STATE OF CONNECTICUT

POLICE OFFICER STANDARDS
and
TRAINING COUNCIL

and the

DIVISION OF CRIMINAL JUSTICE

2020 JOHN M. BAILEY SEMINAR
On New Legal Developments Impacting On Police Policies And Practices

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2019-2020 CASE LAW UPDATES

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CONNECTICUT SUPREME COURT

State v. Ashby, 335 Conn. ___ (2020)

In this case, the court concluded that the incarcerated defendant's sixth amendment right to counsel was violated when a jailhouse informant, acting as an agent of the state, deliberately elicited incriminating information from the defendant.

A claim of this nature derives from Massiah v. United States, 377 U.S. 201 (1964), and requires the defendant to prove the following: (1) the sixth amendment right to counsel had attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel being present; and (3) the agent deliberately elicited incriminating information from the defendant. For purposes of the application of the facts in Ashby to the Massiah test, there was no dispute regarding the first and third factors – the sixth amendment right to counsel had attached, and there was deliberate elicitation. As most cases often do, Ashby focuses on the second factor – the agency determination.

The agency determination asks whether, on the basis of all of the evidence, the informant's conduct is fairly attributable to the state or, put another way, whether the state reasonably must have known that its actions likely would lead to deliberate elicitation of incriminating information. There is no bright-line test for determining agency, which may be established through either implicit or explicit conduct. The determination turns upon a number of factual inquiries including, but not limited to, whether a state actor instructed, directed, or made a promise to the informant; provided the informant with some benefit, or led the person to believe that a benefit awaits or may be available; and identified or emphasized particularly helpful information, or a particular type of evidence. Another pertinent factor asks whether any efforts were made by the state actor to protect the defendant's sixth amendment rights. For example, instructing the informant to cease deliberately eliciting information either altogether or until further notice and advice. Another pertinent factor is whether the defendant was in custody and thus particularly susceptible to the ploys of informants seeking information.

Although not identified by the court, which I find curious, I would add whether the **informant** is in custody to the above list. A jailhouse informant's obvious self-interest, and motivation to curry favor with law enforcement officials, strikes me as plainly pertinent when it comes to assessing what the state might reasonably expect such a person to do even if only indirectly and subtly encouraged by such an official. I would exercise extreme caution in your dealings with a jailhouse informant who offers to obtain information from an incarcerated, sixth amendment-protected defendant. Also, be extremely cautious to avoid what might be perceived as a "wink and a nod" situation in which, absent any promise or arrangement with a jailhouse informant, you later afford one who assisted in a prosecution anything that might be perceived as a benefit. This occurred in Ashby in the form of the state, which could have done so, not objecting to the informant's motion for sentence modification. Absent very careful consideration in light of Ashby, the use of a jailhouse informant in this context is fraught with risk.

In Ashby, the Supreme Court concluded, contrary to the trial court's determination, that, although the record presented a close call, an agency relationship existed between the state and the informant.

State v. Lewis, 333 Conn. 543 (2019)

In this case, the court concluded that a police officer lawfully detained and patted down the defendant based on a reasonable suspicion that he had engaged in criminal activity and might have been armed and dangerous.

A woman called 9-1-1 at 4:16 a.m. to report that, about fifteen minutes earlier, a thirty-two year old black male, who she identified as "O," had broken a window in her apartment and choked her. She said that the man had left her apartment and, although she could no longer see him, she could hear him talking, which indicated that he was still in the area. She denied that the man had any weapons, and described him as wearing a black hoodie, black sweatpants, a fitted orange and gray hat, and a chain around his neck. Police were dispatched and an officer arrived in the area within approximately four minutes of the 9-1-1 call. From his car, he observed the defendant, a black male in dark looking clothing and cap standing alone in the pouring rain, talking on a cell phone, in a parking lot area that was about a minute's walk from the area of the victim's apartment. Without activating its siren or overhead lights, the officer stopped his car about 15 feet from the defendant, lowered the window, and called out, "Yo, my man, what's your name." The defendant was nonresponsive, and the officer exited his car, approached the defendant from an angle, asked for his name again, whether he had ID, and from where he was coming. The defendant mumbled, may have said "Michael," and appeared guarded and under the influence of alcohol or drugs. When the officer touched the defendant, and began to pat him down for weapons, the defendant moved his hand downward. The officer did likewise, and felt the butt of a gun. A struggle ensued, after which, with the assistance of another officer's police dog, the defendant was subdued and arrested. It turned out that the defendant was not the domestic violence suspect who had been reported to the police.

Several aspects of the court's comprehensive decision are noteworthy:

Seizure. The court rejected the defendant's claims that he was seized for constitutional purposes when the officer stopped his patrol car. The officer stopped the car near the defendant, but he did not make a show of authority by activating the emergency lights or the siren, and he did not use the vehicle to block the defendant's path or to contain him. Merely calling out to the defendant from the car, "Yo, my man, what's your name[,]" did not amount to a seizure because it was essentially casual and unaccompanied by any authoritative, confrontational, or coercive language or behavior. The court also rejected the defendant's claim that he was seized when the officer exited the car, approached him foot, and asked his name, if he had ID, and from where he had come. Again, the encounter was

essentially casual, and the officer's language and behavior was not authoritative, confrontational, or coercive.

Reasonable and Articulable Suspicion. The court further rejected the defendant's claim that the officer lacked a reasonable suspicion to believe that criminal activity was afoot. The defendant's similarity to the reported suspect, and his geographical and temporal proximity to the reported crime, alone at night, talking on a cell phone (the victim reported hearing the assailant outside talking) and standing in the pouring rain, provided an adequate basis to detain him in order to confirm or dispel suspicion. The relatively slight variations that existed between the clothing description that the victim gave to the 9-1-1 operator, that the dispatcher gave to the patrol officers, and what the defendant was actually wearing did not negate a reasonable suspicion because a perfect match is not required and the defendant's geographical and temporal proximity to the scene of the crime was more important than the minor discrepancies in the clothing descriptions. It was also important that the officer testified that, under the circumstances of being late at night and pouring rain, the defendant's clothing appeared to be all black, which appearance was consistent with what he had been told.

The opinion also discusses the **collective knowledge doctrine**, which historically has been used to support, not negate, a reasonable suspicion by imputing to the investigating officer the collective knowledge possessed by the police collectively. Here, the defendant sought to use the collective knowledge doctrine to negate a reasonable suspicion by pointing out that the clothing description that the victim gave to the 9-1-1 operator contained more detail and information than was given by the dispatcher to the patrol officers, which additional information was not entirely consistent with the defendant's appearance. The court assumed, without deciding, that the collective knowledge doctrine could be used in the negative manner sought by the defendant, but that its application did not change the outcome. Nevertheless, it is advisable to instruct dispatchers, 9-1-1 operators, and police officers that, to the extent practicable under the circumstances, they should strive to accurately and completely relay all pertinent information to one another.

The opinion also discusses, and dismisses the significance of, generalities regarding the "high crime" nature of the area. In order for this to be a relevant factor in the calculus, investigating officers must offer specific information regarding the nature of an area and the criminal activity known to exist there, that logically can be said to inform his or her reasonable suspicion that *this suspect* is engaged in criminal activity at this time.

Patdown: Lastly, the court rejected the defendant's claim the police lack the reasonable suspicion to believe that he was armed and dangerous that is required to justify a patdown search for weapons. The court concluded that it was reasonable to suspect that the defendant might be armed and dangerous based on the facts that he was (1) suspected of committing a particularly violent crime of domestic violence (choking the victim) and (2) encountered by the officer in close geographical and temporal proximity to the scene of the crime. While the court was not called upon to decide whether the report of a domestic violence crime by itself justifies a patdown of a domestic violence suspect, it noted the

established link that exists between domestic violence incidents, weapons, and harm befalling responding police officers. The inquiry in this regard was complicated by the investigating officer's testimony that he "pat[s] everybody down" for his safety. Officers are reminded that patting down everybody as a blanket practice is contrary to law.

CONNECTICUT APPELLATE COURT

State v. Cane, 193 Conn. App. 95 (2019)

In this case, the court upheld the police entry into the defendant's house under the protective sweep doctrine. That doctrine allows police officers to take steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. Maryland v. Buie, 494 U.S. 325, 327 (1990). A "first tier" protective sweep permits the police, as a precautionary matter incident to an arrest, *without* probable cause or reasonable suspicion, to look in spaces "immediately adjoining" the arrest from which an attack could be launched. In order to lawfully go beyond these immediate areas, and conduct a "second tier" protective sweep, the police *must articulate specific facts* supporting a reasonable belief that the area to be swept harbors a person posing a danger to those on the arrest scene.

In Cane, the defendant was arrested just outside of his house which meant that the home's interior was not a space immediately adjoining the arrest. The police entry into the home to conduct a protective sweep was justified, however, as a second tier sweep based on the following:

> First, the police reported that they saw movement within the defendant's home. [During the incident that led to the arrest, they had seen silhouetted movement through front and rear windows at the same time.] Second, the police reported that there were multiple cars on the defendant's property. Third, it was reported that a car in the driveway was started, and the defendant denied that he was the person who started it. There had been a report of a serious assault of two women that was alleged to have occurred within the prior twenty-four to thirty-six hours at the defendant's home. One of the women was reportedly being treated for serious injuries and alleged that she was hit with a pistol, indicating the presence of a handgun inside the home that might be used by another individual within the home, thereby posing a danger to police officers and others. In addition, the woman had reported that the defendant had guns in the house and that he had people who watched his house. [The police had information that the defendant was involved with a motorcycle gang.] The defendant's behavior was erratic, agitated, and at times bizarre. On the basis of the defendant's behavior on the scene, the court concluded that the police were within their right to discredit the defendant's statements that he possessed no weapons and that no one else was inside the house.

(Footnotes omitted) State v. Cane, 193 Conn. App. at 114–15.

Court of Appeals for the Second Circuit

United States v. Smith, __F.3d__ (2d Cir. 2020) (2020 WL 4290005)

In this case, the court concluded that, under the circumstances, a month-long delay between the lawful warrantless seizure of the defendant's personal electronic device and the issuance of a warrant to search it was unreasonably long in violation of the Fourth Amendment. Although this decision is not strictly binding on a Connecticut court, I strongly advise that you use it a practical guidepost because Second Circuit decisions generally are looked upon by our courts as providing persuasive guidance regarding federal constitutional law, the decision is well-reasoned and legally persuasive, there are no Connecticut court decisions on point, and there is, in my opinion, a high likelihood that our Appellate and Supreme courts would reach the same conclusion.

The device in question was a computer tablet, which a police officer seized without a warrant during the course of a roadside investigation based on probable cause to believe that it contained evidence of criminality. Its evidentiary value was not obvious, however. More than a month after the device was seized, and as the device remained in police custody, a search warrant was obtained and executed. Under the circumstances presented, the court concluded that the month-long delay in obtaining the warrant was not constitutionally reasonable. The court's conclusion derived from its application of the following four-part test, which affords a practical guide that I encourage you to apply:

The Length of the Delay: Thirty days were unnecessary because the facts needed to establish probable cause for the warrant were known to the police on the day that the device was seized and did not require any further investigative efforts;

The Nature of the Item and its Importance to the Defendant: A computer tablet, and any modern personal electronic device, is extremely important to its owner given its capacity to store useful and important personal effects and information, much of which is not related to criminality;

Whether the Defendant Had A Reduced Property Interest In the Seized Item: The defendant's interest in the item was not reduced because his ownership of it was exclusive and not shared, he did not voluntarily relinquish it, and he refused to grant consent to search it after it had been seized. Nor was the defendant's interest reduced as it would have been had this been a case in which the police seized a murder weapon, obvious contraband or other item the investigatory or prosecutorial value of which was evident without a further search of its contents.

The Justification for the Delay: Based on the record in this case, little or no investigatory or duty-related justification was offered for the delay, which, in essence, resulted from mere slow-footedness.

The court elected not to apply the exclusionary rule because the police did not violate the fourth amendment deliberately, recklessly, or with gross negligence, and an objectively reasonable police officer would not have known in light of existing precedent that the delay violated the fourth amendment. Don't assume that a Connecticut court would reach this same conclusion.

DCJ HOUSING UPDATE

The 2020 John M. Bailey Virtual Seminar on
Instruction Re: New Legal Developments
Which Concern Police Policies and Practices

TYPES OF CASES WE HANDLE:

Police: Criminal matters arising out of a landlord-tenant relationship

- Criminal lockout at residential or commercial property
- Illegal utility shut-off on tenant by landlord/agent
- Criminal damage of landlord's property by a tenant
- Criminal trespass by landlord into tenant's unit
- Bad checks for rent or security deposit

Public Health and Safety Officials: Violations Of Health And Safety Codes including with injuries related to:

- Fire, Building, Health, Housing, Zoning and Anti-Blight
- Administrative Search Warrants For Code Inspections
- Dept. of Consumer Protection Trade Practice Violations CGS §20-341a
- Severe Hoarding Cases

COVID-19 HOUSING INFORMATION FROM THE CT JUDICIAL BRANCH

- **March 19, 2020: Update on Civil & Housing Matters including Evictions and Foreclosures**
- There shall be an immediate stay of all issued executions on evictions and ejectments through **May 1, 2020**.

COVID-19 HOUSING INFORMATION FROM THE CT JUDICIAL BRANCH, CONT.

- April 23, 2020
- **ORDER**
- The court hereby orders an IMMEDIATE STAY of the service of all issued executions on evictions and ejectments through **June 1, 2020**.
- James W. Abrams
- Chief Administrative Judge for
- Civil Matters

COVID-19 HOUSING INFORMATION FROM THE CT JUDICIAL BRANCH, CONT.

- May 15, 2020
- **ORDER**
- The court hereby orders an IMMEDIATE STAY of the service of all issued executions on evictions and ejectments through **July 1, 2020**.
- James W. Abrams
- Chief Administrative Judge for
- Civil Matters

COVID-19 HOUSING INFORMATION FROM THE CT JUDICIAL BRANCH, CONT.

- July 20, 2020
- **ORDER**
- The court hereby orders an IMMEDIATE STAY of the service of all issued executions on evictions and ejectments through **September 1, 2020**.
- James W. Abrams
- Chief Administrative Judge for
- Civil Matters

Governor Lamont's Executive Orders Re: Evictions

- **Executive Order No. 7X** April 10, 2020
  - No Notice to Quit or Service of Summary Process before **July 1, 2020** except for serious nuisance as defined in CGS §47a-15.
  - Automatic 60-Day Grace Period for April Rent.
  - 60-Day Grace Period for may Rent, Upon Request.
  - Application of Additional Security Deposit to Rent, Upon Request.
  - Does not relieve the tenant of liability for unpaid rent

"Serious Nuisance" means

- CGS §47a-15:

  (A) inflicting bodily harm upon another tenant or the landlord or threatening to inflict such harm with the present ability to effect the harm and under circumstances which would lead a reasonable person to believe that such threat will be carried out,

  (B) substantial and wilful destruction of part of the dwelling unit or premises,

"Serious Nuisance" means, cont.

(C) conduct which presents an immediate and serious danger to the safety of other tenants or the landlord, or

(D) using the premises or allowing the premises to be used for prostitution or the illegal sale of drugs or, in the case of a housing authority, using any area within fifteen hundred feet of any housing authority property in which the tenant resides for the illegal sale of drugs.

Governor Lamont's Executive Orders Re: Evictions

- **Executive Order No. 7DDD** June 29, 2020
  - No Notice to Quit or Service of Summary Process before **August 22, 2020** except for nonpayment of rent due on or before February 29, 2020, or for serious nuisance as defined in CGS §47a-15.
  - Extended Opportunity to Apply Additional Security Deposit to April, May, June, July or August Rent, Upon Request.

Governor Lamont's Executive Orders Re: Eviction, cont.

- **Executive Order No. 7OOO** August 21, 2020
  - No Notice to Quit or Service of Summary Process before **October 1, 2020** except for nonpayment of rent due on or before February 29, 2020, for serious nuisance as defined in CGS §47a- 15, or for the landlord to use as such landlord's principal residence, provided not during the lease term.
  - Extension of Ability of Apply Security Deposit in Excess of One Month's Rent to September Rent.

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