UNIVERSITY OF ARKANSAS SYSTEM
CRIMINAL JUSTICE INSTITUTE

CJI Legal Briefs

Volume 25, Issue 4
SUMMER 2021

A Publication of the Criminal Justice Institute–University of Arkansas System

Contents

CIVIL LIABILITY:

Deliberate Indifference by City to Recklessness of Officers

Flores v. City of South Bend, CA7, No. 20-1605, 5/12/21

Five South Bend officers were assigned to an area of the city that was considered to be a "hot spot." One drove a fully marked police vehicle. Two officers patrolled in an unmarked car without sirens or lights; two sat in an unmarked car that had sirens and lights. Around 4:30 am, the patrolling car radioed over the tactical channel that they planned to stop a speeding car. The remaining officers promptly acknowledged the report but did not indicate that the traffic stop was an emergency, nor did they request assistance from other officers.

After hearing the exchanges, knowing that no one was requesting assistance, Justin Gorny (two miles away) roared through a residential neighborhood at 78 miles per hour, disregarding the 30 mph speed limit, with infrequent use of lights or sirens. On Western Avenue, he accelerated up to 98 mph and reached the Kaley Avenue intersection with an obstructed view. Disregarding the red light, Gorny sped across and crashed into Erica Flores's car, killing her.

The district court dismissed a 42 U.S.C. 1983 substantive due process action. The Seventh Circuit reversed:

"Flores's allegations plausibly state claims against Gorny and the city. The law does not provide a shield against constitutional violations for state actors who consciously take extreme, obvious risks. Flores's complaint plausibly alleges that the city acted with deliberate indifference by failing to address the known recklessness of its officers as a group and Gorny in particular."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D05-12/C:20-1603:J:Brennan:con:T:fnOp:N:2703454:S:0

CIVIL LIABILITY:
Established Right to be Free from Use of Force
Peroza-Benitez vs. Smith
CA3, No. 20-1390, 4/8/21

Jose Antonio Peroza-Benitez awoke, hearing Reading Police Officers breaking down his apartment door. They were executing a search warrant related to suspected drug offenses. Peroza-Benitez climbed out of his window onto the roof wearing undergarments and flip flops and led officers on a rooftop chase.

Officer Darren Smith radioed that Peroza-Benitez had a firearm. Peroza-Benitez apparently dropped the firearm, which landed in an alley. Peroza-Benitez denies having a firearm. Peroza-Benitez entered an abandoned building and attempted to escape through a window. Officer Smith and Officer Haser grabbed Peroza-Benitez and attempted to hoist him back inside; he resisted. Officer Haser punched Peroza-Benitez. The officers let go. Peroza-Benitez fell and landed in a below-ground, concrete stairwell.

Officers' testimony differs as to whether Peroza-Benitez voluntarily moved upon landing. Peroza-Benitez testified that he was knocked temporarily unconscious. Officer White tased Peroza-Benitez, without providing a verbal warning. Peroza-Benitez was taken to the hospital, where he underwent surgery for arm injuries and a fractured leg.

The district court rejected his 42 U.S.C. 1983 suit on summary judgment, citing qualified immunity. The Third Circuit vacated:

"There was a 'clearly established' right for an injured, visibly unarmed suspect to be free from temporarily paralyzing force while positioned as Peroza-Benitez was. A reasonable jury could conclude that Haser 'repeatedly' punched Peroza-Benitez in the head and caused him to fall, in violation of that right. Tasing a visibly unconscious person, who just fell over 10 feet onto concrete, also violates that person's Fourth Amendment rights."

READ THE COURT OPINION HERE:
https://www2.ca3.uscourts.gov/opinarch/201390p.pdf

CIVIL LIABILITY: Excessive Force; Continuous Taser Discharge
Masters v. Runnels
CA8, No. 19-2199, 5/27/21

Bryce Masters, then a 17-year-old high school senior, was driving his car the afternoon of September 14, 2014. on a residential street in Independence, Missouri. Timothy Runnels, a police officer with seven years' experience in law enforcement, was on patrol in the area. He ran a license plate check on Masters's car, which revealed an outstanding warrant apparently associated with the plate. The outstanding warrant was erroneously associated with Masters's license plate through a clerical error. This fact was not known to Runnels who then initiated a traffic stop.

After both cars stopped on the side of the road, Runnels approached Masters's front passenger-side window and asked Masters to roll it down. Although the window was fully operable, Masters did not roll it down completely. Runnels then

walked around to the opposite side of the car, opened the front driver-side door, and ordered that Masters get out of the car. Masters refused, asking, "For what?" and whether he was under arrest. Runnels told Masters he was under arrest, but he did not explain the reason. During the encounter, Runnels never told Masters why he had been pulled over, and he never asked for Masters's driver's license, vehicle registration, or proof of insurance.

Runnels drew his model X26 Taser, which was in probe mode, and asked, "Do you really wanna get tased right here in the middle of your car?" Masters resisted by leaning back onto the passenger-side front seat, saying, "I haven't done anything officer." Runnels re-holstered his Taser then attempted to physically remove Masters from the car by pulling on his shirt and legs. Masters temporarily succeeded in resisting Runnels by pulling away from him, but at no point during the encounter did Masters attempt to hit or kick Runnels nor did he verbally threaten him. After several seconds, Runnels again drew his Taser and pointed it at Masters. He said, "All right, fine, f*** it. Just get out. Out, out right now," and he pulled the trigger.

One Taser probe lodged in Masters's chest and in his abdomen, and the Taser began to shock Masters. Masters was nevertheless able to move, get out of the car, and lie face-down on the asphalt, where he fell unconscious. Runnels knelt down, released the trigger, and handcuffed Masters's hands behind his back. Runnels kept the Taser trigger engaged from the time he initially fired the Taser until he knelt down to handcuff Masters. The parties agree that the continuous Taser discharge lasted at least 20 seconds, the equivalent of four cycles of the Taser. During the Taser discharge, Masters complied with all of Runnels's commands until he fell unconscious.

After handcuffing him, Runnels lifted Masters, who was still unconscious, by his arms and dragged him several feet around the rear of the car to a driveway on the edge of the road. Runnels dropped Masters face-first onto the concrete, fracturing four teeth and causing abrasions to Masters's forehead as well as a laceration on his chin. In addition, the Taser discharge had disrupted Masters's heartbeat, causing Masters to suffer a convulsion due to a lack of oxygenated blood flowing to his brain 34 seconds after Runnels fired the Taser. One minute and 41 seconds later, Masters fell into cardiac arrest. Emergency medical responders were able to resuscitate Masters, but he suffered hypoxia and anoxic brain injury as a result of his cardiac arrest.

Runnels was subsequently terminated from the Independence Police Department because of this incident and, after an FBI investigation, was indicted on two counts of deprivation of rights under color of law (one for the prolonged use of the Taser and one for dropping Masters to the ground) and two counts of obstruction of justice. On September 11, 2015, Runnels pleaded guilty to the deprivation of rights count related to the drop, the remaining counts were dismissed, and he was sentenced to 48 months' imprisonment.

On September 26, 2016, Masters sued Runnels under 42 U.S.C. § 1983 for violating his civil rights. As relevant to this appeal, Masters initially claimed that Runnels violated his Fourth Amendment right against the use of excessive force by (1) firing a Taser into Masters's chest, (2) prolonging the Taser discharge, and (3) picking Masters up after he was rendered unresponsive and dropping him face-first onto concrete.

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

"We start with whether the evidence makes out a constitutional violation, specifically whether Runnels's prolonged use of the Taser amounted to an excessive use of force. To answer this question, we look to 'whether the amount of force used was objectively reasonable under the particular circumstances.' *Shekleton v. Eichenberger*, 677 F.3d 361, 366 (8th Cir. 2012). We evaluate the reasonableness of an officer's use of force from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (*Graham v. Connor,* 490 U.S. 386, 396 (1989). Looking to the totality of the circumstances, we consider (1) the severity of the crime at issue, (2) the immediate threat the suspect poses to the safety of the officer or others, and (3) whether the suspect is actively resisting or attempting to evade arrest by flight. Force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public.

"Runnels's prolonged use of his Taser was not an objectively reasonable use of force. Masters's conduct leading up to the tasing did not amount to a severe or violent crime. And although Masters initially resisted Runnels's attempts to remove him from the car, he did not physically hit or verbally threaten Runnels. Masters, who was 17 years old at the time, posed at most a minimal safety threat to Runnels. Moreover, any slight safety threat he might have posed dissipated during the last 15 seconds of the continual tasing when he was not resisting but in fact was complying with Runnels's commands, getting out of his car, and laying down on the pavement. In sum, Masters was an unarmed suspected misdemeanant, who was not resisting arrest, did not threaten Runnels, did not attempt to run from him, and did not behave aggressively towards him. *Shekleton,* 677 F.3d at 366. A reasonable officer would not have continued to tase Masters under these circumstances."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/05/192199P.pdf

CIVIL LIABLITY:

Immediate Threat to Office Safety

Cunningham v. Shelby County

CA6, No. 20-5375, 4/19/21

Around noon on March 17, 2017, the dispatcher for the Shelby County Sheriff's Department alerted three of the department's deputies to the potential danger posed by a 911 caller. That caller was Nancy Lewellyn. She told the dispatcher that "she was depressed and suicidal, that she had a gun, and that she would kill anyone who came to her residence."

Three deputies—Justin Jayroe, Paschal and Wiggins—responded. Each drove a Department cruiser equipped with a dashboard camera, which recorded video, sound, and the time of day. The deputies were also aware from the dispatcher that Lewellyn was "suffering from some type of mental illness and/or crisis," and that she was saying she was armed with "what may be a .45 caliber pistol."

At 12:14 p.m., Lewellyn walked outside and turned toward her driveway, carrying in her right hand a BB handgun that resembled a .45 caliber pistol. She began to raise that handgun. The deputies yelled to her, then fired shots. Lewellyn continued walking with her right arm extended and the pistol pointing toward her car. Lewellyn leaned on its hood briefly, then turned back toward the house. The shooting continued. Llewellyn collapsed; 11 seconds had

elapsed since she exited her house. Ten shots were fired. Lewellyn had deposited the handgun on the sedan's hood before turning back. The deputies approached and discovered that she was unarmed. Lewellyn died at the scene.

In a suit under 42 U.S.C. 1983, the district court rejected the deputies' claims of qualified immunity. The Sixth Circuit vacated:

"The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than in hindsight. The 'facts and circumstances' support the deputies' contention that reasonable officers would perceive that Lewellyn posed an immediate threat to their safety."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0085p-06.pdf

CIVIL LIABILITY:

Justifiable Use of Force
Cloud v. Stone
CA5, No. 20-30052, 4/6/21

Around midday on August 29, 2017, Sheriff Deputy Kyle Luker observed Joshua Cloud speeding on I-20 in Simsboro, Louisiana. Luker followed Cloud off the interstate and pulled him over on Highway 80, across the street from Simsboro High School. When Luker wrote Cloud a ticket for driving 13 m.p.h. over the speed limit, Cloud protested that Luker could not possibly have seen him on the interstate. Cloud refused to sign his ticket, which is grounds for arrest under Louisiana law. See La. Stat. Ann. § 32:391(B).

Luker attempted to arrest Cloud. He had Cloud exit his pickup truck and face its side with his hands behind his back. Standing behind Cloud, Luker handcuffed his left wrist, at which point Cloud turned partially around to his left. Luker ordered Cloud to turn back around and reached for his right hand to finish handcuffing him. But Cloud then spun all the way around, turning away from Luker's reach and facing him head-on, with the handcuffs hanging from his left wrist.

With Cloud now facing him, Luker stepped a few feet back and tased Cloud in the chest. Though both taser prongs hit Cloud and began cycling, they did not incapacitate him. Cloud yelled and pulled the prongs from his chest. Luker then released his police dog from his car with a remote button and tried to regain control of Cloud. Luker grabbed Cloud around the waist and tased him again, now with the taser in "drive-stun" mode.

The two men, grappling with each other, moved toward the truck's open door. Cloud produced a revolver from somewhere near the driver's seat. As the two struggled for control of the gun, it discharged twice, the second shot hitting Luker in the chest. Luker was in pain but unable to tell how badly he was injured: as it turned out, his protective vest spared him all but a minor injury. As the struggle continued, Luker managed with one hand to radio police dispatch that shots had been fired. Luker was then able to wrest the revolver out of Cloud's hands and throw it to the ground on the street behind him. With Cloud disarmed and the police dog now engaging, Luker drew back a short distance, withdrew his duty weapon, and ordered Cloud to get on the ground.

At this point, Cloud was crouching in his truck's doorway, keeping the dog at arm's length with his hand on the dog's head. Cloud's revolver was on the ground, behind Luker and to his left. Then, according to Luker, Cloud rushed toward him—"directly at [his] chest or to [his] left a little

bit"—and started to move past him. Luker turned to his left, with Cloud's shoulder brushing across his chest. As Cloud lunged toward the revolver lying on the ground, Luker fired two shots into Cloud's back. Cloud was pronounced dead at the scene shortly thereafter.

Cloud's parents filed suit in federal district court alleging excessive force claims under 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments, state-law survival and wrongful death claims, and disability discrimination claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. The Defendants moved for summary judgment, which the district court granted as to all claims.

The Fifth Circuit affirmed, concluding that the deputy sheriff had reasonable grounds to tase Cloud after Cloud continued to resist arrest.

"In this case, while the deputy sheriff tried to handcuff Cloud, Cloud partially turned around, took a confrontational stance, and deprived the deputy sheriff of the use of his handcuffs, thwarting efforts to complete the arrest. Furthermore, the deputy sheriff's continued force to complete the arrest, like the initial tase, was reasonable. The court also concluded that the deputy sheriff justifiably used deadly force when Cloud lunged for a revolver that had already discharged and struck the deputy sheriff in the chest.

"The court explained that at a minimum, the deputy sheriff knew that a loaded revolver lay on the ground behind and to his left; more than that, though, he knew that the gun had just discharged twice—once into his chest—and that he had had to wrest it from Cloud's hands and toss it away; and he saw Cloud make a sudden move in the gun's direction. Even drawing all inferences in plaintiff's favor, the record shows that Cloud was shot while moving toward the revolver and potentially seconds from reclaiming it.

"Because the court found no constitutional violation, it need not consider whether the deputy sheriff violated any clearly established law."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-30052-CV0.pdf

CIVIL LIABILITY: Misidentification of Subject; Personal Jurisdiction

Rogers v. City of Hobert
CA7, No. 20-2919, 5/7/21

Hobart police officers, relying on information obtained from an investigative database, misidentified Cortez Javan Rogers as a person who allegedly intimidated a witness in a pending murder case. Mr. Rogers shares a first and last (though not middle) name with another person who was the actual subject of the officers' search.

Based on the information found in an investigative database, the Hobart officers applied for an arrest warrant and, upon obtaining a warrant from an Indiana judge, placed it in a database accessible to police departments in other states. A Chicago police officer later had an encounter with Mr. Rogers and, upon checking the outstanding warrants database, learned of the outstanding Indiana warrant. The officer then arrested Mr. Rogers. Chicago authorities immediately released him upon discovery that the Indiana warrant misidentified the suspect.

Mr. Rogers then brought this action in the United States District Court for the Northern District of Illinois against the City of Hobart, the Hobart

Police Department, and Sergeant Rod Gonzalez, its lead investigator. The defendants moved to dismiss for lack of personal jurisdiction. The district court granted the motion.

The Court of Appeals for the Seventh Circuit affirmed the district court's judgment.

"The Hobart officers did not purposefully engage in any activity in Illinois or direct any action in Illinois that would cause them to reasonably anticipate that they would be hauled into the courts of that State. Moreover, the exercise of personal jurisdiction over them would offend traditional notions of fair play and substantial justice. Simply put, none of the supposed Illinois contacts asserted by Mr. Rogers, whether considered separately or together, constitute the requisite 'minimum contacts' among the State, the defendants, and the cause of action necessary to fulfill the requirements of due process. Furthermore, to subject Indiana law enforcement officers to the jurisdiction of another state's courts under these circumstances would be fundamentally unfair."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D05-07/C:20-2919:J:Ripple:aut:T:op:N:2701658:S:0

CIVIL LIABLITY: Movement Consistent With Reaching For a Weapon
Batyukova v. Doege
CA5, No. 20-50425, 4/21/21

Brandon Doege was a deputy of the Bexar County, Texas Sheriff's Office who worked in the county's adult-detention center. He was not a patrol officer and had not undergone the same training as patrol officers. He was, though, commissioned as a peace officer and had received basic training for that role.

Shortly before midnight on June 28, 2018, Deputy Doege was driving westbound on U.S. Highway 90 on his way home from a shift. He was in his uniform and driving his personal vehicle, which was equipped with red and blue police-style lights. After he crossed the line from Bexar County into Medina County, Deputy Doege encountered Batyukova's vehicle stopped in the left-hand lane of the highway. Deputy Doege activated his red and blue lights and parked behind her so he could render aid. At that time, he called 911 and informed the Medina County dispatcher that he was an off-duty deputy, that he had encountered a vehicle in the middle of the road with its hazard lights on, that he was in his personal vehicle with red and blue lights, and that he had not yet approached the vehicle.

Batyukova then began to exit her vehicle. Deputy Doege opened his door and yelled out to Batyukova, "let me see your hands" and "get out of the vehicle." She stepped out of the vehicle, which prompted Deputy Doege to yell "put your hands on the hood." It is undisputed that, over the course of the short encounter, Batyukova yelled "f**k you," "f**k America," and "I hate America." The parties dispute whether Batyukova also said "death to America" and "you're going to f**king die tonight." Deputy Doege testified

that Batyukova made those statements and that they contributed to his fearing for his life, but Batyukova denies doing so.

After requesting a police unit, Deputy Doege again yelled "put your hands on the hood." He also asked her "what is going on" as she continued to shout expletives. After ignoring almost every command Deputy Doege gave, Batyukova began to walk towards Deputy Doege's vehicle. Deputy Doege quickly put his vehicle in reverse and backed up to maintain distance.

Batyukova stopped her approach when Deputy Doege exited his vehicle and drew his weapon. Standing behind his door, Deputy Doege yelled "get down now" and "let me see your hands." At that point, with a cigarette in one hand, Batyukova reached her other hand towards the waistband of her pants. Her hand went behind her back and disappeared from Deputy Doege's view. An instant later, Deputy Doege fired five shots. Bullets struck her wrist, leg, and abdomen. The video evidence shows that, immediately after shooting, Deputy Doege told the dispatcher "shots fired, shots fired...she reached behind her back."

In his deposition, he testified that it was the combination of her saying "you're going to f**king die tonight" and her hand reaching behind her back towards her waistband that made him fear for his life. According to his statement to the Medina County Sheriff's Office, when Batyukova "reached behind her towards her waistband," Deputy Doege "thought she was reaching for a weapon to kill [him]" and "was in fear for [his] life."

After the incident, Batyukova told news reporters that she was attempting to "moon" Deputy Doege. In her deposition nearly two years later, she contradicted her previous accounts and claimed that she never attempted to moon Deputy Doege. Regardless, it is conclusively established by deemed admission that Batyukova "reached toward[s] [her] waistband because [she] intended to lower [her] pants in order to display [her] buttocks to Deputy Doege."

The Fifth Circuit affirmed the district court's grant of qualified immunity and summary judgment to Doege.

"The defendant made a split second decision to use deadly force against a non-compliant person who made a movement consistent with reaching for a weapon, and plaintiff failed to identify clearly established law prohibiting defendant's use of deadly force. Plaintiff also alleged that defendant shot her in retaliation for engagement in activity protected by the First Amendment. The court agreed with the district court that plaintiff did not present evidence that her speech and expressive conduct was a "but-for cause" of the shooting. In this case, defendant did not discharge his firearm at plaintiff when she began shouting expletives at him or when she was walking towards him. Rather, he shot her when she reached her hand behind her back towards the waistband of her pants. Finally, plaintiff has not shown that defendant responded to her medical needs with deliberate indifference."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-50425-CV0.pdf

CIVIL LIABILITY: Negligence; Evolving Emergency Situation
Stark v. Lee County
CA8, No. 20-1606, 4/4/21

Lee County, Iowa, Deputy Sheriff Steve Sproul transported Jaymes Stark from a medical appointment to the Lee County Correctional Center on June 29, 2016.1 Stark sat in the backseat of Sproul's cruiser, restrained by leg shackles, a belly chain, and handcuffs but not by a seatbelt. While Sproul and Stark were en route, the city police dispatcher advised that an armed robbery was in progress at a nearby bank. Sproul drove to the bank with the intent of observing the crime in progress. Upon arriving, Sproul saw the robbery suspect flee on foot through a vacant lot. Sproul drove his cruiser at approximately 20 to 25 miles per hour through the lot to follow the fleeing suspect. During the pursuit, the suspect turned around and fired a handgun, striking the cruiser. In response, Sproul turned sharply to the right and drove away from the scene.

Stark remained in the backseat throughout these events. Stark's shackles prevented him from bracing his body, which, when combined with his lack of seatbelt restraint, caused him to be "thrown around" as Sproul drove over ruts and depressions in the unmaintained lot. Stark immediately thereafter began to experience lower back and neck pain. Stark filed suit under 42 U.S.C. § 1983, alleging that Sproul had failed to safeguard his health and safety and had thereby inflicted injuries upon him. Stark claimed that Sproul thus subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

The Eighth Circuit reversed the district court's denial of qualified immunity. The court could not say that the deputy sheriff's actions in this quickly evolving emergency situation were anything more than negligent and thus were clearly insufficient to constitute deliberate indifference. In the absence of a showing that he acted with deliberate indifference, plaintiff has failed to establish the existence of an Eighth Amendment violation. Accordingly, the court remanded for the district court to enter an appropriate order.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/04/201606P.pdf

CIVIL LIABILITY: Shooting of Suspect—Were Second and Third Shots Eccessive?
Rogue v. Harvel
CA5, No. 20-50277, 4/1/21

The Austin Police Department received two related 911 calls on the morning of May 2, 2017. Jason Roque made the first call to report a shirtless, Hispanic man "just going crazy" with a black pistol—not pointing it at anybody but "all up in the air and whatnot." Jason was speaking about himself but didn't disclose that fact to the 911 operator.

Jason's mother, Albina, then called 911. While crying and pleading with Jason, she told the operator that her son wanted to kill himself. Both Jason and Albina called to report the incident from their home address. During the 911 calls, Officer Harvel was on patrol in northeast Austin, where the Roques live. Harvel learned of the 911 calls through his radio and the dispatch report. Dispatch first described the calls as "Gun Urgent" but changed the reported problem to "Attempted Suicide." Dispatch also noted that Jason's only recent involvement with law enforcement was an allegation of criminal mischief the year before.

Multiple officers, including Harvel, responded to the situation. Harvel and the other officers positioned themselves at the end of Jason's street about 75 yards from Jason's house. Jason was pacing the sidewalk in front of his home with a black gun in his waistband. He was repeatedly saying, "Shoot me!" Albina was standing on the porch imploring Jason not to kill himself. The officers could hear—but not see—Albina from where they were standing. One officer yelled, "Put your hands up!" Jason put his arms out to the side and continued walking on the sidewalk. He yelled at the officers to shoot and kill him.

Jason then pulled out the gun, which was later determined to be a BB gun. Jason pointed the gun at his head then turned away from the officers and said, "I'll f---ing kill myself!" An officer then yelled (for the first time): "Put the gun down!"

The parties dispute what happened next. Video evidence shows that, after the officer's order to put his gun down, Jason turned around to face the officers with the gun pointed in the air. All of the officers claim, however, that they didn't know where the gun was and didn't see Jason point it in their general direction. Nonetheless, in the split second between the officer's command to put the gun down and Jason's turning his body toward the officers with his arm and the gun in the air, Harvel shot Jason with a semi-automatic rifle. The video shows Jason immediately double over, drop the gun, and stumble from the sidewalk toward the street (away from his mother and the officers). The video also shows the black gun hitting the white sidewalk in broad daylight.

Harvel claims that he didn't see the gun fall and considered Jason to be a continuing threat to his mother.

About two seconds after the first shot, while Jason was stumbling into the street, Harvel fired another shot that missed Jason. Jason continued floundering into the street, and two seconds later, Harvel took a final and fatal shot. The police officers then approached Jason's body and unsuccessfully attempted CPR. Paramedics took Jason to the emergency room; he died soon after. Harvel maintains that he took each shot because he thought Jason was a threat to his mother's life and safety.

Jason's parents, Albina and Vincente Roque, sued Officer Harvel as well as the City of Austin under 42 U.S.C. § 1983 for violations of Jason's Fourth Amendment rights.

The Fifth Circuit affirmed the district court's denial of summary judgment, concluding that there are factual disputes regarding whether the officer's second and third shots were excessive and objectively unreasonable.

"In this case, the factual disputes relate to whether a reasonable officer would have known that Jason was incapacitated after the first shot. The court also concluded that precedent shows that by 2017, it was clearly established—and possibly even obvious—that an officer violates the Fourth Amendment if he shoots an unarmed, incapacitated suspect who is moving away from everyone present at the scene. Therefore, if the factual disputes are resolved in plaintiffs' favor, the officer is not entitled to qualified immunity."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-50277-CV0.pdf

CIVIL LIABILITY: Resistance to Arrest; Qualified Immunity
Jacobsen v. Klinefelter
CA8, No. 19-3058, 3/30/21

Gary Jacobsen refused to depart an automobile auction after a deputy sheriff believed that he observed Jacobsen trespassing in a restricted area and directed him to leave. When the deputy, Michael Klinefelter, grabbed Jacobsen's arm to escort him out of the building, Jacobsen shoved Klinefelter away. Klinefelter then warned Jacobsen that he must leave or face an increased use of force, and the deputy eventually deployed pepper spray against a defiant Jacobsen. Jacobsen seized the spray canister from Klinefelter and a further altercation ensued. Officers eventually subdued Jacobsen and led him out of the building in handcuffs.

Gary Jacobsen filed suit against Michael Klinefelter, a deputy sheriff, alleging an unreasonable seizure under the Fourth Amendment and state-law torts of battery and negligent infliction of emotional distress.

The Eighth Circuit affirmed the district court's grant of summary judgment for the deputy based on qualified immunity, concluding that, even if the deputy was mistaken about trespassing, Jacobsen's physical resistance gave the deputy probable cause to believe that Jacobsen committed another offense by unlawfully resisting arrest or detention. The court explained that Jacobsen's use of force gave the deputy reasonable grounds to believe that additional force was justified to remove him from the premises. The court also concluded that, under these circumstances, a reasonable officer could have believed that it was reasonable to strike the resisting plaintiff and take him to the ground for handcuffing. Therefore, the deputy is entitled to qualified immunity on plaintiff's Fourth Amendment claim.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/03/193058P.pdf

CIVIL LIABILITY:
Volatile Circumstances
Lopez v. Sheriff of Cook County
CA7, No. 20-1681, 4/9/21

It was the early morning hours of November 30, 2014, outside the Funky Buddha Lounge on Chicago's West Side. Upon hearing a gunshot, Officer Michael Raines, an off-duty Cook County correctional officer out celebrating a friend's birthday, approached the scene of a scuffle between patrons outside the Lounge. Fernando Lopez was present and pulled a gun, firing two shots into the air.

Having seen Lopez fire near people on a crowded street, Officer Raines confronted and shot Lopez multiple times in the span of three seconds. Lopez reacted by dropping his gun and scampering toward the sidewalk outside the bar. Just as Raines began to chase after him, Lopez's friend Mario Orta picked up the dropped gun and fired at Raines—but missed. Officer Raines then used Lopez as a human shield in a standoff with Orta for several minutes until Orta fled. The scene was chaotic and everything happened fast.

Lopez survived and brought a civil rights suit alleging Officer Raines used excessive force against him in violation of the Fourth Amendment. The district court granted summary judgment for the defendants, concluding that Officer Raines was entitled to qualified immunity because his use of deadly force did not violate

clearly established law. The Court of Appeals affirmed, though not without the same pause expressed by the district court.

"Our review of the record, including video footage of the events, leaves us with the impression that although the circumstances were volatile, Officer Raines may have been able to avoid any use of lethal force. We cannot conclude, however, that his decision to the contrary violated clearly established law."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D04-09/C:20-1681:J:Scudder:aut:T:fnOp:N:2687821:S:0

COMPUTER FRAUD AND ABUSE ACT:
Accessing a Computer
Van Buren v. United States
USSC, No. 19-783, 593 U.S. _____, 6/3/21

Former Georgia police sergeant Van Buren used his credentials on a patrol-car computer to access a law enforcement database to retrieve license plate information in exchange for money. His conduct violated a department policy against obtaining database information for non-law-enforcement purposes.

The Eleventh Circuit upheld Van Buren's conviction for a felony violation of the Computer Fraud and Abuse Act of 1986 (CFAA), which covers anyone who "intentionally accesses a computer without authorization or exceeds authorized access," 18 U.S.C. 1030(a)(2), defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." The Supreme Court reversed.

The United States Supreme Court held that this provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them.

The Court stated that the Government's interpretation of the "exceeds authorized access" clause would attach criminal penalties to a breathtaking amount of commonplace computer activity. For instance, employers commonly state that computers and electronic devices can be used only for business purposes. On the Government's reading, an employee who sends a personal e-mail or reads the news using a work computer has violated the CFAA.

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/20pdf/19-783_k53l.pdf

CONSTITUTIONAL LAW: Eighth Amendment; Cruel and Unusual Punishment; Sentence of Juvenile for Murder
Jones v. Mississippi
USSC, No. 18-1259, 593 U.S. _____, 4/22/21

A Mississippi jury convicted Brett Jones of murder for killing his grandfather when Jones was 15 years old. Under Mississippi law, murder carried a mandatory sentence of life without parole. That sentence was affirmed on appeal.

The Supreme Court subsequently held, in *Miller v. Alabama*, 522 U.S. 460 (2012) that the Eighth Amendment permits a life-without-

parole sentence for a defendant who committed homicide when he was under 18 only if the sentence is not mandatory and the sentencer has the discretion to impose a lesser punishment. The Mississippi Supreme Court ordered that Jones be resentenced. The judge at resentencing acknowledged that he had discretion under *Miller* to impose a sentence less than life without parole but determined that life without parole remained the appropriate sentence. The Supreme Court had recently held in *Montgomery v. Louisiana*, 577 U.S. 190 (2016) that *Miller* applied retroactively on collateral review. The Mississippi Court of Appeals rejected Jones's argument that, under *Miller* and *Montgomery*, a sentencer must make a separate factual finding that a murderer under 18 is permanently incorrigible before sentencing the offender to life without parole.

The Supreme Court affirmed.

"In the case of a defendant who committed homicide when he was under 18, *Miller* and *Montgomery* do not require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole; a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient. The cases require consideration of an offender's youth but not any particular factual finding nor an on-the-record sentencing explanation with an "implicit finding" of permanent incorrigibility before sentencing a murderer under 18 to life without parole. Jones's resentencing complied with *Miller* and *Montgomery* because the sentencer had discretion to impose a sentence less than life without parole in light of Jones's youth."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/20pdf/18-1259_8njq.pdf

CONSTITUTIONAL LAW: Eighth Amendment; Arkansas Sentence of Juvenile for Capital Murder

Ventry v. State of Arkansas
ASC, Cr-20-232, 2021 Ark. 96, 4/29/21

Montrell Dashone Ventry appeals from the life sentence imposed by a Saline County jury at a resentencing hearing after his original sentence of life imprisonment without parole was vacated due to *Miller v. Alabama*, 567 U.S. 460 (2012). In 2008, Montrell Ventry was found guilty of capital murder and aggravated robbery in the shooting death of Nicholas Jones and sentenced to life without the possibility of parole. He appeals from a directed verdict. The Arkansas Supreme Court affirmed. *Ventry v. State*, 2009 Ark. 300. Ventry was seventeen years old when he committed the offenses. In 2012, the United States Supreme Court held in *Miller v. Alabama* that the Eighth Amendment prohibited a sentencing scheme that mandates life imprisonment without the possibility of parole for juvenile offenders. The United States Supreme Court recently held that a finding of permanent incorrigibility before a juvenile can be sentenced to life without parole. *Jones v. Mississippi*, USSC, No. 18-1259, 593 U.S. ___ 4/22/21.

"Ventry did not face a possible sentence of life without parole; he faced a possible sentence of ten to forty years in prison, or life, with parole eligibility after thirty years. If the Constitution does not require a finding of permanent incorrigibility before a juvenile can be sentenced to life without parole, it follows that the Constitution requires no such finding before a juvenile can be sentenced to life with the possibility of parole. Because the State was not required to prove that Ventry was permanently incorrigible before the jury could impose a sentence of life with the possibility of parole, the

trial court did not err in denying the motion for directed verdict."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/496202/1/document.do

EVIDENCE:

Conspiracy; Participation in a Conspiracy
United States v. Burris
CA6, No. 20-1607, 5/25/21

In September-October 2019, Benton Harbor, Michigan, Detective Joseph Kovac, undercover, initiated six controlled purchases of methamphetamine, calling the same telephone number each time. The first two transactions involved Davis. The third transaction involved a different individual. Kovac recorded the license plate number on the individual's truck, determined that it was registered to Sirshun Dontrell Burris at an Agard Avenue address. He used the driver's license photo to confirm Burris's identity. During the following three transactions, officers saw Davis go to and from the Agard address to meet Kovac. At the fifth meeting, Kovac asked for extra methamphetamine. Officers watched Davis walk to the Agard Avenue address, and enter the residence. After the final controlled purchase, Davis was arrested in the yard of Burris's Agard residence. Officers saw Burris exit from the backdoor and flee, clutching something. Burris crossed an alley, jumped a fence, and crossed Union Street. Burris was apprehended, carrying cash, a cell phone, and a loaded firearm. When the officers searched the path that Burris had followed, they found a bag containing methamphetamine at the location where Burris had jumped the fence. In Burris's residence, officers found two additional firearms and a digital scale. He was convicted of three counts related to methamphetamine and of being a felon in possession of a firearm, and was sentenced to 180 months' imprisonment.

Burris contends on appeal that his association with Davis is insufficient to establish participation in a conspiracy and there was not sufficient evidence of an agreement because there was no proof of communication between Davis and Burris.

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

"There is much more than simple association between Burris and Davis. When Detective Kovac called the phone number to arrange drug sales, Davis delivered the drugs five times and Burris brought the drugs one time. Although Burris sold methamphetamine to Detective Kovac on only one of those occasions, officers observed Davis come and go from Burris's residence before and after each of the following three drug transactions including the October 22 transaction, when officers observed Davis exit Det. Kovac's car, enter Burris's residence, and return to Kovac's car after Kovac requested more drugs than the previously agreed-upon quantity. And when the officers executed a search warrant of Burris's residence, Burris fled. The officers found firearms and a digital scale in the house, as well as a bag of methamphetamine in Burris's flight path. This evidence, in sum, was sufficient to establish Burris's involvement in the narcotics conspiracy. See *United States v. Martinez*, 430 F.3d 317, 334 (6th Cir. 2005) (Connection to the conspiracy, a general conspiracy to distribute and possess with intent to distribute drugs, can be inferred from evidence that an individual was involved in repeated drug transactions with members of the conspiracy.

"Burris contends that there was not sufficient evidence of an agreement because there was no proof of communication between Davis and Burris. We find this argument unpersuasive because the government need not provide direct evidence of an agreement between coconspirators. 'A conspiracy may be inferred from circumstantial evidence which may reasonably be interpreted as participation in a common plan.' *United States v. Volkman*, 797 F.3d 377, 390 (6th Cir. 2015). For these reasons, there was sufficient circumstantial evidence for the jury to find the existence of an illicit agreement between Burris and Davis."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/19a0002p-06.pdf

EVIDENCE: Facebook Information
United States v. Wright
CA8, No. 19-3190, 4/16/21

Cedric Antonio Wright's was arrested after he robbed a cellphone store. The car used during the robbery had been stolen by a carjacker the previous day. Wright's involvement in the robbery thus implicated him in the carjacking, as well as several firearm counts. He pleaded guilty to Hobbs Act robbery and conspiracy to commit Hobbs Act robbery.

Wright appealed his conviction in district court claiming that the district court erroneously admitted several prejudicial government exhibits.

Wright's Facebook account contained a photo of him wearing camouflage shorts, several photos of a black Smith & Wesson handgun, a video of Wright holding a black handgun and counting cash, a photo of a black male wearing a black ski mask and holding cash, photos of Wright holding a partially silver handgun, and a photo of Wright holding one gun with three more guns at his feet. His Facebook entries also contained conversations in which Wright discussed the Smith & Wesson handgun and indicated that he wanted to trade it, writing that he had a 40 for trade. In one conversation regarding the gun, El-Amin said to Wright, "Let me know before you do anything wit that b**ch."

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

"Exhibit 14 is a photo from Wright's Facebook account of a black male with arm tattoos wearing a black mask and holding cash. Wright argues that this photo was irrelevant, cumulative, and unfairly prejudicial. However, we find that it was relevant for two reasons: (1) the arm tattoos helped identify Wright as the subject of the photo because the same tattoos are visible on Wright in Exhibit 21, and (2) the photo corroborated JB's physical description of the carjacker, including that he wore a similar black mask. The photo's probative value was not outweighed by the danger of unfair prejudice; even if the presence of cash was prejudicial, it was not so inflammatory on its face as to divert the jury's attention from the material issues in the trial.

"Exhibit 16 contains Facebook conversations from September 25, 2017, between Wright and Rupp, and Wright and El-Amin. In relevant part, Wright says he has a '40 for trade' and is trading only for a glizzy. El-Amin says to Wright, 'Let me know before you do anything wit that b**ch,' an apparent reference to Wright's gun. Wright also says, 'You know I need glizzy.' Exhibit 17 features another Facebook conversation from the same day, in which Wright sends several photos of a black handgun and says it is a Smith

and Wesson 40. The other party asks if Wright is 'tryna get ah glick,' to which Wright replies, 'Yea.' The investigating officer testified that 'glizzy' and 'glick' mean a 'Glock pistol,' and that a '40 for trade' means a .40-caliber gun for trade. Wright argues that these exhibits were irrelevant, confusing, and contained inadmissible hearsay. The Court disagreed. These were relevant because they showed that Wright had a black .40-caliber Smith & Wesson handgun—the exact type of gun found in Ford's van after the robbery—prior to the carjacking and robbery.

"Wright argues that Exhibit 21—a video of him with a firearm in his lap while counting a large amount of cash—was inadmissible because it was cumulative and unnecessary. We find that this video was probative because (1) the gun in Wright's lap matched the gun seized by police, and (2) the visible tattoo helped identify Wright as the masked individual in Exhibit 14. As in Exhibit 14, any potential prejudice from the cash was not 'so inflammatory' as to substantially outweigh the video's probative value. Wright also contends that Exhibit 21 was inadmissible. This argument fails, however, because the video depicted a gun resembling the one seized by the police. Possession of a firearm is intrinsic to all of Wright's charges, and the video is admissible as an integral part of the immediate context of the crime charged. It qualified as intrinsic evidence tending to prove the actual commission of the charged offense, not merely a propensity to do so."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/04/193190P.pdf

EVIDENCE: Internet Searches for Prurient Pictures and Videos

United States v. Nordwall
CA8, No. 20-2122, 5/21/21

The Eighth Circuit affirmed the district court's evidentiary rulings in an action where Terrance Nordwall was convicted by a jury of attempted sex trafficking of children, one count of attempted enticement of minors, and one count of travel across state lines for the purpose of engaging in illicit sexual conduct.

The court concluded that the district court did not abuse its discretion by admitting four of Nordwall's internet searches for prurient pictures and videos of minor girls because it was relevant to his intent and purpose when he traveled across state lines to meet the girls. Furthermore, the probative value of the evidence was not outweighed by the danger of unfair prejudice.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/05/202122P.pdf

FIFTH AMENDMENT: Due Process; Outrageous Government Conduct

United States v. Castaneda
CA11, No.19-12623, 5/19/21

This is another of those cases where a defendant propositions someone on the internet in an attempt to sexually abuse a child, only to discover too late that the person on the other end of the conversations is a law enforcement agent.

Craig Castaneda was convicted of attempted enticement of a minor to engage in unlawful sexual activity and traveling across a state line with the intent to engage in sexual activity

with a person under the age of 12 years. He was sentenced to 420 months imprisonment. Castaneda contends that his indictment should be dismissed because the government's conduct in investigating him was so outrageous that it violated his Fifth Amendment due process rights.

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

"The theory behind the outrageous government conduct defense is that if a defendant can show that the law enforcement techniques used violate fundamental fairness, and are shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment, that ought to bar the government from invoking judicial processes to obtain a conviction. *United States v. Russell*, 411 U.S. 423 (1973).

"While the Supreme Court and this Court have recognized the possibility that government involvement in a criminal scheme might be so pervasive that it would be a constitutional violation, that standard has not yet been met in any case. Like the fabled creature Sasquatch, this defense has entered the common consciousness and is mentioned from time to time. Some claim to have caught fleeting glimpses of it in the remote backwoods of the law, but its actual existence has never been confirmed.

"As for law enforcement's generic sting operation of posting a Craigslist ad and communicating with Castaneda about his desire to abuse a child, there is no legal basis for challenging as outrageous those commonplace, and common sense, tactics. See, *United States v. Gillis*, 938 F.3d 1181, 1187–89 (11th Cir. 2019); *United States v. Stahlman,* 934 F.3d 1199, 1205–07 (11th Cir. 2019); U*nited States v. Jockisch*, 857 F.3d 1122, 1124–25 (11th Cir. 2017).

"Given that the conduct of the government agents in this case was anything but outrageous, we affirm the denial of Castaneda's motion to dismiss the indictment on outrageous conduct grounds. The hunt for Sasquatch will have to continue in another case."

READ THE COURT OPINION HERE:
https://media.ca11.uscourts.gov/opinions/pub/files/201912623.pdf

INDIANA RESERVATIONS:

Tribal Police Officers; Non-Indians
United States v. Cooley
USSC, No. 19-1414, 6/2/21

Crow Police Officer James Saylor approached a truck parked on U.S. Highway 212, a public right-of-way within the Crow Reservation in Montana. Saylor observed that the driver, Cooley, appeared to be non-native and had watery, bloodshot eyes. Saylor saw two semi-automatic rifles, a glass pipe, and a plastic bag that contained methamphetamine. Additional officers, including an officer with the Bureau of Indian Affairs, arrived. Saylor was directed to seize all contraband in plain view, leading Saylor to discover more methamphetamine. Cooley, charged with drug and gun offenses, successfully moved to suppress the drug evidence. The Ninth Circuit affirmed.

The Supreme Court vacated.

"Tribal police officers have authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law; they are not required to first determine whether a suspect is non-Indian and, if so, to temporarily detain a non-Indian only for

'apparent' legal violations. Generally, the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, but a tribe retains inherent authority over the conduct of non-Indians on the reservation when that conduct threatens or has some direct effect on the health or welfare of the tribe. When the jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities; the authority to search that individual before transport is ancillary to that authority."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/20pdf/19-1414_8m58.pdf

JURY INSTRUCTION:

Reasonable Doubt

Baxter v. Superintendent Coal Township SCI
CA3, No. 29-1259, 6/2/21

On an April 2007 afternoon, Demond Brown was shot and killed at a playground in Philadelphia. Two eyewitness accounts and a corroborating witness implicated Armel Baxter and his co-defendant Jeffrey McBride as the shooters. The two eyewitnesses, Hassan Durant and Anthony Harris, saw Baxter and McBride enter the playground wearing hooded sweatshirts. Brown noticed the pair and began to run. The pair then shot Brown eight to ten times and ran away. Durant and Harris knew Baxter from living in the same neighborhood. Rachel Marcelis, a friend of Baxter and McBride, confirmed Baxter and McBride's presence at the playground and their roles in the shooting. On the day of the incident, Marcelis drove by the playground with McBride and Baxter in her car. Either McBride or Baxter said they saw someone at the playground and told her to stop to let them out of the car, and she did so. She thereafter noticed many people running from the playground, including Baxter and McBride. Baxter and McBride got back into the car and said that "they got him" and that McBride "didn't have the chance to shoot" because his gun did not work. McBride later told Marcelis that Brown had killed their good friend. That weekend, Marcelis drove Baxter and McBride to Wilkes-Barre, Pennsylvania. Marcelis returned to Philadelphia a few days later, but McBride and Baxter stayed in Wilkes-Barre until their arrests. When law enforcement first confronted Baxter in Wilkes-Barre, Baxter gave three false names.

Armel Baxter's federal habeas corpus petition argued that his trial counsel was ineffective for failing to object to the reasonable doubt instruction. The Third Circuit affirmed the denial of relief. The reasonable doubt instruction did not prejudice Baxter, given the evidence of his guilt.

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

"Demond Brown was shot and killed at a Philadelphia playground. Several witness accounts implicated Baxter and McBride as the shooters. Baxter was convicted of first-degree murder, criminal conspiracy to engage in murder, and first-degree possession of an instrument of a crime with intent to employ it criminally. The trial judge had described the Commonwealth's burden of proof, beyond a reasonable doubt, the highest standard, stating that the Commonwealth is not required to meet some mathematical certainty or to demonstrate the complete impossibility of innocence. A doubt that would cause a reasonably careful and sensible person to pause, to hesitate, to refrain from acting upon a matter of the highest importance to your own affairs or to your own interests. If you were advised by your loved

one's physician that that loved one had a life-threatening illness and that the only protocol was a surgery, very likely you would ask for a second opinion. You'd probably start researching the illness if you're like me, call everybody you know in medicine. At some moment, however, you're going to be called upon to make a decision. If you go forward, it's because you have moved beyond all reasonable doubt. Reasonable doubt must be a real doubt and may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility."

READ THE COURT OPINION HERE:
http://www2.ca3.uscourts.gov/opinarch/201259p.pdf

MIRANDA:

Custodial Interrogation

United States v. Parker

CA8, No. 18-3277, 4/7/21

Shortly after midnight on April 17, 2017, Richard Parker called 911 from a friend's apartment on Rhomberg Avenue to report that his girlfriend, E.M., was not breathing. Officers from the Dubuque Police Department arrived at the apartment, which was shared by Donte Richards and Ashley Ostrander, both known narcotics users.

As Officer Matthew Walker interviewed Parker, Parker walked around the apartment, where other officers, Ostrander, Richards, and paramedics were either speaking, moving about, or caring for E.M. Parker would pause briefly to answer questions. Eventually, Officer Walker told Parker to "just kinda stay here." Parker stopped for a moment and then continued to roam throughout the apartment. Officer Walker asked him whether E.M. had drunk alcohol or used drugs. Parker replied that E.M. had been drinking and used cocaine. At this point, another officer asked Officer Walker and Parker to continue their conversation outside.

Outside, Officer Walker continued asking Parker about the events that led up to E.M.'s medical emergency and the 911 call. Officer Walker also asked whether Parker had used drugs that day, which Parker denied. As they spoke, Parker tried to reenter the apartment a few times, but each time Officer Walker asked him to remain outside, including when paramedics brought a stretcher through the apartment's back door. Eventually, Officer Walker was able to get Parker to stand inside a vestibule just outside the apartment door. Here, Officer Walker asked Parker about his own drug use and this time, Parker admitted to using drugs earlier that evening. He also told Officer Walker that he last saw E.M. alert roughly 30 minutes before he called 911. Following this conversation, Parker reentered the apartment and sat in the dining room. While Parker sat, officers learned that E.M. had died at the hospital.

Investigator David Randall arrived at the apartment around 2:45 a.m. and asked whether Parker, Ostrander, and Richards would voluntarily accompany him to the police station. He told them that they were not under arrest. Parker was the only one who agreed. Before asking any questions at the station, Investigator Randall again informed Parker that he was not under arrest and also advised him of his Miranda rights. Parker waived those rights and admitted that he and E.M. snorted something he believed was heroin. Later that morning, Parker was arrested for a parole violation and police executed a search warrant at the Rhomberg apartment. Officers recovered baggies containing four grams of heroin from a living room chair.

Parker was charged with one count of distributing a controlled substance near a protected location resulting in death (Count I) and with two counts of possession with intent to distribute a controlled substance near a school (Counts II and III).

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

"Parker's initial interaction with police officers at the scene of his girlfriend's overdose was consensual and an officer's statement to 'just kind stay here' was not a seizure or a significant restraint on his movement. The officer's later statements to remain outside the apartment building were made to assure the officer and defendant did not get in the way of medical staff and did not amount to a detention. There are no other factors suggest the encounter ripened into a seizure or custodial arrest. The defendant was not in custody at the time he made the statements and they were admissible even though he had not received Miranda rights. Once the defendant was taken to the police station, he was given Miranda rights before questioning, and his waiver of those rights was voluntary."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/04/183277P.pdf

MIRANDA: Custodial Interrogation; Harmless Error
Pugh v. State of Texas
TCCA, No. PD-0546-20, 6/9/21

Kedreen Pugh was arrested pursuant to a warrant. At the time he was arrested, he was the driver and sole occupant of a car registered to his wife. On the way to the police station, he volunteered to an officer he was going to be "honest" and had "stuff" in the car. When asked what he had in the car, Pugh responded that he had drugs and a handgun. Heroin and a loaded gun were found together in a shopping bag on the front passenger floorboard.

Assuming, without deciding, that the police officer's question about what was in the car constituted custodial interrogation and elicited an inadmissible answer, the Texas Court of Criminal Appeals concluded that any error in admitting this answer was harmless.

READ THE COURT OPINION HERE:
https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=63b18c98-c7d0-449b-b09e-1507f026e3dc&coa=coscca&DT=OPINION&MediaID=49b71fcd-cacd-4982-be8e-94854a1deffb

MIRANDA: Custodial Interrogation; Station House Interview
State of Indiana v. Diego
ISC, No. 09C01-1806-FA-1, 6/9/21

During the investigation of a possible incident involving child molestation, the Logansport Police Department (LPD) contacted Detective Sergeant Troy Munson of the Seymour Police Department (SPD) because LPD believed a suspect was located in SPD's community. After reviewing LPD's interview of the alleged victim,

Detective Munson searched SPD's database to locate the home address of the suspect, Axel Domingo Diego. A uniformed officer went to the residence and spoke to Domingo Diego's English-speaking girlfriend, Andrea Martin, who prompted Domingo Diego to come speak with the officer.

Martin translated the conversation with the officer because Chuj was Domingo Diego's primary language. Domingo Diego also spoke some Spanish and English. The officer gave the couple Detective Munson's business card and told Domingo Diego that he needed to go to the police department to find "Mr. Troy."

Domingo Diego and Martin arrived at SPD a few days later—perhaps by appointment. Upon entry into SPD's front lobby, an officer opened a door from the lobby to the rest of the police station and, after the couple moved through the open door, it was shut behind them. The door was secure from the lobby, meaning a person would have to be buzzed through to enter the rest of the police station. A person could freely exit the door to the lobby without assistance, but nobody explained this to Domingo Diego or Martin.

The couple boarded an elevator to the second floor. At some point, Detective Munson met the couple. Detective Munson wore his police badge and carried a gun on his person. Despite Martin's warning that Domingo Diego didn't speak Spanish clearly, Detective Munson told Martin to have a seat outside the room because he had the assistance of a Spanish/English translator.

The interview took place inside Detective Munson's personal office which had two exterior windows and was adorned with family pictures. Munson shut the door and closed the blinds on a window overlooking the rest of the detective division at SPD. The door was unlocked, but Domingo Diego was seemingly unaware of this. Through the translator, Domingo Diego was advised that he was not under arrest and that he was free to leave anytime. Domingo Diego indicated that he understood and later testified he felt that he could have left in the middle of the interview but chose not to because he was with a police officer. Munson did not read Domingo Diego any Miranda warnings.

During the course of the approximately forty to forty-five minute interview, Detective Munson asked Domingo Diego questions about the incident in Logansport. Detective Munson told Domingo Diego he had listened to a recording of the victim's father confronting him about an alleged sexual interaction with the victim and that lying to the detective would make things worse. Though he had only reviewed LPD's interview, the detective also implied to Domingo Diego he had spoken directly with the victim. Thereafter, the detective pressed Domingo Diego on what exactly occurred with the victim and Domingo Diego made several potentially incriminating statements. At the end of the interview, Detective Munson asked if Domingo Diego wanted to write an apology letter to the victim but did not require him to do so. After the interview, Detective Munson wished Domingo Diego and Martin a good day and the couple left the building unaccompanied.

Domingo Diego was charged with Count I, Child Molesting, a Class A Felony, Count II, Child Molesting, a Class A Felony, and Count III, Child Molesting, a Class C Felony. Thereafter, Domingo Diego moved to suppress the statements he made during his interview at SPD on the basis that the interview amounted to a custodial interrogation and the statements were obtained in violation of the Fifth Amendment of the United States Constitution and Article I, Section 14 of the

Indiana Constitution. Finding the facts of this case similar to those considered by this Court in E.R., the trial court granted Domingo Diego's motion to suppress.

Upon review, the Indiana Supreme Court found, in part, as follows:

"Police may not interrogate a person in custody without proper Miranda warnings or else the State risks having those custodial statements suppressed in a criminal trial. But not every station house interview implicates Miranda. Miranda warnings are only required when a person is in custody—i.e. when his or her freedom of movement is curtailed to a level associated with formal arrest and when he or she is under the same inherently coercive pressures in the police station as those at issue in *Miranda v. Arizona*.

"Two years ago in *State v. E.R.*, 123 N.E.3d 675, 683 (Ind. 2019), we determined a defendant was subjected to custodial interrogation at a police station house because, based on the totality of objective circumstances, the curtailment of his freedom of movement was akin to formal arrest and he was subjected to overt coercive pressures throughout the interrogation. In the present case, which incidentally involves the same detective and the same police department as in E.R., the trial court found the circumstances amounted to custodial interrogation and suppressed statements made by the defendant during a police interview. Today, we call on E.R. to answer a similar question: *Was defendant Axel Domingo Diego's freedom of movement in this case curtailed to a level akin to formal arrest when he had a free-flowing exchange in a detective's personal office?* We find it was not. We therefore reverse the trial court's suppression order and remand this matter for further proceedings.

"The question before us today is whether Diego was 'in custody' such that Detective Munson should have read him Miranda warnings prior to the interview. Custody under Miranda occurs when two criteria are met. First, the person's freedom of movement is curtailed to the degree associated with formal arrest. And second, the person undergoes the same inherently coercive pressures as the type of station house questioning at issue in Miranda.

"Custody, therefore, is 'a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.' Howes v. Fields, 565 U.S 499, 508, (2012). There is no bright line rule requiring Miranda warnings be given prior to an interview simply because a particular defendant is questioned in a police station. Indeed, the Supreme Court of the United States has advised:

> *Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him in custody.* ***Oregon v. Mathiason****, 429 U.S. 492, (1977); accord* ***California v. Beheler****, 463 U.S. 1121, (1983).*

"At the start of the interview, Detective Munson informed—and Domingo Diego understood—

that he was free to leave at any time. Detective Munson's interview style remained constant; no additional statements like 'sit tight' were made throughout the interview that would have made a reasonable person feel that they could not leave. The interview took place in the detective's personal office with two exterior windows and family photos as opposed to a 'standard' interview room with a couch, table, and chairs. The translator was dressed in civilian clothes. Overall, this presented a more casual atmosphere than the pressure cooker present in E.R.

"Next, Detective Munson asked questions about the incident, truthfully telling Domingo Diego he had listened to a conversation between Domingo Diego and the victim's father and that lying about the situation wouldn't help. Although the detective suggested he had personally talked to the victim, he had in fact reviewed the LPD interview of the victim to hear her version of the alleged events. Toward the end of the interview, Munson asked Domingo Diego if he wanted to write an apology letter to the victim but did not require him to do so. Taken as a whole, Detective Munson's line of questioning was exploratory rather than accusatory or aggressive.

"Additionally, at the end of the interview, Detective Munson told Domingo Diego he was not going to jail and wished the couple a good day. Domingo Diego and Martin left SPD unaccompanied. Other than the secure door from the lobby to the rest of the police station, there is no evidence the couple had to overcome additional significant barriers. This suggests Domingo Diego was not sequestered deep in the building with no hope of independent exit.

"We think there is considerable daylight between E.R. and the present case that directly undercuts Domingo Diego's claim of custodial interrogation. The interview took place in Detective Munson's personal office, not an interview room. The approximately forty-five minute interview—while certainly lengthy—was not particularly hostile; it was exploratory and conversational rather than accusatory. Domingo Diego and Martin left the station unaided, which gives rise to a reasonable inference that Domingo Diego was not cabined into a remote place in the police station. Although blunt, the interview would not have revealed to a reasonable officer that Domingo Diego did not understand what was being said.

"We find that the totality of objective circumstances surrounding the interrogation would make a reasonable person feel free to end the questioning and leave. Thus, the limited curtailment of Domingo Diego's freedom of movement was not akin to formal arrest."

READ THE COURT OPINION HERE:
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=gWaUQt5_9McaXv2Df2cg9nR0aLxbqxEjxp4lST2mn-x3bgp6c6nJCz8gF-KoMqHM0

MIRANDA: Information Volunteered During Terry Stop
United States v. Bass
CA5, No. 20-10588, 5/11/21

On May 25, 2016, an off-duty police officer observed Clarence Bass standing beside the open trunk of a parked vehicle in a convenience-store parking lot. The off-duty officer, Christopher Langlois, reported the activity to the police unit assigned to that high-crime area, explaining that Bass was standing next to a vehicle and appeared to be selling items from the truck. Based on this tip and a prior complaint that Officer Otoneal Boudet had received about Bass illegally selling

CDs in front of local businesses from his purple Dodge Challenger with a red stripe, Officer Boudet was dispatched to respond to the suspicious activity in the area. While driving up to the scene, Officer Boudet activated his body camera to record the interaction.

When Officer Boudet approached Bass, Bass closed his car truck and disclosed that he was selling CDs and had more CDs in the trunk. When Officer Boudet asked Bass whether there was anything illegal in the vehicle, Bass answered, "Just the CDs." Bass also asked Officer Boudet about the complaint made against him, and explained he had been charged with illegally selling CDs before.

Based on the initial disclosure and suspecting that Bass was illegally selling CDs, Officer Boudet asked Bass for consent to search the vehicle. Another man who was observed talking with Bass, Mr. Floyd, was detained and told another officer at the scene, Officer Williams, that Bass gave him a CD without charge. This statement conflicted with what Bass had told Officer Boudet. In an appeal to Officer Boudet's leniency, Bass explained that he was currently on parole.

Officer Boudet again asked to search the vehicle. Bass was hesitant and informed Officer Boudet that the vehicle was registered to his wife. When Bass pulled out a cell phone to allegedly call his wife to seek consent to search the vehicle, Officer Boudet told Bass not to make any calls out of concern for the officers' safety. Officer Boudet continued to question Bass and answered Bass's question as to why someone complained about his activity. After a back-and-forth dialogue that lasted several minutes, Bass offered to and then did open his trunk, where bootlegged CDs and DVDs were displayed.

When asked by Officer Boudet, Bass said he was not carrying any personal identification. Officer Boudet told Bass that he and Officer Williams saw illegally labeled CDs and DVDs in plain view in the trunk. At that point, Officer Boudet asked Bass to sit on the curb and told Bass that he was detained, and that they would search the vehicle. Bass was placed under arrest for unlawfully labeling CDs and DVDs. Officers searched the trunk of the vehicle where they found boxes and bags full of CDs and DVDs. Officer Boudet then started searching the inside of the vehicle around the driver's seat and found a backpack in the back of the vehicle that contained several small baggies of cocaine that totaled 1.5 grams, 442.9 grams of marijuana also wrapped in small baggies, and 221.5 grams of synthetic cannabinoids.

Before putting him in the police car, Officer Williams patted Bass down and searched him. In his pockets, police found a loaded pistol, a loaded handgun magazine, $477 in cash, several small baggies of marijuana, and 5.6 grams of codeine.

Bass was charged by the state of Texas with illegally labeling unauthorized records, possession of marijuana, possession of a controlled substance, possession with intent to deliver a controlled substance, and unlawful possession of a firearm by a felon. Bass had previously been convicted of possession of a controlled substance with intent to deliver, a felony under Arkansas law. Because Bass had 13 prior felony convictions, he was subsequently charged federally in the Northern District of Texas with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) & 924(e).

Bass moved to suppress (1) all the items that were seized from him and his vehicle after he was detained by the two Dallas police officers on May 25, 2016, including the 9mm handgun found in his

pocket, which forms the basis of Count One of the Indictment, and (2) all the statements he made during his encounter with the police on May 25, 2016, about previously selling CDs and being on parole, arguing the items were improperly obtained without reasonable suspicion for his detention, without probable cause, and without consent.

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

"In this case at the suppression hearing, Clarence Bass was seeking to suppress statements he made early in his encounter with Officer Boudet about selling CDs and being on parole. Miranda's procedural safeguards attach 'only where there has been such a restriction on a person's freedom as to render him 'in custody.' *United States v. Chavez*, 281 F.3d 479, 486 (5th Cir. 2002) (quoting *Stansbury v. California*, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L.Ed.2d 293 (1994)). To ascertain whether an individual was in custody, we examine all of the circumstances surrounding the interrogation, but ultimately ask whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

"The district court found that the statements made by Bass were made at a time when the encounter was still characterized as a Terry stop, and Bass volunteered this information when he was not in custody. See *Maryland v. Shatzer,* 559 U.S. 98, 113 (2010) ("The temporary and relatively nonthreatening detention involved in a traffic stop or Terry stop does not constitute Miranda custody."). Bass freely shared the information with Officer Boudet. It is clear from the record that Bass was not in custody within the meaning of Miranda. Because approaching someone who is in a public place and asking questions does not constitute a seizure. *United States v. Hernandez,* 279 F.3d 302, 207 (5th Cir. 2002), Bass was not seized under the Fourth Amendment, and thus not in custody under the Fifth Amendment, when he made these statements

"Reviewing the totality of the circumstances, we find the officers had probable cause to arrest Bass and search his vehicle subsequent to arrest. Although the totality of the circumstances suggest that Bass was not free to leave, his restraint had not yet reached the level necessary to necessitate Miranda warnings. We affirm the district court's denial of Bass's motion to suppress his voluntarily given statements made prior to being in custody."

READ THE COURT OPINION HERE:
https://www.ca5.uscourts.gov/opinions/pub/20/20-10588-CR0.pdf

MIRANDA:

Knowing and Intelligent Waiver

United States v. Outland

CA7, No. 20-1160, 4/14/21

Hoping to stem the swelling tide of heroin use in Springfield, Illinois, the city's police department opened an investigation in 2017 to root out heroin traffickers. As part of this investigation, police arrested Jeremy Outland mid-morning in November 2017 for selling heroin. The officers placed Outland in a squad car and planned to bring him to the local Drug Enforcement Agency office for questioning. But on the way, and somehow while handcuffed, Outland consumed what he claimed was 3.5 grams of heroin he managed to hide from the police. One of the officers then noticed that Outland had collapsed in the back seat, observed a white powder covering his face and jacket, and rerouted to a nearby emergency room. Outland was

unresponsive upon arrival at 10:44 a.m., requiring doctors to administer multiple medications to treat the heroin overdose.

Outland regained consciousness around 10:51 a.m. but fell back into an unresponsive state around 11:10 a.m. and again around 11:20 a.m. despite receiving additional doses of medication in the intervals. He then experienced several apneic episodes where he would temporarily stop breathing while asleep. Eventually doctors placed Outland on a continuous medication drip at 12:25 p.m. and made plans to transfer him to the intensive care unit.

Around 1:00 p.m.—slightly over two hours after Outland first arrived unconscious in the ER—Daniel Weiss, a narcotics officer with the Springfield Police Department, came to the hospital to speak with Outland. Officer Weiss began by reading Miranda warnings and Outland agreed to talk. Over the span of a 45-minute interview, Outland made several incriminating statements about his heroin dealing between Chicago and Springfield.

Outland later moved to suppress the statements he made to Officer Weiss as well as other evidence obtained by police not relevant to his appeal. Outland advanced the twofold contention that he "was so intoxicated as to render his statement involuntary" and that "he was unable to voluntarily and knowingly waive his Miranda rights based upon a long list of medications he was under at the time."

The Seventh Circuit remanded for the district court to make a determination on the validation of Outland's waiver of his Miranda rights in the first instance. The court explained that whether a defendant knowingly and intelligently waived his rights at the outset of a police interview is a distinct and separate inquiry from whether, in the circumstances of the interview as a whole, the defendant's statements were voluntary. Given that Outland was unconscious and entirely incapacitated from an overdose just two hours before police questioned him, a finding as to whether he knowingly and intelligently waived his Miranda rights matters.

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D04-14/C:20-1160:J:Scudder:aut:T:fnOp:N:2690002:S:0

MIRANDA: Officer's Question About Anything Illegal in Vehicle
United States v. Buzzard
CA4, No. 20-4087, 6/11/21

Shortly after 1:30am on October 12, 2018, West Virginia police officer Tyler Dawson pulled over a car for a defective brake light. Jason Buzzard was driving and Paul Martin was in the passenger seat of the car, which had recently left the parking lot of a Sheetz gas station and convenience store. Dawson, who was patrolling alone that night, called into dispatch that he was stopping a vehicle with two occupants and gave his location. He then approached the vehicle and recognized Martin (he'd had prior interactions with Martin while on duty).

At some point during the stop, Dawson asked whether there was anything illegal in the car (the parties' dispute when this occurred). In response, Buzzard and Martin both volunteered drug paraphernalia; Buzzard produced a marijuana "bowl" from under his shirt and Martin produced a hypodermic needle and syringe.

Additional officers arrived on the scene and Buzzard and Martin were removed from the vehicle. The officers searched the car and recovered two handguns wrapped in socks— one from under the driver's seat and one from under the passenger's seat. They arrested Buzzard and Martin, who were each charged with being a felon in possession of firearms.

Martin and Buzzard filed nearly identical motions to suppress the guns, together with additional evidence found in the vehicle. They claimed that Officer Dawson violated their Fourth Amendment rights by asking whether there was anything illegal in the car because the question wasn't related to the traffic stop's mission and unlawfully prolonged the stop.

The Fourth Circuit Court of Appeals found, in part, as follows:

"Here, the district court determined that Dawson's question related to officer safety, reasoning that it 'could expose dangerous weapons or narcotics' and that courts 'have already recognized the authority of officers conducting a traffic stop to inquire about dangerous weapons.' *United States v. Martin,* 395 F. Supp. 3d 756, 760 (S.D.W. Va. 2019) (citing *United States v. Everett,* 601 F.3d 484, 495 (6th Cir. 2010); *Arizona v. Johnson*, 555 U.S. 323, 327 (2009)). The court also reasoned that asking generally if illegal items are in the vehicle relates to highway safety at least as much as searching for traffic warrants to ensure that vehicles on the road are operated safely and responsibly' or to 'make it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses. Thus, the court held, Dawson's question was permissible because it related to the traffic stop's mission.

"Viewing the evidence in the light most favorable to the government, we agree that Dawson's question related to officer safety and thus related to the traffic stop's mission. Dawson was outnumbered, and he asked the question because of the time of night and the high drug area, Mr. Martin's history and Mr. Martin's behavior. Given the totality of the circumstances, it makes sense that he needed to know more about what Buzzard and Martin had in the car.

"It's true that the question 'Is there anything illegal in the vehicle?' could be interpreted more broadly than one worded slightly differently (for example, 'Is there anything dangerous in the vehicle?' or 'Are there weapons in the vehicle?'). But given the importance of officer safety and the Supreme Court's repeated recognition that traffic stops are especially fraught with danger to police officers, we decline to require such laser-like precision from an officer asking a single question in these circumstances.

"Viewing the evidence in the light most favorable to the government, Dawson was mid-stop when he asked whether there was anything illegal in the vehicle. He didn't yet have the information he needed to perform the customary checks on the driver and vehicle, and he was waiting for an additional officer to arrive so he could safely proceed with the stop. Because the question was asked during a lawful traffic stop and didn't prolong the stop, it passes constitutional muster under *Rodriguez v. United States*, 575 U.S. 348 (2015) even if it exceeded the scope of the stop's mission. See *United States v. Bowman*, 884 F.3d 200, 210 (4th Cir. 2018) (Police during the course of a traffic stop may question a vehicle's occupants on topics unrelated to the traffic infraction as long as the police do not extend an otherwise-completed traffic stop in order to conduct these unrelated investigations.)

"Accordingly, we affirm the district court's denial of the motions to suppress."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/204087.P.pdf

SEARCH AND SEIZURE:

Community Caretaking Function;
Search of a Residence
Caniglia v. Stom
USSC, No. 20-157, 593 U.S. ____, 5/17/21

During an argument with his wife, Edward Caniglia placed a handgun on the dining room table and asked his wife to shoot him and get it over with. His wife instead left the home and spent the night at a hotel. The next morning, she was unable to reach her husband by phone, so she called the police to request a welfare check. The responding officers accompanied Caniglia's wife to the home, where they encountered Caniglia on the porch. The officers called an ambulance based on the belief that Caniglia posed a risk to himself or others. Caniglia agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. But once Caniglia left, the officers located and seized his weapons.

Caniglia sued, claiming that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to the officers. The First Circuit affirmed, extrapolating from the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) a theory that the officers' removal of Caniglia and his firearms from his home was justified by a "community caretaking exception" to the warrant requirement.

Upon review, the United States Supreme Court found as follows:

"Neither the holding nor logic of *Cady* justifies such warrantless searches and seizures in the home. *Cady* held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this conclusion, the Court noted that the officers who patrol the public highways are often called to discharge noncriminal 'community caretaking functions,' such as responding to disabled vehicles or investigating accidents. But searches of vehicles and homes are constitutionally different, as the *Cady* opinion repeatedly stressed. The very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and 'there be free from unreasonable governmental intrusion.' *Florida v. Jardines*, 569 U.S. 1, A recognition of the existence of 'community caretaking' tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere.

"What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly declined to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home."

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/20pdf/20-157_8mjp.pdf

SEARCH AND SEIZURE:

Extended Traffic Stop

United States v. Pacheco

CA8, No. 20-1392, 4/30/21

On April 9, 2019, after seeing Reymundo Yanez Pacheco exceed the speed limit and drift across lanes, Cass County Deputy Sheriff Tyler Shiels pulled Yanez over. As Deputy Shiels approached Yanez's vehicle, he noticed that it contained food as well as a case of soda and "looked extremely lived in," which indicated to Deputy Shiels that Yanez was traveling without taking many breaks. Deputy Shiels briefly spoke with Yanez, learning that Yanez was driving a rental vehicle from California. Deputy Shiels also viewed the rental agreement. Deputy Shiels then told Yanez that he was only going to issue a warning and asked Yanez to follow him to his patrol vehicle.

Yanez complied and the two sat in the front of Deputy Shiels's patrol vehicle as Deputy Shiels prepared the warning. While inside, Deputy Shiels saw that Yanez "appeared very nervous" and "uneasy," that he was avoiding eye contact, and that his stomach was visibly "fluttering." As they talked, it seemed to Deputy Shiels that Yanez was trying to control the conversation and asking him "very unusual questions," which, in his experience, was common of people engaged in criminal activity. When Deputy Shiels asked Yanez where he was traveling, Yanez responded "Iowa" even though they were already in Iowa. And when Deputy Shiels asked for a more specific location, Yanez struggled to remember the name of the town. Yanez also indicated that he would be visiting friends in Iowa for four or five days. But Deputy Shiels believed that the rental agreement's term was too short to account for the duration of Yanez's described trip. This struck Deputy Shiels as odd because it suggested that Yanez would drive the rental vehicle from California to Iowa and then fly back to California, which, in his experience, was very expensive and just not oftentimes reasonable for people to do.

Deputy Shiels issued a warning to Yanez but then asked Yanez to wait in the patrol vehicle so that Deputy Shiels could have his canine conduct a drug sniff of Yanez's vehicle. After walking his canine around Yanez's vehicle, Deputy Shiels returned to the patrol vehicle and asked for Yanez's consent to search the back seat of Yanez's vehicle, which Yanez provided. While searching the back seat, Deputy Shiels noticed a spare tire sitting on the floor. When asked why the spare tire was there, Yanez indicated that the rental company had changed the spare tire but then put it in the back seat. Deputy Shiels found this "very bizarre" because rental vehicles are typically "in very good condition" with spare tires in the correct locations. Further, from his experience, Deputy Shiels knew that drug traffickers often transported narcotics in the spare-tire compartment. Deputy Shiels also asked Yanez where his luggage was, and Yanez indicated it was in a backpack in the back seat. In searching the backpack, Deputy Shiels saw "a very minimal amount of clothing," which he considered "not consistent with long travel." When asked why he had not packed more clothes, Yanez said he was planning on purchasing clothes in Iowa.

Deputy Shiels then decided to search the spare-tire compartment in the trunk. Inside that compartment, he found two large plastic bags containing around forty pounds of methamphetamine.

Yanez moved to suppress evidence from that search, arguing that the decisions to extend the traffic stop and to search the trunk were unreasonable under the Fourth Amendment. The district court denied Yanez's motion. The Court of

Appeals for the Eighth Circuit affirmed the district court decision.

"The court considered the totality of the circumstances and concluded that the officer had reasonable suspicion to extend the traffic stop so that his canine could conduct a drug sniff. In this case, the incongruity between defendant's statements suggested that defendant might be lying about his travel plans, defendant gave odd answers about his travel plans, defendant appeared very nervous even though the officer had informed him he would only be receiving a warning, and the officer testified that the rental vehicle had a lived-in look, suggesting that defendant was attempting to travel without making many stops. The officer had probable cause to search the trunk of the vehicle."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/04/201392P.pdf

SEARCH AND SEIZURE:

Guest at Residence; Locked Container

United States v. Simmermaker

CA8, No. 20-2071, 6/1/21

Police officers executed a search warrant of a home in Tipton, Iowa that belonged to W.S., someone familiar to the officers through drug investigations. The search warrant request indicated that officers were told that known drug users were coming and going from the residence. The warrant authorized a search of the house and of W.S. It also authorized the search of items related to drug trafficking and locked containers, safes, hidden compartments or other items or areas capable of storing or concealing any of the other items listed herein.

During the search, officers found Michelle Simmermaker asleep on the couch in the living room of the house. Close by on the couch was a meth pipe and a Brink's security lockbox. The keys to the Brink's box were near the box. Officers woke her, handcuffed her, and removed her from the room. Simmermaker told officers she had been staying at the home for a week, but they later learned she had been there for two nights. The officers unlocked the Brink's box and found 10.95 grams of methamphetamine and a digital scale inside. The officers then got a second warrant to search Simmermaker.

Simmermaker was arrested and indicted for a single count of possession of methamphetamine with intent to distribute. She filed a motion to suppress the search of her Brink's box. The magistrate judge recommended suppression because Simmermaker was a guest at the home and the initial search warrant did not encompass her belongings. The district court, while adopting the magistrate judge's factual findings, disagreed and denied the motion to suppress. Simmermaker then pleaded guilty and was sentenced to 37 months in prison. She appeals the denial of her motion to suppress.

The Eighth Circuit Court of Appeals found as follows:

"The question here is whether the officers violated Simmermaker's Fourth Amendment rights when they searched her Brink's box under the original warrant. While possession of a warrant generally justifies searching the effects of those occupying the premises, special Fourth Amendment concerns arise when the persons on the premises are visitors. *Hummel-Jones v. Strope,* 25 F.3d 647, 651 (8th Cir. 1994).

"The Court evaluates the relationship between the visitor and the place, and whether that relationship is such that it is reasonable for the searchers to believe that the warrant overcomes the visitor's independent Fourth Amendment privacy rights. It is undisputed that, at the very least, Simmermaker was more than a mere visitor or passerby. So, was Simmermaker's lockbox within the scope of the warrant? A visitor's privacy interest is complicated when the visitor is connected to the illegal activity at the location that creates the basis for the search warrant. See *United States v. Clay,* 640 F.2d 157, 161–62 (8th Cir. 1981) (noting that a frisk of a visitor may be reasonable if the officer had suspicion that the visitor was 'involved in the criminal activity that constituted the basis of the issuance of the warrant.')

"Here, the search warrant was for evidence of drug use and distribution. Officers saw Simmermaker on the couch, asleep, with a meth pipe next to her. Known drug users were in and out of the house often. This was enough to give officers particularized suspicion that Simmermaker was connected to the illicit activity that provided the basis for the warrant. It follows that her personal belongings—including the Brink's box—would be subject to the warrant, especially because the warrant included all locked containers. While Simmermaker had a reasonable expectation of privacy in the Brink's box, officers had probable cause that she was involved in the criminal activity that formed the basis for the warrant. Simmermaker's Brink's box fell within the scope of the warrant and searching it was lawful."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/06/202071P.pdf

SEARCH AND SEIZURE:

Prolonged Traffic Stop

United States v. Cole

CA7, No. 20-2105, 4/16/21

On June 25, 2018, Illinois State Trooper Clayton Chapman was on highway patrol duties and received a message from Deputy Sheriff Derek Suttles about a car that he found suspicious. A Volkswagen hatchback sedan with California license plates was headed east toward Trooper Chapman on Interstate 72. Deputy Suttles reported that the Volkswagen was driving roughly 50 to 55 miles per hour where the speed limit was 70 miles per hour.

Trooper Chapman spotted the Volkswagen, driven by defendant Janhoi Cole, and trailed him with the intent to catch him in a traffic violation to provide a pretext for a roadside stop. That opportunity came after Interstate 72 merged with Interstate 55. In the merging traffic, another car cut off the Volkswagen. Trooper Chapman believed that the Volkswagen trailed the car that cut it off at an unreasonably close distance, in violation of the Illinois Vehicle Code. See 625 ILCS 5/11-710 ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."). Trooper Chapman pulled Mr. Cole over to the partially unpaved shoulder lane, requested his driver's license and vehicle registration, and ordered him to exit the Volkswagen and sit in the front seat of the police cruiser.

This initial roadside stop lasted ten minutes. It included an eight-and-a-half-minute conversation between Trooper Chapman and Mr. Cole in the police cruiser. Trooper Chapman used about six minutes of that initial conversation to question Mr.

Cole about his state of residence, employment, travel history, travel plans, vehicle history, and registration information. Mr. Cole said that he was a traveling chef who split his time between New York, Los Angeles (where his girlfriend lived and the car was registered), and Maryland (where he was presently employed). He claimed to be on a long road trip from Maryland to Cincinnati to Colorado, and back. About eight minutes into the stop, Trooper Chapman told Mr. Cole that he would get off with a warning. But Trooper Chapman said that he preferred to go to a nearby gas station to complete the warning paperwork because he was concerned for their safety on the unprotected shoulder. That was not entirely true. Trooper Chapman testified later that he had already decided that he was not going to let Mr. Cole go until he had somehow managed to search the car for drugs. In response, Mr. Cole said he wanted to get on his way as soon as possible and would go only if he had to. Trooper Chapman made clear that Mr. Cole had no choice. Each drove in his respective car to the gas station. On the drive over, Trooper Chapman radioed to request a drug-sniffing dog.

After they arrived at the gas station, Trooper Chapman requested for the first time Mr. Cole's proof of insurance. Trooper Chapman then learned over the radio that Mr. Cole had been arrested for drug crimes fifteen years earlier. Trooper Chapman continued to interrogate Mr. Cole in a faux-casual manner, about his car, itinerary, travel plans, and residence. Mr. Cole's answers became increasingly contradictory and incoherent. He vacillated about whom he visited in Colorado, how long he had been on the road, and how he had the car insured and registered remotely (suggesting he sent two different girlfriends to "one of those places" to fill out different parts of the paperwork). Upon finishing the warning, over thirty minutes after he first pulled Mr. Cole over, Trooper Chapman informed Mr. Cole that he was not free to leave because he suspected Mr. Cole was transporting drugs. The drug-sniffing dog arrived ten minutes later and quickly alerted to the presence of drugs. Trooper Chapman found several kilograms of methamphetamine and heroin in a hidden compartment and arrested Mr. Cole.

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

"Even assuming that the stop was permissible at the outset, the record shows that the officer prolonged the stop by questioning the driver at length on subjects going well beyond the legal justification for the stop. Under *Rodriguez v. United States,* 575 U.S. 348 (2015), prolonging the stop violated the Fourth Amendment and requires suppression of evidence found much later as a result of the actions that prolonged the stop.

"Trooper Chapman measurably prolonged the stop to investigate possible additional crimes without reasonable suspicion, and those actions led to discovery of the evidence against Mr. Cole. The Court of Appeals reversed the denial of Mr. Cole's motion to suppress and remanded the case for further proceedings where Mr. Cole may withdraw his guilty plea that was conditioned on the admissibility of the evidence against him obtained through the unlawful seizure and subsequent searches."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D04-16/C:20-2105:J:Hamilton:aut:T:fnOp:N:2691200:S:0

SEARCH AND SEIZURE:
Plain View; Incrimination Nature Not Readily Apparent
United States v. Arredondo
CA8, No. 20-1382, 5/10/21

Officers arrived at a residence after a neighbor's report of a woman screaming and crying. They entered the home without consent to check on the woman, found her extremely intoxicated but unharmed, and discovered small glass vials. One of the officers picked up the vials, held them higher to get a better view, and turned them to read the labels.

Dane Arredondo moved to suppress the vials, arguing they were the fruit of an illegal search. The district court held that the vials were subject to suppression because their incriminating character was not immediately apparent. The government appealed.

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

"The plain view exception authorizes an officer to seize an object without a warrant if (1) the officer lawfully arrived at the location from which he or she views the object, (2) the object's 'incriminating character' is 'immediately apparent,' and (3) 'the officer has a lawful right of access to the object itself.' *United States v. Lewis*, 864 F.3d 937, 943 (8th Cir. 2017). Here the second prong is not satisfied because the record does not establish the incriminating character of the vials was immediately apparent.

"For an item's incriminating character to be immediately apparent, the officer must have probable cause to associate it with criminal activity. Deputy Fenton possessed no such probable cause. When he came upon small glass containers that looked similar to containers that hold common household items, such as contact lenses, essential oils, or medications for insulin or fertility, there was no basis to immediately suspect contraband. When Deputy Fenton picked up the vials, held them higher to get a better view, and turned them to read the labels, he had no idea of the contents. At that moment, the vials had been searched and seized, before Deputy Fenton had probable cause to believe they were an illegally possessed controlled substance. See *Arizona v. Hicks*, 480 U.S. 321, 323–26 (1987) (moving components of two stereos in order to read the stereos' serial numbers was a search and the plain view of the stereos without serial numbers did not supply probable cause to believe they were contraband, even though the expensive stereos 'seemed out of place in the squalid and otherwise ill-appointed' apartment).

"We also note there is nothing in this record suggesting that Deputy Fenton had specialized expertise or training with regard to narcotics such that his specific knowledge could be a basis for finding probable cause. In fact, after picking up and reading a vial, Deputy Fenton did not know whether Ketamine was a controlled substance. He used his phone to conduct research. Deputy Fenton had nothing more than a hunch that the vials could be incriminating, which is not enough for the plain view exception to apply."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/05/201382P.pdf

SEARCH AND SEIZURE:
Protective Sweep; Hotel Room
United States v. Whitehead
CA8, No. 19-3614, 4/26/21

Anthony Whitehead, no stranger to crime, was wanted on several arrest warrants, including one for the attempted kidnapping of Brittney Lark. While searching for them, a Deputy United States Marshal found a room registered in her name at a Kansas City hotel. At his direction, officers showed up and knocked on the door. Lark, nude at the time, answered. Whitehead, who was also naked, was lying on the far side of the bed. The officers ordered him to walk toward them and lie down outside the threshold of the door, where they handcuffed him and placed him under arrest. While retrieving Whitehead's pants for him, an officer discovered a baggie of cocaine in one of the pockets.

Meanwhile, the remaining officers conducted a "protective sweep" of the hotel room to determine if anyone else was present. Among other places, they checked under the mattress, where they spotted a pistol. Rather than seizing it right then, the officers called agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives to determine how best to proceed. Upon their arrival, the agents asked for Lark's consent to search, and once she gave it, they had her sign a consent-tosearch form. Only then did the agents enter the room to retrieve the gun.

Whitehead moved to suppress the gun. The district court denied the motion based on the protective-sweep and consent exceptions to the Fourth Amendment's warrant requirement

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

"We agree with the district court that the protective-sweep exception justified the initial search, see *Maryland v. Buie*, 494 U.S. 325, 327, 334 (1990) (explaining when officers can conduct a quick and limited search of premises incident to an arrest). When Lark opened the door, the room was dark, the officers saw movement, and they could not tell how many people were there. Combined with Whitehead's extensive criminal history, these articulable facts gave them a 'reasonable belief' that there might be others in the room who posed a danger to them.

"The search was also 'quick and limited,' spanning about two minutes and covering only those places in which a person might be hiding. It makes no difference that the officers were in the process of arresting Whitehead when the search was conducted. Nor did it exceed the scope of a lawful protective sweep to check under the mattress, given that one of the officers testified that, in his experience, fugitives sometimes hide there.

"We also agree with the district court that consent justified the later reentry into the room to retrieve the gun. Lark, who was the registered occupant of the room, consented during a fairly cordial conversation with the agents, who did not threaten her or make any express promises. They even explained to her that the decision was her call and that she could do whatever she wanted. Even if, as Whitehead points out, she was under arrest at the time, we cannot say that the district court clearly erred in finding that her consent was voluntary."

https://ecf.ca8.uscourts.gov/opndir/21/04/193614P.pdf

SEARCH AND SEIZURE: Search Warrant; Controlled Buy as Evidence of Probable Cause; Omission of Information on CS
United States v. Woodfork
CA7, No. 20-3415, 6/4/21

Danville, Illinois, Officer Scott Crawley sought a warrant to search Edward Woodfork's home. Crawley testified under oath, identifying Woodfork as the target of the request, stating that Woodfork had sold crystal methamphetamine in a controlled buy to a confidential source (CS) that day. Officers had searched the CS before and after that buy and surveilled the transaction, which was recorded. Crawley had relied on the CS "multiple times" and found him "reliable." The officers attempted to set up a second controlled buy, using another reliable CS.

Woodfork had insisted that the CS come to Woodfork's home, which was described by naming an intersection, understood to be 1220 North Franklin Street. The judge issued a search warrant for Woodfork's North Franklin home. Officers discovered methamphetamine and a firearm. Woodfork moved to quash the warrant and or to suppress the evidence, arguing that he was entitled to a "Franks" hearing and suppression because Crawley misled the county judge regarding the identification of his home and by omitting details about the CS's criminal histories. The Seventh Circuit affirmed the denial of Woodfork's motion.

"Crawley's omission of the confidential sources' criminal histories was not necessary to a finding of probable cause. Crawley relied on information he had gathered through an investigation involving four separate controlled-buy transactions with confidential informants, which law enforcement had orchestrated and surveilled. See *United States v. Glenn*, 966 F.3d 659, 661 (7th Cir. 2020) ('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.') Indeed, we have held that a controlled buy, when executed properly, is generally a reliable indicator as to the presence of illegal drug activity.

"We agree with the district court that the omission of information about the sources' backgrounds, criminal histories, or motives does not change the probable cause determination. See also *United States v. Sims*, 551 F.3d 640, 645 (7th Cir. 2008) (omission of confidential source's arrest record was not material to the probable cause determination). While we think the omissions of information about the sources' credibility are unfortunate, those omissions do not negate probable cause on these facts.

"Even if Woodfork was able to establish that Crawley made some material omission during the probable cause hearing, Woodfork has failed to make the necessary substantial preliminary showing that Crawley intentionally or recklessly misled the warrant-issuing judge. To secure a Franks hearing, a defendant must put forth an offer of proof' that is more than conclusory and gestures toward more than negligent mistakes. What is needed is direct evidence of the affiant's state of mind or else circumstantial evidence of a subjective intent to deceive. To make the necessary preliminary showing, the evidence must show that the officer submitting the complaint perjured himself or acted recklessly because he seriously doubted or had obvious reason to doubt the truth of the allegations. *United States v. Johnson,* 580 F.3d 666, 670 (7th Cir. 2009). Here, Woodfork has made no such showing."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D06-04/C:20-3415:J:St__Eve:aut:T:fnOp:N:2715341:S:0

SEARCH AND SEIZURE: Search Warrant; Controlled Buy as Evidence of Probable Cause; Omission of Informant Information
United States v. Moore
CA6, No. 20-4029, 6/7/21

Officer Daniel Dickens submitted an affidavit, seeking a search warrant for 10318 Dove Avenue, a single-family Cleveland residence. Dickens averred that earlier that month a confidential informant disclosed to him that a dealer, Moore, was selling cocaine out of that residence. He described Moore's race, height, weight, age, and date of birth and disclosed that Moore deployed an extensive electronic surveillance system. Moore had been charged with several past drug crimes, including one prior conviction for drug trafficking. Dickens also described a controlled drug buy between the informant and Moore that occurred earlier that month at the Dove residence, under surveillance. The state court issued the search warrant. Officers detained Moore and found two firearms, two kilograms of cocaine, 100 grams of cocaine base, and materials used to facilitate large-scale drug trafficking.

Moore unsuccessfully moved to suppress the evidence, arguing that the affidavit lacked indicia that the confidential informant was reliable.

Officers rely on confidential informants with some frequency to procure information to support a request for a search warrant. See *United States v. Crawford*, 943 F.3d 297, 302 (6th Cir. 2019). Oftentimes, the informant's hearsay statements are used to support the request. If so, probable cause demands some additional evidence to validate the informant's reliability. There are various "means" for doing so. For example, an affidavit that both details an informant's tip and describes a controlled drug purchase with the informant provides "sufficient corroborating information" to uphold a finding of probable cause. See *United States v. Archibald,* 685 F.3d 553, 557 (6th Cir. 2012).

That was the case in *United States v. Abdalla*, where the warrant affidavit described a confidential informant's tip that the defendant was engaged in narcotics trafficking from his home. 972 F.3d 838, 842 (6th Cir. 2020). The affidavit supplemented that information by detailing prearranged controlled drug buys from Abdalla's residence for which officers continually monitored the informant. By supplementing the informant's tip with a description of an informant's surveilled controlled purchase, as well as the officers' arrangements for the controlled purchase, the affidavit at issue in Abdalla was unlike those supported merely by a sparse anonymous tip or a conclusory statement about the informant's credibility. And Abdalla, it bears adding, is not alone in holding that a confidential informant's credibility can be corroborated with a controlled buy. See, e.g., *United States v. Crumpton*, 824 F.3d 593, 616 (6th Cir. 2016); *United States v. Ray,* 803 F.3d 244, 277 (6th Cir. 2015); *Archibald*, 685 F.3d at 557; *United States v. Jackson,* 470 F.3d 299, 307 (6th Cir. 2006); *United States v. Coffee*, 434 F.3d 887, 894 (6th Cir. 2006); *United States v. Pinson*, 321 F.3d 558, 563 (6th Cir. 2003). Indeed, even a single controlled purchase can be sufficient to establish probable cause to believe that evidence of drug trafficking is present at the purchase location. Measured by these standards, Dickens's affidavit satisfied probable cause. The affidavit began by noting a host of details about both Moore and his operations at the Dove residence, such as the many steps he took to avoid arousing suspicions from neighbors or law enforcement. The affidavit also revealed that Moore had a history of drug trafficking. See *United States v. Martin*, 526 F.3d 926, 937 (6th Cir. 2008) (concluding that the

defendant's criminal drug history provided other indicia of reliability for the informant's tip). And, most critically, the affidavit detailed a controlled drug buy at the Dove residence between the informant and Moore. To that end, the affidavit carefully described the steps taken by officers to ensure the buy occurred, such as searches of the informant before and after entering the home and the use of prerecorded money. See *Abdalla,* 972 F.3d at 849–50 (holding that an affidavit describing a controlled buy coupled with the officers' arrangements for the purchase provided sufficient corroboration). Collectively, this information demonstrated a fair probability that evidence of drug trafficking would be found at the residence.

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0128p-06.pdf

SEARCH AND SEIZURE: Stop and Frisk; Facts that Disspell Reasonable Suspicion

United States v. Drakeford
CA4, No. 19-4912, 3/26/21

Tremayne Drakeford was arrested and charged with possession and distribution of controlled substances after police apprehended him at a Car Stereo Warehouse and found narcotics in his sweatshirt pocket. After his arrest, Drakeford moved to suppress evidence of the narcotics. The district court denied Drakeford's motion, and he pled guilty to the charged crimes.

Drakeford appealed the district court's denial of his motion to suppress, arguing that the officers did not have reasonable suspicion to stop and frisk him and violated his Fourth Amendment right to be free from unreasonable search.

The Fourth Circuit Court of Appeals agreed with Drakeford.

"In order to sustain reasonable suspicion, officers must consider the totality of the circumstances and, in doing so, must not overlook facts that tend to dispel reasonable suspicion. Here, officers relied on general information from a confidential informant; two interactions that officers believed were consistent with the manner in which illegal drugs are bought and sold, but in which no drugs were found; and a single officer witnessing a handshake between Drakeford and another man and concluding that it was a hand-to-hand drug transaction, even though the officer did not see anything exchanged.

"Moreover, the officers concluded this amounted to reasonable suspicion, overlooking the facts that the interaction took place in a public space, in broad daylight, outside of the vehicles, and in front of a security camera; and after the interaction, Drakeford went into a store, rather than immediately leaving the scene. On these facts, we agree with Drakeford that the officers did not have more than a mere hunch that criminal activity was afoot when they stopped Drakeford."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/194912.P.pdf

SEARCH AND SEIZURE:

Stop and Frisk; Search Exceeded Limits of a Protective Frisk

United States v. Brown

CA9, No. 19-50250, 5/12/21

On the morning of November 15, 2017, El Cajon Police Department Officers Robert Wining and Robert Nasland responded to a radio call stating that motel staff at a downtown Econo Lodge Motel had reported two "transients" in the motel parking lot, one of whom was a white male who had a bike and who had been seen urinating in the bushes and the other of whom was a female.1 The officers, who were in uniform, drove their patrol car over to the Econo Lodge and turned into the parking lot on the motel's south side. On the other side of the parking lot from the motel is a residential development, and the parking lot is separated from that development by a high concrete wall and an even taller wooden fence. Running along the wall is a slightly raised planter area, which in turn is supported by a relatively low retaining wall consisting of cinder blocks. When the officers arrived just past 11:00 AM, the parking lot was nearly empty, but there was a white U-Haul van parked, head-out, in one of the spaces farther down along the wall. As the officers entered the parking lot, they could not see anyone behind the U-Haul, but as they drove past the van, two men—later identified as James Brown and Jon Barlett—came into view seated on the low cinder block wall behind the van. The officers got out of their patrol car. Their body cameras were turned on and recorded the ensuing events.

Barlett is a white male who had a bike with him, so he fit the general description of one of the individuals provided in the radio call. Brown, however, did not meet the description of either of those individuals, because he is an AfricanAmerican male and had no bicycle with him. Officer Wining testified that the two men look surprised to see the police, describing their reaction as a "deer-in-the-headlights look." Wining initiated a conversation, stating, "Howdy, guys," and asking, "What are we up to today?" Brown responded that he had come to "get some stuff out of the van," and Barlett stated that he was going to help Brown. Wining responded skeptically, telling Barlett "the motel called us because they saw you urinating back here in the bushes." Barlett responded, "they didn't see me," emphasizing the word "me." Wining then asked Barlett what his name was and, after he responded, Wining inquired if he had identification. While Barlett looked for his identification, Wining asked what room they were staying in, and Brown gave his room number. Wining then asked Brown if he had identification. After Brown felt the outside of his pants pockets, he said that his wallet was inside the motel. Barlett mentioned that there were "some other folks back there" and pointed to an area farther back in the parking lot. Wining said to Barlett, "You're not staying here, are you, Jon?" Barlett responded that he was not.

Wining then asked the two men directly, "So, do we have a drug deal going on here, or what do we got going?" Barlett mumbled a response, and Brown said, "A drug deal? No, sir." Wining, who had 22 years of experience as a policeman, stated that "that's not uncommon in this area, so don't—you don't need to look at me so surprised." At Wining's request, Brown supplied his name, date of birth, height, and weight. For almost the next full minute, Wining wrote down information and communicated over his radio. Brown then spoke up, saying, "Didn't you say your call was for him urinating in the bushes; what does this got to do with me?" After Wining reiterated what the call was about, Brown said, referring to Barlett, "he

just barely rode up." Wining said, "OK, there was somebody on a bike mentioned. Alright? So, we're here just to check it out." Wining asked Brown if the manager could verify that he was staying at the motel, and Brown said yes and explained that he was staying with another person there.

The officers radioed in the identifying information about the two men, which took over one minute. Wining then asked if either of the men had any warrants. Brown said no, but Barlett answered that he had "just cleared up some," having been released on bond from jail only two weeks ago. Pointing to the visible needle marks on Barlett's arms, Wining asked him whether he was using heroin. Barlett said, "not anymore," but he acknowledged that he "ha[d] a history of it." Shortly thereafter, Brown's cell phone went off, and while still seated on the cinder block wall Brown engaged in a nearly minute-long casual conversation, laughing at one point at what the caller said. After the call ended, Wining asked Barlett where he had gotten his gold-colored watch. Barlett mumbled a response about Walmart, and Brown interjected, "you heard the old saying, everything that glitters ain't gold." Barlett said it was a "nice watch" and he "almost sold it for $40 the other day." Wining then inquired about a small Leatherman-brand multi-tool that was still in its bright-yellow packaging and that was sitting just next to Barlett on the top of the cinder block wall, between Barlett and Brown. Wining asked if Barlett was selling it to Brown, and Barlett said no and claimed that he just found the unopened package "under [a] bridge."

At this point, the encounter between the four men had lasted just over seven minutes. While asking about the multi-tool, Wining noticed that Brown "put his hands down to his sides" and that he then "reach[ed] his index finger into his right pocket." Wining walked over to Brown who raised his hands to his sides and said: "Oh, my bad, man, my bad." Wining ordered Brown to stand up and turn around. Wining explained, "I saw you reaching in that pocket," and when Brown denied that he had done so, Wining said, "Yeah, you were." Brown complied with Wining's instructions and allowed Wining to secure his arms behind his back in a finger hold. Pointing with his free hand to Brown's pants pocket, Wining asked, "What's in here?" Brown responded, "I'm not quite sure." Wining then stated "I'm going to check, OK?" Brown grunted a monosyllabic response that is unintelligible on the officers' body camera video. Wining then reached into Brown's pocket and pulled out a plastic bag. Brown claimed that it was coffee, but after inspecting it, Wining said "that is not coffee, James, that's heroin." Wining conducted a more thorough search of Brown, finding several thousand dollars, a number of unused syringes, and suboxone strips used to treat opioid withdrawal.

The police subsequently obtained the motel's security camera footage from the hour immediately before Brown's and Barlett's encounter with the officers. It showed several people driving up to the vicinity of the U-Haul, briefly interacting with Brown, and then leaving.

Brown was charged with one felony count of possession of 35.35 grams of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Brown moved to suppress the items found during Wining's search, including the heroin and cash. Brown contended that his encounter did not comply with the limitations set forth in Terry v. Ohio, 392 U.S. 1 (1968), and that the evidence the officers found on him should have been suppressed as fruits of a violation of his Fourth Amendment rights.

The Court held that the officers' encounter with Brown was consensual until the point at which an officer ordered Brown to stand up and turn around; at that point, the officer had seized Brown, but the seizure was justified because the officer had developed reasonable suspicion that Brown was engaged in a drug transaction.

The Court concluded, however, that, under *Sibron v. New York,* 392 U.S. 40 (1968), the officer's search of Brown's pocket exceeded the limited scope of what Terry permits because, in conducting the limited protective search for weapons that Terry authorizes, the officer did not perform any put-down or other initial limited intrusion but instead proceeded directly to extract and examine an item in Brown's pocket.

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/12/19-50250.pdf

SEARCH AND SEIZURE:

Traffic Stop; Consent to Search Vehicle

United States v. Cox

CA8, No. 20-2039, 3/30/21

On April 17, 2019, Arkansas State Trooper Christopher Short observed a white SUV steadily accelerating to closely approach a black pickup. When the pickup braked to take an exit, the SUV had to quickly apply its own brakes. Based on this observation, Trooper Short initiated a traffic stop of the SUV, which he later learned had been rented by Cox. Scott Green was driving, with Cox sitting in the passenger seat. After informing Green that he was following "a little bit close," Trooper Short stated that he did not intend to issue a ticket but nevertheless asked for identification. Upon learning the vehicle was rented, he asked to see a copy of the rental agreement and also asked the men about their line of work. Green responded that they were engaged in fugitive recovery.

Green accompanied Trooper Short back to the patrol car, where Trooper Short asked Green about the men's travel plans and purpose and then radioed dispatch to obtain Cox's and Green's criminal histories. Green replied by saying that they were traveling to Virginia in pursuit of a fugitive and planned to stay there for three days. Trooper Short then returned to the SUV and asked Cox similar questions. Cox could not remember the name of the fugitive they were pursuing, but told Trooper Short that they planned to spend only one day in Virginia. When asked about his criminal history, Cox admitted to a prior DUI conviction.

Trooper Short then returned to the patrol car and asked Green whether there were any weapons or drugs in the vehicle. Trooper Short noted that both men seemed to be nervous. Green responded that there were not any weapons or drugs in the car. When Trooper Short asked if he could search the vehicle, Green replied, "I don't care." Dispatch then responded and reported that Cox had a prior drug charge in addition to the DUI conviction. Trooper Short again asked Green if he could search the SUV, and Green again said "I don't care." Green indicated to Trooper Short that both he and Cox had signed the rental paperwork. This exchange occurred about eight minutes after the traffic stop had begun.

Trooper Short then returned to the SUV, informed Cox that Green had consented to a vehicle search, and asked Cox to step out of the vehicle. Cox voiced no objection to the search and exited the vehicle, within which Trooper Short discovered seventeen kilograms of cocaine during his ensuing search.

The Eighth Circuit affirmed the district court's denial of Cox's motion to suppress after he entered a conditional plea of guilty to possession with intent to distribute more than 5 kilograms of cocaine. The court concluded that the trooper's determination that the vehicle was following too closely in violation of the relevant statute was objectively reasonable and provided probable cause to stop the vehicle. In the alternative, the district court did not clearly err in finding that nothing prevented the driver from slowing down sooner and maintaining a reasonable and prudent distance behind the pickup.

The court also concluded that the stop was not improperly prolonged once the trooper indicated he did not intend to issue a ticket as his actions were routine traffic violation-related tasks concerning identification, the vehicle's rental agreement, the men's travel plans and their criminal history checks. The nervousness, demeanors and inconsistent answers justified the trooper's decision to expand the scope of the stop beyond the traffic violation. The driver of the car consented to a search of the rental vehicle, and defendant, a passenger, posed no objection when informed of the impending search and stood by quietly as it took place; under these circumstances, Green's consent validated the trooper's search also to Cox.

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/21/03/202039P.pdf

SEARCH AND SEIZURE:

Vehicle Impoundment;
Community Caretaking Function
United States v. Sylvester
CA1, No. 19-2127, 4/2/21

In or around May 2017, a federal warrant was issued for Richard Sylvester's arrest for suspected drug activity said to have occurred in August 2016. Around 7:30 P.M. on Friday, May 19, 2017, Maine Drug Enforcement Agency ("MDEA") Special Agent Jacob Day was driving off duty along Route 1A in Dedham, Maine. Route 1A is a major highway that runs along the coast of Maine to the Canadian border. Agent Day passed a black Cadillac Escalade driven by Sylvester. Sylvester was alone in the car. Agent Day recognized Sylvester and was aware of the outstanding federal warrant for his arrest from speaking with a United States Drug Enforcement Agency ("DEA") agent a few weeks before.

Agent Day ran a registration check on the Escalade's plate number which revealed that the owner of the car was Hailee Goodwin, who lived in Hancock, Maine. She was later determined to be Sylvester's girlfriend. Agent Day called the DEA agent with whom he had previously spoken and she confirmed that the federal arrest warrant was still active and that Sylvester should be arrested.

Agent Day contacted Lieutenant Tim Cote of the Hancock County Sheriff's Department to request the arrest of Sylvester pursuant to that warrant. At some point, Agent Day also requested that a K-9 unit be brought in to conduct a sniff test of the exterior of the Escalade. Acting on the federal warrant and at Agent Day's request, Lt. Cote went with Sheriff's Deputies Corey Bagley and Jeffrey McFarland and another officer to Route 1A to locate the Escalade. They stopped the Escalade sometime after 7:30 at night along Route 1A in or near Ellsworth, Maine. Sylvester, the sole

occupant, was told to get out of the car and was arrested.

Videos of the traffic stop recorded on the officers' dashboard cameras show that Route 1A is and was on that Friday night a well-trafficked, two-lane highway, and that the parked Escalade was sticking out into the traffic lane so that the cars passing by had to swerve into the oncoming traffic lane to avoid it. During Sylvester's arrest, Dep. Bagley found two knives, a pair of brass knuckles, and a wad of $2,799 in cash on Sylvester. Sylvester told the officers there were no other weapons in the car (that proved not to be true). He also told them he was headed "up the road" to meet Goodwin's mother, but not Goodwin, at a McDonald's. There is no evidence as to how far away the McDonald's was or whether Goodwin's mother was authorized by Goodwin to drive the car or whether Goodwin's mother was available to come retrieve the Escalade promptly or how she would do so. Nor is there evidence that Sylvester specifically requested that Goodwin's mother or anyone else come remove the stopped car.

During the stop, Lt. Cote requested the Maine State Police to do the K-9 sniff as MDEA Agent Day had requested. He was told that it would take some time because the K-9 unit was traveling from a different county. Lt. Cote authorized a towing service to remove the car from the side of the highway and take it to an impound facility in Hancock.

Richard Sylvester argues that a search warrant for the car was invalid because it was issued based on evidence discovered during an inventory search, which was, he alleges, itself unlawful because he argues the initial impoundment of the car was unlawful after he was arrested along a busy highway at night.

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

"The district court found the car Sylvester was driving when he was stopped and arrested was on the verge of a busy highway. There were no other passengers nor anyone else immediately available to remove the car. Sylvester indeed never asserted that the owner of the car was nearby or that anyone else could immediately retrieve the car. Leaving the car on the shoulder of a heavily trafficked highway was an obvious hazard to other vehicles.

"The district court found that the impoundment of the car and its removal from busy Route 1A was a proper exercise of the officers' community caretaking function. The community caretaking function is one of the various exceptions to the Fourth Amendment's requirement that law enforcement officers have probable cause and obtain a warrant before effecting a search or seizing property. Under that exception, law enforcement officers, in their role as community caretakers, may remove vehicles that impede traffic or threaten public safety and convenience' without obtaining a warrant. Our law has been clear on this point for years. Pursuant to that exception, an impound decision is constitutionally valid so long as it is reasonable under the totality of the circumstances. The impound decision must be justified by a legitimate, non-investigatory purpose and cannot be a mere subterfuge for investigation, but the coexistence of investigatory and caretaking motives will not invalidate the seizure. The impoundment of the car in the exercise of the trooper's community caretaking responsibilities was amply justified on objective grounds.

"We also hold that the district court did not err in concluding that the subsequent inventory search

of the car was lawful. 'The Fourth Amendment permits a warrantless inventory search if the search is carried out pursuant to a standardized policy,' *Florida v. Wells*, 495 U.S. 1, 3-4 (1990)."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/19-2127P-01A.pdf

SEARCH AND SEIZURE: Vehicle Impoundment; Justifiable Inventory
United States v. Trujillo
CA10, No. 19-2212, 4/6/21

In this case, Gabriel Trujillo makes a motion to suppress evidence recovered during an inventory search of his vehicle following his arrest for failing to pull over in response to a police command.

When officers ultimately made contact with Trujillo, they learned Trujillo was wearing a bulletproof vest and had handguns in the car for protection because "friends of his ex-girlfriend had made threats against his life."

Disbelieving Trujillo's explanation for why he had failed to pull over earlier, the arresting officer decided to arrest him. Consistent with the policy of the Bernalillo County Sheriff's Office (BCSO), the officer also determined that the car should have been impounded and towed. The officer testified he thought it would be dangerous to leave the vehicle where it was, both because its location presented a danger to other drivers, and because of the risk that someone would remove the firearms - particularly because there was a high incidence of auto burglaries and thefts in the area. When the vehicle was searched, along with the firearms, a small backpack locked with a luggage lock was in the passenger compartment, containing a white crystalline substance believed to be methamphetamine.

Trujillo was indicted on charges of: (1) possession with intent to distribute at least 50 grams of a substance containing methamphetamine; and (2) possession of a firearm in furtherance of a drug-trafficking crime. Trujillo argued that the BCSO's impoundment policy was itself unreasonable because there was no community-caretaker basis for impoundment, and the officer failed to consider alternatives to towing.

After review of the district court record, the Tenth Circuit held that the search was justified as an exercise of law-enforcement community-caretaker functions, as described in *South Dakota v. Opperman*, 428 U.S. 364 (1976), and *Cady v. Dombrowski,* 413 U.S. 433 (1973). The district court was reversed and the matter remanded for further proceedings.

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110503888.pdf

SEARCH AND SEIZURE: Vehicle Impoundment; Private Property
United States v. Venezia
CA10, No. 19-1432, 5/3/21

On January 2, 2019, at about 9:00 p.m., Officers David Tubbs and Jason Jewkes, two members of the Lakewood Police Department ("LPD"), were conducting a routine patrol in Lakewood, Colorado. They observed an Audi pull into the parking lot of a motel and then drive to a gas station across the street. Along the way, the driver—who was later determined to be Hunter Trey Venezia—committed a traffic violation by failing to signal a turn. The vehicle soon returned to the motel parking lot, and as it did so, the officers observed that the front

and rear license plates were not properly affixed to the vehicle's front and rear bumpers; instead, the plates were improperly displayed in the passenger compartment. The officers ran the license plate number through their identification systems, which revealed the vehicle's registered owner was a person named Luis Cuello.

Venezia then parked the vehicle in the motel's private lot. The vehicle was "legally parked," was "not obstructing traffic," and did not pose "an imminent threat to public safety." ROA Vol. 5 at 140. The motel and its parking lot were in a high crime area of Lakewood.

The officers approached the vehicle based on the illegal turn they had observed. The officers asked Venezia, the driver and sole occupant of the vehicle, for his license, registration, and insurance. He did not have a driver's license, registration for the vehicle, car insurance, title to the vehicle, or a bill of sale. Venezia told the officers his license was suspended; the officers confirmed that, in fact, his license had been revoked. Venezia presented the officers with his Colorado identification card, and the officers determined he had an outstanding misdemeanor warrant for "a failure to appear on a traffic ticket." Id. at 75.

When asked about Cuello—i.e., the vehicle's registered owner—Venezia stated he did not recognize the name. He told the officers he had recently purchased the vehicle from a person named Dustin Estep but had been unable to insure or register it due to the holidays. The officers contacted their communication center in an attempt to reach Cuello by telephone, but the attempt was unsuccessful.

At the suppression hearing, the district court found as a matter of fact that Venezia was the vehicle's owner, and that he had recently purchased the vehicle from Estep, who had recently purchased it from Cuello. But the court further found the officers had no information available to them, at the time of their encounter with Venezia, that would have alerted them to this chain of title.

The officers arrested Venezia on the outstanding warrant and impounded the vehicle. Venezia objected to the impoundment. Although he was not a guest at the motel, Venezia indicated that an individual he referred to as his brother was staying there. The officers did not inquire whether Venezia's "brother" (who turned out to be a friend, Christian Kelly) could take possession of the vehicle. The officers also did not ask anyone working at the motel for permission to leave the vehicle in the motel parking lot.

During an inventory search of the vehicle, conducted as part of the impoundment, law enforcement found drugs, drug distribution paraphernalia, a gun holster, and ammunition. Venezia was released on bond, after which he was able to establish his ownership of the vehicle.

The sole issue on appeal is whether the district court was correct in concluding the impoundment was constitutional.

The Tenth Circuit Court of Appeals found, in part, as follows:

"One exception to the warrant requirement is a search or seizure conducted pursuant to police officers' 'community-caretaking functions.' In the context of vehicle impoundments, the community-caretaking doctrine arose from the everyday reality that police frequently encounter disabled vehicles or investigate vehicular accidents in which there is no cause to believe that a criminal offense has occurred. *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973). Thus, in *Cady,* the Supreme

Court recognized that police may impound a vehicle where the vehicle was disabled as a result of an accident, the driver could not arrange for the vehicle's removal, and the vehicle's presence 'constituted a nuisance along the highway.'

"In *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976), the Supreme Court elaborated by providing several illustrations in which the community-caretaking doctrine justifies impoundment. For example, following a vehicle accident, officers may impound a vehicle to permit the uninterrupted flow of traffic and in some circumstances to preserve evidence. Violation of a parking ordinance may also justify impoundment under the community-caretaking doctrine, provided the parking violation thereby jeopardizes both the public safety and the efficient movement of vehicular traffic. Accordingly, the Supreme Court reasoned that the authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

"In *Colorado v. Bertine*, 479 U.S. 367 (1987), the Supreme Court addressed inventory searches conducted pursuant to a community-caretaking impoundment. The Court explained that Opperman does not prohibit the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.

"In this case the vehicle at issue was legally parked on private property (a motel parking lot), did not impede traffic, and did not pose a safety hazard. The private property owner did not object to the vehicle's presence. The vehicle in this case was not at unnecessary risk of theft or vandalism, and thus the officers lacked a reasonable community-caretaking rationale."

Ascertaining whether an impoundment is justified by a reasonable and legitimate, non-pretextual community-caretaking rationale is not an easy task. Here, the court concluded that the impoundment was inconsistent with the Supreme Court's description of the community-caretaking doctrine.

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110516166.pdf

SEARCH AND SEIZURE: Vehicle Search; Backpack left in Friend's Vehicle

California v. Moore
CCA, 3rd App Dist, No. CO90220, 5/18/21

In this case, the trial court denied Jemondre Moore's motion to suppress evidence found during a search of his backpack, which he left on the front passenger's side floorboard of a friend's Jeep. The backpack was searched during a search of the Jeep pursuant to the automobile exception to the warrant requirement. Sergeant Andy Hall of the Sacramento Police Department opened the backpack and found a jar containing approximately one quarter pound of marijuana. He also found a loaded .40-caliber handgun, digital scales, narcotic packaging materials, a cell phone, and a wired charger for an ankle monitor.

The trial court concluded this exception authorized the search because the officer who conducted the search had probable cause to believe the Jeep contained an unlawful amount of marijuana. The Court of Appeal concluded the search was reasonable under the automobile exception to the warrant requirement.

READ THE COURT OPINION HERE:
https://www.courts.ca.gov/opinions/documents/C090220.PDF

VEHICLE STOP: Reasonable Suspicion; GPS Tracking; Suspect and Vehicle Descriptions
United States v. Martin
CA8, No. 20-1511, 6/7/21

Christopher Martin robbed a Sprint Wireless Express store at gunpoint, making off with cell phones and tablets. Little did he know, he also left with a GPS tracker, courtesy of the store employee? The employee called police, describing the robber as "5' 7" tall, heavyset, male, African American with a grey ski mask, a blue hooded sweatshirt and grey sweatpants." The employee described the getaway car as a dark-green Pontiac Grand Am or Grand Prix driven by someone he did not see, and said the vehicle went north on Elmore Avenue. He also reported that the robber had a tiny, silver handgun.

Officers responded to the robbery within minutes. The first on the scene received a slightly more detailed description that the robber was 300 pounds or more and carrying a duffel bag. Dispatch also began receiving location reports from the GPS tracker, which updated every six seconds. The data, collected by a third-party provider, directed officers to the intersection of Kimberly and Spring streets, about 1.5 miles from the store.

At the intersection, officers saw two cars: a white one and a dark-blue, four door Ford Contour. There were two black male passengers in the dark-blue car, and police noticed that the occupants were not looking around at the multiple squad cars. When the dark-blue car pulled through the intersection and into a gas station, one officer turned on his overhead lights.

After stopping the car, officers commanded the driver to exit the vehicle with his hands in the air and to walk backwards toward them. After the driver was secured, they did the same with Martin, who was in the passenger seat. The officers then searched the car and found the stolen cell phones and tablets. Police detained Martin and the driver of the car in separate squad cars.

Martin filed motions to suppress the evidence gathered during the stop. The district court entered an order denying the motion to suppress the stop. Martin pleaded guilty to the lesser included offense of using and carrying a firearm during and in relation to a crime of violence and a conditional guilty plea to interference with commerce by robbery and possession of a firearm by a felon. He reserved his right to appeal the district court's denial of his motions to suppress.

Martin argues police did not have probable cause or reasonable suspicion to stop the car. He suggests police should not have relied on the GPS device and that the description of the vehicle by the store's clerk was not a match.

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

"The Fourth Amendment secures the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' A traffic stop is a seizure and 'must be supported by reasonable suspicion or probable cause.' *United States v. Houston*, 548 F.3d 1151, 1153 (8th Cir. 2008). Police are permitted to make investigative stops of a vehicle if they have reasonable suspicion that an individual in that vehicle recently committed a crime in a general area. See *United States v. Roberts*, 787 F.3d 1204, 1209–10 (8th Cir. 2015) (applying reasonable suspicion standard to stop of a vehicle several blocks from crime scene).

"A reasonable suspicion is a particularized and objective basis for suspecting criminal activity

by the person who is stopped. *United States v. Bustos-Torres*, 396 F.3d 935, 942 (8th Cir. 2005). Reasonable suspicion is determined by looking at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing based on his own experience and specialized training to make inferences from and deductions about the cumulative information available. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Reasonable suspicion must be supported by more than a mere hunch, but the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying the preponderance of the evidence standard.

"The police had at least reasonable suspicion to stop the vehicle. The GPS tracker indicated that it was at the intersection of Kimberly and Spring. Martin argues the GPS was unreliable. In support, he points to cases in which courts heard testimony about the reliability and accuracy of GPS devices. See *United States v. Brooks*, 715 F.3d 1069, 1077–78 (8th Cir. 2013); *United States v. Espinal-Almeida*, 699 F.3d 588, 610–12 (1st Cir. 2012). But those cases are about the admission of the data at trial and do not address whether officers in the field can rely on third-party GPS data while pursuing suspects. Considering the tight window of opportunity officers have to locate a fleeing suspect, we find it reasonable for police to rely on third-party GPS data.

"Other factors also supported the officers' suspicion. The intersection of Kimberly and Spring is in the general area of the crime scene. *United States v. Robinson*, 670 F.3d 874, 876 (8th Cir. 2012) (factors like the location of the parties may support an officer's decision to stop). When the five police cars arrived at the intersection, they saw two vehicles. Police could reasonably rule out one because it did not even remotely match the description given by the store employee. The Ford Contour roughly matched the description. While the employee said the vehicle was a coupe (the Ford Contour is a four-door), a Ford Contour has the same general shape as a Pontiac Grand Am and Grand Prix. Plus, the color (dark green) is close to the color of the Ford Contour (dark blue). Keeping in mind that the employee only saw the car briefly after dark, it was reasonable for officers to believe the employee made minor errors and that this was the car they were looking for. See *United States v. Quinn*, 812 F.3d 694, 699 (8th Cir. 2016) ('We have held that generic suspect descriptions and crime-scene proximity can warrant reasonable suspicion where there are few or no other potential suspects in the area who match the description.').

"Police also noticed unusual behavior by the car's occupants, who did not acknowledge an overwhelming police presence. See *Terry v. Ohio*, 392 U.S. 1 (1968) (irregular activities like repeatedly walking by the same store window can support reasonable suspicion); *United States v. Sokolow*, 490 U.S. 1, 8–9 (1989) (irregularity of purchasing $2,100 in plane tickets with a roll of $20 bills could support reasonable suspicion). The totality of the circumstances gave police at least reasonable suspicion that criminal activity was afoot, so stopping the vehicle to investigate that suspicion comported with the Fourth Amendment.

"The judgment of the district court is affirmed."

READ THE COURT OPINION HERE:
https://cases.justia.com/federal/appellate-courts/ca8/20-1511/20-1511-2021-06-07.pdf?ts=1623079828