**[Cite as *State v. Noller*, 2013-Ohio-3183.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-12-016

Appellee — Trial Court No. CRI-2011-1060

v.

Mark A. Noller, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: July 19, 2013

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Dina Shenker, Assistant Prosecuting Attorney, for appellee.

David J. Longo, Huron County Public Defender, for appellant.

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**SINGER, P.J.**

**{¶ 1}** Appellant, Mark A. Noller, Jr., appeals from the June 8, 2012 judgment of the Huron County Court of Common Pleas convicting and sentencing appellant, after accepting his no contest plea, to charges of theft of a credit card, a violation of R.C.

2913.02(A)(1) and 2913.71(A), and receiving stolen property (a credit card), a violation of R.C. 2913.51(A) and 2913.71(A). For the reasons which follow, we affirm.

**{¶ 2}** On appeal, appellant asserts the following single assignment of error:

> The trial court erred to the prejudice of the Defendant-Appellant when it overruled his motion to suppress evidence, where such evidence was obtained through a warrantless, unreasonable seizure, in violation of his rights under the U.S. and Ohio Constitutions.

**{¶ 3}** The following evidence was admitted at the motion to suppress hearing. Seth Fry, a Norwalk police sergeant, testified he was investigating appellant with respect to the theft of a stolen credit card/ATM/debit card on September 23, 2011, and several withdrawals, totaling $674.

**{¶ 4}** Appellant was arrested on that charge in November 2011, but the arresting officer did not seize any money from appellant at that time. The officer was familiar with appellant because of his lengthy criminal record. During the investigation appellant had indicated a desire to work as a confidential informant for drug buys from a specific person the department was interested in investigating, and an agreement was drafted and approved. Appellant agreed to pay $674 in restitution and the charge would be reduced to a misdemeanor and dismissed in exchange for his assistance. By making this agreement, appellant was released without having to go to jail. The agreement expired December 31, 2011, without appellant ever making a drug buy for the police department.

As a result, a warrant was issued for his arrest and he was arrested January 24, 2012, around midnight.

**{¶ 5}** When appellant was taken into custody, appellant was found to be carrying $684 on his person. Sergeant Fry learned of the money and discussed the seizure of the money with Lieutenant Chris Stanfield. A determination was made that Sergeant Fry should seize the money appellant had been carrying because Sergeant Fry believed it was the money obtained with the stolen ATM card. By the time Sergeant Fry arrived at the jail on January 25, 2012, appellant had already been arraigned, a bond had been set, and appellant was in the housing unit. Sergeant Fry met with appellant to give him a receipt for the money and explain the purpose for the seizure of the money. When appellant became upset and started making statements, Sergeant Fry read appellant his *Miranda* rights and then informed appellant the money would be seized. Lieutenant Stanfield, who was present throughout the interview, was not certain that appellant heard the rights because he was yelling and was argumentative. Neither officer testified as to the details of appellant's statements made at this point.

**{¶ 6}** Appellant repeatedly objected to the seizure of the money. At some point when Sergeant Fry was about to leave, appellant asked to speak with Sergeant Fry alone. Lieutenant Stanfield joined them in an interview room. Appellant kept asking about the seizure and Sergeant Fry told appellant that the money found on him was close to the $700 he had been accused of stealing with the stolen ATM card in the case that had been dismissed pursuant to their agreement. Stanfield heard appellant immediately yell back

"I didn't take that much." Fry, who did not testify as to the exact phrase, testified he heard something to the effect that appellant did not take that much money, which led Fry to believe appellant knew exactly how much was taken ($674). Appellant immediately recanted his statement and stated that he had just been paid. Having known appellant for years, the sergeant had never known appellant to have a steady job. Sergeant Fry stopped appellant and inquired again whether he was understood his rights. Lieutenant Stanfield intervened to stop appellant from yelling long enough to obtain a statement from appellant that he understood his rights. The warnings were given several times as they talked.

**{¶ 7}** Appellant testified the money he was carrying on the night of his arrest was a portion of the $700 he had been paid for a painting job. He admitted on cross-examination that he never filed a W-2 for this job reporting the income for tax purposes. He recalled having spent $13. At the time he was booked, he recognized the officer and indicated to her that he intended to use the money to pay his bond to be released that night. He testified the booking officer called Sergeant Fry to let him know of appellant's intentions. Appellant was unable to post bond, however, because Sergeant Fry took appellant's money. Appellant testified that Sergeant Fry told appellant that because he did not make any controlled drug buys for them, the police would seize the money. Appellant denied ever having been read his *Miranda* rights prior to their conversation becoming heated. But, appellant admitted that he did request to continue the conversation privately with Sergeant Fry. Appellant kept asking why they were taking

the money. He recalled Sergeant Fry stating it was because of the prior $700 theft charge. Appellant denied ever saying that he did not take that much money. He testified that he denied taking the money after the officers started accusing him of having said he did.

**{¶ 8}** Appellant argues that his motion to suppress should have been granted for two reasons. First, the warrantless seizure of the money was unreasonable and violated appellant's constitutional rights.

**{¶ 9}** The trial court held that no Fourth Amendment issue was raised in this case because the money was seized from the jail where it was being stored on appellant's behalf after his arrest. Since appellant had no expectation of privacy in his jail locker contents, the court reasoned the Fourth Amendment was not applicable.

**{¶ 10}** We begin by addressing the issue of the initial seizure of appellant's money at the time of his arrest. The Fourth Amendment to the United States Constitution provides that: "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." This privilege is applicable to the states through the Fourteenth Amendment. *Map v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

**{¶ 11}** The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). "Reasonableness,

in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). A warrantless seizure may be reasonable if it is based upon probable cause that the person has committed a crime. *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

**{¶ 12}** "[A] full search of the person incident to a lawful custodial arrest is not only an exception to the warrant requirement of the Fourth Amendment but is also a 'reasonable' search under that amendment." *State v. Mathews*, 46 Ohio St.2d 72, 74, 346 N.E.2d 151 (1976), citing *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

**{¶ 13}** In this case, appellant was arrested pursuant to a warrant and his money was impounded in the normal course of booking him in order to protect his money. Therefore, the initial seizure of the money was reasonable.

**{¶ 14}** Furthermore, when a person is searched incident to a lawful arrest, the police may seize contraband and the fruits and evidence of a crime to prevent concealment or destruction of evidence. *State v. Waddy*, 63 Ohio St.3d 424, 442, 588 N.E.2d 819 (1992), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 103, fn. 4, 684 N.E.2d 668. *Accord, United States v. Robinson*, 414 U.S. 218, 225-226, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), citing *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925). This exception extends to a

search and seizure even after a person is arrested and taken into custody. *United States v. Edwards*, 415 U.S. 800, 807, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). Such search and seizures are not based on the accused's lack of an expectation of privacy, but on the reasonableness of the police intervention to seize weapons, protect against escape, and preserve evidence. *Id*. at 808. Therefore, a post arrest search and seizure is still limited by the Fourth Amendment requirement of reasonableness. *Id*. at 808, fn. 9, citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

**{¶ 15}** The mere possession of money is not unlawful. *State v. Loza-Gonzalez*, 6th Dist. Lucas No. L-06-1151, 2007-Ohio-1044, ¶ 12, and *State v. Roberts*, 102 Ohio App.3d 514, 518, 657 N.E.2d 547 (9th Dist.1995). For example, when a person is legally detained by the police and is not suspected of a particular crime, the mere fact that the person carries thousands of dollars in cash does not justify a seizure of the money as suspected contraband or evidence of a crime. *United States v. Moreland*, 703 F.3d 976, 987-988 (7th Cir.2012). There must be some "evidence connecting the cash to a crime to establish probable cause for seizing the cash." *Id.* at 988.

**{¶ 16}** While Sergeant Fry indicated that he seized the money in order to determine if it was the money stolen four months earlier, he did not identify anything unique about the money which would enable the police to determine whether it came from a particular ATM machine or not. The trial court specifically avoided the issue of whether the officer's belief was reasonable.

**{¶ 17}** We find the seizure of the money by Sergeant Fry as evidence of the theft offense was unreasonable because it was not based on probable cause. While the amount of cash found on appellant was nearly identical to the amount of money that was withdrawn with the stolen ATM card, this fact gives rise to only a suspicion that it was the stolen money and that appellant committed the theft offense. Therefore, the officer violated appellant's Fourth Amendment right by seizing the money as the fruit or evidence of a crime.

**{¶ 18}** We next address the suppression of appellant's incriminating statements. Sergeant Fry testified that he spoke to appellant in order to give him a receipt for his money. Therefore, we assume that Sergeant Fry had already in fact seized appellant's money. Appellant argues that the statements he made after the illegal seizure of his money should have been excluded as fruits of the poisonous tree.

**{¶ 19}** Generally, evidence obtained as a result of an unlawful search in violation of the Fourth Amendment must be excluded from trial, whether the evidence was tangible or testimonial and direct or derivative evidence (fruit of the poisonous tree). *Wong Sun v. United States*, 371 U.S. 471, 484-485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Weeks v. United States*, 232 U.S. 383, 398, 34 S.Ct. 341, 58 L.Ed. 652 (1914); and *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

**{¶ 20}** However, the exclusionary rule is not automatically invoked simply because the evidence would not have been obtained "but for" the constitutional violation.

*Hudson v. Michigan*, 547 U.S. 586, 592, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). Evidence obtained following the infringement of a constitutional right need not be excluded when the evidence was obtained by a means "sufficiently distinguishable to be purged of the primary taint." *Wong Sun* at 487-88. The justification for applying the exclusionary rule begins to weaken as the causal connection between the constitutional infringement and the discovery of the evidence becomes attenuated. *Hudson v. Michigan*, 547 U.S. 586, 593, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). At some point, "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id*. Therefore, the penalty for violating a person's constitutional rights (evidence exclusion) must "bear some relation to the purposes which the [Fourth Amendment] is to serve." *United States v. Ceccolini*, 435 U.S. 268, 279, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978).

**{¶ 21}** With respect to incriminating statements or confessions made after an illegal arrest or search, such statements have not been excluded where the facts indicate that the statements were made after *Miranda* warnings were given and were determined to be the product of the defendant's free will. *New York v. Harris*, 495 U.S. 14, 19-21, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990) (defendant's confession was not the result of being in unlawful custody or having been arrested in his home illegally) and *United States v. Gross*, 662 F.3d 393, 401-402 (6th Cir.2011) (the time lapse between the illegal arrest and questioning, the degree of free will exercised, and the giving of *Miranda*

warnings indicate that the confession was sufficiently voluntary to purge the primary taint of the illegal police action).

**{¶ 22}** In the case before us, the purpose of the Fourth Amendment protection against illegal seizures is to protect private property from governmental intrusion. While appellant may not have made the incriminating statements "but for" his emotional outrage at having his money seized, the officers intended only to inform him that the money was being seized and not to question him about the theft offense. In this case, there was no relationship between the protection of private property rights and the exclusion of inculpatory statements made voluntarily and after *Miranda* warnings were given.

**{¶ 23}** Appellant's sole assignment of error is well-taken in part and not well-taken in part.

**{¶ 24}** Having found that the trial court did commit error prejudicial to appellant in part, the judgment of the Huron County Court of Common Pleas is affirmed in part and reversed in part. The judgment is reversed only insofar as the trial court denied appellant's motion to suppress the money seized from appellant while he was in custody. This case is remanded to the trial court for further proceedings. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE