



SIXTH CIRCUIT AFFIRMS DENIAL OF MOTION TO SUPPRESS AFTER AMBIGUOUS REQUEST FOR ATTORNEY

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On March 23, 2017, the Sixth Circuit Court of Appeals decided the *United States v. Mays*ⁱ, in which the court discussed whether the statement “I really should have a lawyer, huh?” was a valid assertion of Mays’ right to counsel during a custodial interrogation and request for consent to search his cellular phones. The relevant facts of *Mays*, taken directly from the case, are as follows:

In April 2014, appellant Gregory Mays posted an ad in the "Casual Encounters" section of the online classifieds website Craigslist. He sought a "[s]ubmissive and ready" female who desired to be "used and taken advantage of" and "be made to do many things." The ad specified that he was open to all fantasies, ages, and races, but preferred "no games[,] just new experiences."

On April 16, 2014, an Alliance, Ohio Police Department officer, posing as a fourteen-year-old girl named "Ashley," responded to the ad by email. Although she identified herself as an underage minor, Mays showed interest and began emailing her. The two exchanged messages for several weeks, during which Mays repeatedly asked to meet up with "Ashley" and inquired about her sexual experiences. Several of the more explicit messages from Mays included descriptions of the various sexual acts Mays intended to perform, including promises that she would be "tied up and violated." They also began communicating via text message, leading Mays to frequently encourage "Ashley" to delete all incriminating text messages from her phone.

On May 8, 2014, the two agreed to meet at "Ashley's" home to engage in sexual activity. On the day of their proposed rendezvous, Mays texted and called "Ashley" several times to express concern about getting caught by her neighbors and to ask for directions. When Mays arrived in the parking lot outside her home, he was immediately arrested by Alliance police. Upon the arrest, officers read Mays his *Miranda* rights and discovered two cell phones and a condom in his vehicle. The vehicle was towed, and officers confiscated the items found inside as part of a routine inventory search.

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The officers brought Mays and the confiscated cell phones to the Alliance Police Department, where he was placed in what detectives call a "soft" interview room. Equipped with comfortable furniture, a coffee table, and water, the room was designed to set suspects at ease in order to elicit incriminating information. It worked. Detectives read Mays his *Miranda* rights for a second time and presented him with a *Miranda* waiver form, which he quickly signed. Mays openly discussed his plans to meet up with "Ashley" as well as his interactions with another juvenile female. At some point later in the interview, the detectives presented Mays with a consent form for the search of his two cell phones. The detectives explained what the form meant, including that anything taken from his phones could be used against him in a criminal prosecution.

Before he could finish signing the form, however, Mays remarked aloud "I really should have a lawyer, huh?" The detectives indicated that they would have no problem providing Mays with an attorney if he requested one. This exchange triggered a prolonged colloquy between Mays and the detectives that covered a variety of subjects. At one point during that conversation, the detectives presented Mays with a printed copy of his Craigslist ad and asked him if he could identify it. Mays responded that he could not tell without his glasses, which were left in his car. The officers never provided Mays with his glasses. Instead, they pressed him to finish signing the search-waiver form, telling Mays, "There's [sic] no games here. You want to talk, talk." Mays ultimately relented, remarking "I think lawyers are a waste of money," and signed the search-waiver form. At no point did Mays complain about being unable to read either the *Miranda* form that he was presented at the start of his interview or the search-waiver form. A subsequent search of the phones revealed that, from June 14, 2013 through July 23, 2013, Mays produced digital photographs and videos of himself engaged in sexually explicit conduct with another minor female, which he later sent to others.ⁱⁱ

Mays was ultimately charged with violations of federal law related to exploitation of minors for images on his phones and enticing a minor for sexual activity. He filed a motion to suppress the images obtained from the consent search because he said his consent was not voluntary because he could not read the consent form without glasses. He also argued that his statements were not voluntary because he requested an attorney during the interview. The district court denied his motion to suppress, and Mays entered a conditional guilty plea. He then filed a timely appeal of the denial of his motion to suppress to the Sixth Circuit Court of Appeals.

Mays' first issue on appeal was whether he voluntarily waived his Fourth Amendment rights to consent to the search of the cellular phones. He argued that he could not read the consent form because he did not have his glasses.

The court first examined relevant law related to this issue and stated

It is well-settled law that a "search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (omission in original) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). **One such exception permits police to search a suspect with the suspect's consent. *Ibid.* Valid consent must be given freely and voluntarily, which the court will determine by**

examining the totality of the circumstances. *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996) (citing *Schneckloth*, 412 U.S. at 226).ⁱⁱⁱ [emphasis added]

The court also noted that the government has the burden of proving that consent is freely and voluntarily given. The court stated that factors that should be considered include

the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police." *Riascos-Suarez*, 73 F.3d at 625 (citations omitted).^{iv}

The court then looked to the evidence in the record that is relevant to whether Mays' consent was free and voluntary. First, Mays signed the consent form in three separate places and at no point did he tell the officers that the print was too small to read, which he did do when shown the Craigslist ad. The court reasoned that this showed that Mays was comfortable enough to tell the officers if he could not read the form. Second, the police never threatened Mays and in fact, used the soft interview room, intended to be very non-threatening. Third, the court noted that Mays, at a point during the search, actually showed the officers how to operate his phones. They noted that this is not indicative of someone who felt coerced into signing a consent form. As such, the court affirmed the denial of the motion to suppress related to the Fourth Amendment consent search issue.

The court next examined the second issue, particularly whether the officer's violated Mays Fifth Amendment rights by continuing the interview after he stated "I really should have a lawyer, huh?"

The court first noted the law relevant to this issue and stated

The Fifth Amendment protects "persons suspected or accused of crime . . . [from] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak" by informing him of his rights and honoring them once exercised. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). **The right applies to persons "in all settings in which their freedom of action is curtailed in any significant way," including custodial interrogation. *Ibid.* If, during questioning, an "individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. Consequently, "any statement taken after the person invokes his privilege cannot be other than the product of compulsion" and is thus barred from being introduced against him in a criminal proceeding. *Ibid.*^v [emphasis added]**

The court also noted that when a person invokes their right to an attorney, the request or assertion of the right must be *unambiguous*. The court stated

We have held that "a suspect must assert his [right to counsel] with sufficient clarity that a reasonable officer would perceive it as such under the circumstances." *Franklin v. Bradshaw*, 545 F.3d 409, 414 (6th Cir. 2008)...**Thus, where a suspect merely "makes an ambiguous or equivocal reference to an attorney[,] there is no requirement that law enforcement cease questioning."** *Ibid.* (quoting *United States v. Montes*, 602 F.3d 381, 385 (5th Cir. 2010)).^{vi}

The court also compared Mays' statement to statements made in three relevant prior cases. In each case, the court held that the defendants alleged assertion of their right to counsel was too ambiguous put officers on notice that the suspect was clearly requesting counsel. In discussing the prior cases, the court stated

In *Davis*, the Supreme Court dealt with a suspect who remarked, "Maybe I should talk to a lawyer." *Davis*, 512 U.S. at 462. There, the Court held that the request was not sufficiently unambiguous to be a request for counsel. *Ibid*. In *Amawi*, we dealt with a suspect who, after arrest but prior to boarding a flight to the United States, asked his prospective interviewers if there was a lawyer onboard. *Amawi*, 695 F.3d at 484. We similarly held that simply inquiring about the presence of an attorney "is neither a clear nor unequivocal invocation of the . . . right to counsel." *Id.* at 485. In *United States v. Delaney*, 443 F. App'x 122 (6th Cir. 2011), we held that the inquiry, "I think I should talk to a lawyer, what do you think?" did not constitute an unambiguous request for counsel. *Id.* at 130. In *Delaney*, just as in this case, the interviewing officers informed the suspect that he was free to have an attorney if he desired one, but the suspect chose not to press the issue. *Ibid.*^{vii}

The court then held that in light of the case law discussed above, Mays' statement "I really should have a lawyer, huh?" was ambiguous and not sufficient clear to put the officers on notice that he was requesting a lawyer. In fact, one of the officers actually stated "You want a lawyer, you can ask for a lawyer." This shows the officer was not sure whether Mays wanted a lawyer and further attempted to assure Mays that he could ask for a lawyer. However, Mays did not do so.

As such, the Sixth Circuit affirmed the denial of the motion to suppress.

ⁱ No. 16-3177 (6th Cir. Decided March 23, 2017 Unpublished)

ⁱⁱ *Id.* at 2-4

ⁱⁱⁱ *Id.* at 6

^{iv} *Id.* at 7

^v *Id.* at 8

^{vi} *Id.* at 9

^{vii} *Id.* at 10