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Contents

CIVIL RIGHTS:

Arrest of Individual Watching Making Traffic Stops
Chestnut v. Wallace, CA8, Np. 18-3742, 1/21/20

One evening around dusk, Kevin Chestnut paused his jog in a St. Louis park to watch St. Louis Metropolitan Police Department Officer Leviya Graham perform a traffic stop. He watched the stop for five or ten minutes and then resumed his jog. Shortly thereafter, Chestnut stopped again to observe Graham perform another traffic stop. During this stop, Chestnut stood in a grassy area between the jogging trail and the sidewalk and leaned against a tree. He testified that he stood thirty to forty feet away and across the street from where Graham was conducting the stop. He asserts that he was watching the stops out of curiosity since there had "been a lot of difficulty in citizen/police interaction" as of late. The parties point out that this specific park had been the site of testy exchanges between police and citizens.

Chestnut caught Graham's attention. She radioed dispatch for assistance, reporting that a suspicious person had been following her to her car stops. She described Chestnut as a white male in a yellow shirt who was leaning against a tree across the street from her. Officer Dawain Wallace responded to the call and arrived on scene. From his police car, he saw someone matching Chestnut's description and shined his spotlight on him. Wallace testified at one point that either Graham or the dispatcher had said that Chestnut was "hiding in the treeline" and "kind of peeking and lurking around a tree." Chestnut, on the other hand, testified that he purposely stood in a location where the headlights on Graham's car illuminated him. He said that he intentionally made himself plainly visible, that he was standing still, and that he was not interfering.

After shining his spotlight, Wallace got out of his car, approached Chestnut, and asked him for some form of identification. Chestnut had none on him, so Wallace asked him for his name, address, and social security number. Wallace maintains that he requested this information so he could determine whether Chestnut had any outstanding warrants. Chestnut provided his name and, he says, his birthday. But he agreed to provide only the last four digits of his social security number. At that point, Wallace frisked Chestnut for weapons but found none, yet he directed other officers who had arrived on scene to put Chestnut in handcuffs. Chestnut then provided his full social security number to Wallace and asked to speak to one of Wallace's supervisors. Wallace used the information to perform a warrants check, and he learned that Chestnut had no outstanding warrants. After Wallace's supervisor arrived and spoke with Chestnut, he directed that the handcuffs be removed and permitted Chestnut to leave. Chestnut estimated that the entire encounter with Wallace lasted twenty minutes.

Chestnut sued Wallace, and others not relevant to this appeal, for damages under 42 U.S.C. § 1983, alleging that Wallace detained, frisked, and handcuffed him without reasonable suspicion or probable cause to believe he had engaged in or was about to engage in unlawful conduct. When Wallace moved for summary judgment on the ground of qualified immunity, the district court denied the motion.

Upon review, the Court of Appeals for the Eighth Circuit found, in part, as follows:

"Wallace may be challenging the denial of qualified immunity when the facts are properly viewed in Chestnut's favor—a matter over which we do have jurisdiction. But we agree with the district court that if we view the facts that way, Wallace violated Chestnut's clearly established constitutional rights. See *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005). In *Walker*, attorney John Walker observed an encounter between police and some young men. We said that 'Walker stood with his arms folded some forty to fifty feet from the conversation between the police and the young men' and did not speak to anyone. When officers asked him what he was doing, he responded that he was watching the town's 'finest in action.'

"After further conversation, Walker identified himself as an attorney and offered his driver's license to one of the officers, but the officer instead handcuffed Walker, put him in the back of a hot police car for twenty minutes, and drove him to the police station. Walker was charged with obstructing governmental operations. The purely legal question was whether the officer had arguable probable cause to arrest Walker for obstructing governmental operations because Walker distracted officers who were conducting a traffic stop by silently watching the encounter from across the street with his arms folded in a disapproving manner.

"In ruling for Walker, we explained that in a democracy, public officials have no general privilege to avoid publicity and embarrassment by preventing public scrutiny of their actions. We noted that public police activity invariably draws a crowd of interested but benign on-lookers, and we thought it preposterous that a silent, non-interfering on-looker could have distracted the officers from safely completing the traffic stop. We concluded that no reasonable police officer could believe that he had arguable probable cause to arrest such an on-looker in this situation, for obstruction of governmental operations or for any other purported crime.

"Taking the facts in Chestnut's favor, we think *Walker* establishes that Wallace violated Chestnut's clearly established right to watch police-citizen interactions at a distance and without interfering. We think we have correctly characterized the principle acted on in *Walker*, and thus the right in question, and we conclude that Chestnut has carried his burden to show that *Walker* clearly establishes such a right.

"Other legal authorities fully support our holding that the right here was clearly established. Every circuit court to have considered the question has held that a person has the right to record police activity in public. See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017). Four circuits had so decided by the time of the events in question here. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). This robust consensus of cases of persuasive authority suggests that, if the constitution protects one who records police activity, then surely it protects one who merely observes it—a necessary prerequisite to recording. Our circuit in particular has been quite forthright in upholding the right of citizens to engage with officers while they perform their duties. For example, in *Hoyland v. McMenomy*, we held that officers did not have qualified immunity to arrest a man who had watched officers arrest his wife and even shouted at them. 869 F.3d 644, 654–55 (8th Cir. 2017). We acknowledged that the man was shouting criticisms at the officers while they tried to effect an arrest, but we adverted to the principle from Walker that public officials have no privilege to avoid public scrutiny and criticism of their actions. And we did so despite any fear of danger the officers felt due to Hoyland's presence. In T*hurairajah v. City of Fort Smith*, we affirmed the denial of qualified immunity against an officer who arrested a man who drove by the officer while the officer performed a traffic stop and shouted an obscenity. 925 F.3d 979, 983–84 (8th Cir. 2019). Surely if officers cannot seize someone who criticizes or curses at them while they perform official duties, they cannot seize someone for exercising the necessarily included right to observe the police in public from a distance and without interfering."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/01/183472P.pdf

CIVIL RIGHTS: Cross-Border Shooting **Hernandez v. Mesa**

USSC, No. 17-1678, 587 U.S. ___ 2/25/20

U.S. Border Patrol Agent Mesa, standing on U.S. soil, shot and killed Hernández, a 15-year-old Mexican national, who was on Mexican soil, after having run back across the border after entry onto U.S. territory. Mesa contends that Hernández was part of an illegal border crossing attempt. Hernández's parents claim he was playing a game with his friends that involved running across the culvert. The Department of Justice concluded that Mesa had not violated Customs and Border Patrol policy or training, and declined to bring charges. The government denied Mexico's request for Mesa to be extradited. Hernández's parents sought damages under Bivens, alleging that Mesa violated Hernández's Fourth and Fifth Amendment rights.

The United States Supreme Court declined to extend a Bivens action to the cross-border shooting. The Court stated that a cross-border shooting—is significantly different and involves a "risk of disruptive intrusion by the Judiciary into the functioning of other branches." The Court noted that foreign relations are "so exclusively

entrusted to the political branches as to be largely immune from judicial inquiry" and noted the risk of undermining border security.

The most important question is whether Congress or the courts should create a damages remedy. Here the answer is Congress. Congress's failure to act does not compel the Court to step into its shoes.

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/19pdf/17-1678_m6io.pdf

CIVIL RIGHTS: Excessive Force; Attempt to Regain Control
Johnson v. Rogers
CA7, No. 19-1366, 12/17/19

Timothy Johnson showed up drunk for an appointment at a rehab clinic and threatened a therapist and the security guard. Police officers arrested and handcuffed Johnson behind his back. Having informed the officers that he would run away, they sat him on the pavement next to a patrol car.

Subsequent events were captured on video. Johnson managed to stand. The officers walked him backward and sat him on the grass. They returned to their cars to do paperwork. In about a minute, Johnson got to his knees and stood again. He started to move away, shouting threats and racial taunts.

Officer Michael Rogers pulled Johnson backward by his cuffed hands. When that did not return him to the ground, Rogers claims he used a leg sweep. Johnson contends that his fall and compound leg fracture resulted from a kick designed to punish him rather than to return him to a sitting position. The grainy video does not enable a viewer to distinguish these possibilities. The district court rejected his suit under 42 U.S.C. 1983 on summary judgment.

Upon review, the Seventh Circuit affirmed:

"Rogers is entitled to qualified immunity. Johnson, who had told the officers that he wanted to run away, was not under control. That an attempt to regain control caused injury, perhaps because poorly executed, does not lead to liability. The excessive-force inquiry is objective. If the force used was objectively allowable, the officer's state of mind cannot make it unconstitutional."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D12-17/C:19-1366:J:Easterbrook:aut:T:fnOp:N:2446351:S:0

CIVIL RIGHTS:
Excessive Force; Chokehold
Tuuamalemalo v. Green
CA9, No. 18-15665, 12/24/19

Shahann Greene, a police officer in Las Vegas, Nevada, placed Ian Tuuamalemalo in a chokehold during an encounter following a concert. The chokehold rendered Tuuamalemalo unconscious, and it took some time and several attempts to revive him. Tuuamalemalo sued under 42 U.S.C. § 1983, alleging excessive force. Officer Greene moved for summary judgment based on qualified immunity. The district court denied the motion and Greene appeals.

Upon review, the Ninth Circuit affirmed the district court's denial of summary judgment based on qualified immunity, finding as follows:

"The panel held that its decision in *Barnard v. Theobald*, 721 F.3d 1069 (9th Cir. 2013), squarely addressed the constitutionality of the use of a chokehold on a non-resisting person. Barnard held that any reasonable person should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable. In this case, plaintiff was not resisting arrest when the officer placed him in a chokehold, and there was little chance he could initiate resistance with five other officers fully restraining him and pinning him to the ground. Therefore, it was clearly established that the use of a chokehold on a non-resisting, restrained person violates the Fourth Amendment's prohibition on the use of excessive force."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/24/18-15665_.pdf

CIVIL RIGHTS:

Excessive Force; Imminent Threat to Other if Subject Allowed to Escape
Ybarra v. City of Chicago
CA7, No. 19-1435, 1/3/20

Chicago officers Francis Valadez and Monica Reyes, in an unmarked police car patrolling a neighborhood where a gang-related shooting had recently occurred, saw a passenger in Rafael Cruz's Chevy Tahoe fire gunshots at the occupants of another car. Cruz sped away. The officers followed Cruz's Tahoe, which had dark, tinted windows, but did not activate emergency lights or sirens. Cruz turned and struck a parked car, pushing it forward into a second car, which rolled into a third. Cruz kept driving before crashing into another car and coming to a stop. The officers parked behind Cruz's Tahoe, believing that it had stalled. Valadez began getting out of the car, announcing that he was a police officer. Cruz put his Tahoe into reverse, striking the police car, then pulled forward into a parking lot. The officers followed on foot, wearing bulletproof vests that displayed the police star. The parking lot was "pretty well lit." Cruz's passenger testified that he knew that Valadez was an officer because he could see Valadez's vest. Cruz did not stop but turned back toward the exit. Cruz's headlights shone directly at the officers, who then opened fire. Cruz died as a result of a gunshot wound. Approximately 90 seconds elapsed from the initial shots until Cruz was shot in the parking lot.

The Seventh Circuit affirmed the rejection of claims under 42 U.S.C. 1983. "The officers acted reasonably in using deadly force to protect others in the vicinity by preventing Cruz's escape."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-03/C:19-1435:J:Flaum:aut:T:fnOp:N:2453320:S:0

CIVIL RIGHTS:

Excessive Force; Qualified Immunity
Reich v. City of Elizabethtown
CA6, No. 18-6296, 12/19/19

While traveling to a mental health treatment facility, Joseph Blough got out of his fiancée's (Amanda Reich) vehicle holding his knife, walked through traffic, and wandered into a residential neighborhood. Blough was experiencing hallucinations, having quit his schizophrenia medication. When he ignored his fiancée's repeated pleas to get back in the car, she called 911. Reich told police officers that Blough was paranoid and did not like the police, having been shot by police in the past. After he refused

commands to drop the knife, Blough "took a step forward toward them" with his knife raised in his right hand in a stabbing position. The officers fired three shots, killing Blough. His estate sued, claiming that the officers used excessive force.

The Sixth Circuit affirmed the rejection of the claims on summary judgment. "The officers' use of deadly force was objectively reasonable under the Fourth Amendment; they are shielded by qualified immunity. The totality of the circumstances gave the officers probable cause to believe that Blough posed a threat of serious physical harm to them and others."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0303p-06.pdf

CIVIL RIGHTS: Judicial Decisions of a Duly Elected Judge

Williams v. City of Sherwood
CA8, No. 17-2982, 1/28/20

Tamatrice Williams filed suit against the city of Sherwood under 42 U.S.C. 1983, alleging that it had jailed her without inquiring into whether she had the means to pay the fines imposed and without appointing counsel for her. The district court denied her claims.

The Eighth Circuit affirmed the dismissal of Williams' claim: "The judicial decisions of a duly elected judge are not the kind of decisions that expose municipalities to section 1983 liability. Furthermore, neither the city council nor the mayor has the power to set judicial policy for Arkansas district court judges or the power to ratify their decisions even if the city's policymakers knew of the judge's conduct and approved of it. In this case, the court held that the district court did not err by dismissing plaintiff's claims about the district court's failure to inquire into her indigence and failure to appoint counsel, along with her related, derivative claims about the practices in the Sherwood District Court."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/01/182982P.pdf

CIVIL RIGHTS: Shooting of Dog

Ray v. Roane
CA4, No. 18-2120, 1/22/20

On September 24, 2017, Officer Michael Roane drove to Tina Ray's property to assist with an arrest warrant that was being served on Ray for domestic abuse. When Roane arrived on Ray's property, four other officers were already present and parked in the driveway. Ray's dog—a 150-pound German Shepard named Jax—was secured by a zip-lead attached to two trees that allowed the animal limited movement within a "play area" of the yard. Rather than park in the driveway like the other officers, Roane parked his truck within the dog's "play area," prompting the other officers on scene to shout and gesture toward Roane, indicating that he should "[w]ait" and "[l]et [Ray] get her dog." Roane exited his vehicle and started walking toward the house. As Roane emerged from his vehicle, Jax began barking at and approaching Roane. Roane responded by backing away from the dog and drawing his firearm, while Ray ran to the zip-lead and began shouting Jax's name. "In a short moment," Jax reached the end of the zip-lead and "could not get any closer" to Roane. Roane observed that the dog could not reach him, and further observed that Ray was now holding onto Jax's fully-extended lead and continuing to call Jax's name. Roane therefore stopped backing

up. Roane then took a step forward, positioning himself over Jax, and fired his weapon into the dog's head. The dog died from the wound.

Upon review, the Fourth Circuit reversed the district court's dismissal of plaintiff's 42 U.S.C. 1983 claim. The court held that the complaint plausibly stated a claim for an unconstitutional seizure of plaintiff's property for which the officer was not entitled to qualified immunity. Although the court acknowledged that there was evidence in the record on appeal that contradicted some of the allegations in the complaint, the complaint nonetheless alleged that the officer shot Jax when it was in plaintiff's yard, tethered, and incapable of reaching or harming the officer. Because the court must grant all reasonable inferences in favor of plaintiff, the court reversed and remanded for further proceedings.

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/182120.P.pdf

CIVIL RIGHTS:

State-Created Danger Doctrine
Martinez v. City of Clovis
CA9, No. 17-17492, 12/4/19

Desiree Martinez was a victim of domestic violence. She sought to recover damages under 42 U.S.C. § 1983 from the law enforcement officers who allegedly placed her at greater risk of future abuse. In addition to suing her abuser, Kyle Pennington (a City of Clovis Police Department officer), she asserted claims under against the City of Clovis, the City of Sanger, and six police officers.

Martinez and Pennington started living together in 2013 in Clovis. Pennington first physically and sexually abused Martinez in April 2013, while the two were staying at a hotel in Dublin, California. After that, a pattern of violence ensued.

Martinez was at her cousin's house on the evening of May 2, 2013. When Pennington arrived at the house, he became physically abusive. Pretending to leave, Martinez exited the house and hid outside. After Pennington left, she dialed 911 and took a taxi to the house where she lived with Pennington. Hershberger and Jesus Santillan were dispatched to the home. The officers were onsite when Martinez arrived.

Pennington walked over to the taxi and warned her not to say anything to the officers. Martinez told Hershberger that she did not want to speak to Santillan because he was Pennington's friend. Hershberger then spoke with Martinez outside of Pennington's immediate presence. According to Martinez, however, Pennington was still within eye and earshot.

Hershberger testified that Martinez had told her about Pennington's physical abuse in Dublin but did not mention that Pennington had been physically abusive that evening. Hershberger tried to probe further, but Martinez asked to go inside, insisting that she was fine. Martinez gave inconsistent testimony about whether she told Hershberger that Pennington had pushed her down the stairs that evening, ultimately clarifying that she had. She claimed that Hershberger asked her to "hold on just a second" and moved away. Pennington stared at Martinez in a manner she perceived as intimidating, so she walked toward him, because she didn't want him to think that she was talking to the officer.

While Martinez was standing in front of Pennington, Hershberger returned. She had a tape recorder and asked Martinez to repeat her

statements about what had happened in Dublin. Martinez testified that at that point she was scared because Hershberger had said Dublin and she had said it in front of Pennington, so Martinez told her, 'Nothing, nothing happened.' Martinez heard Pennington clear his throat, which she contends he does when he is angry, and therefore acted like she didn't know what she was talking about.

Hershberger had received domestic violence training. She believed that Martinez faced potential risk if she stayed with Pennington that night. She was aware that domestic violence victims might tend to recant accusations of violence out of fear of reprisal.

However, she did not arrest Pennington. She did not advise Martinez of her right to make a citizen's arrest, her right to obtain a restraining order, or the possibility of staying at a shelter. She did not provide Martinez with Clovis's pamphlet for victims of domestic violence. She contends that this was because Martinez did not indicate that any violence had occurred that evening, and because she was responding to a check the welfare call, not a domestic violence call. Instead, she recommended that Martinez be contacted and interviewed again.

Hershberger and Pennington had both worked with the Clovis Police Department for about nine years. Hershberger did not socialize with Pennington and had only a neutral opinion of him. Pennington testified that after Martinez went back inside the house, Hershberger spoke with him briefly. As Pennington describes it, "she was asking me, you know, what I was doing dating a girl like Desiree Martinez and what was going on, what was going on in my life because I was recently divorced and, you know, that she didn't think that she was necessarily a good fit."

That night, Pennington physically abused Martinez. He called her a "leaky faucet" and asked her what she had told Hershberger and whether she was trying to get him in trouble. The next day, Martinez spoke with a detective over the phone. Pennington had scripted the conversation, and Martinez denied everything that she had said to Hershberger. In May 2013, Martinez contacted members of the Clovis PD again about an incident unrelated to this appeal. To avoid further investigation by the Clovis PD, Martinez and Pennington moved to Sanger at the end of the month.

On the night of June 3, 2013, Pennington physically and sexually abused Martinez. Martinez stated that he choked, beat, suffocated, and sexually assaulted her. Martinez did not have access to a phone, but one of their neighbors made a 911 domestic violence call. Yambupah and Sanders arrived at the house with two other officers. When the officers arrived, both Martinez and Pennington were standing outside of the house.

Yambupah had received domestic violence training. She noticed that Martinez had injuries consistent with those of a victim of physical abuse, including a red cheek, scrapes on her knees, a manicured fingernail that was broken and bleeding, a torn shirt, and bruising on her arms. She photographed Martinez's injuries. Although Yambupah later acknowledged that separating Martinez and Pennington was important because of the possibility of intimidation, Martinez testified that they were not separated by more than seven feet when she and Yambupah spoke. Martinez, believing that Pennington was within earshot, whispered to Yambupah that the injuries had been inflicted by Pennington, that Pennington had tried to smother her with a pillow, and that he had attempted to choke her.

Yambupah believed that she had probable cause to arrest Pennington and determined that he was the dominant aggressor. She believed that this made Pennington's arrest mandatory under California Penal Code § 836(c)(1). She also believed that as a police officer, Pennington had access to weapons. Yambupah learned from Martinez that Pennington was on administrative leave from the Clovis PD because of a domestic violence incident with an ex-girlfriend.

Yambupah told Martinez that she was going to make an arrest, and "huddled" with the other officers. When Yambupah informed them of Martinez's allegations and Pennington's position with the Clovis PD, Sanders, who was acting as a supervisor on the scene, ordered her to refer the matter to the District Attorney instead of making an arrest. Yambupah testified that had Sanders not given the order, she would have arrested Pennington on that day in the interest of Martinez's safety.

The officers did not give Martinez the jurisdiction's domestic violence information handout, did not inform her of her right to effect a citizen's arrest, did not offer her transportation to a shelter, and did not issue an emergency protective order. Yambupah testified that she did not give Martinez the handout because she did not want to leave her side. She asked Martinez to let her help her, but Martinez refused. She did not issue a protective order because Martinez was not willing to pursue any assistance from her at all. She foresaw a risk of continued violence, which she attempted, unsuccessfully, to address by verifying that Pennington was going to leave.

Yambupah did not know that Pennington was an officer with the Clovis PD until Martinez informed her that he was. Pennington testified that he knew of Sanders, but that they were not friends. Pennington's father, Kim, and Sanders had known each other for at least 25 years. On leaving, Sanders said that the Penningtons were "good people."

After the officers left, Martinez was again beaten and sexually assaulted by Pennington. He was arrested the next day, and a criminal protective order was issued. Martinez continued to live with Pennington after his arrest on June 5, 2013. He physically and sexually abused her multiple times between July and September 2013, when she finally moved out. Pennington was eventually convicted of multiple counts of violating the criminal protective order. He also pled guilty to one domestic violence charge.

Upon review, the Ninth Circuit Court of Appeals held the state-created danger doctrine under the Due Process Clause applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity. Similarly, the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity. Going forward, the Court held that the law in this circuit will be clearly established that such conduct is unconstitutional.

The panel held that the conduct of Officers Hershberger and Sanders violated Martinez's constitutional right to due process, but that the officers were entitled to qualified immunity because it was not clear at the time that their conduct was unconstitutional. The panel held that Officer Yambupah's actions left Martinez

in the same position she would have been in had Yambupah not acted at all, and the state-created danger doctrine under the Due Process Clause applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity.

Going forward, the Court held that the law in this circuit will be clearly established that such conduct is unconstitutional. The conduct of Hershberger and Sanders violated Martinez's constitutional right to due process, but that the officers were entitled to qualified immunity because it was not clear at the time that their conduct was unconstitutional. The panel held that Yambupah's actions left Martinez in the same position she would have been in had Yambupah not acted at all, and therefore Yambupah's failure to protect Martinez against private violence did not violate the Due Process Clause.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/04/17-17492.pdf

CIVIL RIGHTS: Warrantless Entry Into a Home; Arrest Without Probable Cause

Barton v Martin
CA6, No. 18-1614, 2/7/20

A cat was clawing Dwain Barton's daughter in their yard. Intending to "scare it away," Barton shot a BB gun at their trampoline's legs, several feet from the cat. Barton yelled to Porter, three doors down, "the next cat that I see in my yard will be a dead one." Barton had previously complained to animal control that Porter fed stray cats. Barton returned to his work.

Porter called 911 and said that Barton had told her that "your grey cat ... got shot in the head." She said she did not know if it was a BB gun and admitted she had not seen the injured cat and that the cat could not have been hers. The dispatcher broadcast: a woman said that her neighbor was "shooting cats" and that she was not sure what type of weapon was used.

Animal Control arrived and spoke to Barton, who refused to come outside or provide identification. He explained that he had shot at a trampoline with a BB gun to scare the cat. The officer saw neither weapons nor injured cats. Minutes later, eight officers arrived, produced weapons, and "surrounded" Barton's house. Barton passed his identification through the door. Moments later, "fearing that Barton was grabbing a gun," Officer Dean Vann "ripped their screen door off and barged into their house." Vann "threw Barton up against the counter." Other officers followed. Vann handcuffed Barton, then "shoved" Barton down his steps and into a patrol car.

At the station, Barton was strip-searched while handcuffed to the wall above his head despite complaints of shoulder injury. Three hours later, Barton was released on a $500 cash bond. The charge was dismissed.

Under 42 U.S.C. 1983, Barton alleged illegal entry, unreasonable arrest and prosecution, excessive force, and First Amendment retaliation. The court granted Vann summary judgment, citing qualified immunity.

The Sixth Circuit reversed: "Warrantless entry into a home without an exception to the warrant requirement violated clearly established law. A phone call reporting criminal activity, without corroboration, does not provide probable cause for an arrest. A reasonable jury could find that

Vann's actions violated Barton's right to be free from excessive force during the arrest and that Vann used excessive force after arresting Barton."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0039p-06.pdf

MIRANDA: Noncustodial Interview
United States v. Ludwikowski
CA3, No. 18-1881, 12/5/19

Michael Ludwikowski went to the police station to report extortionate threats. He was there for about seven hours and was questioned extensively about why he was vulnerable to extortion. He was given water and offered pizza. He went to the restroom, unaccompanied, at least three times. He was interviewed for about four hours, in three phases, punctuated by breaks. He had his phone and used it to make a call. It came to light that Ludwikowski, a pharmacist, had been filling fraudulent oxycodone prescriptions. He was later tried for distribution of a controlled substance.

He moved to suppress the statements he made at the police station, arguing that they were inadmissible because no one read him his Miranda rights.

The Third Circuit affirmed the denial of the motion. Ludwikowski was not in custody, so no Miranda warnings were needed. Much of the interview was devoted to trying to identify the extorter and the motivation. The interview would have been shorter if Ludwikowski had been more responsive. His statements at the police station were not involuntary. A reasonable person would have understood he could leave; Ludwikowski's calm demeanor and calculated answers belie his argument that he subjectively felt his freedom was constrained.

READ THE COURT OPINION HERE:
https://www2.ca3.uscourts.gov/opinarch/181881p.pdf

MIRANDA: Request for an Attorney for Extradition Proceeding
Subdiaz-Osorio v. Humphreys
CA7, No 18-1061, 1/9/20

Nicholas Subdiaz-Osorio stabbed his brother to death during a drunken fight in Wisconsin. He attempted to flee but was stopped in Arkansas by the Arkansas State Police in Mississippi County while driving to Mexico.

The Arkansas police did not interrogate Subdiaz-Osorio that evening. The next morning, Detective David May and Detective Gerald Kaiser, the lead detectives, and Officer Pablo Torres, who is fluent in Spanish, travelled to Arkansas from the Kenosha, Wisconsin, Police Department. Later that same day, Detective May and Officer Torres interviewed Subdiaz-Osorio in the Mississippi County Jail in Luxora, Arkansas.

At Subdiaz-Osorio's request, the interview in Arkansas was conducted in Spanish. Neither Subdiaz-Osorio nor Officer Torres had any trouble understanding each other. Subdiaz-Osorio signed a waiver of his Miranda rights, indicating that he understood his rights.

During the interview, after discussing the extradition process, Subdiaz-Osorio asked in Spanish, "How can I do to get an attorney here because I don't have enough to afford for one?" The officer responded: "If you need an attorney—by the time you're going to appear in the court,

the state of Arkansas will get an attorney for you." The interview continued for an hour with Subdiaz-Osorio's full cooperation. Denying a motion to suppress, the court concluded that Subdiaz-Osorio's question about an attorney was not a request to have an attorney with him during the interview; he was asking about how he could obtain an attorney for the extradition hearing. The Wisconsin Supreme Court affirmed holding that Subdiaz-Osorio did not unequivocally invoke his Fifth Amendment right to counsel. The Seventh Circuit affirmed holding that the state court finding was not contrary to or based on an unreasonable application of established Supreme Court precedent.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-09/C:18-1061:J:St__Eve:aut:T:fnOp:N:2456182:S:0

MIRANDA:

Suspect Initiated Communication After Invoking Miranda Rights

United States v. Carpentino

CA1, No. 18-1969, 1/17/20

After Kurt Carpentino transported an underage girl across state lines for immoral purposes, a Vermont state trooper took him into custody. An interview at a Vermont State Police (VSP) barracks later that day ended abruptly when Carpentino asked to call a lawyer and was immediately returned to a holding cell. Forty minutes later, Carpentino sought to speak with the troopers again, and the interview resumed. This time, Carpentino confessed.

After Carpentino was charged, he beseeched the district court to suppress the confession made during the second phase of his custodial interrogation. In support, he maintained that the interrogation had proceeded in derogation of his Fifth Amendment rights as explicated in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981).

Upon review, the Court of Appeals for the First Circuit found as follows:

"Miranda and its progeny require that law enforcement officers provide warnings concerning certain Fifth Amendment rights—including the right to remain silent and the right to consult an attorney—before interrogating a suspect in a custodial setting. Absent such warnings, most statements that officers obtain during a custodial interrogation are inadmissible at trial. Once a suspect is advised of his Miranda rights, though, he may waive those rights and consent to an interrogation. If the suspect invokes his right to counsel at any point during the interrogation, all questioning must cease either until an attorney is present or until the suspect initiates further communication with the officers.

"Approximately forty minutes after being returned to his cell and before he was given access to a telephone, the defendant waved at a camera to get a guard's attention. When the guard approached the cell, the defendant asked to talk to the troopers who had previously interviewed him. The troopers came to the defendant's cell, confirmed that he wished to speak with them, and brought him back to the interview room. The defendant signed a second Miranda waiver. The troopers resumed the interview and, about thirty minutes later, the defendant confessed to driving M.H. from New Hampshire to Vermont and having sex with her in Vermont.

"The Supreme Court in *Edwards v. Arizona*, 451 U.S. 477 (1981) held that law enforcement

officers may not continue to interrogate a suspect in custody who has invoked his right to counsel until an attorney is present. Any subsequent questioning at the officers' behest without a lawyer present is impermissible because, even if the officers obtain a Miranda waiver, that waiver is presumed to be involuntary. See *Maryland v. Shatzer*, 559 U.S. 98, 104-05 (2010). This rule is designed to prevent officers from badgering a suspect into confessing in the inherently coercive environment of a custodial interrogation. It is common ground that officers may resume questioning a suspect who has invoked his right to counsel without an attorney present if the suspect himself initiates further communication, exchanges, or conversations. To qualify for this exception, the suspect must initiate this further communication without coercion or probing.

"Although courts have 'broadly interpreted' the circumstances that constitute initiation under *Edwards*, not all communication initiated by a suspect paves the way for officers to resume investigation-related questioning. If, say, the suspect makes merely a necessary inquiry arising out of the incidents of the custodial relationship, officers may not commence an uncounseled interrogation. Such 'necessary' inquiries are often mundane; they include, for example, a request for a telephone, clamor for food or water, and a declared need for access to a restroom. Conversely, a suspect opens the door to further questioning if his comments evince a willingness and a desire for a generalized discussion about the investigation. The initiation inquiry focuses not on the suspect's subjective intent but, rather, on the objective reasonableness of the officer's interpretation of the suspect's statements.

"Here, a reasonable officer in the troopers' shoes could have understood the defendant to be seeking to resume a generalized discussion of the investigation. To begin, there is no dispute that the defendant sought out further communication with the troopers; he secured their attention by waving at the camera in his cell and then confirmed that he wanted to speak to them. When the troopers escorted the defendant to the interview room, his very first question zeroed in on the crime that the troopers were investigating: How much, would, uhm, the maximum time be for something like this? A reasonable officer could have interpreted this case-related question from the defendant as evincing a desire on his part to discuss the investigation."

The Court found that Carpentino agreed to waive his Miranda rights after the troopers repeatedly advised him of those rights and the consequences of his waiver. He made this choice freely, without coercion on the troopers' part. Accordingly, the Court held that Carpentino's second Miranda waiver was both knowing and voluntary and that his subsequent confession was therefore admissible.

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/18-1969P-01A.pdf

SEARCH AND SEIZURE:

Abandonment; Cell Phone
United States v. Small
CA4, No. 18-4327, 12/6/19

On October 4, 2015, Baltimore resident Brandon Rowe turned around and saw "a gun in my face." Rowe and his fiancée had just returned from vacation to their house in Baltimore's Federal Hill neighborhood. It was after 10:00 pm, and there were no open parking spots in front of their home. They double-parked and quickly unloaded their car, a silver Acura TSX. Then Rowe drove

off alone in search of parking while his fiancée went into the house. He parked the car in a spot roughly a block away and began walking back. Within a minute, Rowe was confronted by three masked men, one armed with a "gray silver gun." The gunman demanded that Rowe hand over everything he had.

Rowe responded that he had only two sets of keys on him, his car keys and house keys. He handed over his car keys but told his assailants that he wasn't giving them his house keys. The men patted Rowe down and felt his pockets to confirm that he had nothing else of value. Throughout this entire interaction, the gun remained pointed at Rowe's face. After taking Rowe's car keys, the gunman ordered Rowe to follow his assailants, who were walking toward the parked car. Rowe refused and instead turned around and walked home. His assailants did not pursue him.

Rowe called 911 after arriving home, and officers responded rapidly. Later that night, Rowe was driven past the spot where he had parked his Acura. The car was gone.

Shortly before Rowe was confronted by his three masked assailants, an armed robbery took place in the same neighborhood. Around 10:00 pm, Hannah Caswell and Joe Dougherty were walking home from dinner. As Caswell and Dougherty were passing a white minivan parked on the street, a masked man holding a silver gun stepped out in front of them and blocked their path. He held the gun to Caswell's head and demanded that Caswell and Dougherty empty their pockets. When Dougherty refused to hand anything over "until the gunmen took the gun out of [Caswell's] face," a second man came from behind the minivan and ripped open Dougherty's pocket, causing his cell phone to fall to the ground. The gunman picked up the phone and both assailants took off running. The white minivan pulled out of its parking spot and followed. Dougherty and Caswell used a neighbor's phone to call the police. Their descriptions of the silver gun and the assailants were consistent with Rowe's.

On October 7, 2015, three days after the armed robbery and carjacking, a man later identified as Dontae Small drove a silver Acura into the Arundel Mills Mall parking lot shortly after 8:00 pm. Security cameras on the premises scanned the car's license plate, which revealed that it was Rowe's stolen Acura. Police were called, and officers from the Anne Arundel County Police Department set up a perimeter around the parked car and waited for its driver to return.

Small returned to the parking lot at approximately 8:50 pm, unlocked the Acura, and got into the driver's seat. At this point, one of the officers pulled his marked squad car behind the Acura and activated his emergency equipment. Rather than surrender, Small drove the Acura over a curb and fled the scene. Numerous officers followed in pursuit, and a high-speed chase ensued.

After driving for nearly five miles, Small sped through the outbound gate at Fort Meade. Once inside Fort Meade, and with law enforcement still in pursuit, Small drove through a fence surrounding the National Security Agency (NSA) facility and crashed down an embankment. Though officers arrived at the scene of the crash quickly, Small had disappeared.

Small would not be found until he emerged from a nearby sewer around 10:00 am the following morning. Unable to immediately locate the driver of the Acura, police called for backup and began to set up a perimeter. Beginning at around 10:00 pm and continuing for over twelve hours, approximately 200 state and federal officers

conducted an extensive search of the area. During this time, the NSA was put on a lock down until authorities could locate the driver.

Though the authorities did not immediately locate Small, they did find several items of interest while searching the NSA grounds. At 1:45 am, officers found a black hat and a white t-shirt stained with blood near the crash site. Later, at 4:52 am, search personnel discovered a cell phone on the ground approximately fifty yards from the bloody shirt and hat. Detective William Bailey of the Baltimore City Police Department, the lead investigator on Rowe's carjacking, retrieved the phone and took it to a "floating command center."

At the command center, NSA Special Agent Kristel Massengale observed that the cell phone was receiving calls from a person identified on the screen as "Sincere my Wife." At 5:18 am, without obtaining a warrant, Agent Massengale used the phone to call "Sincere" back. Sincere, whose real name is Kimberly Duckfield, informed Agent Massengale that the phone belonged to her husband, Dontae Small. Police quickly obtained a photo of Small and found it matched security footage of the driver from the Arundel Mills Mall. Based on this evidence, police concluded that Small was likely the driver of the stolen Acura.

Throughout the early morning hours, officers used the cell phone three more times without obtaining a warrant. First, at 7:24 am, Detective Bailey called Duckfield and inquired into whether Small had returned home. Duckfield said no. Next, at 8:21 am, Duckfield called Small's phone. Bailey answered and informed Duckfield that police were looking for Small. Finally, Bailey removed the phone's back casing and battery to locate its serial number and other identifying information.

At approximately 10:00 am, Small emerged from the sewer system through a manhole "a little bit" away from the locations of the crash and scattered items. Soon after, Small was spotted by NSA Police Officer Hugh McCall, who asked him to identify himself. Small responded by fleeing on foot.

After a brief chase, Officer McCall caught Small and placed him under arrest. In the weeks following Small's arrest, the government obtained three search warrants relating to his cell phone. The warrant applications contained Small's name and the phone's serial number—information that the government had learned from its use of the phone during the manhunt. The warrants authorized the government to collect: (1) the call history, text messages, internet browsing history, contacts, and deleted data from Small's phone; (2) the historical cell site location data for Small's phone; and (3) records of outgoing and incoming calls for a second cell phone that Small's phone had called on the day of the robberies. The government relied on evidence obtained pursuant to these warrants at Small's trial.

Small contends that the district court erred in denying his motion to suppress the fruits of the warrantless searches of his cell phone. Specifically, Small alleges that there was insufficient evidence for the court to conclude that the phone was abandoned and that no warrant was required for the initial searches. He asserted that the four warrantless searches of his phone violated the Fourth Amendment, rendering all evidence stemming from those searches—including his cell phone location data and text messages—inadmissible.

Upon review, the Fourth Circuit Court of Appeals found, in part, as follows:

"The evidence before the district court depicts a fleeing suspect tossing aside personal items while attempting to evade capture…Based on these circumstances, the district court's inference that Small abandoned the phone seems sensible. Because a cell phone's GPS tracking can lead you to a defendant, it is credible that a fleeing suspect might intentionally discard his phone. And while phones occasionally slip out of pockets, shirts do not accidentally fall off their wearers—at the exact same moments as hats—and cars do not ditch themselves after a crash. The fleeing suspect's relinquishment of the car, the hat, and the shirt near where the cell phone was found support the district court's finding of abandonment.

"When Small discarded the phone, he ran the risk that complete and total strangers would come upon it. In tossing his phone, he relinquished his reasonable expectation of privacy in it as well. The district court's decision to deny suppression is affirmed."

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/184327.P.pdf

SEARCH AND SEIZURE:

Affidavit; Substantial Basis for Finding Probable Cause

United States v. Daigle

CA8, No. 18-2603, 1/14/20

Brent Daigle's wife, Celetra, reported to Griggs County Sheriff Robert Hook on November 9, 2015, that she believed her twelve-year-old daughter, R.M., had been sexually abused by Daigle, the minor's step-father. Sheriff Hook arranged for R.M. to speak with a forensic interviewer at Red River Children's Advocacy Center (RRCAC) on November 12, 2015. Sheriff Hook observed the forensic interview in real-time on a closed-circuit television in a separate room at RRCAC.

During the forensic interview, R.M. disclosed that Daigle had been sexually abusing her since she was seven years old and that the last incident had occurred about one month prior. R.M. provided explicit details regarding how, where, when, and how often Daigle had sexually abused her, and stated that it was his usual practice to take video recordings of the sexual abuse. She explained that Daigle had used various electronic devices to record the abuse over the years, but most recently he had used his cell phone, which she described as a silver phone in a camouflage case with tan rubber parts. In terms of brand, R.M. stated, "I know it's not an iPhone. I think it's a Samsung. One of those bigger Samsungs." After the forensic interview, Sheriff Hook asked Celetra to describe Daigle's cell phone. Celetra described it as an LG phone in a camouflage case with tan-brownish corners. She informed Sheriff Hook that Daigle had the LG phone in his possession and that he was on his way to Louisiana.

That evening, law enforcement officers obtained Celetra's consent to search the family residence, in which they found and seized numerous electronic devices capable of storing electronic images. On November 13, 2015, Sheriff Hook applied for a warrant to search the seized devices and, in support, gave a sworn telephonic affidavit to North Dakota District Judge James D. Hovey. He informed Judge Hovey about R.M.'s forensic interview, summarized R.M.'s detailed allegations of sexual abuse, and noted that, according to R.M., Daigle had used a silver phone in a camouflage case with tan rubber parts, among other devices, to record the abuse. Judge Hovey asked whether the silver phone was listed in the warrant application as a device to be searched. Sheriff Hook clarified that it was not included in the warrant application, because Daigle was on his way to Louisiana and likely had the phone in

his possession. Judge Hovey issued the warrant to search the devices seized from the family residence. Later that day, Daigle was arrested in Louisiana on North Dakota state charges resulting from R.M.'s forensic interview. Arresting officers seized a silver LG cell phone in a camouflage case with tan rubber parts from Daigle's person. Sheriff Hook received the LG cell phone on December 3, 2015 and applied for a warrant to search to search the devices seized from the family residence.

Later that day, Daigle was arrested it. In support, Sheriff Hook submitted a sworn written affidavit, in which he provided a less detailed recitation of the information presented in his sworn telephonic affidavit in support of the first search warrant. Specifically, the written affidavit noted Celetra's report to Sheriff Hook; R.M.'s forensic interview; R.M.'s explanations of how, where, and how often the sexual abuse took place; and Sheriff Hook's observation that R.M. "is a reliable source and says that there is video of her on the LG phone that was in possession of the Defendant at the time of arrest." Sheriff Hook also provided oral testimony in support of the second warrant application at a probable cause hearing held by Judge Hovey, in which Sheriff Hooks testified that the cell phone found on Daigle's person at the time of arrest matched "to a tee" R.M.'s description of the cell phone used by Daigle to record the sexual abuse. Finding probable cause, Judge Hovey issued the warrant to search the LG cell phone.

Daigle was charged with three counts of sexual exploitation of minors. Daigle contends that Sheriff Hook's written affidavit was insufficient to establish probable cause because it failed to set forth: (1) a sufficient basis for assessing R.M. as reliable; (2) Sheriff Hook's qualifications and training in child sexual abuse investigations and assessment of witness reliability; (3) the forensic interviewer's identity and qualifications; (4) the source of the information presented in paragraphs 8, 9, and 10 of the affidavit, which set forth details of Daigle's sexual abuse of R.M.; and (5) the factual basis for R.M.'s knowledge that there was video of her on Daigle's phone at the time of arrest.

The Court of Appeals for the Eight Circuit first rejected Daigle's argument that Sheriff Hook failed to set forth a sufficient basis for assessing R.M. as reliable:

"This Court has explicitly held that, when information is provided by a victim-eyewitness to a crime, the affidavit in support of the search warrant application need not attest to the credibility of that informant or the reliability of the information he or she provided. *United States v. Rajewich*, 470 F.2d 666, 668 (8th Cir. 1972). As we explained in *United States v. Sellaro*, the statement of an eyewitness or victim to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis. 514 F.2d 114, 124 (8th Cir. 1973); see *United States v. Wallace*, 550 F.3d 729, 734 (8th Cir. 2008) (Law enforcement officers are entitled to rely on information supplied by the victim of a crime, absent some indication the information is not reasonably trustworthy or reliable.). Sheriff Hook's affidavit and testimony make clear that R.M. was a victim-eyewitness to Daigle's crimes. This is sufficient to establish R.M.'s reliability."
Second, the Court rejected Daigle's argument that Sheriff Hook's failure to set forth his law enforcement training and qualifications in child sexual abuse investigations and assessment of witness reliability rendered his affidavit insufficient:

"An officer's testimony about his experience, although relevant is not a necessary element of a probable cause determination. *United States v. Brown*, 374 F.3d 1326, 1328 (D.C. Cir. 2004); see *United States v. Garay*, 938 F.3d 1108, 1113 (9th Cir. 2019) ('We have long held that affiants seeking a warrant may state conclusions based on training and experience without having to detail that experience.') While Sheriff Hook opines in the affidavit that R.M. 'is a reliable source,' the affidavit sufficiently establishes R.M.'s reliability even absent that statement. Thus, the fact that the affidavit does not set forth Sheriff Hook's training and qualifications does not detract from a finding of probable cause.

"As to Daigle's claim the affidavit lacked the forensic interviewer's identity and qualifications, the affidavit does not include any statements or opinions of the forensic interviewer. All of the information contained in the affidavit was based on R.M.'s statements during the forensic interview and Sheriff Hook's observations of those statements. Thus, the forensic interviewer's identity and qualifications were irrelevant to the probable cause determination.

"The affidavit identifies specific sexual acts that Daigle performed on R.M., and states where in the family residence these sexual acts took place. So long as the issuing judge can fairly infer the source and basis of the information, the judge may consider such an assertion when determining whether probable cause exists. *United States v. Thurman,* 625 F.3d 1053(8th Cir. 2010). Although the affidavit does not explicitly identify the source of the information contained therein, it can be fairly inferred that R.M. was the source of all information regarding the details of Daigle's sexual abuse. Accordingly, the issuing judge was permitted to rely on the information when assessing probable cause."

The Court held that the issuing judge had a substantial basis for finding probable cause and that the district court did not err in denying Daigle's motion to suppress.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/01/182603P.pdf

SEARCH AND SEIZURE:

Automobile Search; Probable Cause
United States v. McGhee
CA8, No. 18-3594, 12/10/19

During the early morning hours of June 11, 2017, Officer Brandon Bennett of the North Little Rock Police Department responded to a traffic accident involving Delandus McGhee. McGhee told Officer Bennett that he was in a hurry to pick up and take his daughter to the hospital. Officer Bennett expedited his processing of the accident, citing McGhee for unsafe driving and releasing him on a traffic summons. Twenty-five minutes later, Officer Bennett observed McGhee driving in the same vicinity. Suspicious, Officer Bennett ran a background check on McGhee and discovered an outstanding arrest warrant and a suspended driver's license.

Officer Bennett decided to execute the warrant, and eventually found McGhee asleep in his parked car. Officer Bennett woke McGhee and ordered him out of the vehicle. As he exited, with Officer Bennett securing his left arm, McGhee reached down toward the car's floormat. Officer Bennett told him not reach for anything, grabbed McGhee's right arm, and handcuffed him. McGhee informed Officer Bennett he was attempting to retrieve his shoe. Having secured McGhee, Officer Bennett went to retrieve the shoe and noticed the floormat had an extremely raised center. Officer Bennett

brought the shoe to McGhee, returned to the car, and lifted the floormat to find the firearm for which McGhee pled guilty and was sentenced to seventy-seven months' imprisonment

McGhee brought a motion to suppress claiming the search was warrantless and unsupported by probable cause. The district court denied the motion to suppress. McGhee conditionally pled guilty reserving the right to appeal the denial of his motion.

Upon review, the Court of Appeals for the Eighth Circuit found as follows:

"A search generally requires a warrant to pass muster under the Fourth Amendment. *Riley v. California*, 573 U.S. 373, (2014). Warrantless searches, however, can satisfy our Constitution if they fit within an exception to the warrant requirement. The automobile exception is one of these, allowing an officer to legally search a vehicle if he has probable cause. *Shackleford*, 830 F.3d at 753 ('The Supreme Court justified the departure from the traditional warrant requirement because of the lower expectation of privacy in vehicles and also their unique mobility.')

"Probable cause is present 'where there is a fair probability that contraband or evidence of a crime will be found in a particular place.' *Shackleford*, 830 F.3d at 753. In other words, a police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present. *United States v. Murillo–Salgado*, 854 F.3d 407, 418 (8th Cir. 2017).

"Officer Bennett had probable cause. McGhee's duplicity at the traffic stop a few hours before his arrest and his sudden reach toward the floormat as Officer Bennett was escorting him from the vehicle both tend to support a finding of probable cause. See *United States v. Jones*, 535 F.3d 886, 891 (8th Cir. 2008) ('Evasive behavior, while not alone dispositive, is another fact supporting probable cause.'); *United States v. Ameling*, 328 F.3d 443, (8thCir. 2003) (noting that, among other things, 'apparently false statements and inconsistent stories were sufficient to give the officers probable cause that the defendants were involved in criminal conduct').

"Adding to Officer Bennett's reasonable suspicion of illegal activity is the conspicuously raised floormat. Myriad cases have been reported where police found contraband underneath a vehicle's floormat. See, e.g., *Begley v. United States*, No. 17–5039, 2017 WL 6945554, at *1 (6th Cir. Aug. 25, 2017) (methamphetamine); *United States v. Vinton*, 594 F.3d 14, (D.C. Cir. 2010) (butterfly knife); *United States v. Rivera*, 152 F. Supp. 2d 61, (D. Mass. 2001) (pistol). With this, we are persuaded that the totality of the relevant circumstances here establish probable cause for Officer Bennett's search."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/12/183594P.pdf

SEARCH AND SEIZURE:

Computer Software Program Protected by Law Enforcement Privilege
United States v. Hoeffener
CA8, No. 19-1192, 2/24/20

On December 15, 2012, Detective Bobby Baine of the St. Louis Metropolitan Police Department was conducting a child pornography "Internet undercover operation" using a software program called Torrential Downpour. Torrential Downpour is a law enforcement software program configured

to search the BitTorrent network for Internet Protocol ("IP") addresses associated with individuals offering to share or possess files known to law enforcement to contain images or videos of child pornography. Detective Robert Erdely, an investigator for the Indiana County, Pennsylvania District Attorney's Office, testified that the program logs the date, time, and info hash of the activity occurring during the investigation; the path and file name investigated; and the investigated computer's IP address, port identifier, and BitTorrent software. Detectives Baine and Erdely both testified that Torrential Downpour cannot access non-public areas or unshared portions of an investigated computer, nor can it override settings on a suspect's computer.

The software program connected to an IP address in the St. Louis area that had within its files videos or images suspected of containing child pornography. The program downloaded those files from the IP address. When Detective Baine checked his computer log, he reviewed the images that had been downloaded onto his system and identified two of the files as containing child pornography.

Through a subpoena, Detective Baine determined that the IP address for the investigated computer belonged to Hoeffener. Detective Baine forwarded this information to Detective Dustin Partney, who worked in the Special Investigations Unit for the St. Louis County Police Department. In his search warrant affidavit, Detective Partney outlined the undercover operation, how law enforcement officers identified Hoeffener's computer, and described the two images containing child pornography that were downloaded by the Torrential Downpour program.

Detective Partney averred that he had reviewed these two files, found them to contain the described images/movie files, and based on his training and experience, determined that Hoeffener had possessed and distributed child pornography.

On April 29, 2013, a circuit judge issued a search warrant for Hoeffener's residence, permitting officers to search his home as well as electronic data processing and storage devices, computers, computer systems, and other related items for photographs, files, and images depicting sexual contact or sexual performance of a child under the age of 18. The warrant was executed the next day. Multiple computers, hard drives, thumb drives, SIM cards, CDs, digital cameras, and tablet PCs were seized. A forensic examination revealed the uTorrent and eMule file-sharing applications had been installed on Hoeffener's computer and that there were approximately 7,365 image files and 460 video files of child pornography.

Hoeffener conditionally pled guilty reserving the right to appeal the court's adverse rulings on his motion to suppress evidence. Hoeffener seeks to compel the government to produce the source code, manuals, and software for Torrential Downpour.

Upon review, the Court of Appeals for the Eighth Circuit found as follows:

"The government disclosed information that allowed Hoeffener's expert to investigate how the file sharing software Hoeffener was using functioned, how Torrential Downpour functioned, and the activity log gathered from Hoeffener's computer. In addition to this information Hoeffener sought the source code essentially the program itself, and manuals related to the program. Hoeffener's reasoning for seeking this

information revealed nothing more than a fishing expedition to discover how law enforcement's proprietary software is able to identify potential possessors and distributors of child pornography over the BitTorrent peerto-peer sharing network. Hoeffener's mere speculation that the software program could possibly access non-public areas of his computer or that there was a possibility that it malfunctioned during the officers' investigation into Hoeffener's sharing of child pornography is insufficient to meet the requisite threshold showing of materiality to his defense. We find no abuse of discretion in the denial of Hoeffener's motion to compel, let alone a gross abuse of discretion that would result in fundamental unfairness.

"The record reflects that Torrential Downpour searches for download candidates in the same way that any public user of the BitTorrent network searches, and it only searches for information that a user had already made public by the use of the uTorrent software. A defendant has no legitimate expectation of privacy in files made available to the public through peer-to-peer file-sharing networks. *United States v. Hill*, 750 F.3d 982, 986 (8th Cir. 2014); (case involving the file-sharing software LimeWire); *United States v. Maurek*, 131 F.Supp.3d 1258, 1263 (W.D. Okla. 2015) (case involving BitTorrent software). Hoeffener's attempt to distinguish BitTorrent software from other peer-to-peer programs does not alter the fact that he allowed public access to the files on his computer. The district court did not err in denying his motion to suppress evidence."

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca8/19-1192/19-1192-2020-02-24.pdf?ts=1582561834

SEARCH AND SEIZURE:

Consent; DNA Swab

United States v. Welch

CA8, No. 18-3530, 2/27/20

A confidential informant told Minneapolis Police Officer Jeffrey Werner he witnessed Chris Welch storing guns and drugs in a house on Aldrich Avenue North. The informant described Welch as "a black male about 30-35 years old, about 6'0 tall with a medium build and medium afro."

To verify the tip, Officer Werner searched for Welch's name on the Minnesota Department of Motor Vehicles ("DMV") website. He found a "Chris Maurice Welch" whose description generally matched the one given by the informant. Officer Werner showed the informant Welch's DMV photos, and the informant confirmed Welch's identity. Because Welch's criminal history revealed a prior felony conviction, Officer Werner knew it was illegal for Welch to possess a gun. Officer Werner then surveilled the Aldrich house. He saw foot traffic at the house consistent with drug-distribution. Another officer saw Welch sitting inside a car in the driveway next to the house.

Officer Werner obtained a warrant to search the Aldrich house. Police officers followed Welch to the house and began their search shortly after Welch went inside. The officers found three men, including Welch, in a bedroom. Welch's hair was in braids. In that same room, officers found three broken cellphones. The officers also found inside the house four guns and "a large amount of synthetic marijuana," some of which was packaged for sale. Outside the house, police found two men in a car with marijuana and a loaded gun.

Welch was arrested, handcuffed, and given Miranda warnings. He agreed to talk to Officer Werner. Their conversation, as transcribed by the district court, follows:

> *Werner: Okay, well it's customary too, is when we do a search warrant and find guns in the house, we try to take DNA of everyone that's in the house.*
>
> *Welch: Okay, well my DNA is already in the system.*
>
> *Werner: I know, but we've got to take one anyway. So you're cool with me taking your DNA sample real quick? So you've had this done before and stuff?*
>
> *Welch: Yeah, I've done like three of them before. DNA for kids.*
>
> *Werner: Oh, for child support stuff?*
>
> *Welch: Yeah*

Following this exchange, and without telling Welch he could refuse, Officer Werner took Welch's DNA with a cheek swab. The police then took Welch to the county jail.

Months later, the DNA test results showed that a Ruger .22 caliber pistol found at the Aldrich house very likely had Welch's DNA on it. Federal prosecutors charged Welch with illegal gun possession. Welch moved to exclude the DNA evidence and the synthetic marijuana evidence. However, the evidence was admitted and Welch was convicted. Welch appeals.

Upon review, the Court of Appeals for the Eighth Circuit found as follows:

"The police matched the informant's somewhat vague description to Welch's DMV photos. They observed foot traffic consistent with the informant's allegation that drugs were at the house. They knew Welch was prohibited from gun possession and they confirmed he spent time at or near the Aldrich house. During the search of the house, police found drugs and guns. Outside the house, in a parked car, police found more drugs and another gun. And police identified Welch as one of the three men inside the house standing next to three broken cellphones. While the informant got Welch's hairstyle wrong, he got the gun and drug possession right. See *Illinois v. Gates*, 462 U.S. 213, 245 n.14 (1983) ('We have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case.') The officers' knowledge warranted prudent belief that Welch had committed or was committing an offense; they had probable cause to arrest him.

"But probable cause alone does not resolve the DNA evidence's admissibility. The police did not have a warrant to take Welch's DNA; they relied on his consent to swab his cheek. Free and voluntary consent renders a search reasonable under the Fourth Amendment. *United States v. Sanders*, 424 F.3d 768, 773 (8th Cir. 2005). If the government shows that Welch knowingly and voluntarily consented to the cheek swab, then the DNA evidence is admissible.

"The district court explained that Welch's age, intelligence, sobriety, and experience with the criminal justice system, coupled with his Miranda warning, supported a finding of voluntary consent.

"Additionally, the district court found that, while Welch was under arrest when the DNA swab was taken, he had not been detained and

questioned for long. The district court also noted the interview was 'calm and cordial' and free from police intimidation. In fact, as the district court pointed out, 'Welch responded to questions cooperatively and in a steady voice, even chuckling at times.' And in the midst of this even-keeled conversation, Welch complied with Officer Werner's request for a cheek swab 'without hesitation.' According to the district court, the facts surrounding the interrogation support a finding of voluntary consent.

"Given Welch's lawful arrest and voluntary consent, the district court properly denied Welch's motion to suppress the DNA evidence."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/02/183530P.pdf

SEARCH AND SEIZURE:

Emergency Search
United States v. Rodiguez-Pacheco
CA1, No. 18-1391, 1/15/20

Gabriel Rodríguez-Pacheco ("Rodríguez") was a police officer for the Puerto Rico Police Department who was accused of domestic violence, and when some fellow officers showed up at his mother's house (where he was living) in connection with that accusation, a warrantless entry into the house and seizure of Rodríguez's cellphone, camera, and laptop ensued. A later search of the laptop revealed incriminating evidence of the domestic abuse charge, as well as images of unrelated criminal conduct that form the basis for the charges against him in the case now before us.

In the lead-up to his trial, Rodríguez moved to suppress the electronics and the information gleaned from them, along with statements he made to the police. The lower court granted the motion as to some statements Rodríguez made, but denied it as to others. Important here, the lower court denied Rodríguez's motion to suppress seized evidence. Rodríguez appealed.

The facts of the case are as follows:

Officer Nelson Murillo-Rivera, who works for the Domestic Violence Division in the Ponce region of Puerto Rico, was off-duty on February 28, 2015 when he was approached by his wife's coworker, who complained that Rodríguez, with whom she had once been in a relationship, had been sending her threatening text messages. Officer Murillo testified that he saw these complained-of text messages in which Rodríguez was threatening to publish photos and videos of a sexual nature of the victim if she did not agree to rekindle their relationship. Officer Murillo reported the above-described episode to the director of the domestic violence unit; later, he was instructed by the district attorney to locate and arrest Rodríguez pursuant to "established procedure." According to Officer Murillo, that procedure is why he did not get a warrant—he said that, "according to the procedure, anyone alleged to have committed domestic violence must immediately be placed under arrest." And Officer Murillo testified that, in accordance with that procedure and because Rodríguez was a police officer, the proper course of action was to locate and disarm him, explain the complaint to him, then place him under arrest.

Intending to carry out this procedure, around midnight, Officer Murillo headed to Rodríguez's house in Yauco, Puerto Rico with several officers, one of whom was Officer Roberto Santiago. The officers had trouble locating Rodríguez's house until they came across a woman (who happened

to be Rodríguez's sister). When the officers indicated that they were looking for Rodríguez, she led them to their mother's house, then went inside to tell Rodríguez the police were outside. Officer Murillo testified that Rodríguez "immediately" came outside to the front of the house.

Officer Murillo introduced himself, informed Rodríguez that a woman had filed a domestic violence complaint against Rodríguez, and asked if he knew the woman. Rodríguez said he knew the woman, and so Officer Murillo told Rodríguez that the officers needed to seize his service weapon, and he would have to go to the police station to be questioned. Officer Murillo did not handcuff Rodríguez, despite the point of the visit being to arrest him, and he explained that was because Rodríguez "was very cooperative and his family looked like really decent people."

Officer Murillo asked Rodríguez if he was armed -- he described the exchange as follows:

> *I asked him, "Where is your weapon?" He said, "It's in my bedroom. I'll come right back and I'll go fetch it." Immediately I told him, "No, I'll go with you. You tell me where the weapon is and I'll seek it." To which he answered me, "Okay, no problem." He made a gesture with his hand and said, "follow me."*

Rodríguez testified that he did not consent (verbally or nonverbally) for Officer Murillo to enter the house. Officer Murillo followed Rodríguez into the house. Officer Santiago testified that he saw Officer Murillo follow Rodríguez into the house and decided to go in as well for the safety of Officer Murillo.

Once inside the house and then Rodriguez's bedroom, Officer Murillo retrieved the service weapon and also seized a Go-Pro camera, a white laptop, and a cell phone, all of which he believed could be related to the domestic violence accusation. Officer Santiago testified that he didn't scan or sweep the bedroom for weapons or anything else that could pose a threat to his safety, and that Rodríguez was passive during the seizure.

Then, at the police station, after Officer Murillo read Rodríguez his Miranda rights and Rodríguez signed a document indicating that he understood and wanted to invoke those rights, the two reviewed the complaint against Rodríguez, and Officer Murillo told Rodríguez he'd be spending the night in a cell. During this meeting, Rodríguez said, "I'm going to ask you for something from the bottom of my heart. Please let me erase something from the computer." Officer Murillo refused, then took Rodríguez to a cell. The next day, again according to Officer Murillo, Rodríguez "desperately" asked Murillo, "Who's coming to look for me, ICE, ICE?"

Murillo got a search warrant for the seized electronics, and that's what ultimately put Rodríguez on the hook for the charges levied against him in the case before us—authorities found videos and images of Rodríguez engaging in sexual conduct with the victim, as well as videos and images of Rodríguez engaging in sexual conduct with several female minors between the ages of 16 and 17 years old. On March 26, 2015, a federal grand jury indicted Rodríguez on sixteen counts of production of child pornography, violating 18 U.S.C. § 2251(a) and (e), and another count of possession of child pornography involving prepubescent minors, violating 18 U.S.C. § 2252A(a)(5)(B) and (b)(2).

Upon review, the First Circuit Court of Appeals found as follows:

"The Fourth Amendment requires that all searches and seizures be reasonable, and the Supreme Court has ruled that reasonableness requires there be probable cause for the search or seizure and that a warrant is issued. See *U.S. Constitution, Amendment IV; Katz v. United States*, 389 U.S. 347, 357 (1967). Indeed, 'the Fourth Amendment has drawn a firm line at the entrance to the house' and warrantless entries into a home 'are presumptively unreasonable.' *Morse v. Cloutier,* 869 F.3d 16, 23 (1st Cir. 2017) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)). However, there are exceptions to the warrant requirement: consent and exigent circumstances. See, e.g., *Pagán-González v. Moreno*, 919 v F.3d 582, 591 (1st Cir. 2019) (noting consent is 'a jealously and carefully drawn exception to the warrant requirement' (quoting *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *United States v. Almonte-Báez*, 857 F.3d 27, 34 (1st Cir. 2017).

"The basic Fourth Amendment principles just spelled out are the bedrock of Rodríguez's appellate contentions. Rodríguez challenges the warrantless entry, arguing that it was presumptively unreasonable, and, on this record, no exception to the warrant requirement existed. Homing in on the district court's findings only, he says there is no record evidence to support an exigency determination: he was unarmed, had not threatened violence or been violent (there was no indication the officers believed he had been or would become violent—quite the opposite since he was never handcuffed), had no history of violence, and, on the facts of his case, the presence of a gun in the house wasn't enough, on its own, to demonstrate exigent circumstances warranting entry, especially when the presence of the gun wasn't even connected to the domestic violence complaint that prompted the officers' visit in the first place.

"He's right. The record evidence does not support a finding of exigent circumstances that comports with case law. Generally, a warrantless entry into a person's dwelling may be permitted if exigent circumstances arise, *United States v. Samboy*, 433 F.3d 154, 158 (1st Cir. 2005), and, in order to find exigent circumstances, the police must reasonably believe that there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant. (quoting *Fletcher v. Town of Clinton*, 196 F.3d 41, 49 (1st Cir. 1999). We've explained that the exigent circumstances doctrine reflects an understanding and appreciation of how events occur in the real world, *Almonte-Báez*, 857 F.3d at 31, observing that police officers are often forced to make split-second judgment-- in circumstances that are tense, uncertain, and rapidly evolving, (quoting *Kentucky v. King*, 563 U.S. 452, 466 (2011)). To that end, we have indicated that the best examples of exigent circumstances include hot pursuit of a felon, imminent destruction or removal of evidence, the threatened escape by a suspect, or imminent threat to the life or safety of the public, police officers, or a person in residence. *Bilida v. McCleod*, 211 F.3d 166, 171 (1st Cir. 2000).

"In the end, this particular record does not reflect one of those crisis situations when there is compelling need for official action and no time to secure a warrant. *United States v. Irizarry*, 673 F.2d 554, 557 (1st Cir. 1982). No emergency, no urgency, no actual or threatened violence or gun violence, no armed suspects, no fleeing, no split-second decisions by police in tense moments, no legal reason not to get a warrant. The facts of this case simply do not square with our exigent circumstances case law, and it was error to deny the motion to suppress on this basis."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/18-1391P-01A.pdf

SEARCH AND SEIZURE:

Informants; Vehicle Search; Affidavits; Cell Phone Seizure

United States v. Oliver

CA8, No. 17-3627, 2/19/20

On November 25, 2014, police received information from a "confidential reliable informant" that Houston Oliver and his co-conspirators, Desmond Williams and Jimmy Green, would be mailing packages of cocaine to Minnesota from Maricopa, Arizona. As a result of this information, the police contacted a postal inspector who found two packages in the Minnesota post office sent from Arizona—one from Maricopa, Arizona and another with similar handwriting from Chandler, Arizona. After obtaining a search warrant, police officers opened the packages and found cocaine inside each package.

After the seizure of the packages, the informant told police that Oliver would be transporting cocaine in a BMW that would arrive in Minneapolis on November 30, 2014. On the predicted date, police officers in Minneapolis stopped and impounded a BMW that belonged to Oliver and was being driven by Sharrod Rowe. A few days later, after obtaining a warrant, the police searched the vehicle and discovered six kilograms of cocaine in the trunk. That same day, police obtained and executed a number of warrants to search locations associated with Oliver, including a hotel room he rented. During the search of the hotel room, the police recovered certain personal items, including cell phones, but did not recover any drugs.

On appeal, Oliver argues that the district court should have granted his pretrial motion to disclose the identity of the informant or conduct an in camera examination regarding the informant.

Upon review, the Eighth Circuit Court of Appeals found as follows:

"The Government has a 'privilege to withhold the identity of its confidential informants.' *United States v. Harrington*, 951 F.2d 876, 877 (8th Cir. 1991). In order to override this privilege of nondisclosure, defendants must establish beyond mere speculation that the informant's testimony will be material to the determination of the case. See *United States v. Grisham*, 748 F.2d 460, 463 (8th Cir. 1984) (noting the 'central importance of materiality' in determining whether to order disclosure of an informant's identity). We agree with the district court that Oliver presented nothing more than speculation to refute the Government's assertion that Williams was not the informant. Therefore, we have no reason to believe the Government was anything but truthful, and the district court did not abuse its discretion in denying the motion.

"Oliver also argues that the roadside search of his BMW was unlawful because the police had no warrant or probable cause at the time of the stop. When probable cause exists to believe that contraband is located inside the vehicle, a police officer 'may search the passenger compartment and trunk' under what is known as the 'automobile exception.' *United States v. Walker,* 840 F.3d 477, 483 (8th Cir. 2016). When the basis for a search is information supplied by an informant, such information may establish probable cause where the informant has a 'track record of providing accurate information' or where the informant has accurately predicted certain events. *United States v. Winarske*, 715 F.3d 1063,

1067 (8th Cir. 2013). The confidential informant relied on by police here had already provided accurate information about the shipments of cocaine that were sent on November 24, 2014. Furthermore, the informant's tip that a BMW belonging to Oliver and transporting cocaine would arrive in Minneapolis on November 30th was corroborated when the BMW registered to Oliver arrived in Minneapolis on the predicted date. In other words, the informant had a track record of providing accurate information and correctly predicting certain events. Thus, the information the informant provided furnished probable cause to search the BMW under the automobile exception.

"Oliver next challenges the search of his hotel room, arguing that there was no probable cause to search and that the warrant did not allow for the seizure of cell phones. The warrant's reference to 'other media' as items to be seized is broad enough to include cell phones. See *United States v. Gamboa,* 439 F.3d 796, 807 (8th Cir. 2006). The warrant authorized the seizure of 'other media that show standing for an address, vehicle, the location of narcotics proceeds, or a connection between people, addresses and vehicles or that a crime has been committed.' We agree with the district court that it is 'self-evident' that a cell phone could constitute such media. Furthermore, we have held that cell phones may be seized when they may contain other items listed in a search warrant. See *Gamboa*, 439 F.3d at 807. (stating that 'cell phones may well contain records of the use and purchase of controlled substances' as stated in the search warrant). Even if we credited Oliver's argument that cell phones do not constitute media, the cell phones here could have contained other items specifically mentioned in the warrant, such as notes or photographs. Thus, the district court did not err in concluding that fact. Thus, the district court did not err in concluding that the police's seizure of Oliver's cell phones did not violate the Fourth Amendment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/02/173627P.pdf

SEARCH AND SEIZURE:

Routine Administrative Matters
United States v. Cruz-Mercedes
CA1, No. 19-1082, 12/18/19

During a law enforcement sting targeting a Stolen Identity Refund Fraud ("SIRF") scheme, Hector Antonio Cruz-Mercedes was administratively arrested for unlawful presence in the United States. Following the arrest, he was fingerprinted during a routine booking. Subsequently, the government charged him with multiple counts related to his involvement in the fraud scheme. Prior to trial, Cruz-Mercedes moved to suppress his booking fingerprints as the "fruit" of what he contended was an unlawful arrest.

The district court determined that Cruz-Mercedes was arrested without probable cause prior to his admission of unlawful presence in the United States. Nonetheless, the court admitted the fingerprint evidence under the doctrine of inevitable discovery. Following the district court's ruling, Cruz-Mercedes conditionally pleaded guilty, reserving the right to appeal the denial of his suppression motion as to the fingerprint evidence's admission.

The Court of Appeals for the First Circuit affirmed the district court's denial of the motion to suppress, albeit on different grounds. Specifically, they found on these facts that the fingerprints were obtained for routine booking purposes. "Thus, there is no basis in the record of this case

for suppression of the fingerprint evidence, and accordingly they did not need to reach the district court's probable cause or inevitable discovery determinations."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/19-1082P-01A.pdf

SEARCH AND SEIZURE:

Search of Handbag; Inevitable Discovery
United States v. Seay
CA4, No. 18-4383, 12/4/19

On October 27, 2016, police responded to a request from staff at the SpringHill Suites in Hampton, Virginia to evict a difficult customer, Devin Bracey. The officers knocked on Bracey's hotel room door and, after a few minutes of delay, she opened it. As Bracey opened the door, Seay exited the bathroom. After the officers informed them that they had been asked to leave, Bracey and Seay packed their belongings and left the room. Seay carried a clear plastic bag as he left.

The officers searched the hotel room, found ammunition in the toilet bowl and drug paraphernalia wrapped in women's underwear, and ordered Bracey and Seay back into the room. Officer Angela DiPentima separated the suspects to interview them. After Bracey's interview, Officer DiPentima and Officer Daniel Lucy conferred and determined they had probable cause to arrest Bracey on drug charges. They discussed the possibility of arresting Seay for possession of ammunition as a felon and decided they should interview him. Officer Lucy also wanted to "determine what property was whose" and to search Bracey's property prior to taking her to lockup.

While Seay was being interviewed, Officer Lucy searched Bracey's belongings. As footage from the officers' body cameras shows, Officer Lucy first searched a handbag, which Bracey admitted was hers. After searching the handbag, Officer Lucy gestured to the clear plastic bag and asked, "Whose stuff is this right here?" As Bracey picked up the plastic bag, she responded, "This stuff is our stuff." Officer Lucy again asked who the plastic bag belonged to, and Bracey again responded that it was "our stuff." Officer Lucy then searched the plastic bag and discovered a silver handgun wrapped in a red jacket.

The district court granted Seay's motion to suppress the statements he made to officers after a firearm was discovered, because the court concluded that, although officers had probable cause to arrest Bracey, the search of the plastic bag was not a lawful search incident to her arrest. The court denied Seay's motion to suppress the firearm, however, concluding that officers inevitably would have discovered it during an inventory search of the plastic bag. Seay pleaded guilty but reserved the right to appeal the denial of his motion to suppress.

Upon review, the Fourth Circuit Court of Appeals found as follows:

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *U.S. Constitution, Amendment IV.* Generally, the government is prohibited from using evidence discovered in an unlawful search against the individual whose constitutional right was violated. *United States v. Doyle*, 650 F.3d 460, 466 (4th Cir. 2011). However, this rule is subject to certain exceptions. *Utah v. Strieff,* 136 S. Ct. 2056, 2061 (2016). One such exception is the inevitable discovery doctrine,

which allows the government to use evidence gathered in an otherwise unreasonable search if it can prove by a preponderance of the evidence that law enforcement would have ultimately or inevitably discovered the evidence by lawful means. Bullette, 854 F.3d at 265 (quoting *Nix v. Williams,* 467 U.S. 431 (1984)). Lawful means include searches that fall into an exception to the warrant requirement, such as an inventory search that would have inevitably uncovered the evidence in question.

"For the inventory search exception to apply, the search must have been conducted according to standardized criteria, such as a uniform police department policy, and performed in good faith. *United States v. Matthews*, 591 F.3d 230, 235 (4th Cir. 2009) (quoting *Colorado v. Bertine*, 479 U.S. 367, 374 n.6 (1987)). The government may demonstrate standardized criteria by reference to either written rules and regulations or testimony regarding standard practices. *United States v. Clarke*, 842 F.3d 288 (4th Cir. 2016).

"The evidence presented to the district court supported a finding that the firearm inevitably would have been discovered during an inventory search of the plastic bag. Officers Lucy and DiPentima testified that it was standard procedure to inventory an arrestee's belongings before taking her to jail. The officers had probable cause to arrest Bracey and were preparing to arrest her. Officer Lucy testified that Bracey had identified the plastic bag as 'our stuff' and that the officers would have inventoried Bracey's belongings, including the contents of the plastic bag, pursuant to the standard procedure. The officers' testimony explaining the inventory procedure was sufficient to satisfy our precedent.

READ THE COURT OPINION HERE:
http://www.ca4.uscourts.gov/opinions/184383.P.pdf

SEARCH AND SEIZURE:

Search Warrant; Execution Within a Reasonable Time

United States v. Leick

CA8, No. 18-2700, 12/17/19

On August 22, 2017, police began to investigate Kyle Leick when his girlfriend reported that Leick assaulted her at their shared apartment in Dubuque. The girlfriend also disclosed that Leick was a regular user of marijuana and cocaine, and that he kept firearms in their apartment. Based on that information, officers obtained and executed a search warrant for the apartment. They seized drug residue, drug paraphernalia, an AR-15 firearm, and several rounds of ammunition. Leick was not present at the apartment.

After officers searched the apartment, they sought a warrant for a urine sample from Leick "to determine the presence of controlled substances in Leick's system, while he is currently being a drug user in possession of a firearm and ammunition." On August 22, an Iowa magistrate judge issued a warrant for evidence of drug use within the body of Kyle Daniel Leick in the form of a urine specimen. The warrant commanded officers "to make immediate search" of the person described, but Iowa law allowed ten days for execution of the warrant. On August 30, officers arrested Leick and obtained a urine sample from him. The urine tested positive for the presence of marijuana and cocaine.

Leick moved to suppress the urine sample on the ground that probable cause was lacking by the time officers executed the warrant. Leick asserted that a urine sample collected eight days after his alleged possession of a firearm was unlikely to produce evidence that he possessed a firearm as an unlawful user of a controlled substance. The district court denied the motion.

Upon review, the Fourth Circuit Court of appeals found as follows:

"The Fourth Amendment requires police to execute a search warrant within a reasonable time after its issuance. Reasonableness should be measured in terms of whether probable cause still existed at the time the warrant was executed. See *United States v. Shegog,* 787 F.2d 420, 422 (8th Cir. 1986). Factors to consider in determining whether probable cause has dissipated 'include the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search.' *United States v. Gibson*, 123 F.3d 1121, (8th Cir. 1997).

"The record here shows that the warrant for a urine sample from Leick was supported by probable cause when it was executed. Leick concedes that the warrant was valid when issued, but argues that probable cause dissipated by August 30 because evidence of drug use on or before August 22 would not remain in his system for eight days. The district court, however, permissibly relied on testimony of a forensic criminalist from the state crime laboratory that evidence of marijuana use in a chronic user can remain in the user's system for up to two months. Given that Leick's girlfriend informed officers that he used marijuana daily, there was a fair probability that a urine sample collected on August 30 would reveal evidence of Leick's drug use on or before August 22. We therefore conclude that the warrant was supported by probable cause when it was executed, and the district court did not err in denying Leick's motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/12/182700P.pdf

SEARCH AND SEIZURE:

Search Warrant; Nexus

United States v. Gonzalez-Arias

CA1, No. 18-1805, 12/20/19

Until the Drug Enforcement Administration (the DEA) blew the lid off it, Juan Elias Gonzalez-Arias ran a thriving drug business out of his apartment — 264 East Haverhill Street, Unit 18, Lawrence, Massachusetts. From those modest digs, he ordered kilograms of heroin from foreign sources, processed it, and dealt it to buyers around Massachusetts. But in July 2015, federal agents swarmed the apartment, search warrant in hand, and arrested him. Inside, they found a stolen gun, $30,088 in cash, and over a kilo of heroin, along with other narcotics and tools of the trade (including drug ledgers, scales, and a hydraulic kilo press).

Gonzalez-Arias was indicted and pled guilty to drug trafficking charges, including conspiracy to distribute one kilogram or more of heroin, which carried a ten-year mandatory minimum. The district judge sentenced him to 136 months in prison. On appeal, Gonzalez-Arias offers several arguments — that the judge should have suppressed the evidence from his apartment, let him withdraw his guilty plea, appointed him a new lawyer for sentencing, and set a lower guideline sentencing range.

In this case, the Court of Appeals for the First Circuit addressed the issue of evidence of the offense being found at the place to be searched and the staleness doctrine:

"Gonzalez-Arias doesn't dispute there was probable cause to believe he was part of a drug distribution conspiracy. Nor could he. DEA agents watched (through pole-mounted cameras and a GPS tracker on Gonzalez-Arias's car) and listened

(via wiretaps) for over a year as he sold heroin to undercover agents and criminal associates and talked shop over the phone. Agents heard him quarterback drug deals and hand-offs, negotiate prices with buyers and debts to suppliers, and solicit multi-kilo hauls of drugs from foreign sources. And based on that surveillance, Agent Hamelin's affidavit colored Gonzalez-Arias as a seasoned, high-volume drug trafficker. For example, in the fall of 2014, he twice sold $2,100 worth of heroin (30 grams per sale) to the undercover agent — and that was just a preview. During the second sale, he urged the agent to buy even more — at least 100 grams per week — and suggested he'd sell up to 'two kilos' of heroin for $70 per gram. And in March 2015, a cohort ordered just that amount (two kilos) from Gonzalez-Arias and came to his apartment to pick it up. Just two months later — in his biggest move — GonzalezArias told his associate to order at least ten kilos from a Mexican supplier, picked up the first one-kilo shipment himself, borrowed $20,000 to pay for the drugs, then told the associate not to worry about where they would be stored because he (Gonzalez-Arias) would 'welcome the women' (code for kilograms of drugs,) wrote Agent Hamelin).

"And so, admitting there was evidence that he was engaged in the drug trade, Gonzalez-Arias takes aim at what we've called the nexus element of the probable cause standard, see *United States v. Feliz*, 182 F.3d 82, 86 (1st Cir. 1999) (splitting the analysis into two parts: "probable cause to believe that (1) a crime has been committed — the 'commission' element, and (2) that enumerated evidence of the offense will be found at the place to be searched — the so called 'nexus' element), urging that there was no direct evidence that he used the apartment at 264 East Haverhill Street to peddle drugs in the time period leading up to the search.

"This sally stumbles out the gate. A magistrate interpreting a search warrant affidavit in the proper 'common sense and realistic fashion' may find probable cause to believe that criminal objects are in a suspect's residence even if there's no direct evidence: that is, even if agents or their informants never spotted the illicit objects at the scene. Rather, she may glean the link from circumstantial evidence, including the type of crime suspected and normal inferences about where a criminal would hide the evidence sought, combined with more 'specific observations' (like bustle in and out before and after drug deals) identifying the residence as a probable hub or haven for criminal transactions. And such evidence abounded here.

"For starters, common sense and experience teach that a big-time drug-mover like Gonzalez-Arias needs somewhere to keep his drug money, books, and spoils. See *Feliz*, 182 F.3d at 87–88 (finding it 'reasonable' to think — based on 'common sense, buttressed by an affiant's opinion as a law enforcement officer'— that a 'long-time, multi-kilo-level drug trafficker' would need to keep detailed accounts, customer lists, and money in a 'safe yet accessible place' like his home). And here, Agent Hamelin (who had thirteen years of DEA experience) wrote in his affidavit that traffickers like Gonzalez-Arias need to keep records (e.g., balance sheets listing the considerable money he owed foreign drug sources), proceeds from sales (like cash and jewelry), paraphernalia (think scales, sifters, packaging, and heat-sealing devices), and weapons in secure locations for ready access and to hide them from police. Though such generalized observations are rarely enough to justify searching someone's home, they're still factors a judge can weigh in the balance, *United States v. Rivera*, 825 F.3d 59, 64–65 (1st Cir. 2016).

"Against that backdrop, Gonzalez-Arias's calls and movements strongly suggested that 264 East Haverhill Street was the hub of his drug operation and, therefore, a natural place to store his drugs, records, and tools.

"We've repeatedly found probable cause to search a defendant's home when agents spotted him leaving the home immediately prior to selling drugs elsewhere. *United States v. Barnes*, 492 F.3d 33, 37 (1st Cir. 2007). And in *Rivera*, even when the defendant stopped at a stash house before moving on to the deal, we found probable cause to search his apartment because he was a long-time, high-volume drug dealer and used the place as a communications point to further his drug crimes (he made calls from there to set up the deals). 825 F.3d at 64. As in *Rivera* and *Barnes*, that Gonzalez-Arias made his illicit business calls and processed the drugs at the East Haverhill Street building, often minutes before he handed them off to buyers and associates, suggested that he kept the ingredients, processing tools, and records there, along with the weapons to protect them.

"Hoping to slice the baloney just thin enough, GonzalezArias argues that even if the drug dealing traced back to 264 East Haverhill Street (a three-story, multi-unit building), there was only the most tenuous evidence linking him to the apartment that was searched (unit 18) 'rather than just some unit' in that building. Moreover he adds, by the time agents applied for the warrant in July 2015, the evidence of controlled buys had grown stale, with the most recent one happening over 7 months earlier.

"But neither claim cuts it. Four months before they asked for the warrant, agents overheard Gonzalez-Arias order a food delivery to 264 East Haverhill Street and tell the delivery person to buzz apartment 18. Maybe he was eating with a neighbor. But there was at least a 'fair probability' that Gonzalez-Arias was ordering food from the same unit he used to stage his drug deals. Remember, the government need not make a beyond-a-reasonable-doubt or even a more-likely-than-not showing to establish probable cause for a search. See *Rivera*, 825 F.3d at 63.

"As for the staleness issue, we've long recognized that drug trafficking operations on this scale take time to develop — they often germinate over a protracted period of time — so information that might otherwise appear stale may remain fresh and timely during the course of the operation's progression. *United States v. Tiem Trinh*, 665 F.3d 1, 14 (1st Cir. 2011). Well-networked, well-sourced, and well-settled drug peddlers like Gonzalez-Arias aren't likely to close up shop (and toss all the goods, papers, and tools in it) just a month after ordering ten kilos of product. Gonzalez-Arias's drug calls and related trips from his home base right up to the month before the warrant issued were fresh evidence that the illicit items remained in the flat.

"For those reasons, the district court did not err when it denied the motion to suppress."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/18-1085P-01A.pdf

SEARCH AND SEIZURE: Stop and Frisk; Vehicle Stop; Weapons Patdown

United States v. Green
CA8, No. 18-3589, 12/27/19

At approximately 1:00 a.m. on January 13, 2018, Jordan Ehlers, a police officer in Waterloo, Iowa, observed a black Nissan Rogue SUV that, based

on his visual estimation, was speeding. Ehlers ran a search of the license plate number on the SUV, which returned a record for a different vehicle. While following the vehicle, he also noticed that a license plate frame on the SUV covered a portion of the license plate and registration. Based on these three facts, Officer Ehlers initiated a traffic stop.

Once the SUV stopped, Ehlers shined his spotlight on the back of the vehicle, and he observed passengers making what he perceived as suspicious movements. Ehlers exited his patrol car and approached the front passenger side of the vehicle. As the front passenger opened his window, Ehlers immediately smelled alcohol. He also observed open liquor bottles in the car and noticed that the floorboard appeared wet.

Ehlers requested identification from the driver and from each of the three passengers. The front seat passenger did not have identification but identified himself as Tereall Green. Officer Ehlers recognized Green's name from a prior intelligence report indicating that Green was seen in a Facebook video possessing a weapon. Ehlers then turned to the back-seat passengers, requesting identification from each of them. When one of them rolled down his window, Ehlers smelled marijuana. This passenger identified himself as Deshawn Marks. The other backseat passenger said his name was "Spencer Green." Ehlers noticed that "Spencer Green" appeared nervous, and he recognized "Green" as Javonta Herbert from prior contact with him.

After Officers Randy Girsch and Kenneth Schaaf arrived on the scene, Officer Ehlers asked Tereall Green to exit the SUV. He conducted a brief frisk of Green— quicker than normal due to the cold temperature. He did not find anything. Ehlers then frisked Marks, finding clear plastic baggies of marijuana. Because both Green and Marks were shivering, Officer Girsch offered to let them sit in his patrol car, an offer both men eventually accepted.

Back at the SUV, Ehlers asked "Spencer Green" to step out of the car. Ehlers asked if he was Javonta Herbert, and Herbert conceded that was his real name. Ehlers then conducted a patdown of Herbert. As Ehlers frisked Herbert, Officer Schaaf used his flashlight to look into the backseat floorboard of the SUV. He saw a handgun where Herbert had been sitting and immediately yelled "ten thirty-two"— a police code that indicated he had discovered a firearm in the vehicle. Ehlers placed Herbert under arrest.

Officer Girsch, who was standing beside the patrol car in which Tereall Green and Marks were sitting, heard Officer Schaaf call out the "ten thirty-two." Girsch decided to handcuff Green while another officer handcuffed Marks. Although he had observed Ehlers frisk Green earlier in the stop, Officer Girsch frisked him again, this time conducting a more thorough patdown. Girsch discovered a loaded firearm hidden in Green's pants. Green subsequently fled on foot. Officers pursued and captured him within minutes.

Both Green and Herbert were indicted on charges of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). In pretrial matters, the district court denied Green's motion to suppress evidence gathered during the traffic stop, finding that Ehlers had probable cause to stop the SUV and that neither patdown of Green constituted an unreasonable search in violation of the Fourth Amendment.

Upon review, the Court of Appeals for the Eighth Circuit found as follows:

"Under the Fourth Amendment, a traffic stop is reasonable if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. *United States v. Washington*, 455 F.3d 824, 826 (8th Cir. 2006). Even a minor traffic violation provides probable cause for a traffic stop. *United States v. Harris*, 617 F.3d 977, 979 (8th Cir. 2010).

"In this case, the district court found that Officer Ehlers had probable cause to believe the SUV was in violation of three different Iowa traffic laws. First, the district court credited Officer Ehlers's testimony that he observed the SUV speeding. Though we have cautioned that 'there must be sufficient indicia of reliability for a court to credit as reasonable an officer's visual estimate of speed,' *United States v. Gaffney*, 789 F.3d 866, 869 (8th Cir. 2015), we find the district court's determination that the SUV was speeding, based on Ehlers's credibility, training, and video evidence, is not clearly erroneous, and therefore Ehlers had probable cause to stop the vehicle. Furthermore, Ehlers also observed two other infractions that provided grounds to stop the SUV. First, Ehlers noticed that the license plate frame on the SUV covered the letters on the plate and the registration sticker…Second, prior to initiating the stop, Ehlers also ran an inquiry of the license plate which returned a record showing that the registration belonged on a silver 2004 Mercedes-Benz ML 500, but the plate was on a black 2011 Nissan Rogue. Because the license plate frame obscured the plate, Ehlers had probable cause to make a stop, and because the plates were registered to a different vehicle, Ehlers at least had a reasonable suspicion that the SUV may not be properly registered at all, see *United States v. Hollins*, 685 F.3d 703, 706 (8th Cir. 2012); see also *United States v. Givens*, 763 F.3d 987, 989 (8th Cir. 2014) ('Reasonable suspicion exists when an officer is aware of particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.' Therefore, initiating a traffic stop was not a violation of the Fourth Amendment.

"The Court further stated Officers may conduct a protective pat-down search for weapons during a valid stop when they have objectively reasonable suspicion that a person with whom they are dealing might be armed and presently dangerous. In determining whether reasonable suspicion exists, we consider the totality of the circumstances in light of the officers' experience and specialized training. *United States v. Preston*, 685 F.3d 685, 689 (8th Cir. 2012). A pat-down is permissible if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

"The Court noted that the patdown was justified by reasonable, articulable suspicion. Officer Ehlers recognized Green's name from a prior intelligence report indicating that Green possessed a weapon in a Facebook video. Officer Ehlers also smelled marijuana in the vehicle, and he had observed movement prior to the stop that he considered suspicious. Given the presence of illegal narcotics, Ehlers could have suspected that drugs were being transported in the car. See *United States v. Binion*, 570 F.3d 1034, 1039 (8th Cir. 2009). 'A suspicion on the part of police that a person is involved in a drug transaction supports a reasonable belief that the person may be armed and dangerous because weapons and violence are frequently associated with drug transactions.' *United States v. Crippen*, 627 F.3d 1056, 1063 (8th Cir. 2010). Viewing the totality of the circumstances, the Court concluded that Ehlers had reasonable suspicion that Green was armed and dangerous. Therefore, the first frisk was reasonable.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/19/12/183589P.pdf

SEARCH AND SEIZURE:

Unauthorized Driver of a Rental Vehicle; Towing for a Later Search

United States v. Bettis

CA8, No. 18-2407, 1/10/20

In the summer of 2016, informants tipped off police that CJ Bettis was selling heroin in the Minneapolis area. Bettis, who has two prior convictions involving trafficking heroin from Chicago, is married to Natasha Daniels. In a previous investigation, police had searched his home and found more than 80 grams of heroin and a fake ID. When law enforcement learned that Bettis was in Chicago and likely driving a Toyota rented by Daniels, they set up surveillance on his return route.

Shortly before 5 p.m. on November 8, 2016, Minnesota State Trooper Derrick Hagen stopped the Toyota for speeding on I-94. When asked for identification, the driver presented an Illinois photo ID with the name "Vernon Silas." Trooper Hagen recognized him as Bettis. A passport identified the passenger as Dalia Taha. Bettis did not have a valid license. The rental contract showed that Daniels, who was not in the car, was the only authoriz ed driver.

Trooper Hagen smelled a strong odor of raw marijuana coming from the vehicle. He separated Bettis and Taha and questioned both. Bettis claimed that he had traveled to Chicago with his son and attended a cousin's birthday party with Taha. When the trooper said that he smelled marijuana, Bettis admitted that he and Taha had smoked in the car. Taha told a different story. She claimed that she had been at a funeral with Bettis, but she could not remember any details, including the decedent's name. She admitted that she had smoked marijuana but not in the rental car.

A second Minnesota State Trooper arrived and secured Taha in his patrol car. Trooper Hagen then walked his drug-detection canine around the rental car. The dog alerted to the driver's side of the vehicle, and then indicated that the center console had drugs. Law enforcement found marijuana remnants in the console.

Officers conducted a roadside search using flashlights but did not find additional drugs. Based everything they knew and because drug dealers sometimes use marijuana to mask the odor of other drugs, the officers suspected additional drugs were hidden in the Toyota. Shortly after 6 p.m. they towed the vehicle to a police garage for a more thorough search. Bettis and Taha were dropped off at a nearby gas station.

The next day law enforcement performed another dog sniff on the rental vehicle. After the dog alerted, they obtained a state court warrant to search the Toyota. This time, officers discovered approximately 200 grams of heroin in the driver's headrest. That same day Daniels called law enforcement about the vehicle, and the case agent said that it would be returned directly to the rental company.

A grand jury indicted Bettis on one count of possession with intent to distribute heroin and two counts of distribution of heroin. Bettis moved to suppress the heroin.

Upon review, the Court of Appeals for the Eighth Circuit found as follows:

"An unauthorized driver of a rental car can establish the required expectation of privacy with evidence

of consent or permission from the lawful owner/renter. *United States v. Muhammad*, 58 F.3d 353 (8th Cir. 1995). Natasha Daniels testified that in general, 'I drive the rental car and if he needed to use a car, then he could use my vehicle.' Specifically, when she rented the car on November 1—days before Bettis left for Chicago—she did not know that he would be using it. And she thought it was better for Bettis to drive the rental car due to the mileage. Daniels also explained that she did not list her husband on the rental contract because if you add another name they charge more. The Court concluded our precedent holds that an unauthorized and unlicensed driver may challenge a search of a rental car operated with the renter's permission. Bettis has standing to challenge the search of the vehicle.

"Bettis next argues that seizing and towing the Toyota after only finding marijuana debris violated his Fourth Amendment rights.

"Although a warrantless search is usually per se unreasonable, probable cause justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *United States v. Ross*, 456 U.S. 798, 825 (1982). Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place. Armed with probable cause, law enforcement may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. *Michigan v. Thomas*, 458 U.S. 259, 261 (1982). This search need not be completed on the shoulder of the road. *United States v. Casares-Cardenas*, 14 F.3d 1283, 1286 (8th Cir. 1994).

"As the encounter with Bettis unfolded, officers developed additional evidence indicating deception and criminal conduct. Bettis gave the officer a false name and photo ID. Although he admitted Daniels was the only authorized driver, he referred to his wife as 'a friend of mine.' He initially lied about smoking marijuana. And Bettis and his passenger gave inconsistent stories about where they smoked and what they had done in Chicago. The canine alert, the modus operandi resembling Bettis's past crimes, and the knowledge that marijuana is used to mask other illegal drugs all indicated that Bettis was hiding more drugs.

"As more facts came to light, law enforcement properly decided to conduct a more thorough search than flashlights on the shoulder of a busy highway allowed. It was also reasonable to perform a second dog sniff after the marijuana odor subsided. Bettis and Taha were not delayed beyond the traffic stop and no one demanded the immediate return of the vehicle. Moreover, after the second dog alerted, law enforcement obtained a valid search warrant.

"Other practical concerns support the reasonableness of the officers' actions. Without a valid license, the police could not allow Bettis to drive. At the time of the stop, the rental contract in the vehicle showed that it was overdue by one day. Bettis had no proof that the contract had been extended, and his earlier deception justified maintaining control of the rental vehicle after normal business hours. We agree with the district court that law enforcement had probable cause to seize the vehicle and continue the search."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/01/182407P.pdf

SEARCH AND SEIZURE:

Visual Body Cavity Search

Sloley v. Van Bramer

CA2, No. 16-4213-cv, 12/12/19

In the pre-dawn hours of April 1, 2013, Maxmillian Sloley and Daphne Rollins got into an argument at Rollins's house in Athens, New York. According to Sloley, Rollins was somewhere between being his "girlfriend or ex-girlfriend" at the time. The argument stemmed from rumors Rollins had heard that Sloley was romantically involved with another woman. The argument escalated.

During the confrontation, Sloley grabbed the intoxicated Rollins's cell phone and ran out of the house with it. Rollins gave chase, falling down the house's front steps in the process. Rollins then went back inside, reemerging with a baseball bat in hand. At that point, Sloley retreated into his car, tossing Rollins's phone to the ground as he ran. Rollins then struck the windshield of Sloley's car with the baseball bat. After Rollins struck Sloley's car with the bat, they both returned inside. At some point while they were inside, Sloley grabbed the bat from Rollins, went back outside, and hit Rollins's car with it. Sloley then tossed the bat to the ground before driving off. Rollins called 9-1-1, though Sloley was not aware at that time that Rollins had called the police.

New York State Trooper Bryan VanBramer responded to Rollins's 9-1-1 call. According to Bryan, Rollins told him that Sloley may be involved with illegal drug activity and possibly was in possession of illegal drugs. Rollins denies having made any mention of Sloley being involved in, or possibly involved in, drug activity and denies having suggested that Sloley might have been possession of any illegal drugs. A deputy from the Greene County Sheriff's Office pulled Sloley over about five minutes after he left Rollins's house. Sloley told the deputy about his dispute with Rollins. Upon consultation with the New York State Police, the deputy then placed Sloley in handcuffs and brought him back to Rollins's house. Once there, the deputy who had apprehended Sloley transferred Sloley into Bryan's police car. After some discussion with Sloley, Bryan and another state trooper present at the scene brought Sloley to a nearby state police station. The troopers did not ask him if he was involved in any illegal drug activity.

At the police station the New York State, Troopers brought Sloley to an office, where they handcuffed him to the wall. At that point, the troopers informed Sloley that he was going to be charged with harassment and criminal mischief.

Unbeknownst to Sloley at the time, Bryan had at some point told New York State Trooper Eric Van Bramer, to go to Sloley's car with Eric's drug-sniffing dog, Ryder. According to Eric, he recognized Sloley's name "as referring to an individual who was well known in the area for being wrapped up in illegal drugs." Moreover, before April 1, 2013, "several people" had told Eric that "Sloley was a drug dealer."

Eric brought Ryder near Sloley's car. Ryder alerted—i.e., indicated the presence of drugs—on each side of the car, in the area around the car's hood, and in the center console area inside the car. According to Eric, he saw "a small amount of a loose, chunky substance that appeared to be crack cocaine in the crease in the driver's seat." Eric claims he field tested the substance which tested positive for cocaine. Sloley does not contest the fact that Eric brought Ryder to the car. However, he does dispute that Eric found any drugs in the car.

Eric unhooked Sloley from the wall to which he was handcuffed and brought him to a private back

room of the police station. Eric instructed Sloley to remove his clothing, and Sloley did so, piece by piece. Eric searched each article of clothing as Sloley handed them to him. Once Sloley was completely naked, Eric instructed him to lift his genitals, bend over, spread his buttocks, and allow Eric to examine the now-exposed areas of Sloley's body. The search revealed no drugs secreted on or in Sloley's body.

After the search, Sloley got dressed and was brought to Athens Town Court to be arraigned. Sloley was arraigned on the harassment and criminal mischief charges, as well as a drug possession charge for the cocaine Eric had purportedly found in his car. Sloley was held without bail in Greene County Jail. Three days after his arraignment, Sloley was brought back to Athens Town Court where he pled guilty to the harassment charge—a violation—and was sentenced to time served. The other charges were dropped.

On March 27, 2014, Sloley filed complaint, pursuant to 42 U.S.C. § 1983, against New York State and Eric Van Bramer alleging that the search Eric conducted violated his Fourth Amendment right to be free from unreasonable searches.

Upon review, the Court of Appeals for the Second Circuit found as follows:

"It is necessary at the threshold to define several terms essential to the analysis:

a strip search occurs when a suspect is required to remove his clothes; (2) a visual body cavity search is one in which the police observe the suspect's body cavities without touching them (as by having the suspect to bend over, or squat and cough, while naked); (3) a 'manual body cavity search' occurs when the police put anything into a suspect's body cavity, or take anything out. *Gonzalez v. City of Schenectady,* 728 F.3d 149, 158 (2d Cir. 2013); see also *People v. Hall,* 10 N.Y.3d 303, 306-07 (2008). Here, Sloley was subjected to a strip search and visual body cavity search. However, on appeal, he challenges only the constitutionality of the visual body cavity search. Thus, the questions to which we first turn are what the Fourth Amendment requires when police officers conduct visual body cavity searches incident to felony arrests.

"Since at least 1914, it has been accepted that a search incident to an arrest constitutes an exception to the warrant requirement the Fourth Amendment otherwise imposes. *Riley v. California*, 573 U.S. 373, 382 (2014). However, the scope of a search incident to arrest is limited. As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 3 646, 652 (1995). The reasonableness of the search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody. To determine whether a particular search incident to arrest falls within this exception, we examine the degree to which it intrudes upon an individual's privacy and the degree to which it is needed for the promotion of legitimate governmental interests. *Birchfield v. 10 North Dakota*, 136 S. Ct. 2160, (2016).

"Applying this framework, this Court has held that the 'uniquely intrusive nature of strip searches, as well as the multitude of less invasive investigative techniques available to officers' make it such that a strip search cannot be treated as a routine search of an arrestee's person. *Hartline v. Gallo*, 546 F.3d 95, (2d Cir. 2008). Thus, we

have held that the Fourth Amendment requires an individualized reasonable suspicion that a misdemeanor arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest before she may be lawfully subjected to a strip search.

"Van Bramer is correct that neither we nor the Supreme Court have ever squarely held that a similar reasonable suspicion requirement applies to visual body cavity searches of persons arrested for felony offenses. Balancing the degree to which visual body cavity searches intrude upon an individual's privacy against the degree to which they are needed for the promotion of legitimate governmental interests, we now hold that such searches do require reasonable suspicion. In other words, a visual body cavity search conducted as an incident to a lawful arrest for any offense must be supported by 'a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity.' *Hall,* 10 N.Y.3d at 311.

"Visual body cavity searches are invasive and degrading, occasioning a serious invasion of privacy and working a significant harm to a person's bodily integrity. A reasonable suspicion requirement readily accommodates the government's interest in preventing the destruction of evidence without impairing that interest. If an arresting officer has reason to believe, based on 'specific and articulable facts, taken together with rational inferences from those facts,' *Terry v. Ohio*, 392 U.S. 1, (1968), that an arrestee is secreting contraband inside a body cavity, then the officer is permitted to conduct a visual body cavity search. If such suspicion is lacking, then the government's interest in preserving evidence must yield to the individual's strong privacy interest."

READ THE COURT OPINION HERE:
https://www.ca2.uscourts.gov/decisions/isysquery/456e6d6c-35b1-4ab9-8323-57ab994bd865/1/doc/16-4213_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/456e6d6c-35b1-4ab9-8323-57ab994bd865/1/hilite/

SOVERIGN IMMUNITY: Arkansas

Stevens Auto Center v. Arkansas State Police

ASC, No. CV-19-361, 2020 Ark. 28, 2/6/20

The Arkansas Supreme Court affirmed a summary judgment order in favor of the State Police under sovereign immunity. The agency did not commit illegal or unconstitutional action when it denied a convicted felon of an opportunity to be on its approved towing list.

READ THE COURT OPINION HERE:
https://cases.justia.com/arkansas/supreme-court/2020-cv-19-361.pdf?ts=1581004855