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CIVIL LIABILITY:
Pointing a Pistol at a Suspect; Excessive Force

Hopson v. Alexander, CA9, No. 21-16706, 6/16/23

On January 25, 2018, Detective Jacob Alexander pulled his unmarked police vehicle into a Gilbert, Arizona gas station to purchase a drink. He watched as another driver, later identified as Tommy Jones, backed into a parking spot, "cran[ed] his neck," and "nervously" looked around. Jones repeated this behavior several times, each time backing into a new parking spot and "turn[ing] his body 180 degrees in the vehicle to get a good look at his surroundings."

Jones remained in his vehicle throughout, leading Alexander to conclude that Jones had no intention of making a purchase at the gas station. It appeared to Alexander that Jones was scouting around for police officers, video cameras, or other means by which he could be detected, and that Jones was trying to find a parking spot that would allow a hasty exit. Based on Jones's "abnormally nervous" behavior and Alexander's training and decade-plus of law enforcement experience, Alexander believed Jones was casing the gas station and that an armed robbery was about to occur.

After watching this activity go on for approximately fifteen minutes, Alexander observed DeJuan Hopson drive into the parking lot and park alongside Jones. Jones then exited his own vehicle and got into Hopson's. Alexander watched them converse and exchange items. At one point, Jones retrieved something from his own car and returned to Hopson's vehicle. Believing that Jones and Hopson were about to embark on criminal activity and knowing that traffic stops can be dangerous, Alexander called for backup. Detective Brandon

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Grissom arrived a few minutes later, apparently accompanied by four other officers. Grissom parked his police car (which we assume was also unmarked) behind Hopson's vehicle.

Although what happened next is disputed, this is Hopson's version of the story. Alexander approached Hopson's driver's side door with his gun pointed out. He opened the door and "forcefully removed" Hopson from the vehicle. In doing so, he yanked Hopson's left arm with "enough force to put him in a state of shock and make him think that he was being robbed," and then "forcefully" handcuffed him while "verbally daring" Hopson to make a move. Alexander never announced that he was a police officer. Grissom stood nearby and kept his gun pointed at Hopson. Another officer pulled Jones out of the passenger side of the vehicle, and three more officers also stood by, all with guns drawn. Although Hopson alleges no physical injury, he claims that Alexander and Grissom's actions caused him to experience "depression, anxiety, loss of sleep, nervousness, and a fear of retaliation."

The detectives questioned Hopson about the smell of marijuana emanating from the car and checked his driver's license status and criminal history. This turned up prior felony convictions for aggravated assault and several weapons-related offenses, that he was on probation for another crime, and that his license was suspended. Because he was a convicted felon and was on probation, Hopson was not permitted to possess a firearm. Based on the marijuana odor coming from the car and Hopson's inability to demonstrate he could use marijuana for medical purposes (as well as the suspended license), the detectives undertook a search of the car. They first found marijuana but then discovered a Glock handgun with an extended magazine between the driver's seat and the center console.

Alexander placed Hopson under arrest. Hopson was later charged in Maricopa County Superior Court with possession of marijuana and unlawful possession of a firearm. Hopson filed a motion to suppress the evidence found in his car, arguing that there was insufficient justification for an investigatory stop.

Finding that there was not reasonable suspicion to support the stop, the state trial court granted Hopson's motion and dismissed all charges without prejudice.

The Ninth Circuit Court of Appeals reversed the district court's denial of qualified immunity, finding as follows:

"Believing that two men were about to engage in the armed robbery of a gas station, the defendants approached the suspects' vehicle with guns pointed, forcibly removed the driver, Hopson, and handcuffed him. In holding that the officers were entitled to qualified immunity, the panel first determined that it was not clearly established that the officers lacked an objectively reasonable belief that criminal activity was about to occur. Under the qualified immunity framework and given the suspicious Terry-like conduct observed here, no clearly established law gave the panel cause to second-guess Detective Alexander's on-the-ground suspicion that an armed robbery was about to occur. And an armed robbery necessarily involves the use of weapons. Clearly established law therefore did not prevent the officers from suspecting plaintiff might be armed—which, in fact, he was.

"The panel held that defendants did not violate clearly established law when they pointed their guns at plaintiff. Noting that this Circuit's law makes clear that pointing a gun at a suspect is not categorically out of bounds, the panel could find

no authority that placed the unconstitutionality of the detectives' conduct beyond debate in the circumstances they confronted.

"The panel next rejected plaintiff's contention that defendants violated clearly established law by using excessive force when removing him from the car and arresting him. No clearly established law prevented the detectives from acting quickly and with moderate force to ensure that plaintiff was detained without incident. Thus, no controlling authority clearly established beyond debate that the amount of force used during plaintiff's arrest was objectively unreasonable. Finally, the panel rejected plaintiff's argument that the detectives violated clearly established law in failing to identify themselves as law enforcement officers. Under the circumstances of this case, precedent did not clearly establish that the detectives' alleged failure to identify themselves as police officers made their use of force excessive.

"Dissenting, Judge Rawlinson stated that under the facts of this case, viewed in the light most favorable to plaintiff, the officers violated clearly established law when they forcefully yanked plaintiff from his vehicle at gunpoint without warning and forcefully handcuffed him, when he was merely conversing with a passenger in the vehicle and posed no immediate threat to the officers or to the public. Because the officers who used this gratuitous and violent excessive force against plaintiff were not entitled to qualified immunity, Judge Rawlinson would affirm the district court's judgment."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2023/06/16/21-16706.pdf

CIVIL LIABILITY: Qualified Immunity; Claim of Excessive Force

Pollreis v. Marzolf, CA8, No. 21-3267, 4/27/23,

After receiving a tip, members of the Springdale Police Department were conducting surveillance on a suspected gang member and attempted a traffic stop on a Chevy Cobalt. The driver refused to stop and eventually crashed the car. The four occupants of the car fled, with two heading north and two heading south. Officer Marzolf received instructions to set up a perimeter near the suspected gang member's house. Officer Marzolf was also informed over the radio that one suspect was known to carry a gun. Mere moments later, W.Y. and S.Y., Pollreis's sons, began walking down the street toward Officer Marzolf's car. Officer Marzolf turned on his high beams, stopped his car, and asked, "Hey, what are you guys doing?" W.Y. responded, but it is not intelligible on the dashcam. Officer Marzolf then instructed the boys to stop and turn away as he walked toward them with his firearm drawn.

Officer Marzolf continued to question the suspects for approximately one minute before Pollreis walked up from behind him asking, "Officer, officer, may I have a word with you?" Officer Marzolf reported to dispatch that he had two juvenile individuals in dark hoodies and pants stopped, and Sergeant Kirmer gave instructions to detain them. Then, Officer Marzolf ordered the boys to lay on the ground, and they complied. Before long, Pollreis approached Officer Marzolf and asked, "What happened?" and Officer Marzolf acknowledged her by saying, "Hey, step back." After Pollreis identified herself as the boys' mother, Officer Marzolf again ordered her to "get back" while stepping toward her. She responded, "Are you serious?" Officer Marzolf answered, "I am serious, get back." While still pointing his gun at the boys with his right hand, Officer

Marzolf then pulled his taser with his left hand and pointed it at Pollreis. Pollreis, attempting to reassure her children said, "It's OK, boys" while Officer Marzolf holstered his taser and again ordered her to "get back." At this point, Pollreis asked, "Where do you want me to go?" Officer Marzolf responded, "I want you to go back to your house." She replied, "Are you serious? They're 12 and 14 years old." Officer Marzolf retorted, "And I'm looking for two kids about this age right now, so get back in your house." Pollreis acquiesced and told her boys, "You're OK guys, I promise." Pollreis went back to her house and does not appear on the dashcam video again.

Officer Marzolf continued to detain the boys for several more minutes while he, and later another officer and sergeant, questioned them. After the likelihood of the boys being the fleeing suspects was dispelled, they were released. Based on the timestamped dashcam, the entire encounter lasted approximately seven minutes.

At his deposition, Officer Marzolf explained that he "was going to stop any individuals along that area that I was working because that's what your job is on the perimeter." He also highlighted that evening's dark and rainy conditions, which made it difficult to see. Officer Marzolf testified that information "was relayed over the radio that [one of the fleeing suspects] had been known to carry a handgun and that ammunition magazines were found." He also explained that he drew his taser on Pollreis because she disobeyed his verbal commands and came up behind him in a "high threat situation."

Pollreis brought four claims under 42 U.S.C. § 1983 on behalf of her children. The district court granted Officer Marzolf summary judgment, holding he was entitled to qualified immunity.

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

"Pollreis was not suspected of committing any crime and was not actively resisting arrest. But while she commendably remained calm and nonthreatening, a reasonable officer in this situation would be understandably concerned for his own safety. This event took place at night in the rain. Officer Marzolf was alone on the scene when Pollreis approached from behind. Officer Marzolf was placed in a position where he had two possibly armed suspects detained in front of him and a third unknown individual approaching from behind, creating a potentially serious safety risk. Adding to the circumstances, when Officer Marzolf ordered Pollreis to 'get back,' she moved to the side, but she did not immediately comply by moving backward. Rather, she questioned the order and moved sideways.

"Ordered to get back a second time, she again questioned the order and remained where she was until after the taser was drawn. We must judge 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. *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012) (quoting *Graham v. Conner*, 490 U.S. at 396 (1989). Under the totality of the circumstances, Officer Marzolf momentarily pointing his taser at Pollreis to gain control of the scene was not unreasonable. Officer Marzolf did not violate Pollreis's constitutional rights. The decision of the circuit court is affirmed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/04/213267P.pdf

CIVIL LIABILITY: Qualified Immunity; Reasonable Belief an Individual is Armed

Putman v. Harris, CA4, No. 22-1360, 4/19/23

Virginia police responded to a 911 call seeking help to locate Dillard Putman, who they were told was potentially armed and suicidal. After failing to find Putman in his house, two officers and a K-9 searched the surrounding woods. The dog quickly caught Putman's scent, leading officers to find him lying in a shallow ditch.

Bodycam footage shows the subsequent heated encounter, with officers demanding Putman turn around and Putman angrily ordering them to leave. After a two-minute impasse, an officer twice released the dog, who bit Putman and caused a severe injury. The officers ultimately discovered Putman didn't have a gun.

Putman sued under state law and 42 U.S.C. § 1983, alleging, among other things, violations of his Fourth Amendment rights. The district court denied the K-9 officer's summary-judgment motion asserting qualified immunity, holding that the undisputed facts didn't establish whether the officer had a reasonable belief that Putman was armed.

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

"Looking at the facts as the district court understood them, Harris committed no constitutional violation when detaining Putman, as he had probable cause for a mental health seizure and a reasonable belief that Putman posed an immediate threat.

"While the district court relied on the bodycam video in denying summary judgment, our review of the totality of the circumstances demands reversal. The bodycam footage doesn't tell the whole story, compelling as it may be. For instance, it doesn't show that Harris knew Putman had sent texts to his wife earlier in the day threatening to kill himself and stating he had a gun. And even though Putman claimed he was unarmed during the encounter, Harris couldn't confirm this because Putman refused to turn around to show his entire waistband. Even viewed in the light most favorable to Putman, we conclude a reasonable officer could have believed Putman was armed and thus posed an immediate threat.

"Putman's texts conveyed that he may have been armed. Given the heated argument, Putman's erratic arm movements, and his refusal to face away from the officers, Harris could reasonably fear that Putman might pull a hidden gun. It follows that Putman presented 'an immediate threat to the safety of the officers.' *Graham v. Conner*, 490 U.S. 396 (1989). Thus, Harris didn't violate Putman's Fourth Amendment rights when ordering the dog bite.

"We therefore reverse the district court's denial of qualified immunity to Harris on the excessive-force count and remand with instructions that the court enter judgment for Harris on that count."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/221360.p.pdf

CIVIL LIABILITY: Reasonable Use of Force

VanPelt v. City of Detroit, CA6, No. 22-1680, 6/6/23

Officer Aaron Layne pulled Darrin VanPelt over for driving a car with an illegal window tint and called for backup. When Officer Bennett responded, Layne informed him that "the plate doesn't come back to the car" and the "car smells like weed." While patting VanPelt down, Layne found several baggies of marijuana and one baggie of crack cocaine. With VanPelt in handcuffs, Layne led him toward the police car. VanPelt took off running. Four seconds later, Layne tackled VanPelt to the ground, then stood and attempted to pull VanPelt to his feet, briefly grabbing VanPelt's hair. VanPelt replied that he could not stand because his hip was broken. Layne released his grip. VanPelt fell back to the ground.

VanPelt sued Layne for using excessive force and Detroit for failing to adequately train and supervise Layne. The Sixth Circuit affirmed summary judgment in favor of the defendants, citing qualified immunity:

"Layne's tackle and subsequent attempt to lift VanPelt did not violate the Fourth Amendment. Layne's use of force throughout the encounter was objectively reasonable under the circumstances, even assuming Layne could have stopped VanPelt using a less severe technique. When Layne attempted to lift VanPelt, a reasonable officer would not have known that VanPelt was injured. The record and video did not establish any indication of excessive force nor evidence that Layne had 'evil intentions.'"

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0120p-06.pdf

CIVIL LIABILITY: Warrantless Arrest and Excessive Force Claims

Hill v. City of Fountain Valley
CA9, No. 21-55867, 6/1/23

Police responded to a 911 call that a Ford Mustang was darting erratically in the streets. Behind the wheel was a young white male, along with a blindfolded female in the car. With the aid of the car's license plate number provided by the caller, police officers figured out the home address of the driver.

In reality, the driver, Benjamin Hill, was taking his wife for a "surprise" anniversary dinner. When officers arrived at the home that Benjamin shared with his parents and before the mix-up could be cleared, the officers ordered Benjamin's parents, Stephen and Teresa, and brother, Brett, out of their home for obstructing the police and pushed Stephen to the ground as they handcuffed him.

The court rejected plaintiffs' contention that the police officers violated their Fourth Amendment rights against unreasonable seizure when the officers ordered them to exit the home or face arrest for obstruction:

"The officers never seized Brett or Teresa, who did not submit to the officers' demand to leave the home. They therefore could not claim that they were unlawfully arrested. The panel next held that while the officers did not have probable cause to arrest Stephen for obstruction of justice, they were nevertheless shielded by qualified immunity.

"Although it is well established under California law that even outright refusal to cooperate with police officers cannot create adequate grounds for police intrusion without more, here there was no clearly established law that the officers could not arrest Stephen, given his evasive behavior that

appeared to interfere with an urgent investigation into a potential kidnapping. They held that Stephen's excessive force claim failed because he suffered only a minor injury when pushed to the grassy lawn during a tense encounter. Finally, Stephen's First Amendment retaliation claim did not pass muster because he presented no evidence that the officers arrested him because of his mild questioning of the officers."

READ THE COURT OPINION HERE:
https://cdn.ca9.uscourts.gov/datastore/opinions/2023/06/01/21-55867.pdf

CONFESSION: Alleged Coercive Tactics

United States v. Jacobs, CA6, No. 22-3488, 3/28/23

One October evening in 2020, a man walked into a Walgreens in Columbus, Ohio. He was wearing dark clothes, and his pants and shoes had white stains on them. The man placed a pack of gum on the counter and asked the clerk for cigarettes. When the clerk requested identification, the man reached into his pocket and pulled out what looked like a handgun wrapped in a blue bandana. After demanding the cash from the register, the man fled with the money and the cigarettes. He might have gotten away with it—after all, a man of similar description had gotten away with about a dozen armed robberies in the area over the preceding months. But the robber made a crucial mistake: he left the pack of gum.

When the police tested the gum, they found Ronald Lee Jacobs's fingerprint on it. They then obtained an arrest warrant for him. When Jacobs learned of the warrant, he voluntarily went to the police station and met with Detective Todd Agee. After asking a few questions about Jacobs's background, Detective Agee read him his Miranda rights, and Jacobs certified that he understood them. Detective Agee then questioned Jacobs about the Walgreens robbery and the other robberies, showing him pictures from the crime scenes. Detective Agee pointed out that the stains on the robber's clothes in some of the pictures looked like stains presently on Jacobs's jacket. Detective Agee also told Jacobs that his fingerprint was found on the pack of gum.

When Jacobs denied involvement in the robberies, Detective Agee highlighted the strength of the fingerprint evidence against him. He also said that he had a warrant written up to search Jacobs's dad's house, where he was living at the time, as well as Jacobs's car. If needed, Detective Agee emphasized, he'd look until he found the clothes the robber wore and the guns he used:

> *I'll get a search warrant signed, and I'll go over to your dad's house, and I will dump everything in that house out looking for those clothes. And I'm going to take that jacket because the stains on it match the stains on the robber's clothes. This is not a threat. This is not me saying something. This is what I am going to do because I have to find that evidence. I've got to find those guns. And I'll do a search warrant on your dad's house because that's where you're staying, and I'll look for it. And I'll toss the whole place until I find my evidence.*

Finally, Detective Agee said that Jacobs would likely face a severe sentence given the number of robberies, the strength of the evidence, and Jacobs's denial of responsibility. But, Detective Agee said, things might be different if Jacobs wanted to change his story. Jacobs then made his first incriminating statement: "Just a minute. The weapons—them is gone."

After that, Detective Agee offered to let Jacobs "think about it," and he left him alone for a few minutes. Jacobs asked to call his mother and his girlfriend. At first, Detective Agee declined, but when Jacobs asked again, Detective Agee offered to let him use Detective Agee's own phone. He also offered to bring Jacobs anything he needed to eat or drink. Jacobs requested water, which Detective Agee provided.

After the break, Jacobs made several other incriminating statements. He said he "f—ed up bad" because he was "broke" and needed the money for child-support payments. He told Detective Agee that he covered up the shotgun seen in some of the pictures because it was "too big." And he explained that the parcel that looked like a handgun at the Walgreens wasn't a gun at all, just "sh— wrapped up to look like that." He also admitted that he "got rid of" the shotgun and the gloves he used in some of the robberies. Finally, Jacobs worked with Detective Agee to help police retrieve the clothes he wore during the crimes from his girlfriend's house. All told, the interview lasted a little less than two hours.

Ahead of trial, Jacobs moved to suppress the incriminating statements he made during his interview. The district court granted the motion, concluding that Detective Agee used tactics in the interview that were impermissibly coercive, thereby rendering Jacobs's statements involuntary.

The Court of Appeals for the Sixth Circuit found as follows:

"Courts have long condemned the coercion of confessions. *Miller v. Fenton*, 474 U.S. 104, 109 (1985). When a defendant claims that his confession was coerced, to avoid suppression the government must show by a preponderance of the evidence that the confession was voluntary. But courts don't infer coercion lightly. Police action is only coercive when it overbears the accused's will to resist. That requires that three things be true: (1) the police activity was objectively coercive; (2) the coercion in question was sufficient to overbear the defendant's will; and (3) the defendant's will was, in fact, overborne as a result of the coercive police activity.

"Detective Agee didn't engage in any objectively coercive conduct. See *Colorado v. Connelly,* 479 U.S. 157, 167 (1986) (Coercive police activity is a necessary predicate to the finding that a confession is not voluntary.) Detective Agee's conduct closely resembles conduct we've previously held is not coercive. He spoke throughout in a conversational tone, offered Jacobs food and drink, never brandished a weapon or handcuffs, and did not threaten or use violence. The interview was also relatively short. True, Detective Agee did warn that he'd obtain a warrant to search Jacobs's father's house and Jacobs's car. But a threat to perform a lawful search isn't objectively coercive. And all agree that Detective Agee could have lawfully searched the house and car.

"Second, Detective Agee's conduct wasn't sufficient to overbear Jacobs's will. For one thing, Jacobs received a properly issued Miranda warning. Such warnings 'ensure that the police do not coerce or trick captive suspects into confessing.' *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984). So the issuance of a Miranda warning makes it less likely that police conduct will overbear a suspect's will. And for another, Jacobs is sophisticated enough that Detective Agee's conduct wouldn't have overborne his will. Unsurprisingly, the more intelligent, mature, experienced, or educated the suspect is, the

more likely he is to be able to resist pressure during an interrogation. And here, Jacobs had previous experience with the criminal justice system, was forty-three years old, had two years of college education, and wasn't drunk or otherwise impaired. All these factors plus the Miranda warning indicate that Detective Agee's questioning didn't overcome Jacobs's will.

"Third, the timeline and substance of the interview suggest that Jacobs confessed because of the strength of the evidence against him and the prospect of a long sentence—not because of any coercive conduct. Before Jacobs made any incriminating statements, Detective Agee walked Jacobs through the roughly dozen robberies he was suspected of and outlined the evidence against Jacobs. Many of Jacobs's statements came immediately after Detective Agee reiterated the severity of these crimes and the strength of the evidence. For instance, Jacobs made his first incriminating statement ('the weapons—them is gone') right after Detective Agee discussed the likelihood of a severe sentence. Once Detective Agee highlighted how compelling the fingerprint evidence was (once we got those prints, we had everything), Jacobs said, 'I f—ed up bad.' And after Detective Agee again listed several of the robberies and asked which Jacobs remembered, Jacobs said 'I know I got real bad…I f—ed up so bad.' All these facts suggest that Jacobs's incriminating statements were not the result of police coercion, but instead attempts to mitigate the damage once he realized he couldn't avoid responsibility for his crimes. Since none of the three prongs of the voluntariness test was met here, Jacobs's statements weren't improperly coerced.

"Jacobs responds that Detective Agee's threat to obtain a search warrant for his father's house was so coercive as to render his statements involuntary. Specifically, Jacobs points to two phrases Detective Agee used—'I will dump everything in that house out' and 'I'll toss the whole place.' Jacobs argues that those statements rendered the warrant threat coercive.
First, the words Detective Agee used, although forceful, refer to a search, not 'wanton destruction of property.' Detective Agee never said he would 'ransack or destroy the house or that he would throw everything outside.' As it is, threatening a thorough but lawful search—even inartfully—is not by itself impermissible. Detective Agee threatened a thorough but limited search of Jacobs's father's home. Viewing the interview from the totality-of-the-circumstances lens, Detective Agee didn't use coercion.

"In sum, Detective Agee didn't employ unlawful coercion when he interviewed Jacobs. His threat to obtain a warrant was lawful, and the phrases Jacobs points to don't change the result, especially when considered in context."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0055p-06.pdf

CONSTITUTIONAL LAW:
Sixth Amendment; Double Jeopardy

Smith v. United States, USSC, 21-1576, 599 U.S. _____, 6/15/23

Timothy Smith is a software engineer and avid angler from Mobile, Alabama, who spends much of his time fishing, sailing, and diving in the Gulf of Mexico. In 2018, he discovered StrikeLines, a company that uses sonar equipment to identify private, artificial reefs that individuals construct to attract fish. StrikeLines sells the geographic coordinates of those reefs to interested parties. This business model irritated Smith, who believed

that StrikeLines was unfairly profiting from the work of private reef builders. Smith used a web application to obtain tranches of coordinates from the company's website surreptitiously. He then announced on a social-media website that he had StrikeLines' data and invited readers to message him and "see what ree[f]" coordinates StrikeLines had discovered. When contacted by StrikeLines, Smith offered to remove his social-media posts and fix the company's security issues in exchange for "one thing": the coordinates of certain deep grouper spots that he had apparently been unable to obtain from the website. *Ibid.* The ensuing negotiations over grouper coordinates eventually failed, leading StrikeLines to contact law-enforcement authorities.

Smith was indicted in the Northern District of Florida for, among other charges, theft of trade secrets. Before trial, he moved to dismiss the indictment for lack of venue, citing the Constitution's Venue Clause, Art. III, §2, cl. 3, and its Vicinage Clause, Amendment 6. He argued that trial in the Northern District of Florida was improper because he had accessed the data from Mobile (in the Southern District of Alabama) and the servers storing StrikeLines' coordinates were located in Orlando (in the Middle District of Florida). The District Court concluded that the jury needed to resolve factual disputes related to venue, and it therefore denied the motion to dismiss without prejudice. Smith moved for a judgment of acquittal based on improper venue. The District Court denied the motion, reasoning that StrikeLines felt the effects of the crime at its headquarters in the Northern District of Florida.

On appeal, the Eleventh Circuit held that venue was improper on the trade secrets charge, but it disagreed with Smith that this error barred reprosecution. It concluded that the remedy for improper venue is vacatur of the conviction, not acquittal or dismissal with prejudice, and that the Double Jeopardy Clause is not implicated by a retrial in a proper venue.

The United States Supreme Court affirmed:

"The Constitution permits the retrial of a defendant following a trial in an improper venue conducted before a jury drawn from the wrong district. Except as prohibited by the Double Jeopardy Clause, when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried. Nothing in the Venue Clause suggests that a new trial in the proper venue is not an adequate remedy for its violation. The Vicinage Clause—which guarantees the right to 'an impartial jury of the State and district wherein the crime shall have been committed,' concerns jury composition, not the place where a trial may be held, and concerns the district where the crime was committed, rather than the state. The vicinage right is one aspect of the Sixth Amendment's jury-trial rights and retrials are the appropriate remedy.

"The Double Jeopardy Clause is not implicated by retrial in a proper venue. A judicial decision on venue is fundamentally different from a jury's verdict of acquittal. Culpability is the touchstone; when a trial terminates with a finding that the defendant's criminal culpability had not been established, retrial is prohibited. Retrial is permissible when a trial terminates on a basis unrelated to factual guilt. The reversal of a conviction based on a violation of the Venue or Vicinage Clauses, even when called a 'judgment of acquittal,' does not resolve the question of criminal culpability.

READ THE COURT OPINION HERE:
https://www.supremecourt.gov/opinions/22pdf/21-1576_e29g.pdf

EVIDENCE: Admissibility of Photographs

White v. State, ASC, No. CR-22-498, 2023 Ark. 90, 5/25/23,

On June 3, 2020, Steven Burchett and a man named Jeremy Johnston left in Burchett's SUV from Harkey's Valley and went to David White's in-laws' house to pick up money that White's wife, Jesse Kendrick, owed Burchett. White and Kendrick rode with Burchett and Johnston to meet Mike Baker in Dardanelle to get Kendrick's Social Security card so that she could get Burchett's money. Burchett drove, Johnston rode in the front passenger seat, Kendrick in the rear passenger seat behind Johnston, and White in the rear passenger seat behind Burchett.

On the way to meet Baker, White told Burchett to turn down a road so that he could check a mailbox at a property Baker owned where he was expecting to receive his stimulus check. As Johnston got out of the SUV on the front passenger side to check the mailbox, he heard tires rolling over gravel. He turned around and saw that White had pulled Burchett over the top of the driver's seat and into the back seat of the Yukon.

The Yukon was rolling forward because Burchett had not shifted it into park before White pulled him into the back seat. Johnston jumped in to shift the Yukon into park, but Kendrick cut him with a knife before he could do so. Kendrick shifted the Yukon into park and got out of it with a gun and a knife.

As Johnston made his way around the Yukon, he approached the back passenger door on the driver's side. Upon arriving, he witnessed White standing over Burchett, who lay face down in the back seat with his legs dangling out of the open door onto the running board. White held a knife to him with his hands gripped tightly around Burchett's throat. Despite Burchett's attempts to free himself, White pinned him down and stabbed him with the knife.

White shouted, "You're dying [expletive]," and "You're dead, old man." After he killed Burchett, White said, "[T]hat's what you get for talking [expletive] to us." White then proceeded to search through Burchett's pants and truck. He managed to retrieve Burchett's wallet, which contained one hundred dollars and then attempted to wrap the body in a tent. However, White became frustrated with the task and eventually abandoned it. He then pointed his knife at Johnston and ordered him to assist with dragging the body about seventy-five yards toward a discarded refrigerator on the property. White forcefully placed Burchett's body inside the refrigerator and slammed the door shut. He then demanded that Johnston accompany them, and together they departed in Burchett's Yukon. Kendrick took the wheel with Johnston seated beside her, and White, still holding the knife, occupied the rear passenger seat behind Johnston.

They then made a series of stops for various reasons. First, they headed toward an old bridge to dispose of certain objects in the river and attempted to cleanse the bloodstains from the Yukon. Second, they traveled to Dardanelle to meet with Baker and obtain Kendrick's Social Security card. Next, they went to New Blaine to acquire drugs from friends who were camping in the area and then proceeded to Burchett's camper, located in Harkey's Valley, where they obtained heroin. Then they drove back to White's in-law's residence to obtain a bag of clothing for White and Kendrick, and they crossed over Petit Jean Mountain en route to Conway. Once in Conway, they ran the vehicle through a car wash to discard additional items and scrub out the

Yukon's interior before stopping at White's friend's home to purchase marijuana.

Their next destination was Clinton, where they pulled over at a residence, and White exchanged a firearm for methamphetamine. Following this, they headed north toward Omaha, located near the Missouri state border, and they stopped at Harley Fryer's house, where White asked Fryer to fix the knife he had utilized to murder Burchett. Fryer was unable to comply and handed the weapon back to White. Later on, while White was momentarily distracted and had set the knife down, Johnston discreetly picked it up and left it resting on the bed rail of a truck that was parked on Fryer's property.

The following day also involved a series of stops. First, they drove to A.J. Navarro's house to get more meth. Second, they drove to Harrison and stopped at White's brother's house for a few hours before making a trip to Walmart. From Harrison, they drove back to Dardanelle, where they arrived at around 6:00 that evening. They stopped at a gas station in Dardanelle, and while White was inside the store, Johnston called his grandmother to pick him up. Johnston's grandmother took him to Baker's house, and he told Baker to call the police. Johnston then met law enforcement officers at Baker's property, where White had killed Burchett, and led them to the refrigerator containing Burchett's body. Then, with Johnston's assistance, law enforcement discovered the knife used to kill Burchett at Fryer's home. Ultimately, White was found by police hiding in the woods at his in-laws' house and was arrested.

In an interview on June 5, 2020, White initially denied any involvement in Burchett's murder. He claimed that he dropped Burchett off in Pottsville, went on to Conway without him, and never heard from him again. He also claimed that the cuts on his hand were "from the lawnmower." On June 7, 2020, the Yell County jail detention officers found White crying on the floor of a holding cell. He then proceeded to tell the officers that he had killed somebody and that it had "happened so fast." He did not say at that time that anyone had attacked him or that he had acted in self-defense.

Then, on June 8, White asked to talk to the police again. He confessed to killing Burchett but claimed he had "reacted badly in self-defense." He said that when they stopped to check the mailbox at Baker's property, he put his hand on Burchett's shoulder and told him they could not pay him. According to White, Burchett then cut him with a knife he had in his hand, and White "flipped out" and "grabbed [Burchett's] hand, and…started stabbing [Burchett] with it."

An autopsy determined that the manner of Burchett's death was homicide caused by multiple sharp-force injuries—three cuts, and eight stab wounds. Burchett's body had two cuts underneath the chin and on the front of the neck and one on the arm near the right elbow. There were two stab wounds on the right, front part of the neck; one had caused a thyroid cartilage fracture. There were three additional stab wounds in other areas of the neck—one had penetrated through the skin and soft tissues of fat and muscle, hitting the spine. The other two stab wounds on the neck had been inflicted from above and from the side and downward. There were two stab wounds to the chest; the larger of the two measured over three inches deep and penetrated through the ribs into the left chest cavity in the area where the left lung is. The second stab wound was on the lower right abdomen and measured about four inches deep. Additionally, there were rib fractures that may have been inflicted after Burchett died because there was no hemorrhage in the area

surrounding the soft tissue. According to the medical examiner, the injuries Burchett sustained would have led to death by asphyxia, bleeding out, or both.

White testified on his own behalf at trial. His version of the events surrounding Burchett's death was largely consistent with the State's evidence, although he claimed he had acted in self-defense. He said Burchett cut him on his index finger with a small, 1.5-to-2-inch-blade pocketknife, after which he pulled Burchett over the driver's seat and into the back seat of the Yukon. He alleged that Burchett had cut himself "back to front" with the pocketknife in his own hand when he pulled Burchett over the driver's seat and ultimately pushed him face down into the backseat floorboard. He then twisted Burchett's arm behind him and stuck the pocketknife in the seat. After that, he got out of the Yukon, walked over to Johnston, and asked, "What the hell is going on, dude?" Then, he walked back to the Yukon and saw that Burchett had managed to push himself up off the backseat floorboard, "maybe eight to ten inches." He pushed Burchett back down and wrestled with him again over the pocketknife. Finally, he elbowed Burchett in the ribs as hard as he could. He heard Burchett's ribs break, after which Burchett "rattled out and died."

He dumped Burchett's body in a refrigerator, took one hundred dollars from Burchett's wallet, and went to get high. He admitted that the cut on his finger was not life-threatening. He also admitted that he could have opened the car door and gotten away from Burchett. Additionally, he admitted that Burchett posed no direct threat to him when he walked back to the Yukon and hit Burchett in the ribs. He also admitted that he never made any calls to 911, or to anyone else, for help.

David White's argument challenges the trial court's decision to admit two photographs, State's exhibits nos. 34 and 35, depicting law enforcement officers removing the victim's body from the refrigerator. White contends that these photographs were irrelevant and did not shed light on any relevant aspect of the case. Furthermore, he argues that any probative value they may have had was outweighed by the risk of unfair prejudice.

Upon review, the Arkansas Supreme Court found as follows:

"The admission of photographs during a trial is a matter within the discretion of the trial court, and this court will reverse such a decision only if there was an abuse of that discretion. *Collins v. State*, 2020 Ark. 371, at 7, 610 S.W.3d 653, 657. It is generally permissible to admit photographs that are helpful in explaining testimony.

"Photographs have been deemed admissible to demonstrate the nature and location of wounds to counter a defendant's claim of self-defense or establish intent. *Pearcy v. State*, 2010 Ark. 454. Additionally, photographs may be admitted depicting the condition of the victim's body, the type or location of injuries, or the position in which the body was discovered. *Green v. State*, 2015 Ark. 359. A trial court's exercise of discretion can also be demonstrated by its careful examination of each photograph before admitting them into evidence.

"Here, the trial court reviewed the photographs in a pretrial hearing, applying relevant rules to assess their relevance and weighing their probative value against any potential prejudicial effect. The court considered several factors, including whether the photographs shed light on any issues, corroborated testimony, aided

witness testimony, or depicted the condition of the victim's body and the nature of the injuries. The court reexamined the photographs before admitting them at trial. State's exhibits nos. 34 and 35, which were admitted through Officer Seth Race's testimony, portrayed the location, condition, and position of the victim's body when it was discovered.

"These photographs facilitated Officer Race's testimony regarding the details of the discovery and helped the jury understand the testimony better. They also corroborated White's testimony regarding the victim's body placement in the refrigerator. Additionally, as noted by the trial court, the photographs depicted the nature, extent, and location of the victim's wounds and provided different angles and views compared to other admitted photographs of the crime scene. Therefore, the trial court did not abuse its discretion in admitting the challenged photographs because the photographs were relevant, aided in understanding the testimony, and provided corroboration. As a result, the trial court's decision to admit the photographs is affirmed."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/supremecourt/en/item/521966/index.do?q=22-498

EVIDENCE: Bite Marks

State of Illinois v. Prante, SCI, 2023 Il 127241, 5/18/23

John Prante filed a motion in the circuit court of Madison County seeking leave to file a successive postconviction petition challenging his conviction for murder. In his motion and accompanying petition, Prante asserted that recent scientific studies had fully discredited forensic bite mark opinion testimony that was introduced by the State at his trial.

Prante attached to his petition two affidavits from Dr. Iain Pretty, an expert in forensic odontology. In these affidavits, Dr. Pretty averred that at the time of Prante's trial the use of bitemark evidence was a well-accepted forensic technique, generally understood by its practitioners and by the scientific community to be valid and reliable. However, since the time of Prante's trial, that understanding has shifted significantly as a result of new research and scientific review. In light of this new research, Dr. Pretty stated there is no evidence to support the fact that forensic dentists can even agree on what a bitemark is—never mind the more advanced proposal that this pattern may actually be linked to someone. Further, according to Dr. Pretty,even board-certified forensic dentists cannot reliably answer the threshold inquiry in bitemark analysis: whether the injury at issue is or is not a bitemark. Dr. Pretty stated that the conclusions drawn by the forensic dentists in this case, even at the level of identifying these injuries as human bitemarks, would not be supported by the scientific community today.

Prante also appended three reports on bite mark analysis to his petition, all of which were referenced by Dr. Pretty: *a 2009 report of the National Academy of Sciences: A Path Forward (2009), a 2016 report from the President's Council of Advisors on Science and Technology (President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016),* and *a 2016 report from the Texas Forensic Science Commission (Tex. Forensic Sci. Comm'n, Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney— Final Report (2016).*

These three reports were uniform in concluding that bite mark analysis is not scientifically valid. According to these reports, it has not been scientifically established that human bite marks are unique or that human skin can record those marks with accuracy and permanency. Further, there is no scientific basis for identifying one individual to the exclusion of all others based on bite mark analysis and no basis for stating that a particular injury can be associated with an individual's dental impressions.

READ THE COURT OPINION HERE:
https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/f83fa4fd-5ab5-425c-8820-8139f00f6ce8/People%20v.%20%20Prante,%202023%20IL%20127241.pdf

EVIDENCE: Field Tests; Photographs; Firearms

United States v. McCoy
CA8, No. 22-2385, 6/13/23

In 2019, police learned that Gregory Lynn McCoy, a convicted felon, had a pistol and had sold drugs. A state judge issued a search warrant for his residence. While waiting to begin the search, officers saw McCoy arrive in his vehicle and go inside. Entering, police found McCoy in his upstairs bedroom. There, officers found baggies of drugs, ecstasy pills, a digital scale, rubber gloves, and cutting agents. Field testing showed that the baggies contained cocaine, heroin, and methamphetamine. In the living room closet, officers found a box of .45-caliber MagTech ammunition. A drug dog alerted to McCoy's vehicle. There, police found a glass pipe and a .45-caliber semi-automatic pistol, with two fully loaded magazines of .45-caliber MagTech ammunition. They photographed the glass pipe but later accidentally ran over it.

A jury convicted McCoy of unlawfully possessing a firearm. On appeal McCoy argues that the district court erred in admitting (1) testimony about the field tests of the narcotics, (2) the photograph of the glass pipe from McCoy's vehicle, and (3) he claims there is no evidence that the .45-caliber pistol was a firearm.

Upon appeal, the Eight Circuit Court of Appeals found as follows:

"McCoy challenges only the scientific reliability of the field tests. The officer who conducted the tests was trained and certified in using them. He testified to the procedures and the results. See *United States v. Eisler*, 567 F.2d 814, 817 (8th Cir. 1977) (holding that an experienced agent familiar with field tests could testify about the results of the test he conducted). The district did not err, let alone plainly err, by admitting the testimony about the field tests. See *United States v. Downey*, 672 Fed. Appx. 615, 616 (8th Cir. 2016) (holding that a court may rely on circumstantial evidence such as field tests or testimony describing the substance).

"McCoy argues that the photograph of the pipe was inadmissible because it was (1) not inventoried or referenced in the police reports; (2) poor quality; (3) and highly prejudicial. The contents of police reports do not govern the admissibility of evidence. The photograph's quality does not preclude its admissibility. Cf. *United States v. De La Torre*, 907 F.3d 581, 591-92 (8th Cir. 2018) (holding that the audio's poor quality 'did not render the recording wholly untrustworthy'); *United States v. Williams*, 512 F.3d 1040, 1044 (8th Cir. 2008) (holding the court did not abuse its discretion by admitting the recordings of drug buys—inaudible over 40 times). The evidence was not inadmissible simply because it was prejudicial. See, e.g., *United States*

v. Fechner, 952 F.3d 954, 958 (8th Cir. 2020) (holding that a district court has broad discretion to admit probative evidence even when it is prejudicial).

"To convict McCoy for possession of a firearm as a convicted felon the evidence must prove that McCoy's pistol met the definition of a firearm. See *United States v. Hardin*, 889 F.3d 945, 947 (8th Cir. 2018). A firearm is any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

"Proof that a firearm was operable is not required. McCoy's pistol, retrieved from his vehicle, was admitted into evidence. The jury saw the pistol and photographs of it. An ATF agent, testifying as an expert, testified that it met the federal definition of a firearm. The pistol and the testimony are sufficient to prove that the pistol was a firearm. See *United States v. Dobbs*, 449 F.3d 904, 911 (8th Cir. 2006) (holding that lay testimony from an eyewitness is sufficient to determine whether an object is a firearm. *United States v. Mullins,* 446 F.3d 750, 755 (8th Cir. 2006) (finding expert testimony from an ATF agent sufficient to determine that the defendant's gun met the federal definition of a firearm, even when the gun evaluated by the agent was a model and not the original)."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/06/222385P.pdf

EYEWITNESS IDENTIFICATION:
Photographic Lineup

United States v. Watkins
CA8, No. 22-2196, 5/19/23

A jury convicted Javaar Yavonnie Kalem Watkins of possessing firearms and ammunition as an armed career criminal. The district court denied Watkins' motion to suppress the eyewitness identifications. He appeals.

In September 2020, Watkins and his brother went to a bar in Bismarck, North Dakota. Jakim Jackson, Kendrick Jackson, and Alvin Blackmon were also there. After the bar closed, Watkins, his brother, and Blackmon had an altercation in the parking lot. Taking a 9 mm pistol from his truck, Blackmon fired three to four shots in the air. Jakim picked up a cell phone lying on the ground. He, Kendrick, and Blackmon left in Blackmon's truck. The phone rang. Jakim answered. The caller told Jakim he was tracking the phone and wanted it back.

Blackmon gave Jakim his 9 mm pistol and then dropped him and Kendrick off a few blocks from their apartment. When they arrived at their building, Kendrick sat on the porch outside. Jakim went inside to their basement-level apartment. Later that night, Watkins and his brother arrived at the apartment building. They pointed guns at Kendrick and asked "where he is." Believing they were asking about Jakim, Kendrick went into the apartment. Watkins and his brother followed. Watkins pointed a gun at Kendrick's head. Jakim came out of his bedroom. Watkins shot at him. Jakim grabbed the 9 mm pistol. He and Watkins exchanged gunfire. Jakim was shot multiple times. Kendrick fled. Watkins took the 9 mm pistol and left. Investigators found shell casings from two different firearms—a 9 mm pistol and .45-caliber handgun.

Five days later, investigators showed Jakim a photo array of suspects that did not include pictures of Watkins or his brother. Jakim identified one person but wasn't "even 50 percent sure on that." At a second interview less than a week later, investigators showed Jakim two photo arrays, one with Watkins' picture and one with his brother's picture. Jakim positively identified both Watkins and his brother, with 100% certainty. Kendrick separately identified them with 100% certainty.

Watkins contends the district court erred in denying his motion to suppress the eyewitness identification because it was based on the impermissibly suggestive photo array line-up and likelihood of misidentification. Considering the admissibility of a photo lineup identification, this court examines (1) whether the identification procedure is impermissibly suggestive, and (2) whether under the totality of the circumstances the suggestive procedure creates a very substantial likelihood of irreparable misidentification.

The Court found as follows:

"Even if the line-up were impermissibly suggestive as Watkins contends, it was sufficiently reliable (i.e., there was not a substantial likelihood of irreparable misidentification). In assessing sufficient reliability, this court considers the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *United States v. Williams*, 340 F.3d 563, 567 (8th Cir. 2003).

"Balancing these factors, there was very little likelihood of misidentification. As the district court found, the two eyewitnesses interacted with Watkins both at the shooting and at the bar before the shooting, giving them ample opportunity to see him. The eyewitnesses also consistently identified Watkins' physical characteristics, including his lighter skin tone and the tattoo on his neck. Finally, the eyewitnesses expressed 100% certainty about their identifications."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/05/222196P.pdf

MIRANDA:
Spontaneous Statements; Intoxication; Invoking Right to Remain Silent

United States v. Harris, CA8, No. 22-1210, 4/6/23

In September 2019, staff at a hotel in Camdenton, Missouri, called police about an occupant who refused to leave the property. Camdenton Police Officer Nicholas Thomas arrived. The staff said they smelled marijuana coming from Anthony Martinez Harris's room. Through an open door into the room, Officer Thomas saw money on the bed and white powder on the coffee table. He detained Harris and tried to give him Miranda warnings. Harris said he did not understand them. Officer Thomas explained them. Harris replied that he understood. Before Officer Thomas said anything else, Harris offered Officer Thomas $50,000 to let him go and said he was involved with "the cartel" and "MS-13."

Officer Thomas searched the room. Camden County Deputy Sheriff Brian Bonner arrived. Deputy Bonner asked Harris what was in the room. He replied that there was meth, cocaine, heroin, and PCP. He consented to a search of the room. Officers found cash, guns, drugs, and drug paraphernalia. They also found an object wrapped

in a piece of camouflage fabric. Harris volunteered that it was C-4 explosive.

Officer Thomas took Harris to the county jail. Meanwhile, Narcotics Group Task Force Officer Bryan Pratt arrived at the hotel. He found a Kia key in Harris's pocket that matched a stolen car in the hotel parking lot. He searched the Kia, finding more drug contraband. He went to the jail to meet with Harris. He began by advising him of his Miranda rights. Harris "would not answer yes or no that he understood his rights," so Officer Pratt did not ask any questions. Instead, he told Harris that the keys found in Harris's pocket belonged to a stolen car. Harris replied that the Kia was his car.

Harris moved to suppress (1) his statements to Officer Thomas and Deputy Bonner at the hotel; and (2) his statement to Officer Pratt that the Kia belonged to him. At the suppression hearing, all three officers testified that Harris was not intoxicated. The district court found their testimony credible.

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

"The district court found that some of Harris's statements were not subject to Miranda scrutiny because they were made spontaneously and not in response to questioning. This included Harris's comments to Officer Thomas at the hotel that he was involved with the cartel and MS-13 and would give him $50,000 to let him go. The district court did not err in finding that these statements were spontaneous, volunteered, and not in response to interrogation. We have repeatedly held that a voluntary statement made by a suspect, not in response to interrogation, is not barred and is admissible with or without the giving of Miranda warnings.

"Harris argues that his incriminating statements demonstrate a substantial level of intoxication because no sober person facing criminal liability would make them to law enforcement. But intoxication alone does not preclude a valid waiver. Instead, the test is whether, considering the totality of the circumstances, the mental impairment 'caused the defendant's will to be overborne.'

"The district court found Harris was 'alert, aware of his criminal liability, and appropriately responding to questions' while talking with the officers. It credited the officers' testimony that he 'appeared coherent and did not tell them that he was intoxicated or under the influence of drugs.' His behavior was 'consistent with someone who understood the nature of his crimes,' and he 'did not appear to be intoxicated.' The court also noted that Harris's extensive criminal history—including five arrests and convictions—supported this conclusion.

"The court did not err in finding 'no evidence that Mr. Harris' alleged intoxication caused his will to be overborne.' Harris contends his statement to Officer Pratt about the Kia should have been suppressed because it was made after he invoked his Miranda rights. As the district court recognized, however, invoking the right to remain silent requires a clear, consistent expression of a desire to remain silent. The district court found that 'the record does not reflect that Mr. Harris unequivocally invoked his right to remain silent during his brief conversation with Officer Pratt. To the contrary, Officer Pratt testified that after reading Mr. Harris his rights, Mr. Harris indicated he wanted to talk to him but then kept going back and forth on that issue.' The district court did not err in determining that Harris did not unequivocally invoke his right to remain silent.

"The district court did not err in admitting the incriminating statements."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/04/221210P.pdf

MIRANDA: Totality of the Circumstances; Valid Waiver

United States v. Medearis
CA8, No. 22-1841, 4/24/23

On April 22, 2020, police went to arrest Patrick Medearis for an incident that happened the day before. Medearis fled first on an ATV and then in a car. Once stopped, Medearis was sent to the hospital to receive medical attention. Meanwhile, officers searched Medearis's car, finding guns and ammunition.

Days later, a police officer thought that he saw Medearis's car. When the officer tried to pull him over, Medearis fled again, leading police on a lengthy chase that ended with spike strips.

Medearis was arrested. He waived his Miranda rights, and then made statements about being an addict and touching the guns found in the car after the first chase. A grand jury indicted Medearis for being a prohibited person in possession of a firearm.

Medearis moved to suppress his statements, arguing that his Miranda waiver was invalid. The district court denied the motion. He appeals.

"Before making incriminating statements about drugs and guns, Medearis waived his Miranda rights. He argues that his waiver was invalid because he tested positive for drugs, had a neck wound and expressed discomfort, was in a suicide smock and dealing with serious mental health issues, and was interviewed hours after his arrest late the previous night. We disagree. A valid Miranda waiver must be, under the totality of the circumstances, voluntary, knowing, and intelligent. A voluntary waiver is one that is the product of a free and deliberate choice rather than intimidation, coercion, or deception, while a knowing and intelligent waiver is one that is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

"Here, the totality of the circumstances suggests that Medearis voluntarily, knowingly, and intelligently waived his rights. He was not intimidated, coerced, or deceived. On the contrary, officers ensured Medearis appreciated the rights he was waiving, told him that it was his decision to talk, and advised him that he could end the interview at any time. Medearis also had prior experience with the criminal justice system, supporting the validity of his waiver.

"Medearis's further arguments also don't invalidate his waiver. For example, he said he felt like he was 'breathing out of [a wound on his] neck.' But he also responded, 'let's just talk, let's go,' when an officer asked if he would rather talk later in the day. Medearis had drugs in his system, was dealing with serious mental health issues, and was questioned the morning after his late-night arrest. But his will wasn't overborne by these impairments. Rather, he was lucid and responsive throughout the interview. All things considered, Medearis validly waived his rights, and the district court did not err."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/04/221841P.pdf

SEARCH AND SEIZURE: Abandonment; Denial of Ownership was Clear and Unequivocal

United States v. Porter, CA10, No. 22-1134, 5/2/23

Aaron Lee Porter was identified as a suspect in a July 22, 2020, shooting and a warrant was issued for his arrest. A wanted bulletin contained a physical description, a short account of his criminal history, and information that he was suspected of membership in the Crips gang. Mr. Porter was wanted for attempted murder and believed to be armed and dangerous and in possession of a handgun.

Later that day, detective Jay Lopez found Mr. Porter at the warehouse where he worked. From his vehicle, Detective Lopez saw Mr. Porter walk into the building carrying a dark colored backpack. Detective Lopez then entered the building. Once inside, he confirmed with office manager Scott Williamson that Mr. Porter worked there. Mr. Williamson then called Mr. Porter into his office and Mr. Porter was arrested. Detective Lopez asked Mr. Porter "if there were any personal belongings there at the job site that he wanted to bring with him." Mr. Porter stated that "he didn't have any personal belongings." Detective Lopez then "asked him what about the backpack I watched you walk in with, and he responded he didn't have a backpack."

Detective Lopez then went back into the warehouse and informed Mr. Williamson that Mr. Porter had entered the building carrying a backpack and asked where Mr. Porter kept his belongings. Mr. Williamson escorted Detective Lopez back to Mr. Porter's workstation and after briefly searching the area, saw Mr. Porter's backpack at a nearby workstation about 15 or 20 feet away. Mr. Williamson asked another employee if the backpack belonged to Mr. Porter. Reluctantly, the employee confirmed that it did. After confirming that the bag belonged to no one else, Mr. Williamson urged Detective Lopez to take it with him.

Detective Lopez picked up the backpack and shook it. Although fairly empty, he felt something compact and heavy — it felt like a gun. He then opened it looking for identification which revealed a handgun's grip. At that point, Detective Lopez zipped up the backpack. Officers then applied for a search warrant and pursuant to that warrant discovered a Smith & Wesson .40 caliber handgun.

Aaron Lee Porter entered a conditional plea of guilty to one count of being a felon in possession of a firearm. He reserved the right to appeal the denial of his motion to suppress a firearm found inside of his backpack. On appeal, he argues that the Denver police conducted a warrantless search of his backpack and that the district court erred in finding that he had abandoned the backpack.

Upon appeal, the Tenth Circuit Court of Appeals found as follows:

"Ordinarily the Fourth Amendment requires officers obtain a warrant before searching or seizing private property. *Camara v. Mun. Ct.*, 387 U.S. 523, (1967). The Fourth Amendment's protections do not apply, however, where a defendant has abandoned property prior to a warrantless search. Whether abandonment has occurred is an objective inquiry based in words spoken, acts done, and other objective facts. *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983). Overall, the court considers whether, in the eyes of a reasonable officer, the defendant manifested an intent to disavow ownership of the property.

"Mr. Porter urges us to look at the entire context of his conversation with Detective Lopez. In his view, his response to Detective Lopez's question about whether he had a backpack is qualified by Detective Lopez's initial question if there were any personal belongings there at the job site that he wanted to bring with him. Read in context, Mr. Porter posits, his responses indicating he didn't have any personal belongings and didn't have a backpack, cannot be understood to mean he does not have any backpack at all but rather none that he wanted to take with him to the station. The district court considered this argument at the suppression hearing and was unpersuaded. Rather, the facts suggested that Mr. Porter subjectively intended to disclaim any ownership of the backpack. Likewise, the court found that a reasonable officer would believe Mr. Porter had abandoned the bag.

"The defendant's denial of ownership was clear and unequivocal. It is hard to imagine a statement plainer than 'I don't have a backpack.' The statement is clearer still when viewed in conjunction with the fact that Detective Lopez saw Mr. Porter walk into the job site with a backpack. That ambiguity might be read into a statement does not mean it should.

"Because Mr. Porter abandoned the backpack and thus surrendered an expectation of privacy therein, the subsequent search was reasonable."

READ THE COURT OPINION HERE:
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110853130.pdf

SEARCH AND SEIZURE: Affidavit to Collect DNA Evidence; Probable Cause

State of California v. Lepere
Cal.App.4th, No. G061393, 5/16/23

A 79-year-old woman was raped and murdered in her Anaheim home in 1980. Police booked a rape kit into evidence. In 2002, a forensic scientist was able to extract male DNA from the rape kit. In 2021, police identified Andre William Lepere as a person of interest through DNA "Investigative Genealogy." Lepere was living in New Mexico at that time, but there was evidence he had lived in Anaheim in 1980. Police obtained a search warrant and recovered Lepere's DNA from a trash can next to his home. Lepere's DNA was a match with DNA recovered from the 1980 murder victim.

A jury found Andre William Lepere guilty of the 1980 murder. The trial court imposed a sentence of life without the possibility of parole (LWOP). On appeal, Lepere claims the police officer's affidavit in support of the search warrant lacked probable cause.

Upon Appeal, the Fourth Circuit found as follows:

"In this case, the affidavit in support of the nighttime search warrant is typewritten, single spaced, and about five pages long. It is averred to by Agent Eric Marrujo of the New Mexico State Police. In the first part of the affidavit, Marrujo states the address to be searched, provides a description of the home, and states what evidence is to be collected (discarded items in the trash). Marrujo also gives a brief summary of his education and law enforcement experience. In the probable cause portion of the affidavit, Marrujo states he was assigned to assist Detective Trapp with the 1980 Anaheim homicide investigation. Marrujo then provides a fairly detailed description of the crime scene. Marrujo

summarizes the Orange County Crime Lab's DNA investigation, and the FBI's recent involvement through 'Investigative Genealogy.' The affidavit states: On October 2, 2020,the unknown DNA profile was sent to DNA Solutions to possibly develop a SNP (single nucleotide polymorphism) to assist with the investigative genealogy. On December 21, 2020, Detective Trapp received a report from DNA Solutions. The report stated DNA Solutions had been able to generate a SNP profile and had also been able to produce a SNP profile that was uploadable to a free genealogy website that allows you to upload digitized genetic data.

"On January 29, 2021, FBI Agents Steve Wrathall and Nina Vicencia contacted Detective Trapp to inform her that through genealogy, an investigative lead was generated that identified Andre William Lepere as a person of interest in this case. Detective Trapp conducted numerous computer checks and learned Lepere currently had a home address in Alamogordo, New Mexico.

"Marrujo notes Lepere had been arrested in 1973, and his address at that time was three apartment complexes away from where the 1980 murder had occurred. Marrujo also notes that Lepere's mother had died in a car accident in 1982, and her address was in the same apartment complex where the victim was killed. The affidavit further avers that although Lepere had been previously arrested a few times (including an arrest for attempted murder), his DNA had never been entered into the FBI's Combined DNA Index System (CODIS).

"Marrujo concludes: *Based on the above information and details, Detective Trapp believes Andre Lepere is a suspect in the murder [of the victim] and a DNA sample needs to be collected from [Lepere] to compare his DNA to the profile from the victim's vaginal swabs.*

"Here, the genealogical investigation by the Orange County Crime Lab and the FBI established a possible DNA connection between Lepere and the 1980 murder. Further, there was corroborating evidence that Lepere may have been near the victim's apartment in Anaheim, California, at about the time of the 1980 murder. In short, we find there was a fair probability that a search of Lepere's outside trash can would uncover circumstantial DNA evidence linking Lepere to the commission of the 1980 Anaheim murder. Thus, we hold that the New Mexico magistrate had a reasonable basis for issuing the search warrant, and the trial court properly denied Lepere's pretrial motion to suppress the DNA evidence."

READ THE COURT OPINION HERE:
https://www.courts.ca.gov/opinions/documents/G061393.PDF

SEARCH AND SEIZURE: Exigent Circumstances; Reasonable Suspicion

United States v. Cunningham
CA8, No. 22-1080, 6/13/23

Sylvester Cunningham arrived at the Walmart in a vehicle, traveled from the vehicle to the entrance in his own wheelchair, and then transferred to a motorized cart owned by Walmart for use while shopping. When Cunningham first transferred from his wheelchair to a motorized cart, the cart did not work. A Walmart employee helped Cunningham move to a second motorized cart, which also did not work, and then to a third motorized cart, which functioned properly. Cunningham's personal wheelchair remained near the front of the store, pushed against a wall.

Cunningham moved into the store on the motorized cart, but soon returned to the entrance

looking for his cellular phone. He seemed to have misplaced the phone when switching motorized carts. When he could not find the phone in or around the carts, Cunningham received permission from the Walmart employee to drive the motorized cart to the parking lot so that he could check for the phone in his vehicle.

While Cunningham returned to his vehicle, the Walmart employee suspected that the phone could have slid under the seat cushion in Cunningham's personal wheelchair. She lifted the seat cushion and did not find a phone, but observed a firearm. She notified a Walmart manager, who approached the wheelchair and also saw the gun.

The first Walmart employee notified police officer Matthes who was outside the store and about to begin a shift working in uniform to provide security. The Walmart employee told Matthes that she needed immediate assistance because someone in the store had left a gun in a wheelchair. The employee explained that she found the gun under the seat cushion while helping a customer look for a lost cell phone. The Walmart manager stayed near the wheelchair, presumably to ensure that no patron in the vestibule would encounter the firearm. When Matthes entered the store, the manager pointed down at the wheelchair.

By then, Cunningham had returned to the store and was seated in a motorized shopping cart near the entrance. When Matthes questioned him about a gun, Cunningham admitted the wheelchair was his, but denied having a weapon or placing a weapon in the wheelchair. He also admitted that he did not have a permit to carry a firearm, and that he was on federal "probation" (i.e., supervised release) for a prior firearms offense. Cunningham claimed that when he entered the store, there was no gun in or on the wheelchair. Matthes then lifted the seat cushion in the wheelchair and seized a revolver from the seat area.

Cunningham was allowed to transfer from the motorized cart back to his personal wheelchair, and he then moved to a security office in the store. Officers placed Cunningham under arrest and searched his person incident to arrest. In Cunningham's undergarment, officers found a blue latex glove containing thirteen individually-wrapped bags of cocaine, six containing cocaine base and seven containing powder cocaine.

Cunningham moved to suppress the firearm seized from the wheelchair. The district court ruled that Officer Matthes did not violate Cunningham's rights under the Fourth Amendment by searching the wheelchair and seizing the firearm. The court thus denied the motion to suppress the firearm and rejected Cunningham's claim that later evidence-gathering was the fruit of an unlawful search and seizure.

The case proceeded to trial, and a jury convicted Cunningham on all counts. On appeal Cunningham that the district court erred in denying his motion to suppress evidence.

"The officer's action was permissible under the Fourth Amendment on at least two bases: as an investigative search based on reasonable suspicion of crime and danger, see *Terry v. Ohio*, 392 U.S. 1, 22-24 (1968), and as a search for evidence based on probable cause under exigent circumstances, see *United States v. Antwine*, 873 F.2d 1144, 1147 (8th Cir. 1989). Matthes received reliable information from Walmart employees that a firearm was located in the seat of the wheelchair belonging to Cunningham. Although Cunningham denied that he placed a gun in the

wheelchair, Matthes had substantial reason under the circumstances to disbelieve the denial and to conclude that Cunningham was responsible for effects within the wheelchair that he brought into the store. Cunningham's statements established probable cause that he was not permitted to possess a firearm. Matthes also confronted an exigency with a reported firearm in a public location that was readily accessible to customers moving through the Walmart store. The district court properly denied Cunningham's motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/06/221080P.pdf

SEARCH AND SEIZURE: Facebook as an Agent of the Government

United States v. Sykes
CA6, No. 21-6067, 4/24/23

The National Center for Missing and Exploited Children (NCMEC) forwarded to the Knoxville Police a CyberTip from Facebook reporting that a 43-year-old male appeared to be using Facebook private messages to entice a 15-year-old female (M.D.) to produce and send child-exploitation images and engage in sexual activity. The CyberTip suggested that they had already engaged in sexual activity and included information matching Tywan Sykes.

Tywan Sykes was convicted of a series of offenses related to child pornography and enticement of a minor. On appeal, he argues that the district court erred in denying his motion to suppress evidence seized from his Facebook account. He argues that the NCMEC is a government entity and that Facebook had become an agent of the NCMEC by searching his account and then forwarding messages to the NCMEC. Accordingly, evidence seized as a result of Facebook's search was seized pursuant to government action without a warrant and should be suppressed.

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

"For Facebook's private, warrantless search to be attributed to the government, Facebook must have acted as an agent of the government at the time of the search. Facebook produced a declaration from an employee that stated that Facebook had an independent business purpose for keeping its platform safe and free of child-exploitation content. Facebook's private actions to protect its platform are not attributable to the government. Accordingly, the district court did not err in denying Sykes's motion to suppress evidence retrieved from his Facebook account."

READ THE COURT OPINION HERE:
https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0084p-06.pdf

SEARCH AND SEIZURE: Omitting Information from a Warrant Application

Howe v. Gilpin, CA8, No. 22-1860, 4/20/23

In late 2013, Barbara Whelan, State's Attorney for Walsh County, North Dakota, and agents of the Grand Forks Narcotics Task Force (GFNTF), were preparing to try pending drug charges against Paul Lysengen. Delicia Glaze and Scott Kraft were the lead GFNTF agents, supervised by Steven Gilpin. The charges were based primarily on a May 2013 controlled buy by a confidential informant, EB. Lysengen was represented by attorney Henry Howe. His stepson, Anthony Haase, pleaded guilty in a related case and was incarcerated.

In January 2014, Steven Anderson, facing felony theft charges in Grand Forks County, told Gilpin that EB was in danger. Anderson agreed to act as a GFNTF informant. He attended meetings with Lysengen, Howe, and Wesley Smith and secretly recorded comments that provided probable cause to believe a conspiracy to murder EB was afoot. On January 30, Glaze prepared and submitted a Felony Complaint charging Howe with Criminal Conspiracy to Commit Murder, together with a supporting affidavit. A Walsh County District Judge issued a warrant for Howe's arrest for that offense, commencing the criminal prosecution. Howe was arrested that day at the start of a preliminary hearing in one of Lysengen's criminal cases.

Some months later, prosecutor Whelan dismissed the amended charge against Howe, prior to the preliminary hearing, after learning that Anderson previously made false murder-for-hire allegations to Nebraska and Minnesota law enforcement authorities. Howe then filed this § 1983 lawsuit against Gilpin, Glaze, Kraft, and Whelan. After reciting Anderson's lengthy prior criminal history, Howe alleged two Fourth Amendment violations: (I) the warrant was based upon deliberate falsehood or reckless disregard for the truth -- the use of Anderson to develop and generate false evidence incorporated in Glaze's affidavit; and (ii) defendants deprived Howe of a preliminary hearing at which Howe would have been discharged because the warrant was not supported by probable cause. Howe appeals the grant of summary judgment dismissing these claims.

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

"The affidavit provided probable cause to arrest Howe, even if corrected to include the information Howe alleges was recklessly omitted. Henry H. Howe argues that the defendants, working together as investigators, acted with reckless disregard of the truth by declining to inform the judicial officer who issued the arrest warrant 'of highly material information concerning the credibility and criminal history of sole witness.' This deliberate falsehood issue turns on the mental state of the affiant, Delicia Glaze, an officer with the Grand Forks Narcotics Task Force (GFNTF), not the informant. See *Franks v. Delaware*, 438 U.S. 154 (1978). Howe argues Glaze failed to disclose that the informant has a criminal history establishing that he is a chronic liar, which raises a genuine issue of fact regarding Glaze's reckless disregard for the truth. Reckless disregard may be inferred from the omission of information. However, the party attacking a warrant affidavit "must show that the omitted material would be clearly critical to the finding of probable cause.'

"A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' violates the Fourth Amendment. An official who causes such a deprivation is subject to § 1983 liability." *Bagby v. Brondhaver,* 98 -5- F.3d 1096, 1098 (8th Cir. 1996), quoting *Franks,* 438 U.S. 154, 171 (1978). In rejecting Howe's Fourth Amendment claims, the district court concluded that Howe has alleged no facts, nor does the record support any facts, that amount to a deliberate falsehood by Glaze being the basis for the warrant affidavit.

"Probable cause exists if the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed an offense. The core question in assessing probable cause based upon information supplied by an informant is whether the information is reliable. In a § 1983 case, the

issues are whether the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, and, if deliberate falsehood is alleged, whether the affidavit is truthful, which means that the information put forth is believed or appropriately accepted by the affiant as true. Omissions and falsehoods that are immaterial or not supported by the record do not suffice.
Howe argues Defendants knew the informant had serious credibility issues. Therefore, they had a duty to further investigate his criminal history and to disclose his prior false 'murder-for-hire' plots in two other States. We disagree. Once GFNTF agents established probable cause to arrest Howe, as recited in the Glaze affidavit, they had no constitutional duty to further investigate Anderson's credibility. Officers are not required to conduct a mini-trial before arrest. The agents did not disregard plainly exculpatory evidence. There is no evidence Whelan or any GFNTF investigator knew about the false 'murder-for-hire' allegations when Glaze submitted the warrant affidavit.
An agent does not violate a clearly established constitutional right by omitting information from a warrant application that he does not actually know, even if the reason is his own reckless investigation.

"The judgment of the district court is affirmed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/04/221860P.pdf

SEARCH AND SEIZURE: Probable Cause; Collective Knowledge Rule

United States v. Balser, CA1, No. 21-1813, 6/16/23

This case poses the question of whether and when a police officer, admittedly lacking his own probable cause, may seize and search a car at the direction of another officer. Enter Michael Balser. Following a suspected drug buy, Balser was pulled over by Salem, New Hampshire police officer Stephen DiChiara while driving up I-93, but only after a United States Drug Enforcement Agency (DEA) task force officer asked DiChiara to conduct the stop. DiChiara stopped and then seized the car, and a subsequent search of it uncovered roughly a kilogram of cocaine. From there, Balser was indicted for possession of cocaine with intent to distribute, so he moved to suppress evidence of the drugs, asserting that DiChiara could not act solely on the DEA officer's probable cause. After the district court denied the motion, Balser conditionally pled guilty, reserving his right to appeal the denial.

The Supreme Court affirmed, holding that the directive given to DiChiara was sufficient to attribute the DEA officer's probable cause to DiChiara.

"While reviewing the existence of probable cause, we look to the collective information known to the law enforcement officers participating in the investigation rather than isolate the information known by the individual arresting officer. United *States v. Azor*, 881 F.3d 1, 8 (1st Cir. 2017). This is the so-called collective knowledge doctrine."

READ THE COURT OPINION HERE:
http://media.ca1.uscourts.gov/pdf.opinions/21-1813P-01A.pdf

SEARCH AND SEIZURE: Reasonable Non–Investigatory Seizure

United States v. Conley, CA8, No. 22-2282, 6/6/23

A handgun was found in Dwyan Conley's jacket pocket while he was being treated in a hospital emergency room for a gunshot wound. After the district court denied his motion to suppress, Conley conditionally pleaded guilty to possessing a firearm after having been convicted of a felony. He appealed the district court's denial of his motion to suppress. He argued on appeal that because the Hennepin County Medical Center (HCMC) protection officers' restraint of him in the stabilization room amounted to an unlawful seizure, the handgun found in his jacket pocket must be suppressed under the exclusionary rule.

The Eighth Circuit affirmed. The court reasoned that under the balancing test, "the greater the intrusion on a citizen, the greater the justification required for that intrusion to be reasonable."

"Noninvestigatory seizures are reasonable if they are 'based on specific articulable facts' and the 'governmental interest' in effectuating the seizure in question 'outweighs the individual's interest in being free from arbitrary government interference.' The court explained that here the HCMC protection officers' seizure of Defendant in the stabilization room was objectively reasonable under the circumstances. Further, Conley voluntarily brought himself to HCMC's emergency room to seek treatment for a gunshot wound that medical staff considered potentially life-threatening. Given those circumstances, he should have reasonably expected the sort of intrusions that are inherent to the provision of emergency medical care, including the removal of one's clothes to facilitate treatment and—if compelled by the need to maintain a safe environment—even temporary physical restraint."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/06/222282P.pdf

SEARCH AND SEIZURE: Search Incidental to Arrest

United States v. Salazar, CA7, No. 22-2696, 6/2/23

Arnez Salazar was at a bar in Peoria, Illinois, on January 14, 2022. He posted a video of himself online, which Peoria police officers saw. Knowing Salazar had an active arrest warrant for traffic violations, five officers went to the bar to arrest him. The bar's security cameras and the officers' body-worn cameras captured the events that ensued.

When the officers arrived, Salazar was sitting at the bar with a beer in front of him and a black jacket on the back of his chair. Draped over the back of an empty chair to his left was another jacket with a Purple Heart insignia on its back. The officers approached Salazar and told him that they had a warrant for his arrest. Salazar loudly asked why he was being arrested and who called the police. As he stood between the two chairs, an officer cuffed his hands behind his back.
The officers conducted the search after cuffing Salazar. A second officer asked him if he had anything on him, and Salazar said no. That officer reached into Salazar's pants pockets and found some cash and a piece of paper, which the officer immediately returned. A third officer picked up the Purple Heart jacket from the adjacent chair and searched it. A fourth officer reached into the right pocket of the black jacket hanging on Salazar's chair. Salazar asked why the officers were checking both coats, and the officer who had searched the No. 22-2696 3 Purple Heart jacket asked Salazar if that jacket was his. Salazar said yes. The officer who searched Salazar's pants

pockets asked four times if the black jacket was also his, and Salazar said no each time. During this time, Salazar remained standing between the two chairs, with his back to the chair he had been sitting on and his hands cuffed behind his back. The officers stood in a semicircle around Salazar; no officer stood between him and the chair with the black jacket on it.

Meanwhile, the police found a gun in the black jacket on Salazar's chair. An officer lifted the jacket off the chair, felt a firearm in its left side, and said, "There's a gun in here." Salazar continued denying that the black jacket was his. The officers found a wallet containing Salazar's identification in the outside left jacket pocket and a gun in the inside left pocket, which was not zipped or otherwise secured. One of the officers carried the jacket outside to secure the gun, while other officers led Salazar away. The arrest and search occurred over the course of about three minutes.

The government charged Salazar with possessing a firearm illegally, and he moved to suppress the gun, arguing that the warrantless search of the jacket violated his Fourth Amendment rights. The district court held a hearing at which the court explained that despite being cuffed and surrounded by officers, Salazar was so close to his jacket and "agitated" that it would have been "possible," albeit "very difficult," for him to "have reached that gun." In the alternative, the court held that the search was valid because Salazar had abandoned the jacket and any privacy interest in it by denying that he owned the jacket before an officer searched its left pocket and found the gun. Salazar pleaded guilty, reserving his right to appeal the denial of the motion to suppress.

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

"The Court stated that warrantless searches are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. At issue here is a search incident to a lawful arrest, an exception to the warrant requirement derived from the dual interests in officer safety and evidence preservation. See *Chimel v. California*, 395 U.S. 752, 762–63 (1969). Incident to arrest, officers may search the area from within which the arrestee might gain possession of a weapon or destructible evidence. *Chimel*, 395 U.S. at 763. If an arrestee cannot possibly reach the area an officer wants to search, neither justification for this exception is present, and it does not apply.

"Here, the district court did not clearly err in concluding that Salazar could have gained access to the black jacket. The video evidence confirms that Salazar remained standing, agitated, and adjacent to the jacket. Although five officers surrounded him, no officer stood between him and the jacket. Under those circumstances, and accounting for the fast-paced sequence of events, it was reasonable to think that the jacket posed a threat. Salazar, for example, could have lunged for the jacket, which might have contained (and did contain) a weapon.

"The district court did not clearly err in finding that there was a realistic probability that Salazar could reach the black jacket. Thus, the search was reasonable. Since the search of the jacket was valid as a search incident to a lawful arrest, we need not decide whether Salazar abandoned the jacket."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2023/D06-02/C:22-2696:J:St__Eve:aut:T:fnOp:N:3055266:S:0

SEARCH AND SEIZURE: Tenant Using False Identification has Reasonable Expectation of Privacy in Rented Condo

United States v. Thomas
CA7, No. 21-3169, 4/19/23

Federal officials suspected that Michael Thomas was supplying large quantities of illegal drugs in Indiana. Thomas was wanted by state officials too, and warrants had been issued for his arrest. In order to lie low (and continue trafficking drugs), Thomas obtained several fake ID documents, including one issued by North Carolina under the name "Frieson Dewayne Alredius." Using this identity, Thomas leased a condominium in Atlanta, Georgia. Federal officials tracked Thomas to Atlanta and arrested him outside the condo building. Thomas's landlord told the officers that she had rented the unit to someone she knew as "Alredius Frieson." With the landlord's consent, officers searched the condo, finding drugs, drug paraphernalia, and six cell phones. After obtaining warrants to search the phones, the officers discovered evidence that Thomas was trafficking methamphetamine.

Thomas moved to suppress the evidence obtained from the search of the condo, contending that his landlord could not consent to a search of the property he had leased. The United States conceded that the lease gave Thomas a subjective expectation of privacy in the condo. But it argued that this is not an expectation that society is prepared to accept as reasonable, because Thomas had obtained the lease by deceiving the landlord about his identity, which is a crime in Georgia. The district court agreed and denied Thomas's motion. Thomas later pleaded guilty but reserved the right to appeal the suppression order. The court sentenced Thomas to 180 months' imprisonment.

The Seventh Circuit reversed.

"A tenant lawfully may exclude others, even when the landlord consents to a search. Using an alias to sign a lease does not deprive a tenant of a legitimate expectation of privacy. A Georgia tenant who deceives or even defrauds a landlord is entitled to retain possession of the residence until the landlord has provided notice and obtained a judicial order. Thomas's landlord could not summarily terminate his protections without violating Georgia law, nor could she consent to a warrantless search of his condo. A breach of a rental agreement does not automatically deprive the breaching party of a legitimate expectation of privacy."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2023/D04-19/C:21-3169:J:Easterbrook:aut:T:fnOp:N:3032831:S:0

SEARCH AND SEIZURE: Search Warrant; Informant Information; Verification

United States v. Hicks, CA4, No. 19-4707, 4/5/23

A confidential informant tipped off law enforcement that Kacey Hicks was dealing drugs out of his residence in Henderson, North Carolina. In the span of a week, officers used the informant to make two controlled purchases of crack cocaine from Hicks at his residence. Officers presented the informant with a photo of Hicks following the buys, and the informant confirmed Hicks sold him the crack cocaine. Law enforcement used the two controlled buys, the positive identification, and other information from the informant to obtain a warrant to search Hicks's residence. When officers executed the warrant, they found marijuana, cocaine, cash,

and drug paraphernalia such as digital scales, packaging, and inositol powder (a cutting agent). Officers also found a firearm and ammunition in the residence and two firearms and two spent shell casings in a BMW parked on the property.

A federal grand jury charged Hicks with possessing a firearm and ammunition as a felon and possession with intent to distribute a quantity of cocaine and marijuana. Hicks moved to suppress the evidence from the search, arguing the informant's identification of Hicks from a single photo tainted the search warrant. After a hearing, the district court denied the motion to suppress and Kasey Hicks appeals.

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

"The warrant application contained sufficient information for the magistrate to find probable cause to issue a warrant. The application described how officers received a tip from an informant that Hicks was selling crack cocaine from his residence and that the informant knew of foot and vehicle traffic going to and from the residence. It stated that the informant had provided reliable information in the past that led to the arrest of other individuals involved in the sale of illegal drugs. And it described the informant's two controlled purchases of crack cocaine from Hicks and the procedures officers followed to execute those purchases. Taken together, this information presented 'a fair probability' that officers would find 'contraband or evidence of a crime' at Hicks's residence. The district court correctly determined that, even disregarding the informant's identification of Hicks from the single photo show-up, probable cause supported the search warrant.

"Officers searched the informant for contraband before the buys, provided cash to the informant to make the purchases, watched the informant walk to Hicks's residence, and met the informant at a predetermined location afterward. These procedures sufficed to ensure the reliability of the controlled buys. Similarly, contrary to Hicks's argument, probable cause did not require the officers to test the crack cocaine after the buys to confirm its illicit nature. In the warrant application, the lead officer stated that he had eight years of law enforcement experience, was assigned to investigate 'the possession and sale of illegal controlled substances,' and had received training about controlled substances. The magistrate could reasonably conclude the officer visually identified the substance the informant purchased from Hicks as crack cocaine, even though the warrant application did not say whether the officer tested it."

READ THE COURT OPINION HERE:
https://www.ca4.uscourts.gov/opinions/194707.p.pdf

SEARCH AND SEIZURE: Using a Key Fob to Identify a Vehicle

United States v. Miller, CA7, No. 22-1896, 5/23/23

Officers from the Peoria Police Department responded to the scene of gunfire in the 200 block of East Arcadia Street and found Robert Miller lying on the sidewalk, bleeding from an apparent gunshot wound to his face. He was conscious, however, and able to speak with the officers. As Officer Danny Marx began to render aid, he saw that Miller was holding his cellphone in his left hand and a key fob to a vehicle in his right hand. Officer Marx removed the key fob from Miller's hand, dropped it on the ground, and began assessing Miller's physical condition.

Meanwhile, other officers investigated the surrounding area. A white Mercury sedan was parked about 15 to 20 feet from Miller, the only car on that side of the street for about 100 feet in either direction. The car had multiple bullet holes in the rear driver's side door, so a sergeant instructed officers to check if there was anyone in the car. An officer looked through the windows and announced that there was no one inside. Another officer shined his flashlight through the windshield, saw what he thought was blood on the front passenger seat, and told the other officers that it looked as though Miller had gotten out on the passenger side.

While inspecting the bullet holes in the car door, one of the officers asked if Miller owned the car. Officer Marx, who was still speaking with Miller, picked up the key fob that he had removed from Miller's hand. He clicked a button on the fob, and the Mercury's horn honked several times. Officer Marx said, "Yeah, that's his car." Emergency medical personnel then arrived. An officer asked Miller if all the blood in the car was his; Miller answered that it was. Several minutes later, an officer shined his flashlight through the driver's side window of the sedan and told the others that he could see the sights and barrel of a gun sticking out from under a hat on the front passenger seat. The officers did not enter the passenger compartment of the car at that time. Instead, the car was towed to the police station.

Miller was taken to the hospital where he was treated for gunshot wounds to his face and upper shoulder. A detective interviewed him at the hospital. Miller said that he was using his girlfriend's car, a white Mercury SUV, and that he was shot as he was unlocking the car. A check of a law enforcement database, however, showed that the impounded car was registered to Miller.

The police sought a warrant to search the car. The warrant application listed the vehicle identification number, explained that the car belonged to Miller, and described his statement about the shooting. The application also described the scene, including the bullet holes in the car and numerous spent shell casings found in the street. The affidavit explained that although the vehicle was locked, an officer had looked through a window and noticed blood on the front passenger seat and the rear of a black pistol protruding from under a baseball hat. The application requested a warrant to search the car for evidence, including firearms, bullets, blood, and DNA. There was no mention of a key fob.

A state-court judge approved the warrant, and police searched Miller's car and recovered the gun that was visible through the window. DNA from blood on the gun matched Miller's. He was indicted for possessing a firearm as a felon.

Miller moved to suppress the evidence seized from the car, arguing that it was the fruit of an unlawful search. He contends clicking the key fob qualified as a search within the meaning of the Fourth Amendment; and the search violated Miller's rights because Officer Marx activated the key fob before the officers had any reason to suspect that he had committed a crime, and they saw the gun in the car only after the officer used the fob to connect him to the car.

"This argument doesn't hold up under the weight of the stipulated facts. The officers arrived at the scene of a suspected shooting, found Miller bleeding from an apparent gunshot wound, and saw the Mercury nearby with bullet holes and blood in and around it. All this occurred before Officer Marx pressed the button on Miller's key fob. So before the police connected Miller to the Mercury, they had already identified the car as key evidence in a shooting, giving them ample

probable cause for a warrant. On these facts, it's simply implausible to argue that the officers sought the warrant because of what they learned from the click of the key fob. The car would have been searched regardless of the identity of its owner. And as the government also suggests, it was completely reasonable to assume Miller's connection to the vehicle even before Officer Marx confirmed the point by activating the key fob. The suppression motion was properly denied."

READ THE COURT OPINION HERE:
http://media.ca7.uscourts.gov/cgi-bin/OpinionsWeb/processWebInputExternal.pl?Submit=Display&Path=Y2023/D05-23/C:22-1896:J:Sykes:aut:T:fnOp:N:3050156:S:0

SEARCH AND SEIZURE: Vehicle Inventory; Locked Container

Beckwith v. State of Wyoming
SCW, No. S-22-0277, 2023 WY 39, 4/27/23

Wyoming Highway Trooper Caleb Pushcar was patrolling I-25 near Cheyenne on September 25, 2021, when he stopped a vehicle with a nonfunctional headlamp. Mr. Beckwith was driving and had one passenger who identified himself as Leroy Valdez. While Trooper Pushcar was confirming the identities of the vehicle's occupants and running a check on them, Trooper Joshua Gebauer arrived to assist. Dispatch advised that both men had outstanding arrest warrants, and both were arrested and placed in separate patrol vehicles.

Because both occupants of the vehicle were arrested, and no other drivers were available, the troopers impounded the vehicle. Pursuant to Wyoming Highway Patrol (WHP) Policy and Procedure No. 09-24, troopers are authorized to conduct a vehicle inventory without a warrant or probable cause when a vehicle has been lawfully seized or impounded pursuant to the arrest of the driver. The policy defines the scope of the inventory as follows:

> *The vehicle inventory may extend to all areas of the vehicle in which personal property or hazardous materials may reasonably be found, including but not limited to the passenger compartment, trunk, and glove compartment. The vehicle inventory will also include the inspection of closed and sealed packages or containers.*

In accordance with this policy, Troopers Gebauer and Pushcar performed their inventory search of the vehicle. Trooper Gebauer began the inventory in the driver's area. In the center console he observed "a bunch" of small clear plastic bags, one of which contained remnants of a crystalline substance. Trooper Pushcar then found "a little metallic lockbox" on the floorboard toward the back of the driver's seat and handed it to Trooper Gebauer. Because the box was locked, Trooper Gebauer used "a small hammer" and "a mini pry bar" to pop it open. Inside the box, they found several clear baggies with suspected methamphetamine and heroin, cash, a meth pipe, and a small scale. The suspected methamphetamine weighed 29.5 grams, and the suspected heroin weighed 0.6 grams.

The State charged Mr. Beckwith with felony possession of methamphetamine and misdemeanor possession of heroin. Mr. Beckwith filed a motion to suppress the evidence obtained from the locked box. He contended that opening the box exceeded the scope of a permissible inventory search under the WHP policy and therefore violated his Fourth Amendment rights. The district court denied his motion. s. Mr. Beckwith appealed.

The Wyoming Supreme Court found as follows:

"The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Under the Fourth Amendment, warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement. Vehicle inventories are a recognized exception.

"The inventory exception allows police officers to inventory the contents of a vehicle in the possession of law enforcement if the inventory is conducted pursuant to standardized police procedure. Probable cause is unnecessary to conduct an inventory, but the inventory cannot be a bad faith pretext for general investigatory rummaging. Rather than being investigative, a vehicle inventory serves three administrative purposes:

- It protects the vehicle itself from theft or vandalism,

- It protects the police and the towing company from danger, and

- It protects the police and towing company from claims or disputes over property claimed to have been lost or stolen after law enforcement took control of the vehicle.

"Consonant with the Fourth Amendment, the opening of closed containers during an inventory search is permissible if conducted in good faith, pursuant to a standardized police policy, and as long as the search is not a ruse for general rummaging for evidence of a crime. *Johnson*, 2006 WY 79 (citing *Colorado v. Bertine*, 479 U.S. 367 (1987). Mr. Beckwith does not claim Troopers Gebauer and Pushcar acted in bad faith or that their inventory search was a ruse for general rummaging for evidence of a crime. He claims only that the WHP inventory policy did not authorize the troopers to open locked containers, and the opening of the locked box therefore ran afoul of the Fourth Amendment.

"The WHP inventory policy specifies that the vehicle inventory will also include the inspection of closed and sealed packages or containers. These terms are broad enough to include locked containers without the policy using that precise language. See, e.g., *United States v. Morris*, 915 F.3d 552, 556-57 (8th Cir. 2019) (policy requiring inventory of entire vehicle broad enough to include opening of containers); *United States v. Matthews*, 591 F.3d 230, 237 (4th Cir. 2009) (policy requiring "complete inventory" sufficient to include closed containers); *United States v. Wallace*, 102 F.3d 346, 349 (8th Cir. 1996) (policy requiring inventory of contents of vehicle and any containers therein broad enough to encompass locked trunks).

"Finally, we reject Mr. Beckwith's argument that interpreting WHP's policy to allow troopers to open locked containers is nonsensical because it allows them to destroy the property the inventory is intended to protect. Excessive or unnecessary destruction of property can render police conduct unreasonable under the Fourth Amendment. The record contains no evidence, however, that Trooper Gebauer destroyed or even damaged the locked box when he pried it open, and Mr. Beckwith directs us to no such evidence."

READ THE COURT OPINION HERE:
https://documents.courts.state.wy.us/Opinions/Beckwith.S-22-0227.pdf

SEARCH AND SEIZURE: Vehicle Stop; Collective Knowledge of Law Enforcement; Reasonable Suspicion; Delay; Dog Sniff

United States v. Rederick, CA8, No. 22-1787, 4/20/23

Larry D. Rederick moved to suppress evidence from a traffic stop, claiming that the officers unconstitutionally delayed it to conduct a drug-dog search and that the dog's alert did not provide probable cause to search. The district court denied the motion and Rederick appeals.

In May 2019, an Agent with the South Dakota Division of Criminal Investigation began investigating Rederick for suspected drug activity. The Agent learned Rederick had sold meth. As part of the investigation, police monitored his cell phone location. On January 9, 2020, according to his cell phone, Rederick was driving to Nebraska to visit a person police knew was involved with the sale of narcotics. As Rederick returned to South Dakota, the Agent called Highway Troopers Eric Peterson and Cody Jansen, summarizing the investigation and requesting they stop Rederick. The Agent told the Troopers to try to establish independent probable cause for the stop, but if not, to stop Rederick to investigate the drug activity.

Rederick was driving a pickup truck pulling a trailer transporting a sedan. Trooper Peterson began following Rederick. The Trooper noticed the trailer did not have a light illuminating the rear license plate, a violation of S.D.C.L. § 32-17-11. He pulled Rederick over. Trooper Peterson then spent 16 minutes writing a warning ticket for the traffic violation. Within the first 12 minutes, he asked Trooper Jansen to bring the drug-dog unit to the scene. Twenty-two minutes into the stop, Trooper Jansen and his dog, Rex, arrived. Twenty-seven minutes into the stop, the dog alerted to the presence of a narcotic at both doors of the pickup and at the back of the sedan. Searching the vehicles, the Troopers found meth in the trunk of the sedan.

The Eighth Circuit Court of Appeals found as follows:

"The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *United States v. Arvizu*, 534 U.S. 266, 273 (2002), citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Under the Fourth Amendment, a traffic stop is reasonable if it is supported by either probable cause or an articulable and reasonable suspicion that a traffic violation has occurred. Probable cause exists when a reasonable officer, confronted with the facts known to the officer at the time of the stop, could have believed that there was a fair probability that a violation of law had occurred. To determine whether reasonable suspicion exists, courts must look 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.

"The Troopers here had two lawful bases to stop Rederick. They had probable cause to stop him for the traffic violation. See *United States v. Sallis*, 507 F.3d 646, 649 (8th Cir. 2007) ('An officer has probable cause to conduct a traffic stop when he observes even a minor traffic violation.') The Troopers' motivation for the stop is irrelevant. See *Whren v. United States*, 517 U.S. 806, 813 (1996) ('We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved'), citing *United States v. Robinson*, 414 U.S. 218, 221 n. 1 (1973) (ruling that a traffic violation arrest was not rendered

invalid by the fact it was 'mere pretext for a narcotics search.'); *United States v. Fuehrer*, 844 F.3d 767, 772 (8th Cir. 2016) (ruling that the officer's observation of the traffic violation gave him probable cause to stop the vehicle, and his subjective intent to detain the vehicle for a dog sniff search is irrelevant).

"The Troopers also had reasonable suspicion to stop Rederick from the collective knowledge of the Agent's investigation. The collective knowledge of law enforcement officers conducting an investigation is sufficient to provide reasonable suspicion, and the collective knowledge can be imputed to the individual officer who initiated the traffic stop when there is some communication between the officers. *United States v. Thompson*, 533 F.3d 964, 969 (8th Cir. 2008). The Agent communicated the facts from his investigation to Trooper Peterson, who then stopped Rederick. See *United States v. Jacobsen*, 391 F.3d 904, 907 (8th Cir. 2004) ('The patrol officer himself need not know the specific facts that caused the stop, the officer need only rely upon an order that is founded on reasonable suspicion.'). See also *United States v. Williams*, 429 F.3d 767, 771-72 (8th Cir. 2005) (finding that the collective knowledge doctrine allowed the knowledge from the Drug Enforcement Agency's surveillance team to be imputed to the officer who received a radio request to stop the vehicle).

"Rederick argues that the Troopers illegally delayed the traffic stop in order to conduct a drug-dog search. A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. *Rodriguez v. United States*, 575 U.S. 348, 350 (2015). The Fourth Amendment requires that a search not continue longer than necessary to effectuate the purposes of an investigative stop. Whether the duration of the stop is reasonable is determined by the seizure's mission, and law enforcement must be reasonably diligent' in carrying out that mission. In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. An investigative stop must cease once reasonable suspicion or probable cause dissipates.

"Rederick emphasizes the Rodriguez case. An officer there stopped a driver based solely on a traffic violation. Seven or eight minutes passed between the officer's issuing the ticket and the dog's alerting to the presence of drugs. The Supreme Court granted certiorari to determine whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. The Rodriguez decision held that a seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. Because the officers in Rodriguez did not have reasonable suspicion of drug-related activity before the stop, the dog sniff was not fairly characterized as part of the officer's traffic mission.

Unlike in Rodriguez, the Troopers not only saw a traffic violation, but also had reasonable suspicion that Rederick was involved in drug-related activity. The Troopers testified that the purpose for stopping Rederick was to assist with the Agent's investigation, not for a traffic violation. The drug-dog search was, therefore, part of the Trooper's mission for conducting the traffic stop. Cf. *United States v. Tuton*, 893 F.3d 562, 568 (8th Cir. 2018) (A seizure justified only by a police observed

traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation.).

"Addressing the suspicion of drug activity requires time. In *United States v. Magallon*, 984 F.3d at 1279 police handcuffed a passenger in a locked patrol car for over an hour while questioning the driver about suspected drug activity. This court held that the police did not unreasonably delay the passenger's stop because the mission of the stop was to investigate the GMC Sierra and its passengers' involvement with drug trafficking and because reasonable suspicion of drug-related activity existed throughout the stop. Similarly, in *United States v. Murillo-Salgado*, a 23-minute stop—beginning as a traffic stop but evolving into an investigatory stop—was not an unconstitutional delay because the officer developed reasonable suspicion of drug-related activity during the routine traffic-stop tasks. *United States v. Murillo-Salgado*, 854 F.3d 407, 416 (8th Cir. 2017). The Troopers here had reasonable suspicion before stopping Rederick, which existed throughout the stop. Compared to the hour-long delay in Magallon, here only 27 minutes passed from the stop until the dog's alert. This delay did not violate the Fourth Amendment because the Troopers acted diligently to pursue the mission of the stop: to assist with the investigation of Rederick's drug-related activity.

"Rederick argues that the drug dog was unreliable, and therefore its alert did not provide probable cause to search the vehicles.

"An alert or indication by a properly trained and reliable drug dog provides probable cause for the arrest and search of a person or for the search of a vehicle. *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010). See *United States v. Jackson*, 811 F.3d 1049, 1052 (8th Cir. 2016) (concluding that the positive alert by a reliable dog alone established probable cause). A drug detection dog is considered reliable when it has been trained and certified to detect drugs. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. *Florida v. Harris*, 568 U.S. 237, 246-47 (2013). Even if a drug dog's 'performance record raises questions about his reliability, the issue is whether the totality of the circumstances present at the scene' provided probable cause to search. *Winters*, 600 F.3d at 968 (finding probable cause from the drug dog's alert and the officer's observation of the driver's body tremor, dilated pupils, and strong 'chemical' odor), citing *United States v. Donnelly,* 475 F.3d 946, 955 (8th Cir. 2007). Contrary evidence that may detract from the reliability of the dog's performance properly goes to the credibility of the dog, a finding we review for clear error, citing *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994). The sufficiency of a drug dog's alert must be construed with the same flexible, common-sense standard as probable cause. See *Jackson*, 811 F.3d at 1052 (ruling that the dog's alert provided probable cause to search the defendant's aircraft even though it was the dog's first field operation).

"The district court did not clearly err in concluding that by the totality of circumstances, Rex was reliable and the alert provided probable cause to search. The district court properly denied the motion to suppress."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/04/221787P.pdf

SEARCH AND SEIZURE: Vehicle Stop; Insurance Status of Unconfirmed as Basis for Stop

Erby v. State, ACA, No. CR-22-473, 2023 Ark. App. 220, 4/12/23

On December 15, 2020, Trooper Zach Guest of the Arkansas State Police pulled over a white Chrysler 300 for alleged traffic violations. Trooper Guest testified that, while on patrol, he ran the tags of the vehicle, and the Arkansas Crime Information Center/National Crime Information Center (ACIC/NCIC) online insurance-verification database reported that the system was unable to verify insurance for the vehicle, and the car's insurance status came back as "unconfirmed." Trooper Guest proceeded to pull over the vehicle.

Trooper Guest stated that while he spoke with the occupants, he could smell a strong odor of marijuana coming from the vehicle. Both occupants, Wynton Erby and the driver, Breagan Butler, were asked for identification. Erby did not have an ID; he was asked to exit the vehicle and was patted down by Trooper Guest. A firearm—a Glock—was discovered between Erby's legs. Upon questioning, Erby admitted that he is a felon. He was then placed in custody.

Evidence discovered during the traffic-violation investigation led the State to charge Erby with possession of a firearm by certain persons. On April 7, 2021, Erby filed a motion to suppress the evidence seized during the traffic stop, arguing that Trooper Guest lacked the requisite probable cause of a traffic violation being committed to have initiated the stop. Erby asserted that the ACIC/NCIC system returning an insurance status of "unconfirmed" was insufficient to provide probable cause. He additionally argued that the ACIC/NCIC database was not reasonably reliable to form the basis for probable cause. The circuit court held a hearing on the suppression motion on February 16, 2022, and subsequently denied Erby's motion.

Erby entered a conditional plea of guilty pursuant to Arkansas Rule of Criminal Procedure 24.3(b), reserving the right to appeal the denial of his suppression motion. In denying Erby's motion to suppress, the circuit court found that whenever an officer runs somebody through ACIC/NCIC, and it pops up that the license is not valid or can't be confirmed, or the insurance can't be confirmed; that would be sufficient for the officer to at least inquire as to the validity and the presence of the insurance." The circuit court further noted,

> *According to the testimony I've been given, it says here "the insurance was unconfirmed and please rely on insurance information provided by the driver." Well, the only way you ever get to relying on the insurance information provided by the driver, is to stop the driver and inquire. So the Court is going to find that the officer acted in good faith whenever he made the stop.*

On appeal, Erby argues that Trooper Guest lacked probable cause to initiate a traffic stop that was based on an "unconfirmed" insurance status in the ACIC/NCIC database.

Upon review, the Arkansas Court of Appeals found as follows:

"A police officer may stop and detain a motorist when the officer has probable cause to believe that a traffic violation has occurred. Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. In assessing the existence of probable cause, our review is liberal rather than strict. The relevant inquiry is whether the officer

had probable cause to believe that the defendant was committing a traffic offense at the time of the initial stop. Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation that the officer believed to have occurred.

"Arkansas Code Annotated section 27-22-104(a)(1)(b)[10] provides that it is unlawful for a person to operate a motor vehicle within this state unless the motor vehicle and the person's operation of the motor vehicle are each covered by an insurance policy issued by an insurance company authorized to do business in this state. Section 27-22-104(a)(2)(A)(ii) provides that there is a rebuttable presumption that the motor vehicle or its operation is uninsured if the online insurance-verification system fails to show current insurance coverage for the driver or the insured.

"Erby's sole argument on appeal has already been addressed by our court. In *Small v. State*, 2018 Ark. App. 80, this court affirmed the denial of a motion to suppress when the officer initiated a traffic stop after he ran the defendant's tags and discovered that the defendant's insurance had been canceled. We expressly held that the lack of insurance information in the database was sufficient to provide the officer with probable cause to believe that a traffic violation had occurred. Likewise, in *Cagle v. State*, 2019 Ark. App. 69, pursuant to *Small,* the circuit court held that the lack of insurance information in the database was sufficient to provide the officer with probable cause to believe that a traffic violation had occurred. On appeal, we held that the circuit court's reliance on this fact to deny Cagle's motion to suppress is affirmed.

"Erby attempts to distinguish his case from the above-cited precedent; however, we are unpersuaded. We find no merit in his contention that while a 'canceled' status provides probable cause, a returned status of 'unconfirmed' does "not rise to the level of probable cause. Arkansas Code Annotated section 27-22-104(a)(2)(A)(ii) states that a car or driver is presumed to be uninsured if the online-verification system fails to show current insurance coverage. Despite Erby's argument, both 'unconfirmed' and 'canceled' fail to provide proof of current insurance coverage. Therefore, we find no merit to his argument and affirm the denial of his suppression motion."

READ THE COURT OPINION HERE:
https://opinions.arcourts.gov/ark/courtofappeals/en/item/521841/index.do?q=erby

SEARCH AND SEIZURE: Reasonable Suspicion of Drug Activity

United States v. Pounds, CA8, No. 22-2112, 6/15/23

The disputed traffic stop arose from surveillance that police officers conducted at the residence of Robin and Lanny Vensand in Sioux Falls. A confidential informant notified a detective in May 2020 that Robin Vensand was selling methamphetamine from the home. Another source reported in the same month that Lanny Vensand was selling large amounts of meth from his home. Records showed that an informant told police in 2016 that the Vensands were making and selling meth from their home.

Surveillance at the Vensand residence in May and June 2020 showed a significant amount of short-term traffic of the sort that experienced officers knew was typical for a location where drugs are sold. Between June 4 and June 15, officers stopped three vehicles shortly after they departed the residence. On each occasion, the police seized drugs from someone in the vehicle. On June 24, officers stopped a fourth vehicle and seized drugs

after observing a person switch into that car shortly after he departed the residence. Other informants advised police between June and early August 2020 that the Vensands were large suppliers of meth from whom the informants had purchased drugs.

In mid-August 2020, detectives learned from an informant that a large shipment of meth would be delivered to Sioux Falls during the weekend of August 22-23, 2020. Video surveillance of the Vensand residence showed a significant increase in traffic on the evening of August 22. On Monday, August 24, police discovered four pounds of methamphetamine in the home of a suspected associate of the Vensands. The associate told police that he had received the meth from a supplier, who had in turn received the drugs from Lanny Vensand. Video surveillance from the evening of August 22 confirmed that the associate's supplier entered the Vensand residence and left with a large duffel bag.

The incident involving Pounds occurred on the evening of August 24. At approximately 10:00 p.m., a detective saw a red car pull into the driveway of the Vensand residence. The vehicles usually driven by the Vensands were present at the time, suggesting that the Vensands were at home. The driver of the red car, later identified as Elizabeth Pounds, got out of the vehicle and entered the residence. Approximately six minutes later, Pounds emerged from the residence, reentered the vehicle, and drove away.

Surveillance officers followed Pounds, and a patrol officer stopped her vehicle at 10:35 p.m. based on instructions communicated by radio from the detective. A state trooper deployed a canine to sniff the exterior of the vehicle, and the dog alerted for the presence of narcotics. Officers then searched the car and found a total of 220 grams of meth in small packages.

Pounds entered a conditional guilty plea to a charge of possessing meth with intent to distribute it. In the district court, Pounds moved to suppress evidence seized during a traffic stop of a vehicle that she was driving. The district court denied the motion, and Pounds reserved the right to appeal that ruling.

The Eighth Circuit Court of Appeals concluded there was no error in denying the motion to suppress:

"A law enforcement officer may conduct an investigative stop of a vehicle when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity. *United States v. Cortez*, 449 U.S. 411, (1981). We consider the totality of the circumstances to determine whether an officer has a particularized and objective basis to suspect wrongdoing. *United States v. Arvizu*, 534 U.S. 266, (2002). Officers may 'draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them.' Given that the seizing officer received instructions to stop Pounds's vehicle from a member of the law enforcement team that was investigating drug activity associated with the Vensand residence, we consider the information known collectively by the officers at the time of the stop. See *United States v. Mosley*, 878 F.3d 246, (8th Cir. 2017).

Applying those standards here, we conclude that the seizing officer had reasonable suspicion to stop Pounds as she drove away from the Vensand residence on August 24. Officers had abundant reason to believe, based on informant reports and surveillance, that the Vensands were distributing methamphetamine from their residence. Police seized drugs from four short-term visitors who were stopped shortly after leaving the residence in June. As of August 24, investigators had reliable

information that the Vensands were distributing a shipment of methamphetamine that arrived two days earlier, including a quantity that was seized from a downstream customer that very morning. Surveillance showed increased traffic at the residence, consistent with drug sales, beginning on the evening of August 22.

"On August 24, a detective saw Pounds enter the Vensand residence at 10:00 p.m. and depart six minutes later. Although Pounds was previously unknown to investigators, her short-term visit to the suspected drug house conformed to the pattern of the drug trade and gave police reasonable suspicion to believe that she was carrying drugs as she departed. See *United States v. Collins*, 883 F.3d 1029, (8th Cir. 2018); *United States v. Buchannon*, 878 F2d 1065, (8th Cir. 1989). Pounds relies on *United States v. Crawford,* 891 F.2d 680 (8th Cir. 1989), where police lacked reasonable suspicion to stop a person at an apartment complex, because they did not see the defendant enter any particular apartment or do anything that might have linked him to a drug dealer who lived in the complex. But here, the suspicion was particularized and objective, because Pounds made a short visit to a single-family residence that officers reasonably suspected as a site of ongoing drug distribution.

"Police had a reasonable, articulable suspicion that Pounds was involved in criminal activity as she departed the residence, so the traffic stop was permissible under the Fourth Amendment. The district court did not err in denying the motion to suppress. The judgment of the district court is affirmed."

READ THE COURT OPINION HERE:
https://ecf.ca8.uscourts.gov/opndir/23/06/222112P.pdf

SEARCH AND SEIZURE: Warrantless Entry into a Home; Exigent Circumstances

State of Iowa v. Torres, SCI, No.20-1549, 4/7/23

The Supreme Court of Iowa determined whether police needed a warrant to enter a home to assist (and protect) a social worker investigating child endangerment. The defendant, Santos Torres, was drinking at a local establishment when a phone call from his wife prompted him to rush home. She had been arrested for child endangerment and was handcuffed in a squad car when he arrived. Officers suspected he was intoxicated and knew he was agitated. They followed him inside where a lone social worker was interviewing three young children. He was arrested for operating a motor vehicle while intoxicated, second offense; harassment of a public official; and interference with official acts.

Torres moved to suppress evidence on the grounds that the police violated his rights under the Fourth Amendment and Iowa Constitution by seizing him and entering the home without a warrant. The district court denied his motion and he was convicted in a trial on the minutes of testimony. He now appeals.

The Iowa Supreme Court determined that the police did not seize Torres before he entered the home and their warrantless entry was justified to protect and assist the social worker under the exigent circumstances. They affirmed the denial of his motion to suppress and his conviction.

READ THE COURT OPINION HERE:
https://www.iowacourts.gov/courtcases/14647/embed/SupremeCourtOpinion

SUBSTANTIVE LAW: Evidence of the Fair Market Value of an Item

State of California v. Potillo, CalApp2nd, No. B315241, 5/15/23

Jose Portillo appealed from judgments of conviction entered after a jury found them him guilty of one count of grand theft. He contends there was insufficient evidence to support their convictions because the evidence failed to establish the value of the stolen items—15 boxes of adjustable dumbbells—exceeded $950. The only evidence of the dumbbells' value was the testimony of the manager of the warehouse facility where the theft occurred, who testified to the prices listed on three retailers' websites.

The court concluded that evidence of a retail price for a stolen item, whether based on an online listing or a brick-and-mortar store price tag, is admissible for the nonhearsay purpose of showing that a retailer is advertising the item for a specified price in the marketplace. This price, in turn, is circumstantial evidence of the fair market value of the item as the highest price obtainable in the marketplace between a willing buyer and a willing seller.

READ THE COURT OPINION HERE:
https://cases.justia.com/california/court-of-appeal/2023-b315241.pdf?ts=1684184817