Underage Drinking Enforcement Training Center

MONTHLY RESOURCE ALERT:
SEPTEMBER 2011

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OJJDP's 13th National Enforcing Underage Drinking Laws (EUDL) Leadership Conference: A SUCCESS!

We would like to thank all who attended and participated in this year's Conference! The 13th National Leadership Conference (NLC) was held on August 10-12, 2011, at the Rosen Shingle Creek Hotel in Orlando, Florida. This year's NLC theme was "Spotlighting Community Solutions to Underage Drinking". Nearly 1,600 energized and motivated participants attended the conference.

RESOURCE ALERT LEGAL CASE

"Do the administrative regulations of a university giving campus law enforcement access to enforce safety concerns trump Constitutional protections given in the 4th Amendment to the United State Constitution?"

On March 31, 2011, the Court of Appeals of Ohio, Sixth District, Wood County, rendered their opinion in the matter of the appeal of Aaron Miller and Douglas Reining in Bowling Green Municipal Court regarding underage consumption of alcohol, violations of Bowling Green Code of Ordinances 96.02(D). The Appellants pled "no contest" to the charges once their motion to suppress was denied. The state argued that Officer Pearcy entered the Delta Tau Delta fraternity house at Bowling Green State University ("BGSU"), without a warrant, with the purpose of removing appellants from the balcony because of university regulations on use of the balcony. Officer Pearcy discovered alcohol and drugs upon his entry arresting Miller and Reining in the process.

This case presents an interesting question what constitutional protections for an individual, if any, are trumped by a university's desire to keep students safe using an argument that administrative regulations are an exception to the warrant requirement. To read more about this interesting case and determine whether the State's arguments prevailed, please click on the below link for the full case and all of the findings: http://www.udetc.org/documents/ResourceAlerts/Sept2011case.pdf

FEATURED UDETC SERVICES on WWW.UDETC.ORG:

UDETC INTERNET RADIO AND DISTANCE LEARNING

UDETC Internet Radio!

Join us as we discuss the issues surrounding underage drinking on "A National Conversation on Protecting Our Youth – Enforcing Underage Drinking Laws". Our internet radio program will tackle the issues with experts and special guests who are actively working on this state, national and international problem. Tune in **LIVE** every Wednesday from 3:00 – 4:00 PM ET. Shows are rebroadcast every Wednesday evening from 8:00 – 9:00 PM ET.

Distance Learning Course!

Available now, is the first in a series of on-line distance learning courses that aim to provide law enforcement and communities with valuable, no-cost training focusing on the reduction of underage access to alcohol. "Conducting Compliance Check Operations" is a four hour online course designed as a basic-level introduction to compliance check operations and provides a foundation for follow-up on-site training provided by UDETC. The course provides basic guidelines and operational information on reducing sales of alcohol to underage purchasers through compliance investigations of alcohol retailers. It presents rationales for carrying out these investigations and emphasizes the importance of reducing youth access to alcohol thereby reducing alcohol related juvenile crime in the community and improving youth safety and quality of life. Contact hours available upon completion!

You can access both of these resources by visiting www.udetc.org

NATIONAL ELECTRONIC SEMINARS

SEPTEMBER 2011

Massachusetts District Attorneys Help Lead the Way on State EUDL Efforts

Date: Thursday, September 22, 2011
Time: 3:00-4:15 p.m. ET
Speakers: Timothy Cruz, Plymouth County, MA; David Capeless, Berkshire County, MA; Joseph D. Early Jr., Worcester County, MA and Dan DeMille, Massachusetts EUDL Coordinator

In 2009, the Massachusetts Executive Office of Public Safety and Security, took a bold step in addressing underage alcohol problems by bringing a group of new partners to the table. District Attorneys from across the state, who understood the impact of underage alcohol problems, requested the opportunity to join the state's EUDL efforts and the ongoing campaign against underage drinking. Although each proposal was unique to the needs of their county, the district attorneys all recognized the importance of their office in assuming a leadership role in both the education of the community and the opportunity to nudge law enforcement to embrace their important role in curbing underage alcohol use by aggressively enforcing the laws. This webinar will explore how Massachusetts expanded their EUDL partnership, how the participation of the county's chief law enforcement officer has impacted EUDL efforts and how the impact of their efforts moves forward within the Commonwealth of Massachusetts.

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www.udetc.org/documents/ResourceAlerts/ResourceAlert0911.pdf

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2011 Ohio 1545

State of Ohio, Appellee,
v.
Aaron Miller Douglas Reining, Appellants.

Court of Appeals No. WD-10-027.

Court of Appeals of Ohio, Sixth District, Wood County.

Decided: March 31, **2011**.

Matthew L. Reger, Prosecutor for City of Bowling Green, for appellee.

Carrie A. Connelly, for appellants.

DECISION AND JUDGMENT

PIETRYKOWSKI, J.

Aaron Miller and Douglas Reining appeal their convictions in Bowling Green Municipal Court to **underage** consumption of alcohol, violations of Bowling Green Code of Ordinances 96.02(D). Their convictions are based upon no contest pleas. Appellants entered the pleas after the trial court overruled their joint motion to suppress evidence.

Under the motion, appellants sought first, to suppress all evidence gained through the search of the Delta Tau Delta fraternity house at Bowling Green State University ("BGSU"), without a warrant, by a campus police officer based upon claimed illegality of the search. Second, appellants sought to suppress statements made by them to the campus police officer based upon the claim that the statements were made while in custody and without prior *Miranda* warnings. See *Miranda v. Arizona* (1966), 384 U.S. 436.

On the night of the search, the campus police officer issued citations charging both appellants with **underage** consumption of alcohol, a violation of R.C. 4301.69(E)(1) and a first degree misdemeanor, possession of marijuana, a violation of R.C. 2925.11(C)(3)(a) and a minor misdemeanor, and possession with the intent to use drug paraphernalia (grinder for marijuana), a violation of R.C. 2925.14(C)(1) and a fourth degree misdemeanor. After appellants pled no contest to the **underage** consumption charge, the trial court dismissed the other two charges.

Appellants assert one assignment of error on appeal:

Assignment of Error

"The trial court erred by denying Appellants' respective motions to suppress, as the evidence against them was obtained in violation of their rights afforded by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 14 and 10 of the Constitution of the State of Ohio."

Crim.R. 12(I) provides:

"The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

"When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, \ 8. An appellate court reviews a trial court's application of the law de novo. Id.; *State v. McNamara* (1997), 124 Ohio App.3d 706, 710.

Search

Christopher Pearcy, a campus police officer at BGSU, testified at the hearing on the motion to suppress. He stated that on December 8, 2009, he was on patrol when he saw two males standing on the second floor balcony of the Delta Tau Delta fraternity house. He also saw smoke coming from their direction. Entry to the balcony is only available from the second floor of the building. Officer Pearcy admitted that he did not observe any criminal conduct by either of the individuals at any time before he entered the building.

The balcony is located above a side entrance on the second floor and east end of the building. Officer Pearcy did not approach the area from the ground and made no attempt to speak to the individuals from the ground before entering the building.

Pearcy unlocked the front door to the fraternity house by using an electronic key (personal entry device or "PED") and entered at approximately 12:06 a.m. He walked directly to the second floor and gained entry onto the balcony through a computer lab. Pearcy testified that he immediately smelled burnt marijuana upon walking onto the balcony and that he saw one of the appellants holding a pipe. Pearcy took possession of the pipe. The two individuals on the balcony were appellants.

While in the fraternity house, Pearcy also observed an open container of beer and a grinder, drug paraphernalia, in a common room located on the first floor of the fraternity house. During the course of his investigation at the fraternity house, Pearcy questioned appellants concerning marijuana, drug paraphernalia, and **underage drinking** of beer that night. Appellants made incriminating statements to Pearcy during questioning.

In *Athens v. Wolf* (1974), 38 Ohio St.2d 237, the Ohio Supreme Court recognized that with respect to intrusions by law enforcement officials, the Fourth Amendment's protections against unreasonable searches and seizures extends to university dormitory rooms. Id. at paragraph one of the syllabus. Here, appellants object to Officer Pearcy's warrantless entry into the fraternity house itself, claiming a reasonable expectation of privacy even in common areas of the residence. Although the Ohio Supreme Court considered the legality of a search of a fraternity house in *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, the case did not address the issue of the scope of Fourth Amendment protections afforded individual residents of a fraternity house in common areas.

In determining whether the Fourth Amendment protects against a search, "the rule that has emerged * * * is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as `reasonable.'" *Katz v. United States* (1967), 389 U.S. 347, 361 (Harlan, J., concurring). See *Rakas v. Illinois* (1978), 439 U.S. 128, 143-144; *State v. Williams* (1995), 73 Ohio St.3d 153, 166-167.

At the time of the search, only six or seven individuals lived at the Delta Tau Delta fraternity house. Access to the building by the general public was restricted. The building has two entrances and they remained locked. Entry to the fraternity house required use of a PED. Doors locked automatically after use. The only non-resident issued a PED was the fraternity president. Others, including non-resident fraternity members, gained entry to the building only by knocking at the door or by accompanying someone with a PED. Guests were required to be accompanied at all times, particularly after midnight.

Appellants testified that residents to the fraternity house did not live in selfcontained living units. They shared traditional living areas linked by common hallways and corridors.

Appellants argue that the fraternity house should not be treated as a private home because the fraternity house is owned by the university and subject to the student conduct code and university health and safety regulations. The state contends that Fourth Amendment protections should extend solely to a resident's room. A state university cannot require students to waive their Fourth Amendment protections against unreasonable intrusions by law enforcement officials in order to live in university housing. *State v. Ellis,* 2d Dist. No. 05CA78, 2006-Ohio-1588, 13; *Piazzola v. Watkins* (5th C.A. 1971), 442 F.2d 284, 289-290. See *Wolf,* 38 Ohio St.2d at 240.

Appellants request the court to follow the decision of the U.S. Court of Appeals for the Seventh Circuit in *Reardon v. Wroan* (7th C.A. 1987), 811 F.2d 1025, and rule that a fraternity house is to be treated the same as a home for purposes of Fourth Amendment rights:

"[I]t is necessary to address briefly whether the fraternity residence is afforded the same Fourth Amendment status as a home under the protections of *Payton.* More specifically, there is some question as to whether the hallway to the fraternity house where the plaintiffs were arrested is comparable, under a Fourth Amendment analysis, to the common areas of

apartment buildings where the cases have held that privacy interests are not protected under Payton. * * * Although there are certain similarities to the apartment building cases, fraternity residents clearly have a greater expectation of privacy in the common areas of their residence than do tenants of an apartment building. As the district court noted, fraternity members could best be characterized as `roommates in the same house,' not simply co-tenants sharing certain common areas. Moreover, a fraternity, by definition, is intended to be something of an exclusive living arrangement with the goal of maximizing the privacy of its affairs." Id. at 1028, fn. 2 (Citations omitted.)

At the time of the search, Delta Tau Delta fraternity house provided residence for six or seven students with access to the building by the public restricted at all times. We agree with the *Reardon* court that the shared living arrangement at a fraternity house supports treating residents as "roommates in the same house." We conclude that appellants met their burden of showing a reasonable expectation of privacy throughout the house and that the fraternity house should be treated as a home for purposes of Fourth Amendment protections against unreasonable searches and seizures by law enforcement officials.

"The `physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' *United States v. United States Dist. Court for E. Dist. Of Michigan, S. Div.* (1972), 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752. Warrantless entries of residences are presumptively unreasonable, subject to only a few established, well-delineated exceptions. *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639." *State v. Tallent,* 6th Dist. No. L-10-1112, **2011**-Ohio-1142, ¶ 12.

The state argues that appellants had no reasonable expectation of privacy while on the balcony to the fraternity house because their activities were observable from a public street, citing *State v. Ritchie* (Aug. 25, 2000), 2d Dist. No. 2000-CA-20 and *California v. Ciraolo* (1986), 476 U.S. 207. In *California v. Ciraolo,* the United States Supreme Court held that a home owner held no reasonable expectation of privacy that society would be expected to honor that would preclude aerial observation by the naked eye of a defendant's backyard through use of an aircraft overhead. *Ciraolo,* 476 U.S. at 213-214. In *State v. Ritchie,* the Second District Court of Appeals concluded that there is no reasonable expectation of privacy to observation of criminal activities within a house, as to activities that could be observed by persons present at routes normally used to enter or leave the residence. The defendant was observed from outside a house while sitting within at a table with drug paraphernalia, a pipe, and a baggie containing what appeared to be marijuana. Based upon the observation, the police secured a warrant to search the residence.

This case does not present circumstances of the type considered in either *Ciraolo* or *Ritchie.* Officer Pearcy testified that he did not observe any unlawful activity from outside the fraternity house. His observations of criminal activity, including the smell of burnt marijuana, were made from the second floor of the building as he entered onto the balcony.

Such observations come within restrictions against unreasonable searches and seizures under the Fourth Amendment unless Officer Pearcy was lawfully present on the second floor at the time:

"As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a `search' within the meaning of the Fourth Amendment." LaFave, *Search and Seizure* (4th Ed. 2004) 445, Section 2.2.

For Officer Pearcy's observations from the second floor to come within an exception to the Fourth Amendment protections against unreasonable searches and seizures, the intrusion that permitted the view must itself be lawful. See *State v. Williams* (1978), 55 Ohio St.2d 82 at paragraph one of the syllabus.

Even if Officer Pearcy's observations from outside the building presented probable cause to believe that appellants were smoking marijuana, the exigent circumstances exception would not apply to support a warrantless search. Possession of marijuana, a violation of R.C. 2925.11(C)(3)(a), is a minor misdemeanor. Section 14, Article I of the Ohio Constitution prohibits warrantless arrests for minor misdemeanors absent special circumstances and also prohibits searches incident to such arrests. *State v. Brown,* 99 Ohio St.3d 323, 2003-Ohio-3931, 125. This court has held that the exigent circumstances exception to the presumption of unreasonableness of warrantless home entries is not applicable to misdemeanor offenses. *State v. Christian,* 6th Dist. No. F-04-003, 2004-Ohio-3000, ¶ 11; *State v. Scott* (1999), 135 Ohio App.3d 253, 258.

The state argues that the fraternity house is university owned and subject to university regulations, including restricted use of balconies to fraternity houses for safety reasons. Although testimony as to the height of the balcony walls differed, with testimony providing heights ranging from two to three feet in height, waist high, or even four feet high, photographs in evidence demonstrated that the balcony created no imminent risk to the safety of the two students standing there.

The state argues that Officer Pearcy entered the fraternity house with the purpose to remove appellants from the balcony because of university regulations on use of the balcony. However, Officer Pearcy testified that ultimate decision under university regulations as to student use of balconies rested with the house director. The university regulations themselves were not submitted in evidence at trial.

On appeal, the state has submitted a copy of the BGSU Student Handbook 2009-2010 as an exhibit to its appellate brief and made a series of arguments based upon The Residential Community Policies set forth in the handbook. We cannot consider the student handbook in this appeal. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. For the same reason we also do not consider appellants' arguments that campus police are not university officials that are authorized to enter university owned living areas without a warrant under the university regulations.

We conclude that competent credible evidence in the record is lacking to establish that administrative regulations of the university authorized entry by campus police officer Pearcy into the fraternity house on administrative grounds for reasons unrelated to law enforcement.

We also conclude that the state failed to meet its burden of demonstrating that the warrantless entry and search of the fraternity house by campus police fell within an exception to the warrant requirement under the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution. Accordingly, the trial court erred in failing to suppress all evidence gained from Officer Pearcy's entry into the building and search of the premises. We find appellants' assignment of error is welltaken on those grounds.

This determination renders moot appellants' alternative basis for suppression of statements made to Officer Pearcy on *Miranda* grounds. Pursuant to App.R. 12(A)(1)(c), we do not address the moot issue.

We conclude appellants were denied a fair trial. We reverse the judgment of the trial court as to both appellants and remand this consolidated appeal to the Bowling Green Municipal Court for further proceedings consistent with this opinion. Pursuant to App.R. 24, the state is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

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

Mark L. Pietrykowski, J. Arlene Singer, J. and Thomas J. Osowik, P.J. concur.

National Electronic Seminars
Enforcing Underage Drinking Laws Program

The OJJDP Audio–TELECONFERENCE Series

2011 National Electronic Seminars Calendar

September 22, 2011 3:00 – 4:15 p.m. Eastern Time

Massachusetts District Attorneys Help Lead the Way on State EUDL Efforts
In 2009, the Massachusetts Executive Office of Public Safety and Security, took a bold step in addressing underage alcohol problems by bringing a group of new partners to the table. District Attorneys from across the state, who understood the impact of underage alcohol problems requested the opportunity to join the state's EUDL efforts and join in the ongoing campaign against underage drinking. Although each proposal was unique to the needs of their county, the district attorneys all recognized the importance of their office in assuming a leadership role in both the education of the community and the opportunity to nudge law enforcement to embrace their important role in curbing underage alcohol use by aggressively enforcing the laws. This webinar will explore how Massachusetts expanded their EUDL partnership, how the participation of the county's chief law enforcement officer has impacted EUDL effort and examine the impact of their efforts moving forward within the Commonwealth of Massachusetts.

October 20, 2011 3:00 – 4:15 p.m. Eastern Time

Meaningfully Engaging Law Enforcement in Coalition Efforts
As a coalition, have you experienced the challenge of engaging your law enforcement partners in a meaningful way? Perhaps you are a law enforcement officer and are wondering what your role might be with a local coalition. Join us as we discuss the keys to engaging and sustaining a successful partnership between coalitions and law enforcement. We will learn the "do's and don'ts", the culture, and some of the best practices as we hear from successful community and enforcement practitioners.

November 17, 2011 3:00 – 4:15 p.m. Eastern Time

Alcohol and Crime
How many crimes are committed in this country where alcohol is a causal factor? If you are a cop on the street you don't have to be a scientist to figure that out. Cops know the answer based on experience; it's a huge percentage, However, in a world where science is fact how do we really prove it. In the spring of 2005, the Wyoming Association of Sheriffs and Chiefs of Police received grant funding from the Wyoming Department of Transportation – Highway Safety Program to collect and evaluate alcohol-related arrest data in ten counties in Wyoming for a period of six months. Although it had long been suspected that alcohol was a factor in a large number of custodial arrests in Wyoming, reliable data had not been available previously to more accurately determine the scope and impact of alcohol on crime in Wyoming. This pilot project was initiated with the expressed purpose of formulating effective enforcement strategies aimed at reducing the number of alcohol related crimes and traffic crashes in Wyoming. The data collection process has continued since 2005, has been refined and was expanded to include data collection in all twenty-three counties of Wyoming in 2006. The collection of data was then extended to a full twelve-month period in 2008. We've invited a well respected researcher in the field of criminal justice in Wyoming to discuss his conclusions of the study and what strategies are underway to inform Wyoming communities of the results and what communities can do to reduce alcohol related crime.

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Enforcing Underage Drinking Laws Program

AUDIO CONFERENCE

TOPIC

Massachusetts District Attorneys Help Lead the Way on State EUDL Efforts

In 2009, the Massachusetts Executive Office of Public Safety and Security, took a bold step in addressing underage alcohol problems by bringing a group of new partners to the table. District Attorneys from across the state, who understood the impact of underage alcohol problems, requested the opportunity to join the state's EUDL efforts and the ongoing campaign against underage drinking. Although each proposal was unique to the needs of their county, the district attorneys all recognized the importance of their office in assuming a leadership role in both the education of the community and the opportunity to nudge law enforcement to embrace their important role in curbing underage alcohol use by aggressively enforcing the laws. This webinar will explore how Massachusetts expanded their EUDL partnership, how the participation of the county's chief law enforcement officer has impacted EUDL efforts and how the impact of their efforts moves forward within the Commonwealth of Massachusetts.

DATE

September 22, 2011

TIME

3:00–4:15 p.m. ET

PRESENTERS

Presenter 1:
District Attorney Timothy Cruz, Plymouth County, Massachusetts

Presenter 2:
District Attorney David Capeless, Berkshire County, Massachusetts

Presenter 3:
District Attorney Joseph Early, Jr. Worchester County, Massachusetts

Presenter 4:
Dan Demille, Boston, Massachusetts
daniel.demille@state.ma.us

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