendant.[3] There was also testimony from Green that Howard had driven the Toyota to the post office on two consecutive days, and there was no evidence that the car was stolen or reported stolen. Thus, a reasonable inference from the evidence is that the defendant was using the car with the owner's permission. The driver of an automobile who demonstrates that he has the owner's permission to use the vehicle has a reasonable expectation of privacy in the vehicle and standing to challenge its stop and search.

[3] Plaintiff's hearing exhibit 4, the vehicle/tow supplement.

State v. Carter, 69 Ohio St. 3d 57, 63 (1994). Therefore, Howard has standing to object to the warrantless search of the car.

Since he has standing, the merits of Howard's claim that the Toyota was illegally searched must be decided. Because of that, and because it is possible that a reviewing court could find that he also has standing to object to the seizure and search of the Express Mail package, the merits of that claim will also be addressed to determine whether there are grounds independent from lack of standing to deny the motion to suppress evidence of the package.

The defendant argued in his written motion to suppress that the Express Mail box was separately seized each time he inquired of the post office about it. However, at the motion hearing, he narrowed that claim to suggest that it was first seized at the moment on September 18 that postal inspector Green ordered the package to be marked in the post office's system as "undeliverable as addressed" so that it would be taken out of its regular course while he investigated further.[4] Howard says that when Green "seized" the package by directing it to be taken out of circulation in the ordinary course he lacked sufficient evidence to justify the seizure.

U.S. mail such as letters and sealed packages subject to letter postage is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment. *State v. Collopy*, 12th Dist. No. CA2001-12-290, 2002-Ohio-5997, ¶8, citing *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). In turn, the Fourth Amendment allows a brief

[4] It was not explicit from Green's testimony that he knew the package had already been marked "undeliverable as addressed" when it was rejected by The UPS Store, but even if he was aware, a redundant instruction from Green would be certain to take the box out of the delivery stream to make sure it wasn't delivered before Green could investigate. By the way, there is no suggestion here that the carrier's decision to mark it as undeliverable when it was refused by The UPS Store was unconstitutional since that decision was not based on a suspicion that the package was evidence of a crime.

detention of the package – analogized to an investigative stop as allowed by *Terry*[5] – where there is a reasonable, articulable suspicion that criminal activity is afoot.

In *Van Leeuwen*, the movement of two 12-pound packages through the mail was delayed for slightly over one day while suspicious circumstances surrounding their mailing were investigated to the point where probable cause was established and a warrant issued to open the packages. The United States Supreme Court reasoned as follows in finding no violation of the Fourth Amendment:

> No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained. The rule of our decision certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection. We only hold that on the facts of this case a 29-hour delay between the mailings and the service of the warrant cannot be said to be "unreasonable" within the meaning of the Fourth Amendment. Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.
> *Van Leeuwen*, supra, at 253.

In this case, Green detained the package for further investigation when he knew that 1) its label shared curious labeling with another suspicious package, 2) it was delivered to Ohio from the illegal drug "source state" of California, 3) by Express Mail, an expensive service ordinarily used for business but 4) without indicia that it was anything other than personal mail, and 5) being sought by a person who seemed unusually eager to retrieve it. Those facts were sufficient to justify a brief detention of, and closer look at, the package to determine if there was probable cause to support a warrant.

Green's further investigation disclosed additional facts. First, he observed that the package was labeled with a return address not where it was mailed in California, but in Ohio.

[5] *Terry v. Ohio*, 392 U.S. 1.

Then, available law enforcement databases revealed no connection between the return address of W. Central Avenue and the return addressee Larry Craig. Finally, the dog sniff of the package showed the likely presence of illegal drugs. By then, all of the facts known to Green amounted not only to reasonable suspicion but to probable cause to support a warrant, yet the package was removed from circulation for less than 24 hours before it was delivered to Howard. That delay in delivery was not an unreasonable invasion of Howard's privacy under the Fourth Amendment.

Nor did Green violate the Fourth Amendment when, after giving the package to Howard, he approached the defendant with the intention of detaining him and seeking consent to search the package. The evidence suggests that Howard ran before Green could actually ask him to stop, but both possibilities should be considered. If Green detained Howard for a *Terry* stop before Howard ran, then that stop was justified not just by reasonable suspicion but by probable cause to believe that Howard was committing a felony, namely possession of drugs, since the package was described as weighing about a pound, i.e. more than the misdemeanor weight for possession of marijuana. On the other hand, if there was only an arrest, and no investigatory stop, it too was justified by the same probable cause. Not only is it allowed by section 2935.04 of the Ohio Revised Code, but the warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment. *State v. Elmore*, 111 Ohio St. 3d 515, 521 (2006).

That leaves for decision the propriety of the post-arrest vehicle search. The state expanded upon Andrejcak's rationale that the Toyota was subject to a tow because it was in a public lot and not associated with anyone by arguing that the tow, and related inventory search,

was permissible under the Cleveland Codified Ordinances. The state additionally contends that the vehicle search was permissible because of the plain odor of marijuana emanating from it.

An inventory search of a lawfully impounded vehicle is a well-defined exception to the warrant requirement of the Fourth Amendment. *State v. Wells*, 8th Dist. No. 93433, 2010-Ohio-4000, ¶8. This exception permits police to conduct a warrantless search of a vehicle, prior to the tow, for the purpose of inventorying its contents after the vehicle has been lawfully impounded. *Id*. Inventory searches are excluded from the warrant requirement because they are an administrative, rather than investigatory, function of the police that protect an owner's property while it is in the custody of the police, insure against claims of lost, stolen, or vandalized property, and guard the police from danger. *State v. Mesa*, 87 Ohio St.3d 105, 109 (1999).

The question in this case is whether the car was lawfully impounded. Impound means to take and hold in legal custody. *State v. Arbuckle*, 9th Dist. No. 94 CA 0058231995 (Mar. 29, 1995). The authority of an agent of the executive branch of government to impound a private vehicle is conferred by statute and there are two that might apply here. R.C. 4315.61 allows for the impoundment of a vehicle by the police where the car has come into police possession "as a result of the performance of" a police officer's duties. If Howard had been arrested while the Toyota was obstructing traffic or somehow presented a danger to the public then impoundment would be proper under this section. But that didn't happen here. The car was legally parked in the post office lot and there is no reason to believe it was a hazard or that it would have interfered with the normal operation of the post office if it had been left there until Myrna Howard could retrieve it.

The second relevant statute is section 405.02 of the Cleveland Codified Ordinances, which provides as follows:

> Police officers are authorized to provide for the removal of a vehicle under the following circumstances: . . .
>
> (e) When any vehicle has been used in or connected with the commission of . . . any felony. . . .
>
> (g) When any vehicle is left unattended due to the removal of an . . . arrested operator.

In deciding whether either of these subsections justified the towing (and concomitant inventory) of the car it is worth keeping in mind that the ordinance does not set forth a mandatory duty to impound under the listed circumstances. A police officer may exercise discretion and decide that the vehicle can be safely left where it is or make other arrangements, such as notifying the owner to move it. At the same time, the police are not required to make efforts to effect a less intrusive means of towing and inventory to ensure the vehicle's safekeeping. The existence of other available options to move the automobile is not necessarily dispositive on the question of the reasonableness of the government's conduct. *State v. Perry*, 11th Dist. No. 2011-L-125, 2012-Ohio-4888, ¶47. Where an inventory search is done in connection with a decision to impound a car the law requires only that law enforcement's exercise of discretion be reasonable, taking into account the totality of the circumstances.

Although Howard was arrested for felony drug possession and the felonies allegedly committed while resisting arrest – aggravated robbery, felonious assault and assault on a peace officer – there is no evidence to suggest that the car was "used in or connected with" these crimes. None of the crimes had yet been committed when Howard left the car in the lot to enter the post office. And while it might be true that Howard intended to commit the felonies of drug trafficking and drug possession as he drove to the post office, the statute seems distorted

beyond its intended purpose if it is applied to any car that a defendant uses just prior to a felony offense without regard to its use in the actual commission of the crime.

That leaves section 405.02(g) as the only possible statutory rationale for impounding the car. There is no doubt that Howard was the Toyota's operator and that his "removal" from the place the car was parked was effected by an arrest. But was the car "unattended?" That word is not defined in either the Ohio Revised Code or the Cleveland Codified Ordinances. If a term is not defined by statute it should be accorded its plain and ordinary meaning**.** *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, ¶ 17. An unattended vehicle means a car left with no one paying attention to or looking after the vehicle. That was the case here. Howard, the operator, was being arrested and, until he could call Myrna Howard or someone else, the Toyota had nobody responsible for it. Impounding the car in this situation serves the purposes that justify inventory searches generally: protecting the owner from vandalism or theft and insulating the police from claims by the owner in the event of damage or theft. Therefore, the police acted within their discretion when deciding to impound the Toyota, an inventory search was permissible, and the evidence resulting from that search should not be suppressed at trial if otherwise admissible.

Finally, beyond the reasons discussed in this entry, an independent ground justifying a denial of the motion to suppress is the defendant's failure to file the motion within 35 days of arraignment as required by Rule 12(D) of the Ohio Rules of Criminal Procedure.

CONCLUSION

For all of the foregoing reasons, the defendant's February 19, 2013 motion to suppress evidence is denied.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of March, 2013 to the following:

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_____
Judge John P. O'Donnell