

Recent Case Report

U.S. v. Howard

(8th Cir. 2008) __ F.3d __ [2008 WL 2697238]

ISSUES

A potpourri of legal issues resulting from a series of encounters over a seven-week period between James Howard and officers in Omaha, Nebraska.

FACTS

Howard, a well-known miscreant in Omaha, made an illegal left turn in front of an officer and was promptly pulled over. One of the first things the officer noticed was a bottle of cough syrup sticking out from under Howard's pants pocket. The officer suspected the bottle contained "lean," a local street name for codeine cough syrup fortified with some illegal drug. But, just to make sure, he asked, "I that 'lean?'" Howard said yes, so the officer seized the bottle, arrested him, searched him incident to the arrest, and found marijuana. While transporting Howard to jail, the officer happened to mention that residents in his neighborhood had been complaining about gang activity and gunfire. Howard responded by saying that his only vices were "smoking weed" and "drinking lean." He had not been *Mirandized*.

One week later, officers encountered Howard again. This time he was inside an apartment they had entered to search for drugs pursuant to a warrant. In the course of the search, the apartment manager permitted officers to search the basement of the building which the occupants of the apartment had been using. Hidden in the ceiling, they found stolen weapons, ammunition, bottles of codeine, digital scales, and plastic bags containing rock cocaine. After being *Mirandized*, Howard admitted that some crack cocaine the officers found in his possession was his, but he denied that he lived in the apartment or was otherwise responsible for all the evidence found in the basement. An officer noticed that Howard had a bandage on his leg, so he asked what had happened. Howard explained that he had gotten a rash from sleeping on a cot in the apartment that was being searched.

One month later, an officer observed Howard standing on the porch of an apartment building. When Howard saw the officer, he ran into an apartment and shut the door. The officer knew that Howard was arrestable for selling crack cocaine to a police informant, so he went in and arrested him. During a search incident to the arrest, the officer found marijuana.

Two weeks later, an officer stopped Howard for running a red light. While talking with him, the officer noticed "small white crumbs of crack cocaine" on the passenger seat. After being arrested and *Mirandized*, Howard admitted that he had been smoking "primo," which is a local street name for a mixture of crack cocaine and marijuana.

When Howard's motion to suppress the evidence and statements was denied, he pled guilty to a variety of charges.

DISCUSSION

On appeal, Howard urged the court to suppress all of the evidence seized during these incidents and all of his incriminating statements. The court refused.

ARREST #1 (PART A): Howard began by arguing that the officer who stopped him for making an illegal left turn violated his *Miranda* rights because he had not obtained a waiver before asking if the bottle contained “lean.” Officers must, of course, obtain a waiver before “interrogating” a suspect who is “in custody.” And it is settled that a suspect is “in custody” if a reasonable person in his position would have believed he was under arrest, or that his freedom had been restricted to the degree associated with an arrest.¹ But the court pointed out that it is equally settled that drivers who have been stopped for traffic violations are not “in custody” for *Miranda* purposes because these types of detentions are usually brief and relatively nonthreatening. As the United States Supreme Court observed in a DUI case, “The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*.”² Consequently, the court ruled that a waiver was not required.

ARREST #1 (PART B): Howard argued that his subsequent admission—that he only smokes “weed” and drinks “lean”—should have been suppressed because, at that point, he had been arrested. But the court pointed out that, even if a suspect is in custody, officers are not required to obtain a *Miranda* waiver unless they “interrogate” him, meaning the officer must have asked a question or made a statement that was reasonably likely to elicit an incriminating response.³ Accordingly, the court ruled that the officer’s statement to Howard—explaining why the police were saturating the area—plainly did not fall into the category of “interrogation.”

ARREST #2 (PART A): As noted, the second arrest occurred when officers, while searching an apartment for drugs, found cocaine in Howard’s possession. Howard argued that the cocaine and his confession that he possessed it should be suppressed because the warrant was based solely on information furnished by a police informant. The court explained, however, that information from an informant may establish probable cause for a warrant if the informant has a good track record for providing accurate information.⁴ And here, said the court, the officers who testified at the motion to suppress established that this informant was reliable.

ARREST #2 (PART B): Howard claimed that the guns, drugs, and paraphernalia discovered in ceiling of the apartment building’s basement should have been suppressed because, although the apartment manager permitted the officers to search it, they did not have a warrant. The court wasted no time with this argument, pointing out that Howard lacked standing to challenge the search inasmuch as the basement was a common area in the building.

¹ See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 662; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442; *California v. Beheler* (1983) 463 U.S. 1121, 1125; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.

² *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

³ See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

⁴ See *Adams v. Williams* (1972) 407 U.S. 143 [“[W]e believe [the officer] acted justifiably in responding to his informant’s tip. The informant was known to him personally and had provided him with information in the past.”]; *People v. Terrones* (1989) 212 Cal.App.3d 139, 146 [“If the informant has provided accurate information on past occasions, he may be presumed trustworthy on subsequent occasions.”].

ARREST #2 (PART C): As noted, one of the officers who was executing the warrant asked Howard what was wrong with his bandaged leg. Howard's response was incriminating because, by admitting that slept in the apartment, he connected himself to the evidence found there and in the basement. Howard argued that his response should have been suppressed because the officer's question constituted "interrogation." The court disagreed, saying there was "no evidence the police could have reasonably suspected he obtained the wound from sleeping in a bed in a particular location" and, furthermore, there "is not even a reasonable probability the police were trying to trick Howard into disclosing this particular information."

ARREST #3: The court summarily rejected Howard's argument that the officer who chased him into the apartment lacked probable cause to arrest him, pointing out that the same officer had seen him selling crack cocaine to an informant. (It appears that Howard did not challenge the officer's entry into the apartment. This was probably because the entry would have been justified under the "hot pursuit" exception to the warrant requirement.⁵ In addition, it appears that Howard would have lacked standing to challenge the entry.)

ARREST #4: Howard contended that when he was stopped for running the red light he was under the influence of "primo," and therefore his admission that he was using primo and marijuana was involuntary. The courts have consistently ruled, however, that a statement made by a person who is under the influence of drugs will not be deemed involuntary if his answers were responsive to the officer's questions.⁶ And here, said the court, Howard "appeared to understand the questions posed to him, and responded appropriately."

GROUND FOR THE TRAFFIC STOPS: Finally, Howard argued that the two traffic stops were unlawful because, contrary to the testimony of the officers, he did not make an illegal left turn or run a red light. The court ruled, however, that in light of Howard's lengthy arrest record and his recent streak of felonies, misdemeanors, and infractions, his credibility was shot.

Howard's convictions were affirmed. POV

⁵ See *U.S. v. Santana* (1976) 427 U.S. 38, 43 ["[A] suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place." Edited].

⁶ See *Mincey v. Arizona* (1978) 437 U.S. 385, 399 ["Mincey gave unresponsive or uninformative answers to several more questions"]; *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618 ["Each of appellant's answers is appropriate to the question asked."]; *US v. Gaddy* (8th Cir. 2008) __F.3d__ [2008 WL 2717681] [despite sleeplessness and recent drug use, the suspect's waiver was voluntary because he appeared to be "calm" and "cooperative," and "in control of his facilities"].