

AUGLAIZE COUNTY
COMMON PLEAS COURT
FILED

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I. JEAN NECKSTROTH
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION**

STATE OF OHIO)	CASE NO. 2021 CR 0161
)	
Plaintiff)	
)	JUDGE FREDERICK D PEPPE
vs.)	
)	
COLE D FISCHBACH)	MOTION TO SUPPRESS
)	STATEMENT
Defendant)	

Now comes the Defendant, Cole Fischbach, by and through his attorney Robert A. Grzybowski and moves the Court to suppress the oral statement made by the Defendant on July 29, 2021 to officers of the Auglaize County Sheriff's Department.

Mr. Fischbach's statement was obtained in violation of his rights against self-incrimination pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 10 of the Ohio Constitution.

FACTS

On June 29, 2021, Lt. Burke and Deputy Ryan Burke of the Auglaize County Sheriff's Department met Mr. Fischbach at the New Knoxville school. He was the suspect in an allegation reported by a Kim Waterman, New Knoxville School official, that he was in an inappropriate relationship with a juvenile student at the school. An interrogation was conducted by Lt. Burke

and Deputy Burke which was tape recorded without Mr. Fischbach knowledge. It's from these facts, Mr. Fischbach moves to suppress the oral statement given to law enforcement.

MEMORANDUM

In *Miranda*, the United States Supreme Court concluded that in the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. Those safeguards include the now familiar *Miranda* warnings- namely, that the defendant be informed "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires"-- or their equivalent. *Id.* At 479.

Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" *Id.* At 444. In order to determine whether a person is in custody for purposes of receiving *Miranda* warnings, courts must first inquire into the circumstances surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave. *Thompson v. Keohan* (1995), 516 U.S 99, 112, 116 S.Ct. 457, 133 L.Ed. 2d 383. Once the factual circumstances surrounding the interrogation are reconstructed, the court must apply

an objective test to resolve “the ultimate inquiry” of whether there was a “formal arrest or restraint of freedom of movement’ of the degree associated with a formal arrest”. *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275, quoting *Oregon v. Mathiason*, 429 U.S. 4962, 4965, 97 S.Ct. 711, 50 L.Ed.2d 714.

In *Rhode Island v. Innis* (1980), 446 U.S. 291, 298, 100 S. Ct. 1682, 64 L.Ed.2d 297, the court undertook, to refine the contours of the term “interrogation” in light of the use of the word “questioning” in *Miranda*. The *Innis* court determined that the *Miranda* rules are not so narrow as to apply to only “those police interrogation practices that involve express questioning of a defendant ***.” *Innis* court read the term “interrogation” more broadly, to also include the more subtle “techniques of persuasion” sometimes employed by police officer that do not rise to the level of express questioning, but which also can be extremely coercive in some situation. *Id.* At 299-300.

“The fundamental import of the privilege [against compulsory self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.” *Id.* At 299-300, quoting *Miranda*, 384 U.S. at 4780. Moreover, the *Innis*, court determined that “[i]nterrogation,’ as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself” *Id.* At 300.

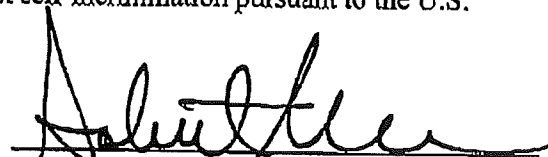
Therefore, the first issue before the Court is to determine whether Mr. Fischbach was in custody when he was detained by law enforcement officers.

Second, whether statements made by Mr. Fischbach were made knowing, voluntarily and intelligently, so as to waive his right against self-incrimination. Based upon the totality of the

circumstances surrounding the interrogation, Mr. Fischbach was in custody which required Miranda warnings.

Furthermore, Mr. Fischbach did not knowingly, voluntarily, and intelligently waive his right against self-incrimination.

WHEREFORE, Mr. Fischbach moves the Court to suppress the oral/recorded statement of June 29, 2021 because it violated his right against self-incrimination pursuant to the U.S. Constitution and Ohio Constitution.

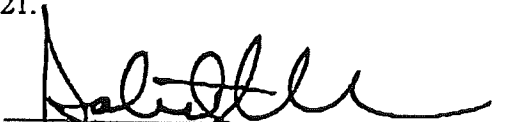


LAW OFFICE OF
ROBERT A GRZYBOWSKI

By: Robert A. Grzybowski
Attorney for Defendant
Ohio Bar No. (0044014)
212 N. Elizabeth St., Suite 210
Lima, Ohio 45801
(419) 221-0725
Fax 419-222-1326
robertgrzybowski@centurylink.net

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served upon the Prosecutor via facsimile at 419-739-6786, this 17th day of November, 2021.



Robert A. Grzybowski
Attorney for Defendant