

# Recent Case Report

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## People v. Tully

(2012) 54 Cal.4th 952

### Issues

(1) Was a traffic stop unduly prolonged? (2) Did an officer exceed the permissible scope of a consent search? (3) Did officers violate *Miranda* in obtaining statements from the suspect that later linked him to a murder?

### Facts

Late one night, a man broke into the home of Sandy Olsson on Hollyhock Street in Livermore, then raped and murdered her. He also stole her purse. Later that day, officers found the purse and the murder weapon—a Buck 110 knife—on a nearby golf course. There were two identifiable prints on the knife. While interviewing neighbors, officers spoke with a man who lived two doors down from Olsson’s home. He said that Richard Tully occasionally stayed with him and that Tully had purchased a Buck 110 knife about ten months earlier. Investigators sent the prints from the murder weapon to the Department of Justice (DOJ) in Sacramento and requested a comparison with the prints of several suspects, including Tully. The result was negative and the investigation stalled.

About a year later, Livermore officer Scott Trudeau happened to be conducting surveillance on the house of a suspected drug dealer when he saw Tully drive up, enter the house, then leave about 25 minutes later. Trudeau decided to conduct a traffic stop after learning that Tully’s driver’s license had been suspended. While Trudeau was writing a ticket, backup officer Tim Painter spoke with Tully. Painter was aware that Tully was a drug user, that he “liked to use a knife,” and that he was a suspect in a recent vandalism incident resulting from a drug deal “gone sour.” Painter informed Tully that he knew he was using drugs and that he was often armed with a knife. He then asked Tully if he could search him. Tully said OK and Painter found a bundle of methamphetamine in a coin pocket.

After Tully was arrested on the drug charge and transported to the police station, Trudeau *Mirandized* him but Tully invoked his right to remain silent. A few minutes later, however, he spontaneously said that he didn’t want to go to jail and indicated he might be interested in becoming an informant. Trudeau then phoned a narcotics officer and asked him to come to the station to discuss the matter. While they waited, Trudeau and Tully engaged in some small talk during which Tully spontaneously said that he supported his meth habit by burglarizing houses and cars, and that he had been treated for stomach problems at the local Veterans Administration (VA) hospital. After Tully spoke with the narcotics officer, he was released.

A few days later, Trudeau drove to Tully’s house on Hollyhock Street to return his driver’s license. As he pulled up, four things occurred to him: (1) Tully’s house was located just two houses away from Sandy Olsson’s home, (2) Tully had mentioned he was treated at the local VA hospital, (3) Sandy Olsson had been a nurse at that hospital, and (4) an FBI profile suggested that the murderer probably lived near Olsson’s home and was likely a drug user. Trudeau immediately contacted the lead investigator on the case, Sgt. Scott Robertson, and suggested that he ask DOJ reexamine Tully’s prints. Robertson

agreed and hand-delivered the fingerprint card to Sacramento. This time there was a match. (The court explained that the reason the initial comparison did not yield a match was that the analyst “had looked only at the right middle finger for each print card; the match that was eventually made was to defendant’s right ring finger.”)

Based on this evidence, Sgt. Robertson arrested Tully and took him to the police station for questioning. As the interview progressed and as Tully continued to deny any involvement in the crime, Robertson asked if he would be willing to take a polygraph test. Tully responded that “it would behoove me to consult a lawyer . . . [b]efore submitting to any questions I wouldn’t want to answer,” adding that he did not know how polygraph machines worked “so that’s why I’d like to talk to somebody who does.” The interview was then terminated and the tape recorder was turned off. But a few minutes later the tape recorder was turned back on with Sgt. Robertson saying “[w]hen we last left this tape, we were talking about polygraph and you mentioned talking to a lawyer. Do you want a lawyer now?” Tully said no. Nothing of interest occurred during the subsequent interview. Tully remained in jail.

Two days later, Tully’s wife notified Sgt. Robertson that Tully told her that he had been present when the murder occurred, but that the killer was a Hells Angel known as “Doubting Thomas.” Robertson then confronted Tully with this information, at which point Tully admitted that he had gone to Sandy Olsson’s house with “Doubting Thomas” but that Thomas” had killed her. Tully did, however, confess that he had raped her.

Tully’s statements and the fingerprint evidence were admitted against him at trial. He was convicted and sentenced to death.

## **Discussion**

The main issues on appeal were whether the trial court erred in refusing to suppress the evidence of the following: the fingerprint match, Tully’s admission that he was present when the murder occurred, and his confession that he had raped Sandy Olsson. Because everything flowed from the traffic stop, that is where the analysis starts.

### **The traffic stop**

Tully contended that the fingerprint match should have been suppressed because the decision to resubmit his prints to DOJ for a comparison with the prints on the knife was the fruit of an illegal traffic stop. Specifically, he argued that the stop had been unduly prolonged when Officer Painter questioned him about an unrelated subject; i.e., the vandalism report. If so, it would have meant that Tully’s consent to search would have been given during an illegal detention in which case the drugs in his coin pocket might have been suppressed along with everything that flowed from the arrest. This could have included the fingerprint match because the decision to resubmit the prints resulted mainly from Tully’s post-arrest admission that he supported his drug habit by burglarizing houses and that he was an outpatient at the VA hospital. And if the car stop and arrest were unlawful, Tully’s subsequent admission that he was present when the murder occurred and his confession that he had raped Sandy Olsson might also have been suppressed.

Apart from the fact that the link between the fingerprint examination and Officer Painter’s questioning about the vandalism was tenuous (See “Comment,” below), the United States Supreme Court has ruled that officers are not prohibited from questioning traffic violators about subjects unrelated to the traffic violation if (1) the questioning did not “measurably extend” the duration of the stop; and (2) there was some legitimate

reason to ask the questions, which essentially means that the officers were not on a fishing expedition.<sup>1</sup> Not only did Painter's questioning not measurably extend the stop, the court ruled it did not extend it at all, since it occurred while Officer Trudeau was writing the traffic citation. Consequently, the court ruled that the evidence resulting from the traffic stop was obtained lawfully and, therefore, Sgt. Robertson's decision to resubmit the fingerprint evidence was not the fruit of an illegal detention.

### **The consent search**

Tully argued that even if the traffic stop was lawful, the decision to resubmit his prints was the fruit of an illegal consent search. Specifically, he argued that he had consented only to a search for weapons, and because it was unlikely that a weapon would have been found in his coin pocket, Painter's search exceeded the scope of the consent and was therefore unlawful. It follows, said Tully, that because his arrest was the fruit of an illegal search, and because his arrest resulted in his admissions that he was a burglar and drug user which, in turn, resulted in the Sgt. Robertson's decision to resubmit his fingerprints to DOJ, the fingerprint match was the fruit of the illegal search and should have been suppressed.

The court pointed out, however, that in determining the permissible scope of a consent search the courts apply a "reasonable officer" test; i.e., officers may search any place or thing they reasonably believed the consenting person had authorized them to search.<sup>2</sup> Although Painter did not expressly seek consent to search for weapons as well as drugs, the court ruled that he obtained implied consent to search for both. As the court explained, "Painter testified that he told defendant about his information that defendant used drugs and carried a knife. When he asked defendant if he could search him, defendant said, 'Sure, I don't have anything on me.'" It therefore appeared that Tully "understood Painter was asking to search for both drugs and weapons," which meant the search of the coin pocket was lawful because it could have held drugs.

### **Miranda**

Tully contended that his incriminating statements should have been suppressed because they were obtained in violation of *Miranda*. He also argued that the fingerprint match should have been suppressed because his first incriminating statement helped trigger the decision to resubmit his prints for examination.

**FIRST STATEMENT:** As noted, after Tully invoked his right to remain silent at the police station, he said he was interested in becoming an informant. So, while Tully and Trudeau waited for a narcotics officer to arrive, they had a short conversation, during which Tully spontaneously admitted that he supported his meth habit by burglarizing houses and cars, and that he had been treated for stomach problems at the local VA hospital. Because this information was obtained after he invoked, Tully contended it was obtained in violation of *Miranda*. The court ruled, however, there was no *Miranda* violation because

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<sup>1</sup> See *Arizona v. Johnson* (2009) 555 U.S. 323, 325 ["An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."].

<sup>2</sup> See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 ["The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"].

“it was defendant who reinitiated the conversation of his own volition after Trudeau had acceded to his initial invocation of his right to remain silent.”

**SECOND STATEMENT:** Finally, Tully argued that his admission that he was present at the murder scene and his confession that he had raped Sandy Olsson should have been suppressed because he had previously invoked his *Miranda* right to counsel when, after Sgt. Robertson asked if he would be willing to take a polygraph test, he replied “it would behoove me to consult a lawyer” and that, because he didn’t know how polygraphs worked, “I’d like to talk to somebody who does.”

In the past the courts would sometimes rule that an invocation occurred if the suspect expressed any reluctance to discuss his case “freely and completely.” Now, however, the courts recognize that a suspect’s act of placing limits or conditions on an interview demonstrates a willingness to speak with officers if they agree to his conditions.<sup>3</sup>

Consequently, the court ruled that Tully’s comments about an attorney demonstrated only an intent to not undergo a polygraph test without one, not that he wanted to have an attorney present during further questioning. “The context in which defendant referred to an attorney,” said the court, “was not a request for counsel for purpose of the interrogation then occurring, but an indication that, if required to submit to a polygraph test, he would first want to consult with a lawyer.”

For these reasons the court ruled that Tully’s statements and the fingerprint match were obtained lawfully, and it affirmed Tully’s conviction and death sentence.

### **Comment**

Even if the officers’ decision to resubmit Tully’s prints to DOJ had been a direct result of an illegal traffic stop and illegal consent search, it is possible that the subsequent fingerprint match would not have been suppressed. This is because it is settled that if an officer’s misconduct merely provided officers with an impetus to investigate a certain person, the subsequent investigation will not be deemed the fruit of the violation. As the court explained in *People v. Thomason*, “[W]here illegal police conduct merely suggests that a particular person should be investigated, a legally conducted investigation is then undertaken and, in the course thereof, probable cause to make an arrest or secure a search warrant is obtained through the independent acts of the suspect and others, the taint is dissipated.”<sup>4</sup> POV

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<sup>3</sup> See *Michigan v. Mosley* (1975) 423 US 96, 103-4 [“Through the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person’s exercise of that option counteracts the coercive pressures of the custodial setting.”]; *People v. Johnson* (1993) 6 Cal.4th 1, 25-26 [a suspect does not automatically invoke his rights “by imposing conditions governing the conduct of the interview”].

<sup>4</sup> (1980) 112 Cal.App.3d 980, 986. ALSO SEE *U.S. v. Smith* (9th Cir. 1998) 155 F.3d 1051, 1061 [“[U]nder Ninth Circuit precedent, the baseline inquiry in evaluating taint is not whether an unlawful search was the impetus’ for the investigation or whether there exists an unbroken “causal chain” between the search and the incriminating evidence; rather, courts must determine whether anything seized illegally, or any leads gained from illegal activity, tended significantly to direct the investigation toward the specific evidence sought to be suppressed.”]