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Contents

CIVIL LIABILITY: Arm-Bar Takedown; Taser

Kohorst v. Smith

CA8, No. 19-1955, 8/6/20

During the nighttime hours of November 19, 2015, Officer Thomas J. Smith was dispatched to the area of a 911 report that the caller had given two highly intoxicated men a ride to a neighborhood near Lake Crystal, Minnesota, and that after they had been dropped off the caller had observed them knocking on random doors. The caller expressed concern that the two were at risk of freezing or walking into the nearby lake. A contemporaneous Computer Aided Dispatch ("CAD") report indicated the individuals were suspected of participating in an altercation at a movie theater earlier in the evening. Officer Smith had his laptop open during his patrol. Upon arrival, Officer Smith found a visibly intoxicated Brett Kohorst wandering the streets with his pants undone.

Officer Smith approached Kohorst and attempted to strike up a conversation with Kohorst directing him to take a seat on the hood of the squad car. Officer Smith observed that Kohorst was extremely intoxicated. While Kohorst's responses to the officer's questions and instructions to sit on the squad car were semi-coherent, Kohorst plainly did not sit on the squad car or respond to Officer Smith's initial inquiries but rather stated, "I'm looking for my friend Jacob." Officer Smith repeated his request that Kohorst sit on the car three more times and told him to get his hands out of his pockets. It is debatable whether or not Kohorst was sober enough to understand the nature of Officer Smith's directions. That said, although Kohorst did not sit down, he did remove his hands from his pockets in order to fix his pants after Officer Smith informed him that his pants were undone. Officer Smith then asked Kohorst where his friend was. Kohorst responded by

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asking if there was a reason why Officer Smith was looking for his friend. Officer Smith told him, "Yeah, [because] someone called us [because] they think you guys are lost and drunk. The guy who dropped you off here." After adjusting his pants, Kohorst returned his hands to his pockets. Officer Smith twice more asked Kohorst to keep his hands out of his pockets. Eventually Kohorst complied.

Despite repeated requests from Officer Smith, Kohorst failed to provide any information about his residence beyond saying that he lived in Apple Valley, Minnesota. Eventually the officer asked Kohorst for his identification. Kohorst responded by taking his wallet out of his back pocket, holding it against the front of his chest, and placing his other hand back in his pocket. When Officer Smith reached for the wallet, Kohorst jerked it away and held the wallet behind his back. Officer Smith grabbed Kohorst's arm and attempted to place him in an escort hold. The body-cam video at this point became obscured because of Officer Smith's close proximity to Kohorst. However, the two appeared to struggle. Officer Smith, who was still alone on the scene, called for assistance. He repeatedly told Kohorst, "Do not fight with me" and instructed Kohorst numerous times to place his hands behind his back. Kohorst refused to comply. Officer Smith then initiated an arm-bar takedown and took Kohorst to the ground.

Once Kohorst was on the ground, Officer Smith repeatedly directed him to place his hands behind his back and unsuccessfully tried to handcuff Kohorst. Finally Officer Smith warned Kohorst that if he did not comply he would be tased. Kohorst responded by placing his left arm behind his back while keeping his right arm underneath him or at his side while appearing to roll to his side. Officer Smith tased Kohorst in "drive stun mode" and once again attempted to place Kohorst's arms in a position to handcuff him. Kohorst continued to attempt to roll onto his back or press himself up off the ground. Officer Smith continued to order Kohorst to his stomach with his hands behind his back but Kohorst continued to fail to comply. At this point, Officer Smith pushed Kohorst's shoulder toward the ground causing Kohorst's face hit the pavement, splitting his chin. Officer Smith again ordered Kohorst to put both hands behind his back. Kohorst responded "they are," even though only his left arm was behind his back. Officer Smith repeated his commands twice more. Kohorst did not comply. Officer Smith then tased Kohorst in "barb" mode causing Kohorst to roll onto his back.

During the second tasing, Officer Smith continued to order Kohorst to put his hands behind his back "or I'm going to tase you again." In response to Officer Smith's instructions, Kohorst stated that he was trying to get his wallet. By now Kohorst had rolled to his stomach with his left arm behind his back and his right arm at his side. Officer Smith tried to pull Kohorst's right arm behind Kohorst's back, but Kohorst pulled it away and moved both arms toward the ground. Officer Smith once again tased Kohorst in "barb" mode and twice more instructed him to place his hands behind his back. Finally, Kohorst complied and was handcuffed. Shortly thereafter when Sergeant Steven Stoler and additional back-up arrived at the scene, Officer Smith stated, "There's one more somewhere around here."

The officers successfully placed Kohorst in the back of a squad car. While they waited for paramedics to arrive, Kohorst began kicking the interior of the squad car door and slammed his head into the plexiglass partition somehow managing to slip one leg over his handcuffs so that his wrists were cuffed between his legs in an awkward position. Sergeant Stoler attempted

to fix Kohorst's handcuffs. He told Kohorst, "Now listen to me. You are going to come out here, lay down and we are going to handcuff you and you're not going to give us any problems, are you clear? If you give us problems, you will be tased again." With Kohorst still in the vehicle, Sergeant Stoler began to undo Kohorst's cuffs and said, "If you do anything with this hand…" Before Sergeant Stoler could finish his sentence Kohorst began to visibly resist, leading Sergeant Stoler to command, "Don't, don't twist your hand." Another officer suggested pulling Kohorst from the vehicle in order to reapply the handcuffs. Sergeant Stoler then lifted Kohorst out of the squad car with two hands and dropped him to the ground. Kohorst believes his head struck the ground, although he concedes he has no memory of any of the relevant events of November 19, 2015. In the absence of Kohorst's ability to testify, the court is left with the recordings and the officers' testimony. Sergeant Stoler testified at his deposition that he placed Kohorst on Kohorst's side and shoulder to reduce the risk of head injury. After Kohorst's handcuffs were fixed, the officers asked him, "Your buddy live around here?" An officer inquired if Kohorst and his friend were the individuals from the movie theater fight. Officer Smith replied, "I bet you they were."

Brett Kohorst sued officers Smith and Stoler of the Burnsville Police Department alleging claims of excessive force under 42 U.S.C. § 1983. The district court granted the officers' motion for summary judgment based on their claim of qualified immunity.

The Eighth Circuit Court of Appeals affirmed the district court decision:

"The use of force is least justified against a nonviolent misdemeanant who does not flee or actively resist arrest and poses little threat to officers or the public. When a suspect is passively resistant, somewhat more force may reasonably be required. The failure to follow police instruction may constitute passive resistance. Whether a suspect's resistance is intentional does not impact how a reasonable officer would interpret the suspect's behavior. An officer is entitled to use the force necessary to effect an arrest where a suspect at least appears to be resisting. We have upheld the use of force where a suspect is non-compliant and resists arrest or ignores commands from law enforcement.

"Kohorst first claims that Officer Smith's arm-bar takedown and later push into the ground constitute unreasonable uses of force. In *Ehlers v. City of Rapid City,* 946 F.3d 1002 (8th Cir. 2017) we upheld the finding of qualified immunity when an officer executed a takedown after Ehlers twice ignored orders to put his hands behind his back. Once Ehlers was on the ground, the officer pushed Ehlers' head down before ordering him to put his hands behind his back. We determined that the takedown did not violate a constitutional right because Ehlers 'at least appeared to be resisting' so the officer was entitled to use necessary force to restrain him.

Based on the circumstances confronting Officer Smith when he arrived on the scene, the arm-bar takedown and the pushing down of Kohorst, who at minimum appeared to be resisting and was not complying with commands, do not rise to the level of force required to constitute a constitutional violation.

"Kohorst next alleges that Officer Smith's use of the taser constituted excessive force in violation of the Fourth Amendment. We have previously determined that an officer may interpret a suspect laying on his stomach with his hands underneath him and refusing to give his hands

to officers as resistance. 'Unarmed, passively resisting subjects can pose a threat necessitating the use of taser force.' *Cravener v. Shuster,* 885 F.3d 1135, 1140 (8th Cir. 2018).

"Officer Smith gave several clear orders for Kohorst to stop moving and lay down on his stomach, or he would be tased. Because Kohorst's arms were at times underneath him or at his sides after the tasings and orders, a reasonable officer in Smith's position could have perceived Kohorst to be resisting arrest and could have feared for his safety. While Officer Smith's takedowns and repeated tasings of Kohorst 'likely reside on the hazy border between excessive and acceptable force, we cannot conclude that only a plainly incompetent officer would have believed the force used was constitutionally reasonable.' *Blazek v. City of Iowa City*, 761 F.3d 920, 924 (8th Cir. 2014). Officer Smith's actions, while a close call, did not violate a clearly established right and the district court did not err in granting qualified immunity. Officer Smith's actions, while a close call, did not violate a clearly established right and the district court did not err in granting qualified immunity.

"Kohorst alleges that Sergeant Stoler used excessive force in removing him from the back of the squad car. An arresting officer need not avoid risk of harm or even take the most prudent course of action when transporting an arrestee. *Kasiah v. Crowd Sys., Inc.,* 915 F.3d 1179, 1184 (8th Cir. 2019). Nor are officers required to treat detainees as gently as possible. However, when a person is subdued and restrained with handcuffs, a gratuitous and completely unnecessary act of violence is unreasonable and violates the Fourth Amendment.

Kohorst was suspected of being involved in a fight earlier in the night and had been acting violently in the back of the squad car: hitting his head against the plexiglass, kicking his legs, and contorting his body enough to at least partially escape his handcuffs. Given the physical situation Kohorst had worked himself into, it was entirely possible that Kohorst could work his way to having his handcuffs in front of him, a dangerous and potentially lethal situation for the officers.

"Video of the encounter establishes that Sergeant Stoler's removal of Kohorst from the back of the vehicle was not a gratuitous and completely unnecessary act of violence. Kohorst was uncooperative, arguably resisting, and posed a potential threat as he had already attempted to escape his handcuffs. While we view the evidence in the light most favorable to Kohorst, no reasonable jury could review the video and conclude that Sergeant Stoler's action was gratuitous or unnecessarily violent–especially where Kohorst has no recollection of the event to testify to. Kohorst has also offered no evidence to refute Sergeant Stoler's explanation that he intended to place Kohorst in a way that reduced injury risk.

"Sergeant Stoler's movement of Kohorst, an at least passively resisting suspect, was not gratuitous or unnecessarily violent. The district court did not err in granting qualified immunity."

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/191955P.pdf

CIVIL LIABILITY:

Deliberate Indifference to Serious Medical Needs of a Detainee in their Custody

Dyer v. City of Mesquite

CA5, No. 19-10280, 7/6/20

Claims by Robert and Kathy Dyer arise out of the death of their 18-year-old son, Graham, from self-inflicted head trauma while in police custody. Graham died after violently bashing his head over 40 times against the interior of a patrol car while being transported to jail. The Dyers brought various claims against the paramedics who initially examined Graham, the officers who transported him, and the City of Mesquite.

Responding to a late evening 911 call concerning Graham, who had consumed LSD, Officer Gafford first arrived on the scene, observed Graham's erratic behavior, and physically restrained him. Officer Houston arrived next and handcuffed Graham. During this encounter, Graham was "rolling" and "yelling" while officers tried to calm him down. Officers Heidelburg, Scott, and Fyall next arrived. The Paramedics then arrived, examined Graham, and released him to the police.

Graham was then placed in Heidelburg's patrol car. While officers were trying to secure Graham, he bit Fyall on the finger. Graham was placed in leg restraints, but his seatbelt was not fastened. Heidelburg then drove off with Graham. Scott and Gafford followed in their own patrol cars. While Heidelburg was driving, Graham screamed, thrashed violently, and slammed his head multiple times against the interior of the car. Heidelburg told Graham to stop hitting his head, but Graham did not comply. Heidelburg testified he pulled the car over to try to stop Graham from hitting his head on the cage." Scott saw Heidelburg pull the car over and assumed he was doing so because Graham "was banging his head." The internal investigation report prepared by the Mesquite Police Department (based in part on a video recording of the incident) reported that Graham slammed his head against the "metal cage, side window and back seat" 19 times before Heidelburg pulled over.

At that point, Scott stopped to help prevent Graham from banging his head on the back of the car. Gafford also pulled over, seeking to help stop Graham from doing further harm to himself. Gafford testified he could actually see the car shaking from side to side as Graham flung himself around in the back seat. When the car stopped, Graham continued to scream and thrash, and the Officers tased him several times to regain control. After re-securing Graham, Heidelburg resumed driving toward the jail and Graham continued to scream and slam his head against the car's interior. According to the investigation report, Graham bashed his head another 27 times before they arrived at jail.

All three Officers removed Graham from the patrol car and brought him into the sally port. Graham continued kicking and screaming as jail personnel tried to secure him. Graham was moved inside the jail, placed in a restraint chair, and eventually put in a padded cell. No evidence shows Graham caused any further harm to himself once restrained. The Officers each said they had no recollection of reporting to the jail sergeant the fact that Graham had slammed his head repeatedly against the interior of the patrol car in route to jail. The investigation report states only that the jail sergeant was informed by transport officers Graham had been medically cleared at the scene.

Just over two hours later, the sergeant noticed Graham's breathing was labored and summoned paramedics, who arrived at 1:40 a.m. Graham was

transported to a local hospital and died at 11:00 p.m. that evening. Among other injuries, the autopsy reported extensive blunt force injuries to Graham's head and cranial hemorrhaging. The reported cause of death was craniocerebral trauma. Graham had ingested LSD and was in a drug-induced psychosis.

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

"In this case, a reasonable jury could find that (1) Graham violently bashed his head against the interior of Officer Heidelburg's patrol car over 40 times while en route to jail; (2) Officers Heidelburg, Gafford, and Scott were fully aware of Graham's actions and of their serious danger; (3) the Officers sought no medical attention for Graham; and (4) upon arriving at jail, the Officers failed to inform jail officials what Graham had done to himself, telling them only that Graham had been "medically cleared" at the scene.

"From this evidence, a reasonable jury could conclude that the Officers were either aware or should have been aware, because it was so obvious, of an unjustifiably high risk to Graham's health, did nothing to seek medical attention, and even misstated the severity of Graham's condition to those who could have sought help.

"The Fifth Circuit reversed the district court summary judgment dismissing the deliberate-indifference claims against the Officers, and remanded the case for further proceedings consistent with this opinion."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/19/19-10280-CV0.pdf

CIVIL LIABILITY: Significant Threat of Physical Harm; Deadly Force
Monzon v. City of Murrieta
CA9, No. 19-55164, 7/22/20

After leading police officers on a high-speed chase in a stolen van, Junef Monzon turned down a dead-end street. He stopped at the end of the road, and the police officers parked and exited their cruisers behind him. Monzon turned the van around, pointing it generally toward the officers. As the van accelerated in an arc toward and eventually between the officers, they commanded Monzon to stop and fired on him when the van moved in their direction and in the direction of their fellow officers. Monzon crashed into a police cruiser, pushing that cruiser into one of the officers, and the officers continued to fire. Monzon sustained multiple gunshot wounds and was pronounced dead at the scene.

In granting summary judgment for the City of Murrieta, the five police officers, and John Does 1 through 10, the district court found that the officers' use of deadly force was reasonable. Monzon's parents appealed the ruling.

The Court of Appeals for the Ninth Circuit held that that the officers' use of deadly force was objectively reasonable given the dynamic and urgent situation, where officers were faced with the immediate threat of significant physical harm. The panel noted that first, the severity of Monzon's crime weighed in favor of the use of force. Monzon led officers on a dangerous high-speed chase at night, and he refused to stop his van at the behest of officers even after coming to the end of a street. Second, Monzon posed an immediate threat to the safety of the officers when he ignored commands to stop the van and drove near, toward, and amongst the officers on foot. Third, Monzon's driving endangered

the officers and left them with only seconds to consider less severe alternatives. Finally, a reasonable officer in the position of the individual defendant officers would have probable cause to believe that Monzon posed an immediate threat to the safety of one or more of the other officers or himself.

READ THE COURT OPINION HERE:
http://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/22/19-55164.pdf

CIVIL LIABILITY:

Significant Threat of Deadly Force
Estate of Biegert v. Molitor
CA7, No. 19-2837, 7/31/20

Joseph Biegert texted his mother that he had taken pills in an apparent suicide attempt. She called the Green Bay police and requested a welfare check. She stated that Biegert was depressed, had a history of suicide attempts, was alone, and had no weapons nor vehicles. Officers were dispatched to Biegert's apartment.

As they approached, Biegert called police dispatch, expressing concern that there were strangers outside his door. While Biegert was on the call, the officers knocked and announced themselves. The officers did not know that Biegert had called dispatch and grew suspicious when they heard him walk away from the door, rummage for something, and return to open the door. Biegert opened the door, confirmed his identity and that he was depressed, and allowed both officers into the apartment.

Biegert initially cooperated. He began resisting when the officers tried to pat him down. The officers used fists, tasers, and batons. Biegert armed himself with a kitchen knife. When he began to stab an officer, they shot him. He died at the scene.

In rejecting a suit alleging excessive force, the Seventh Circuit affirmed that the officers reasonably restrained Biegert and reasonably resorted to lethal force when Biegert threatened them with a knife.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D07-31/C:19-2837:J:Barrett:aut:T:fnOp:N:2556163:S:0

CIVIL LIABILITY:

False Arrest; Failure to Investigate
Kingsley v. Lawrence County
CA8, No 19-1524, 7/2/20

In 1995, Kiman Kingsley and his siblings Kaleb, Kaland, and Karen purchased a farm in Lawrence County. In 1996, the Kingsley Farm was conveyed to a trust, with Kiman, Kaleb, Kaland, Karen, and their then-minor sibling Kevin named as trust beneficiaries. Eventually, Kiman, Kaleb, and Kaland turned the Kingsley Farm into an organic farming operation and crop-spraying business, which the three brothers co-owned and operated. Kevin worked on the Kingsley Farm until 2008, when he and his now-wife Lisa left to start a competing crop-spraying business.

According to Kiman, after Kevin's departure, Kevin and Lisa endeavored to steal the Kingsley Farm's customers, eliminate the Kingsley Farm as a competitor, and take over its businesses. Further, Kiman alleges that Kevin and Lisa have recruited others, including law enforcement officers with the Lawrence County Sheriff's Office (LCSO), to assist them in this endeavor.

On January 25, 2013, James Tyler, one of the employees of the Kingsley Farm, was charged with sexual misconduct involving two minors. On February 13, 2013, Tyler was released from jail after Kiman posted bond for him. Later in February, Lisa and Cynthia, Kaleb's then-wife, went to the LCSO to meet with Deputy Sheriff Chris Berry, the detective assigned to investigate Tyler's case. Deputy Berry recorded the meeting, which was later transcribed.

Lisa and Cynthia began the meeting by expressing to Deputy Berry their concerns about Tyler being released on bond and returning to the Kingsley Farm. Lisa then posed the following hypothetical to Deputy Berry: If someone were to report to Deputy Berry that Kiman had screamed at her and had threatened, "[W]e're going to get you and the prosecuting attorneys, we're all mad at you, we're going to get you," would that be "enough to get charges against [Kiman]"? Deputy Berry responded, "Well, I hope so. That's all I can say, you know. I'm steady working on it and you know I want [that] as much as you all do because [Kiman] needs to back off and let this thing ride out and I'm not seeing it happen."

Shortly thereafter, Lisa posed a second hypothetical to Deputy Berry: If Kiman and his wife, Darlene, were criminally charged for threatening "ladies," could Kiman and Darlene be arrested and taken away from the Kingsley Farm at the same time, and, if so, could Lisa and Cynthia, as property owners, then force Tyler off the Kingsley Farm? Deputy Berry responded that Lisa and Cynthia would have to "go through the courts" to do that. He explained that they would have "to get writs" which would take thirty days. Throughout the rest of the meeting, Deputy Berry repeatedly informed Lisa and Cynthia that they would need to go through the court system.

On July 5, 2013, Deputy Sheriff Jon Ford received a call from his dispatcher directing him to respond to a call from Cynthia, who had reported to police that Kiman had assaulted her. Deputy Ford met with Cynthia at the police station in Miller, Missouri and obtained verbal and written statements from her. In her statements, Cynthia claimed that she and Kiman had an argument earlier that day at the Kingsley Farm and that Kiman tried to stab her with a yellow pocket knife. Cynthia explained that she used a taser on Kiman and then got into her vehicle, locked the doors, and began to drive away. Cynthia reported that, as she drove away, Kiman attempted to stab her tires with the yellow pocket knife but one of his employees, Marty Johnson, prevented him from doing so.

After obtaining verbal and written statements from Cynthia, Deputy Ford went to the Kingsley Farm to investigate Cynthia's allegations. He was accompanied by Deputy Sheriffs Cam Carter and Steve Vollmer. When the deputies arrived at the farm, they were met by Marty Johnson, who informed them that Kiman was flying an airplane but would return shortly. In the meantime, Deputy Ford asked Deputy Carter to interview Johnson about the incident. After speaking to Johnson, Deputy Carter reported to Deputy Ford that Johnson had stated that "the incident was a family matter" and "that he did not want to get involved." No one else claiming to be a witness to the alleged incident came forward to Deputy Ford.

When Kiman returned to the Kingsley Farm, Deputy Ford spoke to him and found on his person a yellow pocket knife. Deputy Ford then arrested Kiman for the alleged assault of Cynthia and transported him to the Lawrence County jail.

At the jail, Deputy Ford filled out a Prosecutor Referral Form and a Statement of Probable

Cause. He placed the completed forms, along with copies of the police reports and Cynthia's written statement, in a tray to be forwarded to the Lawrence County Prosecutor's Office, with a request that those materials be considered in determining whether to criminally charge Kiman. Those materials were also turned over for assignment to an LCSO detective for any follow-up investigation which might be necessary. Deputy Ford had no further involvement in this matter.

The next day, on July 6, 2013, Deputy Berry was assigned as the detective to investigate Kiman's case. After reviewing the materials turned over by Deputy Ford, he determined that the only other witnesses identified in the police report were Cynthia's two minor children who were in her vehicle at the time of the incident. Pursuant to Deputy Berry's request, a case worker at the Children's Center of Southwest Missouri interviewed Cynthia's children on July 8, 2013. Deputy Berry was present for the interviews, but he did not participate in them in any way. The interviews were videotaped and copies of the tapes were then forwarded to the Prosecutor's Office. Deputy Berry did not interview any other witnesses, and he had no further involvement in this matter.

In August 2013, the Lawrence County Prosecutor recused himself from Kiman's case because of an association he had with Kiman. Patrick Sullivan was appointed as the special prosecutor. Following his appointment, Sullivan reviewed the materials that had been sent to him by the LCSO. Sullivan also met with Cynthia. However, it was not until September 2015 that Sullivan filed state criminal charges against Kiman for assault in the second degree and armed criminal action. Sullivan's reason for the two-year delay was that he "was thinking about it." At no point prior to filing the criminal charges against Kiman did Sullivan ask the LCSO for additional information or any follow-up investigation.

On March 3, 2016, a preliminary hearing was held in Kiman's criminal case. Kiman's counsel conceded that probable cause existed for him to be bound over for trial. In September 2016, however, Kiman retained new counsel who met with Sullivan and provided him with a private investigator's summaries of his interviews with additional persons who had allegedly witnessed the incident, as well as a copy of the divorce decree that was entered in the divorce proceedings between Cynthia and Kaleb on September 30, 2016. After reviewing the divorce decree, Sullivan decided to dismiss the criminal complaint against Kiman because he felt the factual findings set forth in the divorce decree could be used to impeach Cynthia in Kiman's criminal case. The criminal complaint against Kiman was dismissed on November 16, 2016.

Kiman Jay Kingsley filed a 42 U.S.C. Section 1983 action against Lawrence County, Missouri, Sheriff Brad Delay and Deputy Sheriff's Chris Berry and John Ford, in their individual capacities, for false arrest in violation of the Fourth Amendment, reckless or intentional failure to investigate in violation of the Due Process Clause of the Fourteenth Amendment, and conspiracy to violate those constitutional rights; and against Lawrence County for its unconstitutional customs or policies. Appellees moved for summary judgment on all claims, which the district court granted.

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

"The court held that Deputy Ford was entitled to qualified immunity on a Fourth Amendment false arrest claim where he had probable cause to make the warrantless arrest of plaintiff. In this case,

prior to arresting plaintiff, Deputy Ford was told by his dispatcher that plaintiff had tried to stab the victim. The victim gave both oral and written statements about the incident and other evidence corroborated the victim's statements. The court also held that the sheriff and the second deputy are entitled to qualified immunity on the Fourth Amendment false arrest claim. The officers are also entitled to qualified immunity on plaintiff's Fourteenth Amendment substantive due process claim for failure to investigate.

"A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least arguable probable cause. *Borgman v. Kedley*, 646 F.3d 518, 522-23 (8th Cir. 2011). Probable cause to make a warrantless arrest exists when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense. Arguable probable cause exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is objectively reasonable. *Borgman*, 646 F.3d at 523

"Further, the law does not require law enforcement officers to conduct a perfect investigation to avoid suit for false arrest. Officers have no duty to conduct further investigation once they had arguable probable cause to arrest. *Clayborn v. Struebing*, 734 F.3d 807, 809 (8th Cir. 2013). The Court further considered whether Sheriff DeLay, Deputy Berry, and Deputy Ford are entitled to qualified immunity on Kiman's Fourteenth Amendment substantive due process claim. To establish a substantive due process violation, Kiman must demonstrate that a fundamental right was violated and that the Officers' conduct shocks the conscience. *Folkerts v. City of Waverly*, 707 F.3d 975, 980 (8th Cir. 2013). Where, as here, the plaintiff's substantive due process claim is based on a failure to investigate, the plaintiff must show that the officers intentionally or recklessly failed to investigate, thereby shocking the conscience. *Akins v. Epperly,* 588 F.3d 1178, 1184 (8th Cir. 2009). Whether conduct shocks the conscience is a question of law to which we apply a rigorous standard. *Johnson v. Moody,* 903 F.3d 766, 773 (8th Cir. 2018). Investigators shock the conscience when they (1) attempt to coerce or threaten the criminal defendant, (2) purposefully ignore evidence of the defendant's innocence, or (3) systematically pressure to implicate the defendant despite contrary evidence.

"At most, Kiman has presented evidence that the Officers failed to strictly follow Lawrence County Sheriff Office procedure, to ascertain the identities of potential additional witnesses, and to explore possible inconsistencies. However, none of these purported inadequacies in the investigation amount to conscience-shocking behavior, thereby establishing a due process violation. Accordingly, the court concluded that Sheriff DeLay, Deputy Berry, and Deputy Ford are entitled to qualified immunity on Kiman's Fourteenth Amendment substantive due process claim for failure to investigate."

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/191524P.pdf

CIVIL LIABLITY:
Physical Search of Body Cavities
Brown v. Polk County, Wisconsin
CA7, No. 19-2698, 7/13/20

Sharon Brown was a detainee at the Polk County Jail who underwent a physical search of her body cavities. The institution had a written policy authorizing such a search to be conducted by medical personnel when there was reasonable suspicion to believe an inmate was internally hiding contraband. Fellow inmates had reported that Brown was concealing methamphetamine inside her body, and that prompted jail staff to invoke the policy. Officers took Brown to a hospital, where a doctor and nurse inspected both her vagina and rectum. The search revealed no drugs.

Brown sued Polk County and several jail officials under 42 U.S.C. § 1983 alleging a violation of her Fourth Amendment rights. The defendants moved for summary judgment, and the district court granted the motion, concluding that the defendants had reasonable suspicion that Brown was concealing contraband, their suspicion justified the cavity search, and the ensuing search was reasonable.

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

"The inspection of Brown's body cavities was a search to which the Fourth Amendment applies. But the Fourth Amendment does not prohibit all searches, only unreasonable ones. *Maryland v. King*, 569 U.S. 435, 446–47 (2013). Reasonableness is evaluated by balancing 'the need for the particular search against the invasion of personal rights that the search entails.' *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

"The search was performed pursuant to a written policy with defined procedures that required reasonable suspicion and approval from the jail's chief deputy. So, too, was it conducted in a medical setting by licensed medical professionals. And Brown was afforded some measure of privacy, undergoing the search outside the presence of any officers. The decision of the district court was affirmed."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D07-13/C:19-2698:J:Scudder:aut:T:fnOp:N:2545265:S:0

CIVIL LIABILITY: Qualified Immunity; Accidental Shooting of an Arrestee
Bryant v. Gillem
CA5, No. 19-11284, 7/9/20

On August 24, 2016, a district attorney investigator, Mike Chapman, determined from radar that a Ford Explorer was being driven at 45 m.p.h. in a 35-m.p.h. zone on U.S. Highway 287 in Childress, Texas. Jonathan Bryant was the driver, and he had a passenger. Chapman activated his patrol car's emergency lighting to initiate a traffic stop, but Bryant accelerated. Chapman pursued, notifying the Childress County Sheriff's Office and requesting assistance. Chief Deputy Sheriff Danny Gillem of the Childress County Sheriff's Office responded to Chapman's request and joined the chase.

Chapman's dash camera recorded the chase and the subsequent arrest. The high-speed chase lasted approximately 14 minutes. At one point, Chapman estimated Bryant was traveling at over 115 m.p.h. The video depicts events of Bryant's swerving in and out of traffic. His recklessness caused other motorists to swerve and some to

drive off the road. Chapman considered this driving to be so dangerous to the public that he used his Glock pistol to fire into Bryant's vehicle four different times, with approximately 19 rounds discharged. After the fourth time, Bryant slammed on his brakes and began driving off the right side of the highway. Chapman rammed into the rear of Bryant's vehicle, forcing it off the road into knee-high grass.

Bryant and a passenger exited the vehicle with their hands raised and then laid on the ground in compliance with the officers' commands to do so. Chapman appeared on video holding his pistol in both hands, and he walked to the passenger side of the vehicle to secure the passenger.
Another officer also had his firearm drawn. At one point in the video, Deputy Gillem walks into view of Chapman's dash camera. As he approached Bryant, who was still on the ground in the grass, Gillem held his pistol with both hands and pointed it at Bryant. Bryant immediately put both hands in the air, then placed them on his back. Gillem then put his pistol into his left hand, knelt alongside Bryant, and drove his right knee into Bryant's back. Still holding the firearm with his left hand and reaching with his right for Bryant's hands, Gillem fired his pistol into Bryant's left shoulder — accidentally, Gillem claims. Only five seconds elapsed from Gillem's coming into the view of the camera and the shooting.

After shooting Bryant, Gillem immediately holstered the weapon and requested medical assistance. At this point in Gillem's dash-camera video, Gillem yelled, "Hey, get me an ambulance! He's shot. I shot him. Get an ambulance. Shot him in the arm. Get an ambulance." Gillem also made statements such as, "I'm not going to let you die," and "I messed up. I messed up. I had him on the ground, and I went and got his arm, and as soon as I did, 'pow!"

Later that day, Texas Ranger Ricky Brown began a criminal investigation of the shooting. Brown's written report included written statements by Gillem and Chapman, as well as written summaries of radio transmissions and video footage of the incident. Chapman stated that after he heard the gunshot, he went to Gillem, who said "he accidentally shot [Bryant] while he was attempting to arrest him." Gillem also stated that after "I grabbed his arm and moved it behind his back I discharged my firearm which was in my left hand and struck the violator in the left shoulder area." Brown closed the investigation after a grand jury failed to indict Gillem.
Brown and Gillem were both deposed. On direct examination, Brown testified he believed Gillem's pulling the trigger was reflexive and accidental. On cross examination, Brown acknowledged that Gillem did not follow his training to holster his gun before attempting to secure a suspect and did not follow his training to keep his finger away from the trigger when there was no intention to discharge the firearm.

Gillem signed a declaration stating, "I did not intend to discharge my weapon at any time and did not even realize I was holding the gun in my left hand as I kneeled down and accidentally discharged the gun." Another declaration was submitted in which Margo Frasier, the former Sheriff of Travis County, Texas, stated her opinion as a putative expert that Gillem's actions were objectively reasonable.

Bryant brought suit under 42 U.S.C. § 1983 against Gillem and other now-dismissed parties, alleging a violation of his Fourth Amendment rights. Gillem moved for summary judgment based on a defense of qualified immunity. The district court granted the motion and dismissed the case with prejudice. Bryant timely appealed.

The Fifth Circuit Court of Appeals emphasized the significance of intent.

"Unless the evidence supports that a defendant acted willfully when violating someone's federal rights, there is no liability under Section 1983. *Gorman v. Sharp,* 892 F.3d 172, 174 (5th Cir. 2018). The district court found that Bryant failed to present any competent summary judgment evidence reasonably showing that Gillem's failure to holster his firearm and his discharge of the firearm were intentional acts. The Court reiterated that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement but only when there is a governmental termination of freedom of movement through means intentionally applied. *Brower v. Cnty. of Inyo,* 489 U.S. 593, 596–97 (1989)."

Because Bryant failed to show a violation of any Fourth Amendment rights, the opinion of the district court was affirmed.

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/19/19-11284-CV0.pdf

CIVIL LIABILITY:

Qualified Immunity; Deadly Force
Birkeland v. Jorgenson
CA8, No. 19-2086, 8/20/20

John Birkeland lived in a one-bedroom apartment in Roseville, Minnesota. At approximately 9:55 p.m. on February 10, 2016, each of his next door neighbors called 911, nearly simultaneously, to report a disturbance in Birkeland's apartment. The neighbors made nearly identical reports of the sounds emanating from Birkeland's apartment: yelling, throwing things, and the sound of breaking glass. Each noted similar disturbances in the past and noted that Birkeland might have mental health issues.

After standing outside Birkeland's door for just over eighteen minutes, the officers decided to enter the apartment. Sergeant Adams used a battering ram to force open the door. By this time, Officer Jorgensen and his K-9 (Otis, a Belgian Shepherd) had arrived on scene. After receiving no response to any of these warnings or the other officers' commands to come towards the door, some of the officers entered the apartment. Otis, while leashed, assisted the officers in clearing the bathroom and kitchen. When Otis entered Birkeland's bedroom, he alerted to the closed sliding doors to a closet that was 2'6" wide and 7'5" long.

Officers Jorgensen and Eckert stood outside the closed closet with Otis. Officer Christensen and Sergeant Adams stood by the doorway at the entrance of the bedroom. Officer Jorgensen instructed Birkeland to, "Come out of the closet. You are going to get bit." When Birkeland did not comply, Officer Jorgensen slid open the left closet door and saw a person crouched in the closet. Officer Jorgensen described Birkeland's position as "crouched, ambushed-type position, leaning forward." He testified that he could not (1) ascertain if there was another person in the closet; (2) tell if there was a weapon in the closet; or (3) see Birkeland's hands.

Otis was sent into the closet and Officer Jorgensen yelled, "Dog's on. Dog's on." Otis bit Birkeland's right knee, causing several linear cuts and ten puncture wounds. Birkeland responded by stabbing the left side of Otis's face with a knife, causing Otis to yelp. Officer Jorgensen ordered Birkeland to, "Let go of that knife! Let go! Let go! Let go now!" Within seconds, Officer Jorgensen

fired three shots and Officer Eckert fired once at Birkeland.

Birkeland was hit twice in the chest and once in the neck. The other shot went into the back wall of the closet. The shots were fired during the commotion of Officer Jorgensen attempting to pull Otis out of the closet after being stabbed, with Otis either still attached to Birkeland's knee or trying to bite Birkeland again. The parties dispute, and the video does not show, whether Birkeland started to come out of the closet on his own accord or because he was being pulled out by Otis.

Dean Birkeland, as trustee for the next-of-kin, brought this wrongful death action against Officers Jorgensen and Eckert as well as Sergeant Joseph Robert Adams and the City of Roseville. The district court granted summary judgment in favor of the officers and the City on all claims except the use of deadly force.

The Court of Appeals for the Eighth Circuit court granted an appeals on the denial of qualified immunity on the deadly force claim.

"Turning to the issue–whether the facts, taken in the light most favorable to Birkeland, support a finding that Officers Jorgensen and Eckert violated Birkeland's clearly established constitutional rights when they shot and killed him–our precedent compels the conclusion that the officers' use of deadly force in this situation was not a violation of a clearly established right. *Swearingen v. Judd*, 930 F.3d 983, 988 (8th Cir. 2019). Regardless of whether Birkeland's movement toward the officers was voluntary, in light of the close proximity between the officers and Birkeland's location in the closet, Birkeland's failure to comply with Officer Jorgensen's commands to drop the knife, and Birkeland's stabbing of the police dog in the face with a knife, Birkeland posed a threat of serious physical harm to the officers and we cannot say that their use of deadly force, even if just over the line of reasonableness, violated a clearly established right. The district court erred in denying the officers qualified immunity on the deadly force claim.

"The undisputed facts establish that Birkeland was in possession of a knife, he refused to comply with the officer's commands to drop the knife, he was in a confined area in close proximity to the officers, and he used the knife to stab a police dog in the face. While the question of willful or malicious conduct is typically a jury question, *Brown v. City of Golden Valley,* 574 F.3d 491, 500 (8th Cir. 2009), under these undisputed facts, we conclude there is no genuine issue of material fact for a jury to decide and the officers are entitled to official immunity as a matter of law."

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/192086P.pdf

CIVIL LIABILITY:

Qualified Immunity; Deadly Force
Liggons v. Cohen
CA8, No. 19-2045, 8/21/20

Antoinette Liggins, on behalf of herself and her minor son, sued police officer Michael Cohen under 42 U.S.C. § 1983, alleging that he used excessive force in seizing the son, whose initials are B.C. The case involves a shooting: Cohen, in the line of duty, shot B.C., who was carrying a stolen gun, on July 11, 2015. B.C. sustained serious injuries and is paralyzed below the waist. The question is whether Cohen's use of force was reasonable or, if not, whether he is entitled to qualified immunity. The district court,

describing it as "a close case," denied Cohen's motion for summary judgment. Cohen brings an appeal, and we conclude that he seizure was not unreasonable, so the Court of Appeals for the Eighth Circuit reversed.

The incident occurred after a citizen called 911 and reported to police that B.C.'s brother, whose initials are A.C., had stolen her .40 caliber pistol the night before. A.C. was fifteen years old; B.C. was sixteen. The caller reported that A.C. possessed the stolen weapon at an apartment complex located on Hodiamont Avenue in St. Louis. She said that A.C. was wearing a red hoodie and blue shorts and was standing in the breezeway of one of the apartment buildings at the complex.

The apartment building included a breezeway between the front and back of the property. In the rear, a sidewalk led straight out from the breezeway. On the left of the sidewalk was a parking lot; on the right was a playground. In the distance, forward and behind the playground, was a fence. There was a hole in the fence large enough for a person to pass through.

Cohen was one of five officers who responded to the call. Cohen knew of A.C. and B.C. from a recent carjacking investigation during which he saw surveillance video of the brothers occupying the stolen vehicle. He also was familiar with the apartment complex and what the district court described as "a history of violent activity" there. He knew that it was common for people to flee when police arrived at the complex, and he was aware that some used the hole in the fence behind the buildings to evade the cops.

Based on this information, the officers decided that two of them would approach the front of the complex, and that Cohen and two others would drive to the back. The officers behind the building would seek to prevent the subject with the gun from escaping through the hole in the rear fence.

When police arrived, it was B.C. who possessed the stolen firearm. He was wearing a white t-shirt with dark sleeves and standing in the breezeway talking with a companion. He carried the gun in an over-the-shoulder bag. When the officers arrived, onlookers began to shout "Police! Police!" B.C. began running, first through the breezeway to the area in front of the building. But when he saw a police car arrive on the street, he quickly turned around and ran back through the breezeway to the area behind the building.

What happened next is disputed, but in this procedural posture, we accept the facts as assumed by the district court in the light most favorable to the plaintiffs. As B.C. ran through the breezeway, he pulled the gun out of his bag. By B.C.'s account, he was holding the gun by the barrel and pointing it down in his right hand. Because he was running fast, his hands moved at least slightly. B.C. testified that the gun did not rise above his waist.

Cohen had just arrived in the parking lot behind the complex when he saw B.C. emerge from the breezeway with a gun in his hand. Cohen promptly exited his vehicle and moved quickly around a truck that was parked between him and the sidewalk leading out from the breezeway. Two seconds after leaving his vehicle, and almost immediately after rounding the back of the truck, Cohen fired four shots at B.C. According to B.C., Cohen gave no warning before shooting.

The first shot missed, and the next three struck B.C. B.C. says that he dropped the gun after Cohen's first discharge, but the shots were fired in rapid succession. Video evidence shows that B.C.

came to rest in the playground area between the sidewalk on his left and playground equipment to his right. B.C. enters the video frame while sliding to the ground three seconds after Cohen exited his squad car.

Upon review, the Court of Appeals for the Eighth Circuit stated:

"The officer had reasonable grounds to believe that the plaintiff's son, who was fleeing officers and carrying a stolen weapon the officers were seeking, could raise the gun and shoot; the incident happened so quickly that the defendant officer had no time to discern whether the young man was carrying the gun in an unusual manner or to shout a warning before he shot; given the convergence of events and the split-second timing, it was not unreasonable for the officer to shoot."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/08/192045P.pdf

CIVIL LIABILITY:

Qualified Immunity; Stomping on Ankle Causes Breaking of Bone

Shelton v. Stevens

CA8, No. 18-3379, 7/9/20

In the early morning hours of October 15, 2015, Juan Shelton violently assaulted a man at a strip club in Davenport, Iowa. Shelton and his two brothers repeatedly kicked the man in the head and left the victim in a coma.

Police obtained an warrant for Shelton's arrest the next day. That afternoon, police officers Walker and Proehl observed Shelton exit a business and enter a car. The business was located across the Mississippi River from Davenport in Rock Island, Illinois.

The officers approached the vehicle and ordered Shelton out of the car. Shelton refused. Proehl attempted to pull Shelton out and used force that included a punch to the face and a knee to the head. Walker observed a loaded magazine of bullets in the front seat. At that point, Proehl saw that Shelton was sitting on a handgun. The officers backed away and drew their weapons, but Shelton started his car and sped away. Walker, Proehl, and several more officers from Davenport and Rock Island chased Shelton at high speed for several miles.

Walker announced several times over the radio that Shelton was armed with a gun. Stevens, a Davenport officer, joined the pursuit. Having crossed the river back to Iowa, Shelton eventually crashed his car in a wooded area. He then fled on foot into the surrounding woods, and eventually emerged on the other side where a city street bounded the woods.

Police found Shelton walking on the street with his hands in the air, but he refused to comply with police commands to stop and get on the ground. The ensuing scene was captured on a video recording. Two officers, Colclasure and Lansing, tackled Shelton to the ground. Three others joined in attempting to restrain and handcuff Shelton. Shelton was held down by the officers, but he refused to surrender and kept his hands underneath him in a position described as "turtling."

One officer felt a hard object in Shelton's front pocket. Approximately thirty seconds after the first officers tackled Shelton, officer's Robinson and Stevens approached the scuffle.

During the scrum on the ground, Colclasure punched Shelton in the ribs to keep him from reaching his pocket. Lansing said that officers were able to gain control of one arm only, and he then used a chokehold that eventually caused Shelton to lose consciousness briefly. At almost the same moment when Lansing applied the chokehold, Robinson arrived and hit Shelton on the head with the butt of his radio. No more than two seconds later, Stevens stomped on Shelton's ankle. R. Doc. The officers then gained control of Shelton's hands and placed them in handcuffs. The hard object in his pocket turned out to be a cell phone.

Shelton was hospitalized for several injuries, including a broken left ankle that required surgery to place several pins in his leg. Shelton sued officers Proehl, Colclasure, Lansing, Robinson, and Stevens, claiming they violated his right under the Fourth Amendment to be free from unreasonable seizure by using excessive force in arresting or attempting to arrest him. The district court ruled that all officers except Stevens were entitled to qualified immunity.

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

"The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The inquiry is objective, so the officer's subjective motivations are not controlling. *Graham v. Connor,* 490 U.S. 386, 396 (1989).

"Under all the circumstances, we conclude that Stevens's alleged use of force was unreasonable under the Fourth Amendment. A stomp on the ankle with sufficient force to break it was excessive when the legitimate objective was to facilitate restraint of Shelton's hands while he was pinned to the ground by several officers. Although the reasonableness requirement of the Fourth Amendment does not require an officer to pursue the least aggressive or most prudent course of conduct, *Cole v. Bone*, 993 F.3d 1328, 1334 (8th Cir. 1993), the availability of lesser measures is relevant to the inquiry. *Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014). There were other means, short of the force employed, to distract Shelton from his efforts to avoid restraint and to assist with apprehension of the arrestee while still maintaining officer safety. The force used by other officers on the scene, for example, likely was sufficient to produce the desired outcome without causing serious injury to Shelton. Even allowing for the rapidly evolving situation, and eschewing the temptation to evaluate police conduct with perfect hindsight, we conclude on balance that Stevens's stomp, under the assumed facts, constituted an unreasonable use of force.

"Even so, to defeat Stevens's defense of qualified immunity, Shelton must demonstrate that his right to be free from this particular use of force was clearly established at the time of the incident. Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Even where an officer's action is deemed unreasonable under the Fourth Amendment, he is entitled to qualified immunity if a reasonable officer could have believed, mistakenly, that the use of force was permissible—if he was 'reasonably unreasonable.' *Anderson v. Creighton*, 483 U.S. 635, 643 (1987). 'Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the

specific facts at issue.' *Kisela v. Hughes*, 138 S. Ct. 1148, (2018).

"The Court thought Stevens's action falls within the zone described as the 'sometimes hazy border between excessive and acceptable force.' *Saucier v. Katz*, 533 U.S. 194, 206 (2001). The district court's treatment of three officers suggests the haziness: Robinson and Lansing were granted qualified immunity for a blow to Shelton's head and a brief chokehold, respectively, because they were trying to 'subdue a non-compliant, potentially armed suspect.' But the court reasoned that Stevens's stomp, no more than two seconds later, violated a clearly established right because 'Shelton was being restrained by at least five other officers' who appeared to have Shelton substantially under control.

"As we see it, all three officers confronted a suspect who was being restrained by several other officers, and all three were trying to subdue a non-compliant, potentially armed suspect. Is it obvious that a chokehold with its potential for asphyxiation, or blunt force to the skull with the attendant risk of head injury, is more suitable to the situation than a hard step on the talus? As it turned out, given how the officers applied the tactics here, Shelton was able to resume breathing after the choke, did not suffer brain injury from the blow to the cranium, but assumedly sustained a fractured ankle from Stevens's act. Some use of force was reasonable, and constitutional distinctions among a chokehold, a radio-bang to the head, and an unreasonable ankle-stomp—all objectively designed to prompt Shelton to surrender his hands—are hazy enough to warrant qualified immunity for Stevens.

"A number of the relevant factors supported the use of force, so reasonableness was a matter of degree, and qualified immunity protects officers from the specter of lawsuits and damages liability for mistaken judgments in gray areas. For these reasons, the order of the district court denying qualified immunity to Stevens is reversed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/07/183379P.pdf

EVIDENCE: Testimony Regarding Firearm
United States v. Maya
CA6, No. 19-5100, 7/20/20

Police caught Andy Maya and two accomplices smuggling 50 pounds of marijuana into Kentucky in a BMW transported on a car-hauling truck from another state. When they searched Maya's home, police found a firearm in his bed near over $20,000 in cash and money orders. Maya admitted to a drug-trafficking conspiracy and to possessing the firearm but denied possessing the gun "in furtherance of" the conspiracy—an offense that triggers an additional five-year prison term. A jury nonetheless convicted Maya of that offense and the Sixth Circuit Court of Appeals affirmed the judgment.

"A rational jury could conclude that Maya possessed the firearm 'in furtherance of' the drug conspiracy based on evidence that he, among other things, kept his firearm near his drug proceeds. The district court did not abuse its discretion in admitting an officer's testimony that drug dealers use guns for protection because they often have large amounts of cash and cannot rely on the police to protect them, that the gun's placement under the mattress made it 'easily accessible,' and that this location near the money was 'consistent with the firearm being used to protect the funds.'"

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0224p-06.pdf

MIRANDA: Custodial Interrogation
Lentz v. Kennedy
CA7, No. 18-2659, 7/28/20

Christy Lentz feigned ignorance for nearly a week as she pretended to help investigators locate her missing father. Officers soon discovered the father's decaying body hidden at the office building the two shared, and all signs pointed to Lentz as the murderer. Lentz, with her young daughter in tow, voluntarily accompanied officers to the police station under the pretense of follow-up questioning for the missing persons investigation. For the first hour and a half, officers asked general questions, like when and where she last saw her father, to commit Lentz to her story. They then took a cigarette break. When the interview resumed, the tone changed. The officers read Lentz her Miranda rights and confronted her with the mounting evidence against her. Over the next four hours, Lentz slowly confessed to shooting her father.

In the state trial court, Lentz moved to suppress her videotaped confession but the court denied her motion. She proceeded to trial, where the confession was admitted into evidence, and a jury found her guilty of first-degree murder. The Illinois Appellate Court affirmed the conviction on direct review. Lentz then tried her hand at state post-conviction proceedings but was unsuccessful. Now on federal habeas review, Lentz claims the interrogation violated her constitutional rights in two ways: that she was "in custody" during the pre-Miranda portion of the interview, and that her confession was involuntary.

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

"Lentz confessed to shooting her father over the course of a five-and-a-half-hour interrogation. She maintains that any statements she made before she received her Miranda warnings should have been suppressed and that her confession was involuntary because the officers used her daughter's well-being to coerce the confession. The Illinois Appellate Court considered all of the circumstances surrounding Lentz's confession and reviewed the videotaped interrogation, and determined that Lentz was not in custody during the pre-Miranda portion of the interview and that her confession was voluntary despite any references that the police officers made about her daughter. Our habeas review is narrow and because the state court's decision did not involve an unreasonable application of clearly established federal law, the district court's judgment denying Lentz's petition for a writ of habeas corpus is affirmed."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D07-28/C:18-2659:J:St__Eve:aut:T:fnOp:N:2553479:S:0

MIRANDA:
Custody; Polygraph Examination
United States v. Ferguson
CA8, No. 19-1723, 7/27/20

Danny Ferguson's conviction arises from the attempted burning of a trailer home on the Pine Ridge Reservation in South Dakota. The trailer home belonged to Christy Pierce, who lived there with two of her children and one grandchild. Pierce was known to Ferguson, as she had a contentious relationship with Ferguson's family.

On the evening of April 7, 2015, Pierce was inside her trailer home when she heard her dog barking and smelled the odor of something burning. After looking outside and seeing nothing amiss, Pierce ignored the barks and odor, believing that the odor came from a space heater. The next morning, April 8, 2015, after Pierce's son, Samuel Rios, arrived for a visit, Pierce noticed burn marks on the front corner of her trailer home. Pierce and Rios also discovered a bottle that smelled like gasoline or kerosene. Based on these discoveries, Pierce believed that there had been a fire outside of her trailer home and that someone had tried to "burn [them] out."

At approximately 5:00 p.m. that same day, Pierce observed Ferguson driving by the trailer home on a motorcycle. Pierce and Rios then observed Ferguson drive his motorcycle up to her trailer home. When they went outside to investigate, Rios observed Ferguson place a blanket into the insulation under the trailer home and light the blanket on fire. Pierce observed the same scene, but did not see Ferguson light the blanket; she observed flames only after the blanket had ignited. Pierce did not see Ferguson's face, but she recognized his hair, motorcycle, and jacket, having observed him driving onto the trailer home's yard moments earlier. Rios yelled at Ferguson, who rode away on his motorcycle. Rios then went inside to warn his family to leave the trailer home, before returning outside, pulling the burning blanket away from the insulation, and smothering the fire.

Agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives subsequently inspected Pierce's property and concluded that both incidents had been intentional, rather than accidental. The Federal Bureau of Investigation (FBI) initiated an arson investigation. After Pierce and Rios identified Ferguson as the responsible party, two FBI agents, Agent Michelle Gruzs and Agent Mark Lucas, interviewed Ferguson at his home. The agents informed Ferguson he was not under arrest and could ask the agents to leave at any time. During their discussion with Ferguson, the agents made clear that they suspected Ferguson was responsible for the fires at Pierce's trailer home. In denying that he was responsible, Ferguson stated that he would be willing to take a polygraph examination. At some point during the discussion, Ferguson told the agents that they had crossed a line in their questioning, and he asked them to leave. The agents complied with Ferguson's request and left immediately.

Following the interview, Agent Gruzs and Agent Jeff Goble set up a polygraph examination for Ferguson. On the morning of the examination, Ferguson and his wife arrived at the Justice Center in Pine Ridge, South Dakota, where the examination was to take place. There, they met with John Witt, who, although not a licensed attorney, was Ferguson's tribal advocate.2 The Justice Center is a facility that houses the tribal judicial system and offices of the Bureau of Indian Affairs. The facility is divided into a public area and a secured area, which is where the Bureau of Indian Affairs space is located. To access this secured area, a person must be admitted by a receptionist; however, to exit the secured area, a person must simply walk back through the doors. Ferguson's polygraph examination took place in the secured area. Ferguson, his wife, and Witt all waited in the public area while the agents prepared the examination room.

Before the examination, Ferguson or Witt requested that Witt remain with Ferguson for the polygraph examination. The agents denied the request as it was against policy, the room was not large enough, and Witt's presence would be distracting to Ferguson. Only Agent Goble was

in the room with Ferguson during the polygraph examination. At the beginning of the examination, Agent Goble read Ferguson a polygraph authorization form, which advised him he had the right to refuse the examination, he could leave or terminate the examination at any point, he could refuse to answer any questions, he had the right to remain silent, he had the right to stop questioning at any time, anything he said could be used against him, he had the right to consult with and have the presence of an attorney, and an attorney would be provided to him if he could not afford one. Ferguson signed the form.

During questioning, Agent Goble asked Ferguson about his medical history. Ferguson stated that, in 2000, he had been in an accident and suffered a fractured skull but did not offer any information about the effects of his skull fracture, nor was he asked any follow-up questions. When questioned specifically about the fire, Ferguson denied knowledge of it, but acknowledged that he understood he was being accused of attempting to start it. After several minutes of questioning about the fire, Ferguson again denied the allegations, told Agent Goble he was going to leave, and walked out of the room.

After leaving the room, Ferguson went to the parking lot. When Agent Gruzs found Ferguson speaking with Witt in the parking lot, she asked Ferguson why he had left the room, and Ferguson responded that he had needed to use the restroom. However, according to Witt, Ferguson came to him to tell him he no longer wanted to take the polygraph examination. After speaking with Agent Gruzs and Witt for a few more minutes, Ferguson agreed to resume the polygraph examination. Upon resumption of the examination, Ferguson told Agent Goble that he had gotten nervous before leaving the room. Agent Goble again reminded Ferguson that he could leave and did not have to answer questions. Ferguson chose to resume the polygraph examination. Before the conclusion of the examination, Ferguson took one additional break of approximately five minutes after asking to use the restroom. Agent Goble then concluded the examination and asked Ferguson to give him a few minutes to score the results. Ferguson returned to the public area where Witt was waiting. After less than 10 minutes, Agent Gruzs brought Ferguson back to the examination room for a post-polygraph interview. Witt was not aware that the agents were going to question Ferguson independent of the polygraph examination, believing that all questioning would be conducted as part of the polygraph examination. The agents did not bring him to the examination room with Ferguson for this interview.

Agent Goble told Ferguson that he failed the polygraph examination, meaning that his answers had been “deceptive.” Upon being questioned about his “deceptive” answers, Ferguson made incriminating statements, including that the trailer home should not have been in the pasture where it was located; that he did not know anyone would be home; that he did not mean to hurt anyone; that he would never do that again; and answered questions about how he started the fire. Ferguson also stated several times that he wanted to “plead the Fifth.” After Ferguson made statements about not wanting to talk anymore or not wanting to talk about a specific topic, agents reminded him that it was his right not to answer questions and that he could end the interview. When Ferguson finally asked whether the interview was being recorded and again stated that he “just want[ed] to plead the Fifth,” the agents thanked Ferguson for coming to talk to them and ended the interview.

Ferguson was subsequently indicted on one count of arson for the April 7 and April 8 fires.

Before trial, Ferguson filed a motion to suppress the statements he made to agents following the polygraph examination, arguing that he was in custody when he was interrogated and he was not given Miranda warnings; that he was entitled to the presence of counsel, but was denied that right; that the interrogation was coercive; and that his statements were not voluntarily made. The district court, adopting the magistrate judge's report and recommendation, denied the motion. The district court concluded that Ferguson was not in custody, so he did not have a Fifth Amendment right to counsel or to remain silent and thus agents did not violate those rights. The district court also considered the facts and circumstances surrounding the questioning and concluded that Ferguson voluntarily made the incriminating statements.

The case proceeded to trial. At the close of the evidence, Ferguson moved for judgment of acquittal, which the district court granted with respect to the April 7 fire, but denied with respect to the April 8 fire. The jury returned a guilty verdict. Ferguson then filed two separate motions for judgment of acquittal or for a new trial, arguing that the evidence was insufficient to sustain his conviction.

The Eighth Circuit affirmed the district court's denial of Ferguson's motion to suppress and Ferguson's conviction for one count of arson related to a fire at a trailer home. In regard to the motion to suppress, the court held that Ferguson was not in custody for the purposes of Miranda protections during a polygraph examination and subsequent interview. In this case, Ferguson came voluntarily to the justice center to take the test; he was read and signed the authorization form, which reiterated that he could refuse to take the test, decline to answer questions, end the test at any time, and have an attorney present; and Ferguson's movement was not restrained. Because Ferguson was not in custody, he was not entitled to Miranda protections of the right to remain silent and the right to counsel.

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/191723P.pdf

MIRANDA:

Request for Routing Information
United States v. Tapia-Rodriguez
CA8, No. 18-3751, 8/6/20

Idelfonso Tapia-Rodriguez pleaded guilty to conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine, reserving the right to appeal the denial of his motion to suppress. On appeal, Tapia-Rodriguez raises a single issue—whether the district court erred in denying his motion to suppress statements made when Omaha police officers, about to conduct a search to which his roommate had consented, asked Tapia-Rodriguez "if he lived in the house and which bedroom was his." Tapia-Rodriguez argues this was an unconstitutional custodial interrogation because he had not been given the warnings mandated by Miranda v. Arizona, 384 U.S. 436, 444 (1966).

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

"Under Miranda, a defendant's statements are inadmissible if they were the product of custodial interrogation" and he was not properly advised of his right to be free from compulsory self-incrimination and to the assistance of counsel. Here, the government concedes that Tapia-Rodriguez was 'in custody.' The issue is whether Sergeant Heath asking Tapia-Rodriguez (1)

whether he lived in the apartment, and (2) which bedroom was his, was interrogation. The Supreme Court has defined 'interrogation' as 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.' *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The 'should have known' standard is objective and 'focuses primarily upon the perceptions of the suspect, rather than the intent of the police.' 'Thus, not all government inquiries to a suspect in custody constitute interrogation and therefore need be preceded by Miranda warnings.' *United States v. McLaughlin*, 777 F.2d 388, 391 (8th Cir. 1985).

"A request for routine information necessary for basic identification purposes is not 'interrogation' unless the government agent should reasonably be aware that the information sought is directly relevant to the substantive offense charged. Here asking Tapia-Rodriguez for his name was a routine identification request because his name was not directly relevant to the substantive offense the officers were investigating. Tapia-Rodriguez properly does not argue that asking for his name was interrogation. Likewise, asking Tapia-Rodriguez whether he lived in the apartment was a request for routine information necessary for basic identification purposes because the officers were trying to understand and identify his presence in an apartment they were about to search with Rodolfo-Chaidez's consent. Tapia-Rodriguez argues his answer to that question tied him to the crime, but a routine identification inquiry is not interrogation under Miranda, even if the information turns out to be incriminating. Thus, his response to this question was admissible.

"Heath's follow-up question, asking Tapia-Rodriguez to identify his bedroom, presents a closer question. As the district court recognized, an essential aspect of this case is that the officers came to the apartment to conduct a consensual search. It is well established that a warrantless search may be justified by proof that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *United States v. Matlock*, 415 U.S. 164, 171 (1974). Rodolfo-Chaidez as co-occupant obviously had authority to consent to a search of the common areas of the apartment and his own bedroom. But a co-tenant's unrestricted consent to search leased property will not justify a warrantless search of a room set aside for the defendant's own private use. And here, Heath testified that Rodolfo-Chaidez did not claim common authority over the entire apartment; he identified a roommate and did not include the second bedroom in his consent to search. Thus, when Tapia-Rodriguez identified himself as the roommate, the officers needed to determine, before searching a bedroom outside the scope of Rodolfo-Chaidez's consent, whether Tapia-Rodriguez occupied that bedroom and, if so, whether he would consent to its search.

"We have never held that a request to search must be preceded by Miranda warnings, or that a lack of Miranda warnings invalidates a consent to search. Indeed, it is well established that consenting or refusing to consent to a search is not subject to suppression under Miranda. Here, to avoid conducting an illegal warrantless search, the officers needed to determine whether Tapia-Rodriguez claimed to occupy the second bedroom and whether he would consent to the search. After Tapia-Rodriguez said he lived in the apartment, asking 'will you consent to a search of your bedroom?' would not have been custodial interrogation. Similarly, the officers would not have violated Tapia-Rodriguez's rights

under Miranda by asking Rodolfo-Chaidez 'which bedroom does Tapia-Rodriguez occupy?' before asking Tapia-Rodriguez for consent to search that bedroom. We conclude the answer cannot be different simply because Heath instead asked Tapia-Rodriguez which bedroom was his.

"In our view, asking Tapia-Rodriguez which bedroom was his before asking for his consent to search falls within the purview of these cases because the police had a legitimate need for the information to ensure they were conducting a lawful consensual search. Of course, the issue is fact intensive. Here, as the district court recognized, it is significant that Sergeant Heath asked only questions that were reasonably related to obtaining consent to search, did not ask what the officers might find in the bedroom, and did not know from either the protective sweep or what Rodolfo-Chaidez had told them that there was contraband in the second bedroom. Therefore the question was not the kind of investigative questioning—intended to elicit an incriminating response—that was at issue in Miranda.

"For these reasons, we conclude that neither of the two questions at issue constituted interrogation that required Miranda warnings. Therefore, the motion to suppress Tapia-Rodriguez's responses to those questions was properly denied. Accordingly, the judgment of the district court is affirmed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/08/183751P.pdf

SEARCH AND SEIZURE:

Affidavit; Failure to Completely Erase Template Shows Two Addresses for Search

United States v. Abdalla

CA6, No. 19-5967, 8/27/20

The Tennessee Judicial Drug Task Force and the Drug Enforcement Administration investigated Samer Abdalla for suspected narcotics trafficking. The Tennessee judge who signed the warrant permitting officers to search Abdalla's residence on New Hope Road only had jurisdiction in DeKalb County but the warrant, in one place, listed an address on Carey Road in Trousdale County. This error resulted from the officer using a previous warrant as a template and failing to erase all vestiges of that document.

Abdalla argued that a warrant cannot be valid if it contains a mismatch between the residence in the authorization section and the residence that the police searched and that a judge's failure to notice an address outside his jurisdiction in a warrant's authorization section demands the inference that the judge impermissibly rubber-stamped the warrant. The affidavit supporting the warrant listed the correct address and county at the top of the first page; the warrant itself directed officers to the correct address by providing step-by-step directions along with a detailed description of Abdalla's residence.

The Sixth Circuit affirmed the denial of a motion to suppress:

"Abdallah's conviction as a felon in possession of a firearm. The warrant's singular incorrect address posed almost no chance of a mistaken search. Despite the government's irregular mistake, this clerical error case demands the usual result for technical mistakes that threaten no constitutional harm."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0282p-06.pdf

SEARCH AND SEIZURE:

Arrest Warrant; Entering Curtilage
United States v. Bennett
CA8, No. 19-3130, 8/25/20

In October 2018, the Davenport, Iowa Police Department received an anonymous tip on the whereabouts of Jerry Bennett, a fugitive, who was wanted on outstanding arrest warrants. Davenport police officers Brandon Askew and Nate Kelling knew Bennett was prone to carry firearms. With valid arrest warrants in hand and standing on neighboring property, a police officer recognized Jerry Lee Bennett, Jr. walking out of the back of a residence. The officer and his partner ordered Bennett to stop, and after initially refusing, Bennett complied. When the officers arrested Bennett, they found a loaded firearm on him.

Bennett appeals his conviction for being a felon in possession of a firearm. Bennett argues that the firearm should be excluded because the officers unlawfully entered the curtilage of the property to make the arrest.

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

"Where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited. Where a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited. No Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways. A police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.

"The district court found that Askew recognized Bennett before he set foot on the curtilage of the home, and that finding was not clearly erroneous. Askew testified at the suppression hearing that he saw and recognized Bennett's face while approaching 2330 West Second Street, but still standing on the adjacent property. The district court credited Askew's testimony that he was able to recognize Bennett, even from this distance, based on their prior interactions. The valid warrants for Bennett's arrest provided the officers a legitimate law enforcement objective to enter the property. Further, any intrusion on Bennett's privacy interests was minimal because Bennett placed himself in a visible location and the officers saw him there."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/08/193130P.pdf

SEARCH AND SEIZURE:

Automobile Checkpoint; Reasonable Suspicion of Criminal Activity
United States v Burgos-Coronado
CA5, No. 19-60294, 8/18/20

Around midnight on May 18, 2018, State Troopers Gregory Bell, Matthew Minga, Andrew Beaver, and Steven Jones set up a "driver's safety checkpoint" on a highway approximately eight miles east of Starkville, Mississippi. The

checkpoint was intended for the troopers to check for driver's licenses, insurance, seat belt usage, and other safety matters.

After approximately 15 to 20 minutes of light traffic, the troopers stopped a Toyota with a Florida license plate traveling north, occupied by Pavel Isaac Burgos-Coronado, Javier Alejandro Moline-Borroto, and Valentina Sybreg Castro-Balza. Trooper Minga approached the Toyota and made contact with the occupants. Trooper Bell, who was observing and overheard Trooper Minga's exchange with the Toyota occupants, identified Moline-Borroto as the driver, Burgos-Coronado in the rear driver-side seat, and Castro-Balza in the rear passenger-side seat.

Trooper Bell testified that he started questioning Moline-Borroto only after the passengers gave Trooper Minga their identifications. Upon inspecting the Toyota occupants' identifications, Trooper Bell noticed that Castro-Balza's Venezuelan passport did not have a stamp indicating her entry into the United States. Trooper Bell also testified that because of the seating arrangement within the Toyota — male driver, empty passenger seat, male occupant in rear driver-side seat, and female occupant in rear passenger-side seat — he had a concern about the trip being abnormal "from a human trafficking aspect."

About 25 to 30 seconds after the Toyota was stopped, a Volkswagen arrived at the checkpoint. Trooper Jones, who had been near Troopers Minga and Bell when the stop of the Toyota took place and had overheard discussion of a Venezuelan passport, talked to the occupants of the Volkswagen and noticed that it too had a Florida license plate, and he noted that the driver of the Volkswagen, Daniel Pena-Morales, also had a Venezuelan passport. When Trooper Jones informed Trooper Bell of the apparent connections between the two vehicles, Trooper Bell asked the driver of the Toyota, Moline-Borroto, if he was traveling with anyone. After hesitation, Moline-Borroto responded that he was traveling with the individuals in the Volkswagen. Trooper Jones asked the driver of the Volkswagen, Pena-Morales, the same question, to which Pena-Morales responded that he was not traveling with anyone. According to Trooper Bell's testimony at the suppression hearing, these conflicting accounts put him on "high alert." Ultimately, the troopers searched the Toyota and the Volkswagen and found evidence of credit card skimming in both.

The defendants challenge the denial of their motion to suppress evidence, arguing police officers did not have reasonable suspicion that would allow prolonging their stop at a highway safety checkpoint.

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

"A checkpoint-type stop of an automobile is a seizure constrained by the Fourth Amendment. *United States v. Green,* 293 F.3d 855, (5th Cir. 2002). While suspicionless seizures are ordinarily unreasonable, and thus Fourth Amendment violations, certain types of automobile checkpoint stops have been excepted from this general rule. The Supreme Court has suggested that such checkpoints designed to check a driver's license and registration are permissible. *Delaware v. Prouse,* 440 U.S. 648 (1979)). We have explained that it is a legitimate, programmatic purpose that justifies a checkpoint stop made without any suspicion. *United States v. Machuca-Barrera*, 261 F.3d 425 (5th Cir. 2001). We examine the available evidence to determine the 'primary purpose' of a checkpoint; 'a program driven by an impermissible purpose may be proscribed while a program

impelled by licit purposes is permitted.' *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000).

"Trooper Bell testified that the troopers were stopping every car that passed to check for driver's licenses, insurance, seat belt usage, and other safety aspects. The district court's finding that the purpose of the checkpoint was to check licenses, insurance, and seatbelts was not clearly erroneous. Seizures carried out at general crime control checkpoints are justified only if accompanied by 'some quantum of individualized suspicion.' *Edmond*, 531 U.S. at 47. In contrast, the suspicionless checkpoint here was permissible because it served a legitimate programmatic purpose closely related to the necessity of ensuring roadway safety and 'problems peculiar to the dangers presented by vehicles.' *Green*, 293 F.3d at 858.

"In the context of immigration checkpoints, we have held that 'the permissible duration of the stop is limited to the time reasonably necessary to complete a brief investigation of the matter within the scope of the stop.' *Machuca-Barrera*, 261 F.3d at 433. The primary purpose of the checkpoint stop here was not related to immigration, but the inquiry remains the same. 'The key is the rule that a stop may not exceed its permissible duration unless the officer has reasonable suspicion.'

"The collection of information was that a female passenger's passport lacked an entry stamp, which might reasonably suggest that she was in the country illegally. Further, the abnormal seating arrangement — abnormal because the officer believed multiple adults do not usually choose to sit in the back when the passenger seat is empty — when combined with the unstamped passport and the late hour, might suggest that the woman was being held against her will. Based on these facts, the troopers had the 'minimum level of objective justification' to support reasonable suspicion of criminal activity — namely, human trafficking— sufficient to justify prolonging the stop by inquiring further about where the Toyota occupants were going. During that justified extension, more facts were discovered supporting reasonable suspicion and, eventually, supporting a search."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/19/19-60294-CV0.pdf

SEARCH AND SEIZURE: Delaying in Obtaining a Search Warrant
United States v. Smith
CA2, No. 17-2446, 7/28/20

On the afternoon of October 30, 2014, Trooper Timothy Snickles of the New York State Police noticed a car pulled off in an embankment on the side of the road near Keene, New York. The driver was Kirkland Smith. He was hunched unconscious over the steering wheel while the car was still in the "drive" position with the engine running and the doors locked. Snickles knocked on the window for about two minutes before he finally got a response from Smith, who unlocked the doors. Opening one of the doors, Snickles reached in to put the vehicle in "park," turn the engine off, and take the key from the ignition.

There was a strong smell of alcohol, and lying on the passenger seat of the car were plastic wine jugs as well as a Nextbook tablet computer and a cell phone. When Smith tried to get out of the car, he fell to the ground intoxicated and barely able to speak. Snickles then went back inside the car to check the glove compartment for any identification or vehicle information.

While Snickles was looking for this information, he noticed a pornographic image on the screen of the Nextbook tablet as it lay on the front passenger seat. Snickles contacted his dispatcher to run Smith's information and learned that Smith was a registered sex offender. He then spoke by telephone with Kyle Kirby—a state police investigator—to share what he had seen on the tablet, and Kirby instructed Snickles to secure any electronic devices that were in the car. Snickles stated in his deposition that "the electronic device—the Nextbook tablet—was secured as it may pertain to a possible illegal sexual encounter with a female."

Kirby waited for more than a month before seeking a warrant to search the tablet and cell phone. The subsequent search of the tablet yielded dozens of videos and images of child pornography. This discovery in turn triggered additional search warrants for Smith's residences where the police seized devices that contained even more child pornography.

The district court found that Kirby "was solely responsible for 24 active criminal investigations across an expansive, rural area of New York State." These investigations "included matters involving rape, suicide, drowning, burglary, grand larceny, sexual abuse, accidental shooting, unattended death, death of an incompetent person, and endangering the welfare of an incompetent person." The size of Kirby's district "involved travel times of up to an hour and a half" to drive to outlying towns from the state trooper headquarters in Ray Brook, New York. The district court cited Kirby's testimony that he considered Smith's case to be one of the highest priorities on his case list, that he worked all of 15 his scheduled workdays between October 30th and December 1st, and that he actively worked on Smith's case and other cases during that time.

The District court stated that while one might expect that a search warrant would have been sought more expeditiously, the Court found no evidence to indicate any deliberate, reckless, or grossly negligent disregard for Smith's rights. Thus, the district court concluded that "even if the one-month delay in obtaining the search warrant was unreasonable, suppression is not warranted because it would serve no deterrent effect as there is no evidence of intentional wrongdoing by Investigator Kirby."

Kirkland Smith appealed, primarily contending that the district court erred when it denied his motion to suppress the fruits of a search of a tablet computer that contained child pornography. He also challenges the reasonableness of his sentence.

The Court of Appeals for the Second Circuit found, in part, as follows:

"We have previously rejected by summary order Smith's challenges to the district court's denial of his suppression motion, except that we remanded for the district court to conduct a hearing and make findings with respect to whether the police waited for an unreasonably long time before applying for a search warrant after their seizure of Smith's tablet computer. Following the district court's hearing and ruling that the delay was not unreasonable, the appeal has been restored to this panel. We now rule that the police delayed unreasonably long in violation of the Fourth Amendment when they waited without good cause for 31 days to seek a search warrant after seizing Smith's tablet computer. We conclude, however, that the exclusionary rule does not apply because the police's unreasonable delay was due to isolated negligence and because an objectively reasonable police officer would not have known that the delay amounted to a

violation of the Fourth Amendment in light of then-existing precedent.

"The right of the police to temporarily seize a person's property pending the issuance of a search warrant presupposes that the police will act with diligence to apply for the warrant. If the police have seized a person's property for the purpose of applying for a warrant to search its contents, it is reasonable to expect that they will not ordinarily delay a month or more before seeking a search warrant. We conclude that a month-long delay well exceeds what is ordinarily reasonable.

"The fact that a police officer has a generally heavy caseload or is responsible for a large geographical district does not without more entitle the officer to wait without limit before applying for a warrant to search an item that the officer has seized. That is because the Fourth Amendment imposes a time sensitive duty to diligently apply for a search warrant if an item has been seized for that very purpose, and all the more so if the item has been warrantlessly seized. The police may not overlook this duty to attend to other matters for which the Constitution imposes no such time-sensitive duty unless there are important reasons why other matters must take priority. "After seizing an item without a warrant, an officer must make it a priority to secure a search warrant that complies with the Fourth Amendment.

"The exclusionary rule applies only if the police have violated the Constitution deliberately, recklessly, or with gross negligence, or if a constitutional violation is the product of recurring or systemic negligence. The application of the exclusionary rule is not appropriate for constitutional violations that are the product of isolated simple negligence, because exclusion in such circumstances will not result in appreciable deterrence of police misconduct.

"Although we hold that Kirby's delay in applying for a warrant to search Smith's tablet was unreasonable, the record does not show that Kirby acted with a deliberate intent to violate Smith's rights or that it was reckless or grossly negligent for Kirby to allow a month to slip by before applying for a search warrant. Kirby's delay was an isolated act of negligence.

The general press of police business may not justify a lengthy delay absent particular evidence showing why other police duties reasonably took precedence. These principles shall likewise inform the application of the exclusionary rule in future cases."

READ THE COURT OPINION HERE:
https://www.ca2.uscourts.gov/decisions/isysquery/9c70c27a-42e5-457a-a17e-e338c6adfaca/1/doc/17-2446_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/9c70c27a-42e5-457a-a17e-e338c6adfaca/1/hilite/

SEARCH AND SEIZURE: Expectation of Privacy in Bitcoin Records
United States v. Gratkowski
CA5, No. 19-50492, 6/30/20

Robert Nikolai Gratkowski became the subject of a federal investigation when federal agents began investigating a child pornography website. To download material from the Website, some users, like Gratkowski, paid the Website in Bitcoin.

Bitcoin is a type of virtual currency. Each Bitcoin user has at least one "address," similar to a bank account number, that is a long string of letters

and numbers. Bitcoin users send Bitcoin to other users through these addresses using a private key function that authorizes the payments. To conduct Bitcoin transactions, Bitcoin users must either download Bitcoin's specialized software or use a virtual currency exchange, such as the one used here, called Coinbase.

When a Bitcoin user transfers Bitcoin to another address, the sender transmits a transaction announcement on Bitcoin's public network, known as a blockchain. The Bitcoin blockchain contains only the sender's address, the receiver's address, and the amount of Bitcoin transferred. The owners of the addresses are anonymous on the Bitcoin blockchain, but it is possible to discover the owner of a Bitcoin address by analyzing the blockchain.

Federal agents used an outside service to analyze the publicly viewable Bitcoin blockchain and identify a cluster of Bitcoin addresses controlled by the Website. Once they identified the Website's Bitcoin addresses, agents served a grand jury subpoena on Coinbase—rather than seeking and obtaining a warrant—for all information on the Coinbase customers whose accounts had sent Bitcoin to any of the addresses in the Website's cluster. Coinbase identified Gratkowski as one of these customers. With this information, agents obtained a search warrant for Gratkowski's house. At his house, agents found a hard drive containing child pornography, and Gratkowski admitted to being a Website customer. Gratkowski moved to suppress the evidence obtained through the warrant, arguing that the subpoena to Coinbase and the blockchain analysis violated the Fourth Amendment. The district court denied the motion. Gratkowski entered a conditional guilty plea to both counts, reserving the right to appeal the denial of his motion to suppress.

The Fifth Circuit Court of Appeals held that Gratkowski lacked a reasonable expectation of privacy in his information on the Bitcoin Blockchain where the nature of the information on the Bitcoin blockchain and the voluntariness of the exposure weigh heavily against finding a privacy interest in an individual's information on the Bitcoin blockchain. The court also held that Gratkowski lacked a reasonable expectation of privacy in his Bitcoin transactions on Coinbase where the nature of the information and the voluntariness of the exposure weigh heavily against finding a privacy interest in Coinbase records.

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/19/19-50492-CR0.pdf

SEARCH AND SEIZURE:

Knock and Announce; Open Door

United States v. Sherrod

CA8, No. 18-2976, 7/17/29

Gabriel Sherrod argues that police officers obtained evidence in violation of the Fourth Amendment's knock-and-announce rule.

On the evening of September 17, 2016, Sherrod's mother-in-law called Kansas City police and requested a welfare check on her grandchildren, who lived with Sherrod. She spoke with Officer Timothy Trost, who discovered Sherrod had an active felony arrest warrant. Sherrod's mother-in-law confirmed that Sherrod matched the warrant's description.

Officer Trost and two other officers tried to do the welfare check soon after 8 p.m., but all three were diverted to another call. Once that call was done, three more officers accompanied Officer

Trost and the two original officers to Sherrod's residence. The six officers arrived around 10 p.m. and parked down the block from Sherrod's house. When they approached, a child, later identified as Sherrod's son, was taking out the trash. Officer Trost asked him if Sherrod was home. Without answering, the child immediately turned and walked toward the house. Officer Trost and two officers followed him to the front door, and three officers went to the back of the house.

Sherrod's son was unsure whether the officers followed him toward the home, but he had a good feeling that they probably did. He went into the house and left the door open. Officer Trost, in uniform, then stepped into the house and calmly said Sherrod's name. Sherrod stood up and fled. As Officer Trost gave chase and alerted the other officers, he noticed a cache of weapons near the entryway. The officers covering the back of the house arrested Sherrod outside.

With Sherrod in custody, Officer Trost returned to the front door to seize the guns. He then noticed another handgun by the couch, syringes filled with black liquid, a spoon with brown residue on it, and a scale. Officer Trost and the other officers then conducted a protective sweep of the home and located an additional firearm above a door frame. All items were in plain view.

The Eighth Circuit Court of Appeals affirmed the decision of the district court stating that the common law knock-and-announce rule does not apply when officers enter an open door and that the officers' conduct was reasonable under the Fourth Amendment.

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/182976P.pdf

SEARCH AND SEIZURE: Probable Cause; Audio and Video Recording

United States v. Glenn

CA7, No. 19-2802, 7/20/20

Police investigating drug trafficking in Vermilion County, Illinois, sent an informant to buy two ounces of cocaine at the home of Finas Glenn. The transaction was recorded on audio and video.

About a month later, the police asked for a warrant to search Glenn's home. A state judge put agent Pat Alblinger under oath, took his testimony (which was recorded), and issued a warrant. A search turned up cocaine and guns.

Indicted on drug and weapons charges, Glenn moved to suppress the evidence seized in the search. A district judge held a hearing and concluded that the warrant was supported by probable cause. Glenn then pleaded guilty to one firearms charge, and the prosecutor dismissed the remaining counts. The plea reserved Glenn's right to contest on appeal the denial of his motion to suppress.

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

"This warrant rests on the 'controlled buy' plus Alblinger's testimony that the informant had for more than a decade provided reliable information. Glenn contends that this is not enough to show probable cause, because Alblinger did not tell the state judge whether agents had searched the informant before the transaction, that the informant had a long criminal record and was cooperating to earn lenience, and that the informant's record of providing accurate information was with the local police as a whole rather than with Alblinger personally. While we think these omissions unfortunate they do not negate probable cause. When, as *Illinois v. Gates*,

462 U.S. 213 (1983) requires, the evidence is viewed as a whole and the federal court gives the state judge great deference.

"The principal reason to search an informant before a controlled buy is to make sure that he does not try to trick the investigators by providing the drugs himself and then asserting that he bought them from the target. It is possible that some sleight of hand might be practiced even when a transaction is recorded, but the audio and visual record of this transaction would have allowed a conviction beyond a reasonable doubt. Probable cause is a lower standard. The Fourth Amendment does not require best practices in criminal investigations. That the agents could have managed this controlled buy to provide an even higher level of confidence does not imply that probable cause is missing.

"Given the audio and video evidence of the controlled buy, the informant's reliability and motivations are not material to the existence of probable cause. Gates observed that these considerations can be important to the total mix of information, which is why police do well to provide details to the judge asked to issue a warrant, but the omissions do not detract from the powerful audio and video evidence."

The Court of Appeals for the Seventh Circuit also rejected a staleness claim to the seized evidence.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D07-20/C:19-2802:J:Easterbrook:aut:T:fnOp:N:2549132:S:0

SEARCH AND SEIZURE: Probable Cause; Cooperating Witness and Confidential Informants; Verification
United States v. Knutson
CA8, No. 19-1737, 7/24/20

Officers began investigating Knutson after a cooperating defendant (CD) told them that a white male named Todd was selling large amounts of meth out of a home located at 890 Arkwright Street. The CD had purchased drugs from Todd for a long time and had seen him in the past four days with a .45 revolver, a .40 automatic handgun, a submachine gun, and an assault rifle. The CD also indicated that Todd had a stolen Dodge in his garage and cameras around the home. After identifying Knutson as the home's occupant, officers showed the CD a picture of him. The CD confirmed that it was Todd. A background check revealed that Knutson could not legally possess firearms.

Officers later received similar information from a confidential informant (CI), who was familiar with Knutson and knew that he sold drugs out of the Arkwright home. The CI also indicated that Knutson had various firearms in the home, including a .45 revolver, a .45 automatic handgun, a submachine gun, and an assault rifle. Like the CD, the CI noted that Knutson had a stolen Dodge in the garage and had cameras around the home, and the CI identified him from a photograph. The CI agreed to visit Knutson's home. After the visit, the CI recounted to the officers what was inside: large amounts of meth, an assault rifle, and a submachine gun.

Based on that information, officers received a search warrant for the Arkwright home and for Knutson's person. In addition to the facts above, the warrant described Knutson as the home's tenant. Officers executed the warrant on Knutson's person and the home separately.

When they attempted to stop Knutson, he fled, and the officers found money and a gun along his flight path. During the search of the home, officers discovered meth, drug paraphernalia, and a number of guns. They also found mail that tied Knutson to the home, and two individuals at the home stated that Knutson lived there.

Before the district court, Knutson challenged the warrant as unsupported by probable cause. The district court rejected Knutson's probable cause argument. A quick review of the evidence shows why. The CD indicated that someone with the same name and race as Knutson sold meth, possessed firearms and a stolen vehicle, and maintained security cameras at the Arkwright home. That information was independently corroborated by the CI, whose information was nearly identical—even identifying some of the same guns and the make of the stolen car. Further, the officers' personal investigation, which included sending the CI into the home, corroborated those findings. The district court denied Knutson's motion to suppress.

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

"Here, the search warrant application relied on the CD's and CI's statements. 'It is well-settled law that the statements of a reliable informant can provide, by themselves, a sufficient basis for the issuance of a warrant.' *United States v. Gladney*, 48 F.3d 309, 314 (8th Cir. 1995). An 'informant's reliability, veracity, and basis of knowledge are relevant considerations—but not independent, essential elements—in finding probable cause.' *United States v. Reivich*, 793 F.2d 957, 959 (8th Cir. 1986). 'Information may be sufficiently reliable to support a probable cause finding if it is corroborated by independent evidence.' *United States v. Keys*, 721 F.3d 512, 518 (8th Cir. 2013. "Independent verification exists here. The two informants verified each other by independently providing highly-detailed, nearly-identical accounts. Further, the CD and CI affirmed that the person 'Todd' was Knutson based on a photograph. And according to the warrant application, Knutson shared the same first name, race, and address as the described dealer. Finally, the CI verified the informants' information by entering the home and confirming the presence of drugs and firearms."

The Court of Appeals for the Eighth Circuit stated that the district court did not err in finding there was probable cause. The affidavit was based on two highly detailed tips that were corroborated by police investigation.

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/191737P.pdf

SEARCH AND SEIZURE: Probable Cause; Totality of the Circumstances
United States v. Kizart
CA7, No. 19-2641, 7/28/20

Kevin Kizart was driving alone when Officer Russell stopped him for speeding. As they talked, Russell smelled burnt marijuana coming from Kizart's car. Kizart explained that his brother had smoked marijuana in the car earlier. Russell stated he would search the vehicle, had Kizart step out of the car, patted him down, and found no drugs or weapons.

Russell searched the passenger compartment, including areas not in plain view, for several minutes. Russell asked Kizart how to open the trunk. Kizart did not respond and "looked sort of shocked" for about five seconds, making Russell

"suspicious." Russell removed the keys from the ignition and used them to open the trunk. Toward the back of the trunk, he found a backpack with a garbage bag inside, which contained three smaller bags of what appeared to be raw marijuana and a "white, vacuum-packed brick " that turned out to be methamphetamine. The backpack contained approximately three pounds of marijuana and three pounds of methamphetamine.

Charged with possessing marijuana and methamphetamine, each with intent to distribute, Kizart unsuccessfully moved to suppress the drugs. The Seventh Circuit affirmed.

"The totality of the circumstances, including the smell of burnt marijuana and Kizart's reaction and behavior when Russell asked Kizart about the trunk, provided probable cause to search his car's trunk."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D07-28/C:19-2641:J:Brennan:aut:T:fnOp:N:2553727:S:0

SEARCH AND SEIZURE:

Search by a Private Person

United States v. Ringland

CA8, No. 19-2331, 7/16/20

Mark Ringland was convicted of receipt of child pornography. At trial, the government introduced evidence of child pornography found on Ringland's electronic devices. Law enforcement officers seized and searched Ringland's devices under authorized warrants based on information furnished by Google, Inc. ("Google") and the National Center for Missing and Exploited Children ("NCMEC").

On appeal, Ringland asserts the district court erred in denying his motion to suppress this evidence because he contends Google, acting as a government agent, conducted unlawful warrantless searches of his email accounts. Alternatively, Ringland argues that NCMEC, acting as a government agent, also conducted unlawful warrantless searches of his email accounts by expanding Google's original searches. Finally, Ringland argues the good faith exception to the exclusionary rule does not apply to save the unlawful searches.

The Eighth Circuit found the searches lawful and affirmed the district court decision.

"A warrantless search is presumptively unreasonable absent some exception to the warrant requirement. *United States v. Hernandez Leon*, 379 F.3d 1024, 1027 (8th Cir. 2004). The ordinary sanction for police violation of Fourth Amendment limitations has long been suppression of the evidentiary fruits of the transgression. *United States v. Fiorito*, 640 F.3d 338, 345 (8th Cir. 2011). The Supreme Court has also long held, however, that Fourth Amendment protection extends only to actions undertaken by government officials or those acting at the direction of some official. Thus, the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative but it does protect against such intrusions if the private party acted as an instrument or agent of the Government.

"Whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. *United States v. Wiest*, 596 F.3d 906, 910 (8th Cir.

2010). In this context, we have focused on three relevant factors: [1] whether the government had knowledge of and acquiesced in the intrusive conduct; [2] whether the citizen intended to assist law enforcement or instead acted to further his own purposes; and [3] whether the citizen acted at the government's request. A defendant bears the burden of proving by a preponderance of the evidence that a private party acted as a government agent.

"Here, Google did not act as a government agent because it scanned its users' emails volitionally and out of its own private business interests. Google did not become a government agent merely because it had a mutual interest in eradicating child pornography from its platform. The government did not know of Google's initial searches of Ringland's gmail accounts, the government did not request the searches, and Google acted out of its own obvious interests in removing child sex abuse from its platform. Again, Google was not required to perform any such affirmative searches. The electronic service reporting reporting requirement for child pornography alone does not transform Google into a government agent. Moreover, the statutory scheme does not so strongly encourage affirmative searches such that it is coercive. In fact, the penalties for failing to report child pornography may even discourage searches in favor of willful ignorance. Thus, Google was not a state actor here and its searches do not implicate the Fourth Amendment."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/20/07/192331P.pdf

SEARCH AND SEIZURE:

Stop and Frisk; Exigent Circumstances Doctrine; Suspicionless Seizure

United States v. Curry

CA4, No. 18-4233, 7/15/20

This appeal presents the question of whether the Fourth Amendment's exigent circumstances doctrine justified the suspicionless seizure of Billy Curry, Jr. The police seized Curry after responding to several gunshots that were fired in or near an apartment complex less than a minute earlier. When the police arrived, they encountered five to eight men—including Curry—calmly and separately walking in a public area behind the complex, away from the general vicinity of where the officers believed the shots originated. Several other people, likely visitors or residents, standing around closer to the apartments.

Officer Gaines approached Curry and another man wearing a blue jacket, both of whom were separately walking away from the officers. According to Gaines, he was not looking for Curry, specifically, but was looking at everyone's hands to ensure that they did not have a firearm. When he first saw Curry, Gaines testified, Curry had a cell phone in his left hand and was walking without putting his hands in his pockets or in his waistband. Curry made no furtive gestures, nor did he walk at an accelerated pace indicative of flight.

Gaines instructed the two men to put their hands up, and they complied. Curry stood completely still for about four seconds before pointing toward where the shots had come from and telling the officers that he was looking for his nephew. Gaines instructed Curry to pull his shirt up. Gaines claims he could not get a full view of Curry's waistband and asked him to lift his shirt again. Officer Gaines then ordered, 'Pick your shirt up,' and Curry responded, 'I'm liftin' it up.'" Gaines testified that Curry did not comply, but instead turned away.

Unable to visually check for a bulge because of what he deemed noncompliance, Gaines called to Officer O'Brien to help him pat Curry down. Officers stated that Curry remained evasive and prevented them from reaching his right side. Gaines and O'Brien restrained Curry's arms and began to pat him down. Gaines testified that he felt a hard object like the butt of a handgun on Curry's person, and the body camera video shows that Gaines notified the other officers that "It's on him," referring to a firearm. An apparent struggle ensued, and Gaines was never able to fully retrieve the object that he felt before Curry was taken to the ground.

The officers handcuffed Curry and took him into custody. As they handcuffed him, the officers told Curry that they had found his gun. Gaines testified that he found the flashlight that he had dropped during the struggle approximately one to one-and-a-half feet from the location where Curry had been taken to the ground. Next to Gaines's flashlight was a silver revolver.

The district court held that exigent circumstances did not justify the suspicionless, investigatory stop of Curry, and so it granted his motion to suppress a firearm and other evidence based on the unreasonableness of the seizure that led to its discovery.

The Fourth Circuit Court of Appeals agreed with the district court's conclusion.

"To hold otherwise would create a sweeping exception to Terry v. Ohio, 392 U.S. 1 (1968). The exigent circumstances doctrine typically involves emergencies justifying a warrantless search of a home, not an investigatory stop of a person, and the few cases that have applied the doctrine in the investigatory seizure context are materially distinguishable. In those cases, the government isolated a discrete area or group of people and engaged in minimally intrusive suspicionless searches in an effort to search for a suspect implicated in a known crime in the immediate aftermath of that crime. Requiring such suspicionless seizures to be narrowly targeted based on specific information of a known crime and a controlled geographic area ensures that the exigency exception does not swallow Terry whole. Because these limiting principles were wholly absent from Curry's stop, we hold that the stop was not justified by exigent circumstances and thus was not reasonable under the Fourth Amendment."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/184233.P.pdf

SEARCH AND SEIZURE: Stop and Frisk; Reasonable Suspicion; Bystander's Tip
United States v. Mitchell
CA4, No. 18-4654, 6/20/20

Shortly after closing time on April 7, 2013, officers with the Huntington Police Department were dispatched to "Rehab," a Huntington, West Virginia bar, in response to a report of a large fight, an assault, and a person with a gun. An officer quickly arrived on the scene, and a bystander informed him that a black man wearing red pants and a black shirt had a gun and was leaving the scene walking eastbound on Fourth Avenue. Another officer heard this report and, within one minute, saw a man matching the description: Mitchell. The officer stopped and frisked Mitchell, found a firearm on his person, and took him into custody.

A federal grand jury indicted Mitchell for possession of a firearm by a felon, based on state

felony convictions he had incurred one month before the incident, and the district court issued a warrant for his arrest. Four years later, in May 2017, Mitchell was arrested on the warrant. Mitchell moved to suppress the gun seized from his person, arguing that the officer who stopped and frisked him lacked reasonable suspicion.

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

"The Fourth Amendment protects against 'unreasonable searches and seizures.' U.S. Const. Amend. IV. Under well-established doctrine, a police officer may, consistent with the Fourth Amendment, conduct a brief investigatory stop—known as a 'Terry stop'—predicated on reasonable, articulable suspicion that 'criminal activity may be afoot.' *Terry v. Ohio*, 392 U.S. 1, 30 (1968); see *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Reasonable suspicion is 'a less demanding standard than probable cause' but requires 'at least a minimal level of objective justification for making the stop.' *Wardlow*, 528 U.S. at 123. 'The Government bears the burden of proving that reasonable suspicion justified a warrantless seizure.' *United States v. Kehoe*, 893 F.3d 232, 237 (4th Cir. 2018).

"In evaluating the validity of a Terry stop, we must consider 'the totality of the circumstances—the whole picture.' *United States v. Sokolow,* 490 U.S. 1, 8 (1989). 'The principal components of a determination of reasonable suspicion will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion.' *Ornelas*, 517 U.S at 696. Facts innocent in themselves may together amount to reasonable suspicion; officers are permitted to conduct investigative stops 'based on what they view as suspicious—albeit even legal—activity.' *United States v. Perkins*, 363 F.3d 317, 326 (4th Cir. 2004). And because reasonable suspicion is a less demanding standard, it can arise 'from information that is less reliable than that required to show probable cause.' *Alabama v. White*, 496 U.S. 325, 330 (1990).

"Our determination of reasonable suspicion must give due weight to 'commonsense judgments and inferences about human behavior' made by officers in light of their experience and training. *Wardlow*, 528 U.S. at 125; see *Perkins,* 363 F.3d at 321. The standard 'depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Kansas v. Glover,* 140 S. Ct. 1183, 1188 (2020) (quoting *Navarette v. California*, 572 U.S. 393, 402 (2014)). Thus, while we require more than an inchoate and unparticularized suspicion or hunch, we also 'credit the practical experience of officers who observe on a daily basis what transpires on the street,' *United States v. Lender,* 985 F.2d 151, 154 (4th Cir. 1993).

"Considering the totality of the circumstances, we conclude that Officer Black had reasonable suspicion of criminal activity when he stopped Mitchell. Jim Smith, a Rehab employee or regular patron known to Corporal Howard, had called 911 to report a large fight and assault, with a victim 'Knocked out laying on the ground.' Smith had given dispatch his name and telephone number. See *Kehoe*, 893 F.3d at 239 (caller disclosed his first name and telephone number, which supported the reliability of his tip).

"Officers knew that Rehab was a problem area, especially at this late hour when the bars were emptying. (A bar's reputation as a 'known problem area' added to the officers' reasonable suspicion); see *Wardlow,* 528 U.S. at 124 (An

individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime, but officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.) In connection with the fracas, Smith had reported that 'Someone said they had a gun.' The officers heard this information from dispatch on their radios and could reasonably infer from the report that the person with the gun was involved in the fight. Corporal Howard arrived on the scene within four or five minutes, and a bystander informed him that 'a male with red pants, black shirt, a black male had a firearm on him and was walking eastbound on 4th Avenue' away from Rehab.

"The bystander's tip corroborated Smith's report to dispatch that someone in the altercation said they had a gun. Officer Black heard Corporal Howard's description of the suspect with the gun and within one minute saw Mitchell, wearing red pants and a black shirt, walking eastbound on Fourth Avenue within a block of Rehab, as the bystander had predicted. See *White*, 496 U.S. at 330–331 (discussing the importance of corroboration in establishing the reliability of an anonymous tip). On these facts, it was entirely reasonable for Officer Black to stop Mitchell based on suspicion that he had been involved in the fight and assault at Rehab and, after stopping him, to frisk him for weapons on the reasonable belief that he was armed and dangerous.

"Put simply, 'police observation of an individual, fitting a police dispatch description of a person involved in a disturbance, near in time and geographic location to the disturbance establishes a reasonable suspicion that the individual is the subject of the dispatch.' *United States v. Lenoir,* 318 F.3d 725, 729 (7th Cir. 2003)."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/184654.P.pdf

SEARCH AND SEIZURE:

Stop and Frisk; 911 Call Generates Reasonable Suspicion for a Stop

United States v. Vandergroen

CA9, No. 19-10075, 7/7/20

At about 11:27 p.m. on February 17, 2018, an individual who worked at a bar called Nica Lounge ("Nica") in Concord, California called 911 to report a man with a gun seen on his person. The witness gave his name, identified his position at Nica, and indicated he was calling from the bar. He explained that three of Nica's customers had told him they saw a man in the area with a pistol "on him." The witness said the man (whom he could see) was in the back parking lot and had just walked into a neighboring bar. Witness 2 described the man as "Latin," "wearing a blue sweater with a Warriors logo," "skinny," and in his early 20s, features that mostly matched Vandergroen's.

Continuing in the call, the witness next reported that the man had walked out of the neighboring bar and was in the parking lot next to Nica Lounge. The operator asked for more details about the man, including whether the suspect had been fighting. The witness said the man had not. The operator also asked the witness where the gun was located on the defendant, and the witness indicated that he would ask the patrons who reported the gun to him. Before the witness could provide more information, however, the man started running through the parking lot by

Nica. The witness started reporting the man's movements, including that the man jumped into a black four-door sedan. The witness identified the car as a "Crown Vic," noted the man was driving out of the parking lot, and told police officers arriving on the scene which car to follow. At the end of the call ("the 911 call"), the witness provided his full name and phone number.

In response to the 911 call, dispatch alerted officers that "patrons think they saw a HMA [Hispanic Male Adult] blue warriors logo carrying a pistol." Dispatch directed officers to "1907 Salvio Nica Lounge," and stated, 3 patrons think they saw an HMA with a blue sweatshirt on carrying a pistol. We're getting further...

> *HMA wearing a blue sweatshirt with a Warriors logo on it...currently IFO Pizza Guys...no 4-15 [i.e. no fight] prior to patrons seeing the male with a pistol. 3 females say they saw it on him. We're still getting further...Subject is running toward DV8 Tattoos and just got into a black vehicle... getting into a 4-door sedan, black in color...*

Shortly thereafter, an officer reported over the dispatch "we're gonna do a high-risk car stop." The police then executed a stop of the man, later identified as Vandergroen. During this stop, the police conducted a search of Vandergroen's car and found a loaded semi-automatic handgun under the center console to the right of the driver's seat. An officer then placed Vandergroen under arrest.

Vandergroen was subsequently charged in a single-count indictment with being a felon in possession of a firearm. Before trial, Vandergroen filed a motion to suppress evidence found in the course of his arrest, arguing that the 911 call did not generate reasonable suspicion justifying his initial stop. The district court denied the motion. Vandergroen then requested that the case be set for a stipulated-facts bench trial, reserving the right to appeal the denial of the motion to suppress. After accepting the parties' factual stipulations, the district court adjudged Vandergroen guilty. Vandergroen filed a timely notice of appeal.

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

"The Supreme Court and this circuit have identified a number of factors that can demonstrate the reliability of a tip, including whether the tipper is known, rather than anonymous, *Florida v. J.L.*, 529 U.S. 266, 270 (2000); whether the tipper reveals the basis of his knowledge, *Rowland*, 464 F.3d at 908; whether the tipper provides detailed predictive information indicating insider knowledge, id.; whether the caller uses a 911 number rather than a non-emergency tip line, *Foster v. City of Indio*, 908 F.3d 1204, 1214 (9th Cir. 2018); and whether the tipster relays fresh, eyewitness knowledge, rather than stale, second-hand knowledge, *United States v. Terry-Crespo*, 356 F.3d 1170, 1176–77 (9th Cir. 2004). When evaluating the reliability of a tip such as the 911 call here, in which a caller reports information from a third party regarding possible criminal activity, we consider the reliability of both the caller himself and the third party whose tip he conveys. See *United States v. Brown*, 925 F.3d 1150, 1153 (9th Cir. 2019) (considering both the fact that the caller was known and that the third-party tipster was anonymous in evaluating the reliability of such a tip).

"The totality of the circumstances in this case demonstrates that the 911 call was sufficiently reliable to support reasonable suspicion. First,

the statements by the witness himself were undoubtedly reliable. The witness provided his name and employment position, making him a known, and therefore more reliable, witness. (A known informant's tip is thought to be more reliable). Further, the witness revealed the basis of his knowledge— explaining that multiple patrons told him that Vandergroen had a gun on him and offering to ask follow-up questions to the patrons about the exact location of the gun—thereby enhancing the tip's reliability. Finally, the fact that the witness placed his call using an emergency line, which allows calls to be recorded and traced, increased his credibility.

"Second, we conclude that, viewed collectively, the statements by Nica's patrons were also reliable. Although the patrons remained anonymous during the call, which generally cuts against reliability, their statements exhibited sufficient indicia of reliability to overcome this shortcoming. *J.L.*, 529 U.S. at 270 (quoting *Alabama v. White*, 496 U.S. 325, 327 (1990)). The reports were based on fresh, first-hand knowledge. The patrons reported personally seeing the gun on Vandergroen shortly before they reported it to the witness. Police may ascribe greater reliability to a tip, even an anonymous one, where an informant was reporting what he had observed moments ago, not stale or second-hand information. *Terry-Crespo*, 356 F.3d at 1177. Furthermore, the fact that the anonymous tipsters were Nica's patrons who were still at the bar when the 911 call was being made narrowed the likely class of informants, making their reports more reliable. Further still, the fact that multiple individuals reported seeing a gun also made the information more reliable. The existence of multiple tipsters, though anonymous, mitigates the specter of an unknown, unaccountable informant seeking to harass another by setting in motion an intrusive, embarrassing police search by relaying false information. *J.L.*, 529 U.S. at 271–72. Taken together, these factors rendered the information provided by the Nica's patrons through the witness sufficiently reliable to support reasonable suspicion.

"While the 911 call was thus reliable, it may only support reasonable suspicion if it also provided information on potential illegal activity. In other words, a tip must demonstrate that 'criminal activity may be afoot,' (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)), and the absence of any presumptively unlawful activity from a tip will render it inadequate to support reasonable suspicion, Furthermore, any potential criminal activity identified must be serious enough to justify immediate detention of a suspect. *United States v. Grigg,* 498 F.3d 1070, 1080–81 (9th Cir. 2007).

"The 911 call gave the police reason to suspect Vandergroen was carrying a concealed firearm, which is presumptively a crime in California. In short, the 911 call in this case was both reliable and provided information on potentially criminal behavior. The witness was reliable as an identified caller using an emergency line, and the Nica patrons' reports he conveyed contained sufficient indicia of reliability to support reasonable suspicion. Furthermore, the reported activity— possessing a concealed weapon—was presumptively unlawful in California and was ongoing at the time of the stop. Thus, the 911 call generated reasonable suspicion justifying the stop and the district court was correct to deny Vandergroen's motion to suppress the evidence obtained during the stop."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/07/19-10075.pdf

SEARCH AND SEIZURE:

Totality of Circumstances; Flight

United States v. Wilson

CA7, No. 19-2503, 6/30/20

On May 16, 2017, Dispatch reported three black males armed with guns selling drugs in front of a residence in Chicago's Lawndale neighborhood, a high-crime area on May 16, 2017. Dispatch described one of the three men as wearing a white shirt, another wearing a red shirt, and the third wearing a boot-style cast on his leg.

Officers Mukite and Collins responded. Before reaching the residence, they passed Douglas Park—about one block from the reported address—where a large group of adults had gathered in the playground area. The group included multiple black males wearing both red and white shirts. The officers approached the group. As they did, Officer Collins noticed Wilson grab a bulge in the front right pocket of his athletic/mesh shorts, turn his right side away from the officers, and sit down on a ledge facing away from them and on the fringe of the group. Wilson had on a dark blue shirt. Officer Collins walked around to Wilson's front to see if Wilson was wearing a boot or cast (he was not). When he did, Officer Collins observed the same bulge in Wilson's pocket. Officer Mukite stood behind Wilson. Officer Collins asked Wilson to stand up and made a corresponding hand gesture. Wilson rose from his seated position and sprinted away instantly. Officer Mukite gave chase and tackled him. While on the ground, Wilson indicated to the officers that he had a gun on his person. They searched him and found a loaded revolver.

The government charged Wilson with one count of felon in possession of a firearm. Wilson pleaded guilty but reserved the right to challenge.

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

"Wilson claims he was seized when the officers approached and asked him to stand up, and that this seizure lacked reasonable suspicion. The incident was captured on Officer Mukite's body camera. We reviewed the video footage and it tells all. There is no question Wilson did not submit to the officers' authority when asked to stand up. Yes, he rose to his feet, but only to sprint away. He did not even pause momentarily before doing so; he stood and ran in one motion. Therefore, Wilson was not seized when the officers approached and asked him to get up, nor was he seized in the split second between the officers' request and his flight. The only seizure here occurred when Officer Mukite subsequently tackled Wilson.

"The Court turned to that seizure's constitutionality, i.e., whether the officers had reasonable suspicion to seize Wilson through physical force. This requires a fact-intensive inquiry: we look to the totality of the circumstances to see whether police had a particularized and objective basis for suspecting the particular person stopped of criminal activity.

"When Mukite tackled Wilson, the officers knew he had a conspicuous bulge in his right pocket. They had watched him act evasively, grabbing the bulge, turning his right side away from their view, and sitting facing away from them. They knew they were in a high-crime area and had received a dispatch report minutes earlier of armed men selling drugs nearby. See *United States v. Richmond*, 924 F.3d 404, 411–14 (7th Cir. 2019) (holding reasonable suspicion for seizure supplied by defendant's evasive behavior upon seeing police in a high crime area and gun-like bulge spotted in his pocket by officers). On the

other hand, the officers also knew Wilson did not match any of the three men reported—he was not wearing red or white, nor was he wearing any boot or cast. Still, the Fourth Amendment did not require the officers to disregard all of the above simply because of these discrepancies. *United States v. Adair*, 925 F.3d 931, 936 (7th Cir. 2019) (rejecting defendant's argument that reasonable suspicion was negated by mismatch between his clothing and that of the suspect reported by a 911 caller).

"If these were all the facts, establishing reasonable suspicion might have been a close call for the officers. But Wilson's unprovoked, headlong flight from police in a high-crime area put any lingering doubt to rest. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). A reasonable officer could infer from Wilson's flight that Wilson knew he was in violation of the law. *District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018). Considering the totality of the circumstances—and his flight especially—Wilson's seizure was supported by the officers' reasonable suspicion that he was engaged in criminal activity."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D06-30/C:19-2503:J:Barrett:con:T:fnOp:N:2538370:S:0

SEARCH AND SEIZURE:

Traffic Stop; Extending the Stop

United States v. Reyes

CA5, No. 19-10291, 7/1/20

Officer Will Windham stopped Reyes, approached her car, informed her that she was speeding, and requested her driver's license and registration. Reyes volunteered that she was trying to get her kids to school. Windham found that odd because there were no passengers. He asked where the kids were, and Reyes responded that they were in Abilene—fifteen miles ahead.

Windham asked Reyes to accompany him to his patrol car while he looked up her information. According to Windham, she was "extremely hesitant" to leave the truck. After she refused, he explained that he completes traffic stops in his patrol car for safety purposes—to avoid being hit by passing vehicles and because he doesn't know what may be inside the driver's vehicle. Additionally, it was very cold. Windham found Reyes's persistent reluctance to exit her truck unusual.

As she pondered exiting her vehicle, Reyes asked, "What about the truck"? Windham answered that it could stay parked where it was. As Reyes sat down in the passenger seat of the patrol car, she locked her truck. Windham—who had never seen anyone lock his or her vehicle during a traffic stop—suspected that Reyes was trying to hide something illegal.

Windham asked Reyes where she was heading, and she mumbled, "this address," as she scrolled through her phone to find it. He inquired, "I thought you said you were taking the kids to school." She responded, "Yeah. Not my kids. My kids [are] in Grand Prairie. I'm helping a friend take her kids to school. She doesn't have a car or

anything." Confirming that Reyes started her trip in Grand Prairie, Windham asked, in a surprised tone, "What time did you leave?" She replied, "About, what, three hours ago, or so?" Windham, shocked that she purported to travel three hours to take kids to school, "could tell something was not right."

Windham asked Reyes who owned the truck, which had a temporary Oklahoma tag. She replied that it was her ex-husband's. Based on his training, education, and experience, Windham surmised that narcotics couriers often use vehicles registered to others to avoid forfeiture.

As Reyes showed Windham the truck's documents, he asked whether she had ever been arrested. She stated that she had an arrest for DWI. Soon after, and while continuing to examine the truck's documents, Windham asked whether there was anything illegal in the truck. Reyes's facial expressions changed dramatically, and her eyes shifted from Windham to the front windshield as she shook her head and said, "No, no, no. There shouldn't be. I mean, it's brand new. It's brand new."

Sounding skeptical, Windham asked again, "So you drove all the way from Dallas, or Grand Prairie, to take these kids to school for this lady?" Reyes then added, "Not just for that. I wanted to see her." She then explained that she previously had a relationship with the woman in prison and that the woman's husband "was going to be at work." Windham told Reyes that she wasn't going to make it in time to take the kids to school. She then changed her story yet again, claiming that she was going to Abilene "just to see her, to be honest."

After typing into the computer some more, Windham asked for consent to search the truck. Reyes responded that she could not give consent because it was not her truck. He explained that she could grant consent because she had control of the truck. She refused.

At that point—roughly eight-and-a-half minutes into the stop— Windham informed Reyes that he was going to call a canine unit to perform a free-air sniff. He said that if the dog detected drugs, he would have probable cause to search inside. He requested a canine unit, then told Reyes that he was going to check the truck's vehicle identification number ("VIN") to see whether it matched the paperwork, because he was "not getting a good return" on the license plate.

Windham noted that Reyes had several items on her and asked whether she had any weapons. She emptied her pockets, which contained only a wallet and a pack of cigarettes. She asked whether she could have a cigarette, and Windham agreed to let her "stand outside and smoke" while he got the VIN. Reyes got out of the car for about thirty seconds, without smoking. After reentering the car, she told Windham that she didn't have her lighter on her. He asked if she had one in the truck, and she responded that she did not know and mumbled that she had "probably dropped it." Windham found it odd that Reyes declined to retrieve her lighter. He testified that he had never had a smoker turn down his offer to let him or her smoke.

After Windham received Reyes's criminal background check, he asked her whether she had any other prior arrests. She said that, in addition to the DWI, she had been arrested for warrants related to tickets. Windham prodded further, and Reyes conceded that she had been arrested for a pill that was found in her ex-girlfriend's vehicle. That story evolved, however, and Reyes admitted that she was arrested for a meth offense. She said that she went to jail for that offense and later

explained—her story shifting yet again—that the woman she was going to visit was her girlfriend in prison.

Within a few minutes, a canine unit arrived and conducted the sniff. The dog alerted officers that there was a controlled substance in the truck. Windham searched inside and found 127.5 grams of meth and a loaded handgun.

The Fifth Circuit Court of Appeals affirmed the district court's denial of Reyes's motion to suppress evidence after Reyes pleaded guilty to conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine.

"The court held that the officer had reasonable suspicion to extend the stop because the officer knew that the location where defendant was pulled over is a known drug-trafficking corridor; defendant drove a truck registered in someone else's name; defendant was unusually protective of the truck and initially refused to exit; defendant offered inconsistent and implausible stories about the purpose of her travel; defendant had a conviction for possession of meth; and when asked about anything illegal in the truck, defendant's facial expressions changed dramatically. The court also held that defendant offered no persuasive reason why Miranda demands the suppression of her statements during a routine traffic stop."

READ THE COURT OPINION HERE:
http://www.ca5.uscourts.gov/opinions/pub/19/19-10291-CR0.pdf

SEARCH AND SEIZURE: Traffic Stop; Extending the Stop; Miranda
United States v. Cortez
CA10, No. 19-2058, 7/14/20

After a routine traffic stop in New Mexico led to Raquel Cortez and Josefina Reyes-Moreno's indictment for conspiring to transport undocumented aliens, both defendants jointly moved to suppress evidence based on Fourth and Fifth Amendment violations they allege occurred during the stop. The district court found no constitutional violations and denied the motion.

The Tenth Circuit agreed that no constitutional violations occurred during the stop.

"No Fourth Amendment violation occurred because none of the law enforcement officers' initial questions impermissibly delayed the stop and, during the stop, the officers developed reasonable suspicion the defendants were transporting undocumented aliens, justifying a further detention until Border Patrol arrived. No Fifth Amendment violation occurred because neither Cortez nor Reyes-Moreno faced custodial interrogation during the stop, rendering the absence of Miranda warnings harmless."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/opinions/19/19-2058.pdf

SEARCH AND SEIZURE:

Vehicle Search; Detention During Execution of a Search Warrant

United States v. Freeman

CA8, No. 19-2055, 7/10/20

Police searched for the two perpetrators of a bank robbery and shooting. They identified one suspect as Derrick Ashley, Jr., but the identity of the other remained unknown. Investigation led law enforcement to a house in St. Joseph, Missouri. To acquire information for a warrant application, a detective watched the St. Joseph house to see if Ashley was inside. As he drove past the residence, the detective observed a tan car parked directly in front of the residence and a silver Pontiac with two occupants parked behind the tan car. The detective parked a short distance away.

Eventually, the detective saw Ashley walk out of the house and speak with the Pontiac's passengers. The Pontiac drove away soon thereafter but returned less than an hour later. It parked behind a Cadillac, which had parked behind the tan car while the Pontiac was away. Ashley again exited the residence and walked to the Pontiac. He took a bag of dog food from the car and returned inside. Law enforcement used the information the surveilling detective gathered to obtain a search warrant for the house Ashley occupied.

Special response team officers then arrived in an armored car and parked in front of the house. The surveilling detective and multiple officers walked up the street to help secure the cars' occupants. As they approached the Pontiac, which had an open sunroof, the officers smelled marijuana. One officer looked into the Pontiac and saw the driver lean forward. The driver was later identified as Maurice Freeman. Believing Freeman was attempting to conceal something in or retrieve something from the floorboard, the officer ordered the car's occupants to turn the engine off and raise their hands.

Freeman and the other passenger were removed from the car, handcuffed, and taken to the armored vehicle. Based on the smell of marijuana, officers searched the car. That search revealed a handgun and a pill bottle that appeared to contain marijuana; Freeman admitted the gun was his. Freeman was arrested, and police later found methamphetamine on his person.

A grand jury indicted Freeman with felony possession of a firearm. Freeman moved to suppress all of the evidence discovered in the Pontiac. Freeman claims there was nothing to justify the officers' decision to secure the car's occupants and ensure officer safety during the warrant's execution.

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

"The Supreme Court has recognized 'that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.' *Michigan v. Summers,* 452 U.S. 692, 705 (1981). The Court has identified three justifications that support a detention: 'officer safety, facilitating the completion of the search, and preventing flight.' *Bailey v. United States,* 568 U.S. at 194 (2013).

"Freeman argues that the justifications articulated in Summers and Bailey do not support the detention here. We disagree. As to officer safety, the Court in Summers recognized that although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic

efforts to conceal or destroy evidence. The same could be said of the search warrant here.

"The officers were seeking Ashley, the suspect of a gun shooting and bank robbery. The execution of a warrant for such an individual qualifies as one that may give rise to sudden violence or frantic efforts to conceal evidence or escape. Further, Ashley's accomplice was still at large, and the police observed Ashley twice interacting with the Pontiac's passengers. Officers testified that the Pontiac and its passengers were either three car lengths from the home or between the house and residence to the north. That placed the passengers within the line of sight of the dwelling. If armed, those passengers posed a real threat to the safe and efficient execution of the search warrant. Given that threat; the Pontiac's passengers' "connection to the residence to be searched, and the dangerous suspect therein, a concern for officer safety justified the brief detention which occurred here.

"In sum, the Court found that Freeman's initial detention was permissible under the Supreme Court's rationale in Summers. Thus, the officers' (1) brief detention of the Pontiac's passengers and (2) approach of the car were constitutionally permissible. During that approach, the officers developed probable cause to search the car when they smelled marijuana and saw Freeman's furtive movements. As a result, their brief seizure of Freeman and subsequent search of the vehicle based on probable cause was constitutional. The district court did not err in denying Freeman's motion to suppress.

READ THE COURT OPINION HERE:
https://www.ca8.uscourts.gov/sites/ca8/files/opinions/192055P.pdf

SEARCH AND SEIZURE:

Video Used to Record Activity

United States v. Trice

CA6, No. 19-1500, 7/21/20

Officers had entered the common area of Rahem Abdullah Trice's apartment building and placed a camera disguised as a smoke detector on the wall across the hallway from the door of his unit. The camera was equipped with a motion detector and set to activate whenever the door to his apartment opened. The camera made several videos of Trice entering and exiting his apartment. This information was used in an affidavit in support of the search warrant. Law enforcement executed the warrant and seized drugs and other paraphernalia consistent with distribution.

The Sixth Circuit Court of Appeals rejected Trice's Fourth Amendment arguments as "squarely foreclosed by two lines of authority."

"Trice had no reasonable expectation of privacy in the apartment's unlocked common hallway where the camera recorded the footage. Law enforcement may use video to record what police could have seen from a publicly accessible location. The camera captured nothing beyond the fact of Trice's entry and exit into the apartment and did not provide law enforcement any information they could not have learned through ordinary visual surveillance."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0225p-06.pdf