POINT of VIEW

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Investigative Contacts

Street encounters between citizens and police officers are incredibly rich in diversity.[1]

There are probably no encounters on the streets (or anywhere else) that are more "rich in diversity" than those daily exchanges between officers and the public. After all, they run the gamut from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men involving arrests, or injuries, or loss of life."[2]

Situated between these two extremes is a type of police encounter commonly known as an investigative contact or "consensual encounter." Simply put, a contact occurs when officers who lack grounds to detain a suspect attempt to confirm or dispel their suspicions by asking him some questions, and maybe seeking consent to search him or his possessions. As the Supreme Court explained, "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means."[3]

One of the peculiar things about contacts is that they usually pose a dilemma for both the suspect and the officer. For the suspect (assuming he's guilty of something), the last person on earth he wants to chat with is someone who carries handcuffs. But he also knows that his refusal to cooperate, or maybe even hesitation, might be interpreted as an admission of guilt. So, he will ordinarily play along for a while and see how things go, maybe try to outwit the officer or at least make up a story that is not an obvious crock.

Meanwhile, the officer knows that, while his badge might provide some "psychological inducement,"[4] he cannot "throw his weight around."[5] So, he must employ restraint and resourcefulness, all the while keeping in mind that the encounter will instantly become a de facto detention if it crosses the line between voluntariness and compulsion.

Another peculiarity of contacts is that both the officer and the suspect are playing roles—and they both know it. But, for officers, acting skills and resourcefulness are not enough. As one court put it, they must also have been "carefully schooled" in certain legal rules so as to prevent contacts from inadvertently becoming illegal de facto detentions, at least until they develop reasonable suspicion or probable cause. The purpose of this article is to explain these rules.

Before going further, it should be noted that whenever officers interact with anyone in their official capacity, the law will classify that interaction as an arrest, a detention, or a contact. Arrests and detentions are Fourth Amendment "seizures," which means they are subject to several restrictions; e.g., officers must have probable cause or reasonable suspicion.

Contacts, on the other hand, are not seizures so long as they remain consensual.[6] And it's the job of officers to make sure that happens, at least until they develop grounds to detain.[7] So we will start by discussing the circumstances that are relevant in determining whether an encounter was consensual at the outset, and whether it later became an illegal seizure.[8]

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[1] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[2] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[3] *United States v. Drayton* (2002) 536 U.S. 194, 200.
[4] *U.S. v. Ayon-Mesa* (9th Cir. 1999) 177 F.3d 1130, 1133.
[5] *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425.
[6] See *People v. Rivera* (2007) 41 Cal.4th 304, 309 [contacts "require no articulable suspicion"].
[7] See *Florida v. Bostick* (1991) 501 U.S. 429, 437; *Illinois v. Wardlow* (2000) 528 U.S. 119, 125 [the suspect "has a right to ignore the police and go about his business."].
[8] Note: We covered the subject of grounds to detain in the Spring-Summer 2020 edition.

One other thing. Officers will sometimes contact suspects at their homes. These are known as "knock and talks," and they are subject to the same rules as contacts that occur in public places. But because the courts view them as more intrusive, there are some additional restrictions. We covered these restrictions in the article "Knock and Talks" in the Spring-Summer 2020 edition.

Principles of Contacts

A police-suspect encounter will be deemed a contact if a reasonable person in the suspect's position would have "felt free to decline the officers' requests or otherwise terminate the encounter."[9] To put it another way, "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required."[10] Later in this article we will discuss the circumstances that are relevant in determining what a "reasonable person" would have believed. But first, it is necessary to discuss the basics.

REASONABLE "INNOCENT" PERSON: One of the most important things to remember about the fictitious "reasonable" suspect is that he is *innocent* of the crime under investigation.[11] Said the Third Circuit, "What a guilty [suspect] would feel and how he would react are irrelevant to our analysis because the reasonable person test presupposes an *innocent* person."[12] This is significant because a person who was guilty of the crime under investigation might reasonably view the officers' words and actions much more ominously than an innocent person, and might erroneously conclude that any perceived restriction on his freedom was an indication that he had been detained.

SHOULD VS. MUST: The test is whether a reasonable person would have believed he *must* stay or was otherwise *required* to cooperate with officers. A detention does not result merely because a reasonable person would have believed that he *should* do so, or because the officer's request made him uncomfortable. As the Court of Appeal observed, "Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street but this does not, by itself, mean that they do not have a right to leave if they so desire."[13] For example, in *In re Kemonte H.* the court ruled that an innocent person who saw two officers approaching him "would not have felt restrained" but would "only conclude that the officers wanted to talk to him."[14]

OBJECTIVE VS. SUBJECTIVE CIRCUMSTANCES: In applying the "free to terminate" test, the courts will consider only those circumstances that the suspect would have seen or heard. Thus, the officer's thoughts, beliefs, suspicions, and plans are irrelevant unless they were somehow communicated to the suspect. For example, an encounter will not be deemed a detention merely because the suspect testified that, based on his prior experiences with officers, he thought he would be arrested if he did not comply with the officer's requests.[15]

TOTALITY OF CIRCUMSTANCES: In applying the "free to terminate" test, the courts will consider the "totality of the circumstances."[16] Although there are some actions that will automatically convert the encounter into a seizure (e.g., commands, handcuffing), in most cases it takes a "collective show of authority."[17] As the California Supreme Court explained, "This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation."[18]

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[9] *Florida v. Bostick* (1991) 501 U.S. 429, 438.
[10] *Florida v. Bostick* (1991) 501 U.S. 429, 434.
[11] See *United States v. Drayton* (2002) 536 U.S. 194, 202; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1373.
[12] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 953. Also see *United States v. Drayton* (2002) 536 U.S. 194, 202.
[13] *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512. Also see *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216.
[14] (1990) 223 Cal.App.3d 1507, 1512.
[15] See *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124.
[16] See *Florida v. Bostick* (1991) 501 U.S. 529, 539.
[17] *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.
[18] *In re Manuel G.* (1997) 16 Cal.4th 805, 821.

COMPARE MIRANDA: Do not confuse the "free to terminate" test with the test utilized in *Miranda* to determine whether a suspect was "in custody." Although both tests attempt to gauge the coercive pressures that existed during police-suspect encounters, suspects will be deemed "in custody" for *Miranda* purposes only if they reasonably believed they were *under arrest.*[19] Thus, detainees may be "in custody" for Fourth Amendment purposes even though they knew they had not been arrested.

COMPARE STREET REALITY: It must be acknowledged that many of the things that officers may say and do without converting a contact into a detention would probably send the message that the suspect was not free to terminate the encounter. In fact, one court described the idea that a contacted suspect would ever feel perfectly free to walk away as "the greatest legal fiction of the late 20th century."[20]

Other courts, however, understand that the "free to terminate" test is simply a practical—albeit imperfect—compromise between competing interests.[21] As the Fourth Circuit put it, if a suspect decided to walk away, it "may have created an awkward situation," but "awkwardness alone does not invoke the protections of the Fourth Amendment."[22] Similarly, the Ninth Circuit observed that "we must recognize that there is an element of psychological inducement when a representative of the police initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop."[23]

Engaging the Suspect

The success or failure of an attempt to contact a suspect often depends on the manner in which the officers were able to get the suspect to stop and talk with them. This is because the usual methods of stopping suspects constitute such an assertion of police authority that their use will automatically result in a seizure.

COMMANDS TO STOP: A command to stop—whether express or implied—will automatically result in a seizure if the suspect complied. As the Court of Appeal explained, "[W]hen an officer 'commands' a citizen to stop, this constitutes a detention because the citizen is no longer free to leave."[24] Examples of commands include "Come over here. I want to talk to you,"[25] "Sit on the curb,"[26] "Step away from your car,"[27] and "Get off your bicycle, lay it down, and step away from it."[28]

While a mere *request* to stop and talk will not result in a detention, a command will be implied if the officer's words "constituted a show of authority such that [the suspect] reasonably might believe he had to comply, then the encounter was transformed into a detention."[29] For example, in *U.S. v Buchanon*,[30] a state trooper who had stopped to assist the occupants of a disabled vehicle suspected that they might be transporting drugs. So he said, "Gentlemen, why don't you all come over here on the grass a second if you would, please." Although the trooper's words were phrased as a request, the court listened to a recording of the incident and concluded that his tone of voice was "one of command."

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[19] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 434; *People v. Leonard* (2007) 40 Cal.4th 1370, 1401.
[20] *People v. Spicer* (1984) 157 Cal.App.3d 213, 218. Also see *People v. Lopez* (1989) 212 Cal.App.3d 289, 291 ["Of course, in theory the citizen can refuse and simply walk away. Whether this is an accurate assessment of street reality is not for us to decide."]; *People v. Linn* (2015) 241 Cal.App.4th 46, 68, fn.10.
[21] See *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133; *U.S. v. Dortch* (8th Cir. 2017) 868 F.3d 674, 677.
[22] *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 302, 311.
[23] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133.
[24] *People v. Verin* (1990) 220 Cal.App.3d 551, 556. Also see *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[25] *People v. Roth* (1990) 219 Cal.App.3d 211, 215.
[26] *People v. Cartwright* (1992) 72 Cal.App.4th 1362, 1371.
[27] See *U.S. v. Buchanon* (6th Cir. 1995) 72 F.2d 1217, 1225. Paraphrased.
[28] *People v. Foranyic* (1998) 64 Cal.App.4th 186. Paraphrased. Also see *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 411.
[29] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. Also see *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[30] (6th Cir. 1995) 72 F.3d 1217, 1220, fn.2.

Emergency lights: Shining emergency lights at a moving or parked vehicle is essentially a command to stop and will result in a detention if the driver stops.[31] As the Court of Appeal observed:

> A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer.[32]

Or, as the Supreme Court put it:

> Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.[33]

A detention will also result if the vehicle was parked and occupied.[34]

A detention will not, however, result if it appeared that the lights were directed at another vehicle or person, or if the apparent objective was to clear traffic.[35] As the court put it in *Lawrence v. U.S.*, "A pedestrian who notices a patrol wagon's emergency equipment ordinarily is not likely to know that an officer is signaling for a stop until the officer communicates in a more direct manner to the pedestrian the officer's intention to stop the pedestrian."[36]

Spotlights, high beams: It seems to be the general rule that a seizure will not result merely because officers utilized a white spotlight or high beams to illuminate the suspect or his vehicle.[37] Although a person who is illuminated by white lights might conclude that he is "the object of official scrutiny,"[38] a detention will not result so long as the apparent objective of the officers was to illuminate the area for officer-safety. As the Eighth Circuit explained in *U.S. v. Mabery*, "the act of shining a spotlight on Mabery's vehicle from the street was certainly no more intrusive (and arguably less so) than knocking on the vehicle's window."[39]

For example, in *People v. Perez*[40] a San Jose police officer on patrol spotted two men in a car that was parked in an unlit section in the parking lot of a motel that was known for drug dealing. As the officer stopped behind the car, he turned on his high beams and a white spotlight to "get a better look at the occupants." He subsequently arrested the driver, Perez, for being under the influence of PCP. Perez argued that the spotlight and high beams would have caused a reasonable person to believe he was being detained, the court rejected the argument, saying:

> While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount of a detention.

Similarly, in *People v. Franklin*[41] an officer on patrol in a high crime area spotlighted Franklin as he was walking on the sidewalk. He did this because it was a warm night and Franklin was wearing a full-length camouflage jacket. As the officer was talking to Franklin, he saw blood on his hands, and this ultimately led to his arrest for a murder that had just occurred in a nearby motel room. In rejecting the argument that the officer's action resulted in a detention, the court said "the spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."

[31] See *Brower v. County of Inyo* (1989) 489 U.S. 593, 597; *People v. Ellis* (1993) 14 Cal.App.4th 1198, 1202, fn.3.
[32] *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-6. Compare *U.S. v. Summers* (9th Cir. 2001) 268 F.3d 683, 687.
[33] *Berkemer v. McCarty* (1984) 468 U.S. 420, 436.
[34] See *People v. Brown* (2015) 61 Cal.4th 968, 978; *People v. Steele* (2016) 246 Cal.App.4th 1110.
[35] See *Brendlin v. California* (2007) 551 U.S. 249, 254; *People v. Brown* (2015) 61 Cal.4th 968, 980.
[36] (D.C. App. 1986) 509 A.2d 614, 616, fn.2
[37] *People v. Franklin* (1987) 192 Cal.App.3d 935, 940; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave."].
[38] *People v. Perez* (1989) 211 Cal.App.3d 1492, 1496 ["While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention."];
[39] (8th Cir. 2012) 686 F.3d 591, 597.
[40] (1989) 211 Cal.App.3d 1492, 1496.
[41] (1987) 192 Cal.App.3d 935.

BLOCKING THE SUSPECT'S PATH: A detention will result if officers blocked the suspect's path and it reasonably appeared that their purpose was to prevent him from leaving.[42] For example, in *People v. Wilkins*[43] a San Jose police officer was driving through the parking lot of a convenience store when he saw that two men in a parked station wagon had slid down in the seat as if to conceal themselves. Having decided to contact them, the officer "parked diagonally" behind the vehicle, effectively blocking it in. During the subsequent encounter, the officer learned that the driver was on searchable probation, and this led to the seizure of drugs. But the court ruled that the evidence should have been suppressed because the officer had parked "in such a way that the exit of the parked station wagon was prevented."

In some cases, the courts have ruled that a detention did not result if the officers' car merely impeded the suspect's ability to leave. For example, in *People v. Perez* the court ruled that the defendant was not detained since "the officer parked his patrol vehicle in front of defendant's vehicle and left room for defendant's car to leave."[44] And in *U.S. v. Basher* the Ninth Circuit ruled that, although the officer testified that he "parked his vehicle nose-to-nose with Basher's truck," this did not result in a detention because the officer testified that "there was room to drive away."[45]

URGENT INTEREST: A seizure may result if officers approached the suspect or his vehicle in a manner that demonstrated an urgent interest in him. For example, in *People v. Jones*[46] an Oakland police officer decided to contact Jones and two other men who were standing on a street corner. The court described the manner in which the officer rolled up: "[He] pulled his patrol car to the wrong side of the road and parked diagonally against traffic about 10 feet behind the group." The officer then addressed the men, saying something like, "Stop. Would you please stop," at which point he saw a baggie containing cocaine in Jones's pocket. In ruling that Jones was illegally seized, the court noted that the officer "arrived suddenly and parked his car in such a way as to obstruct traffic."

In another Oakland case, *In re Kemonte H,*.[47] two officers saw Kemonte leaning into a car in a neighborhood where drugs were commonly sold. Suspecting a sale, they "pulled the [patrol] car over, stopped the car approximately 15 to 20 feet away from Kemonte and walked toward him at a 'semi-quick' pace." In ruling that the officers' actions did not result in a detention, the court said that a reasonable person "would not have felt restrained by two police officers approaching him on a public street," and that a reasonable person "could only conclude that the officers wanted to talk to him."

SURROUNDING THE SUSPECT: A detention might also result if there were multiple officers on the scene, and they effectively surrounded the suspect. This subject is covered in the section on officer-safety measures.

"YOU'RE FREE TO LEAVE": It is significant that officers told the suspect that he was free to leave.[48] Although such notification is not required,[49] it is recommended, especially in close cases.[50] Also note that any qualification on the suspect's freedom to leave or to otherwise terminate the encounter will likely result in a detention; e.g., "You can leave after you answer some questions."[51] Finally, a "free to go" advisory is virtually irrelevant if officers conducted themselves in a manner that reasonably indicated that the suspect was not, in fact, free to leave; e.g.,

[42] See *U.S. v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1387; *U.S. v. Delaney* (D.C. Cir. 2020) __ F.3d __ [2020 WL 1897221].
[43] (1986) 186 Cal.App.3d 804.
[44] (1989) 211 Cal.App.3d 1492, 1946. Also see *U.S. v. $25,000* (9th Cir. 1988) 853 F.2d 1501, 1504-4.
[45] (9th Cir. 2011) 629 F.3d 1161, 1167.
[46] (1991) 228 Cal.App.3d 519, 523.
[47] (1990) 223 Cal.App.3d 1507.
[48] See *Florida v. Royer* (1983) 460 U.S. 491, 504; *People v. Profit* (1986) 183 Cal.App.3d 849.
[49] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40.
[50] See *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 496.
[51] See *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537; *U.S. v. Ramos*, (8th Cir. 1994) 42 F.3d 1160, 1162.

the officer used a "commanding tone of voice,"[52] the officer kept "leaning over and resting his arms on the driver's door."[53]

Officer–Safety Measures

A suspect who is being contacted may, of course, pose a threat to officers. This can create a problem because many officer-safety precautions send the message that the suspect is being detained. For example—and not surprisingly—the courts have ruled that a seizure will result if officers drew their weapons on the suspect,[54] handcuffed him,[55] or conducted a nonconsensual pat search.[56] Still, some precautions are permitted because they are relatively nonintrusive.

Backup officers: The number of backup officers, their proximity to the suspect, and the manner in which they arrived and conducted themselves are all relevant.[57] For example, in *U.S. v. Washington* the court ruled that the defendant was seized mainly because he was "confronted" by six officers who were "around him."[58]

Similarly, in *U.S. v. Buchanon*[59] the court ruled the defendant was detained because, among other things, "The number of officers that arrived [three], the swiftness with which they arrived, and the manner in which they arrived (all with pursuit lights flashing)." In contrast, the court have ruled that a detention did not result merely because backup officers were "posted in the background,"[60] were "out of sight,"[61] were "four to five feet away,"[62] or were "little more than passive observers."[63]

Remove hands from pockets: As noted, a detention will not result if officers simply requested that the suspect remove his hands from his pockets or keep them in sight. As the Ninth Circuit observed, "Police officers routinely ask individuals to keep their hands in sight for officer protection, and here the request "does not appear to have been made in a threatening manner."[64] Again, it is important that the officer requested—and did not command—the suspect to remove his hands. As the Court of Appeal explained, "[I]f the manner in which the request was made constituted a show of authority such that appellant reasonably might believe he had to comply, then the encounter was transformed into a detention."[65] For example in *U.S. v. Jones* the court ruled that a detention resulted when the officers "quickly approached Jones and nearly immediately asked first that he lift his shirt and then that he consent to a pat down."[66]

Warrant checks: Running a warrant check without the suspect's consent will not automatically result in a detention,[67] but it can be problematic

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[52] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814. Also see *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537, 541-42 [seizure resulted when, after the officer returned the suspect's driver's license the suspect asked, "That's it?" and the officer replied, "No, wait a minute."].

[53] *U.S. v. McSwain* (10th Cir. 1994) 29 F.3d 558, 563.

[54] See *In re Manual G.* (1997) 16 Cal.4th 805, 821; *People v. Gallant* (1990) 225 Cal.App.3d 200, 207.

[55] See *People v. Zamudio* (2008) 43 Cal.4th 327, 342.

[56] See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240, fn. 3; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238.

[57] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [the "presence of several officers" is a factor]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [suspect "was confronted by six officers" who were "around" him].

[58] (9th Cir. 2004) 387 F.3d 1060, 1068.

[59] (6th Cir. 1995) 72 F.3d 1217, 1224.

[60] *U.S. v. Kim* (9th Cir. 1994) 25 F.3d 1426, 1432, fn.3.

[61] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 954.

[62] *U.S. v. $25,000* (9th Cir. 1988) 853 F.2d 1501, 1504-1505.

[63] *U.S. v. White* (8th Cir. 1996) 81 F.3d 775, 779.

[64] *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1167.

[65] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941.

[66] (4th Cir. 2012) 678 F.3d 293, 305.

[67] See *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1286; *People v. Bennett* (1998) 68 Cal.App.4th 396, 402; *People v. Terrell* (1999) 69 Cal.App.4th 1246; *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 302, 310.

because it takes time to get the information—and as time progresses, the suspect might reasonably believe he was not free to leave. As noted, a detention may also result if officers, without consent, took the suspect's ID to a patrol car to run the check.[68]

Requesting ID

Before attempting to confirm or dispel their suspicions, officers will usually ask the suspect to identify himself, preferably with a driver's license or other official document. Like a request to stop, a request for ID will not convert a contact into a detention. As the Supreme Court explained, "[N]o seizure occurs when officers ask to examine the individual's identification—so long as the officers do not convey the message that compliance with their requests is required."[69]

The tricky thing about requesting ID is that a detention might result if officers retained the ID for an unreasonable amount of time after they had reviewed it. This is because the officer's act of holding on to the ID could reasonably be interpreted as an indication that he was not free to leave. Said the Ninth Circuit:

> When a law enforcement official retains control of a person's identification papers, such as vehicle registration documents or a driver's license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart.[70]

For example, the courts have ruled that a detention resulted when an officer held on to the ID while he conducted a consent search, or when the officer pinned the ID to his uniform.[71] Although one court ruled that a detention might result if an officer took the ID while he walked back to his patrol car to run a records check, the Fourth Circuit ruled in *U.S. v. Analla* that the officer "necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher."[72]

Conducting the Investigation

After engaging the suspect, taking appropriate safety measures, and obtaining the suspect's ID, officers will ordinarily begin their investigation by asking questions, seeking consent to search, and/or completing a field contact card. In this section, we will discuss how the courts determine whether the officers' actions in this phase would have caused a reasonable person in the suspect's position to believe he was no longer free to terminate the contact.

Questioning the suspect

In most cases, officers who have contacted a suspect will attempt to confirm or dispel their suspicions by asking questions. As the court observed in *People v Manis*, "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on–the–scene questioning."[73] While questioning will not per se convert a contact into a seizure, it can be problematic if the suspect gives answers that are vague, nonresponsive, or unintelligible. That is because such questioning may be lengthy and the officers' manner may become so aggressive or accusatory that the suspect no longer feels free to terminate the encounter.[74]

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[68] See *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1306, 1315 ["Mr. Jones was seized once the officers took Mr. Jones's license and proceeded to conduct a records check based upon it."].
[69] *Florida v. Bostick* (1991) 501 U.S. 429, 437. Edited. Also see *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85 ["It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary."].
[70] *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
[71] *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538
[72] *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124.
[73] (1969) 268 Cal.App.2d 653, 665.
[74] See *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174 ["Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one."].

INVESTIGATIVE VS. ACCUSATORY QUESTIONING: The courts distinguish between two types of questioning: investigative and accusatory. While investigative questions are not likely to result in a detention, accusatory questioning can do so—instantly. As the Court of Appeal observed,

> [Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention. The degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention.[75]

For example, in *Florida v. Royer*[76] the Supreme Court ruled that a contact in an airport became an illegal detention mainly because "the officers informed [the suspect] they were narcotics agents and had reason to believe that he was carrying illegal drugs." Similarly, in *Wilson v. Superior Court* the California Supreme Court ruled that "an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."[77]

In contrast, "investigative" questions are worded so as to convey the idea that officers are merely exploring the possibility that the suspect might have committed a crime. While such questioning is "potentially incriminating," it is also potentially exonerating.[78] Thus, in *People v. Lopez* the court noted that, while the officer's questions "did indicate [he] suspected defendant of something," and that his questions were "not the stuff of usual conversation among adult strangers," his tone was apparently "no different from those presumably gentlemanly qualities he displayed on the witness box."[80]

MIRANDA: Officers should never *Mirandize* a person whom they have contacted. This is because *Miranda* warnings are commonly given to people who have been arrested. Thus, a person who is told that anything he says may be used against him is unlikely to think he is free to leave. In addition, as noted earlier, a *Miranda* warning is superfluous because it is required only if the suspect reasonably believed he was under arrest.

MOOD OF THE ENCOUNTER: The manner in which the officers addressed the suspect and responded to his questions and statements is pivotal because these are circumstances that the suspect would necessarily perceive as indicating the nature of the encounter.

For example, in *U.S. v. Kim*,[81] a DEA agent approached two suspected drug traffickers on an Amtrak train and said, "You guys don't have drugs in your luggage today, do you?" One of the men, Kim, then consented to a search of his luggage which contained methamphetamine. In rejecting Kim's argument that the agent's question reasonably indicated that he was not free to terminate the encounter, the court noted that "[t]he tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry."

In other cases, the courts have noted the following as indications that an encounter remained consensual: the officers "spoke in a polite, conversational tone,"[82] they were "restrained,"[83] they "were non-

[75] *People v. Lopez* (1989) 212 Cal.App.3d 289, 293. Edited.
[76] (1983) 460 U.S. 491, 502.
[77] (1983) 34 Cal.3d 777, 790.
[78] See *Florida v. Bostick* (1991) 501 U.S. 429, 439 [a seizure does not result merely because officers ask "potentially incriminating questions."].
[79] (3rd Cir. 1994) 27 F.3d 947, 953. Also see *People v. Boyde* (1988) 46 Cal.3d 212, 239 [the officer's "role in eliciting the story was responsive rather than aggressive"].
[80] (1989) 212 Cal.App.3d 289, 293. Also see *People v. Zamudio* (2008) 43 Cal.4th 327, 344 ["no accusations were made against defendant" but the officers "told defendant about the discrepancies between his statements and his wife's].
[81] (3rd Cir. 1994) 27 F.3d 947, 953.
[82] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[83] *Fare v. Michael C.* (1979) 442 U.S. 707, 727.

threatening in their appearance and demeanor,"[84] they "posed their questions in a calm, deliberate manner," and their voices were "very quiet and subdued."[85]

In contrast is the case of *People v. Spicer*.[86] Here, officers stopped a car driven by Mr. Spicer because it appeared that he was under the influence of something. While one officer was conducting the field sobriety tests, another officer walked over to his passenger, Ms. Spicer, and asked her to produce her driver's license. Although he merely wanted to make sure that he could release the car to her, he did not explain this. While Ms. Spicer was looking through her purse, the officer saw a gun and arrested her. But the court ruled the gun was seized illegally, mainly because the officer's blunt attitude had effectively converted the encounter into a de facto detention. Said the court, "Had the officer made his purpose known to Ms. Spicer, it would have substantially lessened the probability his conduct could reasonably have appeared to her to be coercive."

Persistent questioning: Suspects who have agreed to answer an officer's questions will often give answers that are nonresponsive, unintelligible, vague, or simply bewildering. This is sometimes a ploy by which the suspect tries to appear cooperative while providing officers with as little information as possible. When this happens, officers must necessarily be persistent. Although the persistence of an officer's questioning may, at some point, indicate that the suspect is not free to leave, that will not ordinarily happen so long as the suspect was not pressured and freely responded.

For example, in *U.S. v. Sullivan*[87] a U.S. Parks police officer contacted Sullivan and asked if he had "anything illegal" in his vehicle. Sullivan hesitated, then asked "illegal?" The officer repeated the question but, instead of answering it, Sullivan "turned his head forward and looked straight ahead." The officer persisted, telling Sullivan that if he had anything illegal in the vehicle, "it's better to tell me now." Still no response. Eventually, Sullivan admitted that he had a gun in the vehicle, and this led to his conviction for possession of a firearm by a convicted felon. In rejecting Sullivan's argument that the officer's persistent questioning had converted the contact into an illegal seizure, the court said, "[T]he repetition of questions, interspersed with coaxing, was prompted solely because Sullivan had not responded. They encouraged an answer, but did not demand one."

In contrast, in *Morgan v. Woessner*[88] the court ruled that baseball star Joe Morgan was unlawfully seized at Los Angeles International Airport when an LAPD narcotics officer continued to question him after Morgan "indicated in no uncertain terms that he did not want to be bothered." Said the court, "We find that Morgan's unequivocal expression of his desire to be left alone demonstrates that the exchange between Morgan and [the officer] was not consensual."

Warrant checks

Running a warrant check without the suspect's consent will not automatically result in a detention because the law presumes that contacted suspects are not wanted for anything. But warrant checks can be problematic because it takes time to get the information—and during this time the suspect might reasonably believe that he is not free to leave. For example, a detention will likely result if officers, without the suspect's consent, took his ID to a patrol car to run the warrant check. As the California Supreme Court explained, "[C]ommencing a warrant check does not constitute a seizure per se but

[84] *U.S. v. Flowers* (4th Cir. 1990) 912 F.2d 707, 711.
[85] *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618.
[86] (1984) 157 Cal.App.3d 213. Also see *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111-12 ["rather than engage in a conversation, [the officer] immediately and pointedly inquired about defendant's legal status as he quickly approached"].
[87] (4th Cir. 1998) 138 F.3d 126, 133-34. Also see *INS v. Delgado* (1984) 466 US 210, 216-17 [a seizure results "if the person refuses to answer and the police [persist]"].
[88] (9th Cir. 1993) 997 F.2d 1244, 1253.

detaining a person without cause until a warrant check is completed is illegal."[89] For example, in *U.S. v. Jones* the court ruled that Jones was illegally detained when "the officers took [his] license and proceeded to conduct a records check."

In contrast, the court in *U.S. v. Analla* ruled that a detention did not result when the officer, instead of taking the suspect's license to his patrol car, "stood beside the car, near where Analla was standing."[90] Consequently, if officers want to run a warrant check, they should ordinarily seek the suspect's consent to do so. Note that the same rules would seemingly apply if officers held onto the suspect's ID to complete a field contact card.

Seeking consent to search

Like any other request, a request to search will not convert a contact into a seizure unless the officers pressured the suspect into consenting.[91] As the Tenth Circuit observed, "But consent is valid only if it is freely and voluntarily given."[92]

Consent to transport

In some cases, officers will seek the suspect's consent to accompany them to some location such as a police station (e.g., for questioning, fingerprinting, or a lineup) or to the crime scene (e.g., for a showup). Again, such a request will not convert the encounter into a detention so long as the officers made it clear that the suspect was free to decline.[93] Also, if a contacted suspect was voluntarily transported somewhere, the courts often note whether he was seated behind the cage.[94] But such a circumstance would probably be virtually irrelevant if officers explained to the suspect the reason for doing so; e.g., it is required per departmental policy.

Detentions into Contacts

In the course of a detention, officers may conclude that, although they still have their suspicions, they no long have grounds to hold him. At that point, the detention must, of course, be terminated. Nevertheless, they may be able to continue to question him if they can convert the detention into a contact. To make this happen, officers must make it clear to the suspect that he is now free to go by doing three things:

(1) **Return ID**: If officers obtained the suspect's ID or any other property from him, they must return it.[95]

(2) **"You're free to go"**: While not technically a requirement,[96] officers should inform the suspect that he is now free to leave.[97]

(3) **No contrary circumstances**: There must not have been other circumstances that, despite the "free to go" advisory, would have reasonably indicated to the suspect that he was, in fact, not free to leave." For example, in *U.S. v. Beck*[98] the court ruled that a suspect was detained because, although he was told he was free to go, he was also told he could not leave unless he consented to a search. POV

[89] *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1286. Also see *Barber v. Superior Court* (1973) 30 Cal.App.3d 326, 330
[90] (4th Cir. 1992) 975 F.2d 119.
[91] See *Florida v. Bostick* (1991) 501 U.S. 429, 437 ["request consent to search his or her luggage [does not convert a contact into a detention] so long as the officers do not convey a message that compliance with their requests is required"]; *Florida v. Royer* (1983) 460 U.S. 491, 497; *U.S. v. Dilly* (5th Cir. 2007) 480 F.3d 747, 749 ["Once the government has demonstrated consent, the next issue is whether it was voluntary."]; *U.S. v. Wilson* (4th Cir. 1991) 953 F.2d 116, 122.
[92] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814. Also see *Florida v. Royer* (1983) 460 U.S. 491 504.
[93] See *United States v. Mendenhall* (1980) 446 U.S. 544, 557-58 ["[Respondent] was not told that she had to go to the [police] office, but was simply asked if she would accompany the officers."]; *P v. Zamudio* (2008) 43 C4 327, 344 [there was "no command associated with the officers' request that defendant come to the police station"].
[94] See *People v. Zamudio* (2008) 43 Cal.4th 327, 342; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128.
[95] See *Florida v. Royer* (1983) 460 U.S. 491 504; *U.S. v. Latorre* (10th Cir. 2018) 893 F.3d 744, 751.
[96] See *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[97] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 436; *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254.
[98] (8th Cir. 1998) 140 F.3d 1129, 1136-37.

Protective Sweeps

Protective sweeps are a necessary fact of life in the violent society in which our law enforcement officers must perform the duties of their office.[1]

While the objective of most police searches is to discover evidence of a crime, there is a separate category of search known as the "protective search." These are searches that are conducted for the sole purpose of protecting officers from harm.

The most common protective search is the pat search whose objective is to discover and remove weapons in the possession of detainees and arrestees. Protective vehicle searches are another type, but they are conducted for the purpose of locating weapons inside stopped vehicles. The third protective search is a search incident to arrest which is a search for weapons within grabbing distance of a person who had just been arrested. These three types of protective searches have one thing in common: they are all searches for *weapons*.

The fourth type of protective search—the "protective sweep"—is different because it is a search for *people.* Specifically, it is a search for people who (1) are inside a residence or other structure, and (2) are reasonably believed to pose a threat to officers who have lawfully entered. As the First Circuit explained, protective sweeps "are not justified by the potential threat posed by the arrestee but, rather, by the potential threat posed by unseen third parties who may be lurking on the premises."[2] Or, as the court observed in *State v. Murdock*, these situations are especially dangerous because the police officer will rarely be familiar with the home he or she is entering. The arrestee, however, knows where items such as weapons and evidence are secreted."[3]

It has been argued that officers should *always* be permitted to sweep the homes they lawfully enter to conduct a criminal investigation because they can never be sure whether there is someone on the premises who poses a threat to them. In fact, some officers think that is the law. For example, in *U.S. v. Hauk*[4] officers in Kansas City, Kansas went to the defendant's home to arrest him on a warrant. After doing so, they conducted a sweep that resulted in the seizure of drugs. At a suppression hearing, the defendant's attorney was cross-examining one of the officers:

> **Q**: So I take it, then, it is just a matter of routine when you are executing arrest warrants at a particular residence, that a protective sweep then is done, because in your experience, there is at least some likelihood that some other person might be present, correct?
> **A**: Absolutely.
> **Q**: So, as a general policy of the police department, when you folks effect an arrest warrant, you routinely do a protective sweep regardless, right?
> **A**: For officer safety, absolutely.

That was the wrong answer, said the court, because "the Fourth Amendment does not sanction automatic searches of an arrestee's home," and that "the mere abstract theoretical 'possibility' that someone dangerous might be inside a residence" is insufficient.[5] Or, as the Ninth Circuit pointed out, "[T]he Fourth Amendment was adopted for the very purpose of protecting us from 'routine' intrusions by governmental agents into the privacy of our homes." And it is "dismaying that any trained police officer in the United States would believe otherwise."[6]

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[1] *U.S. v. Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017.
[2] *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 49.
[3] (Wis. 1990) 455 N.W.2d 618, 624.
[4] (10th Cir. 2005) 412 F.3d 1179, 1186.
[5] *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.
[6] *U.S. Castillo* (9th Cir. 1988) 866 F.3d 1071, 1079. Also see *U.S. v. Taylor* (6th Cir. 2012) 666 F.3d 406, 409 ["The police cannot justify a sweep simply by citing their standard procedure."].

Requirements

Officers may conduct a protective sweep if (1) they had a legal right to enter the premises, (2) they had reason to believe there was someone there who had not made himself known or was otherwise unaccounted for, and (3) they reasonably believed the person posed a threat to them or others.

Before we examine these requirements, it should be noted that there is a different type of protective sweep—known as a "vicinity sweep"—that officers may conduct as a matter of routine whenever they have lawfully arrested a person in a residence or other structure.[7] Vicinity sweeps are, however, limited to inspections of spaces that are (1) "immediately adjoining the place of arrest," and (2) large enough to conceal a hiding person.[8]

Principles of protective sweeps

LEVEL OF PROOF: If officers were inside the premises when they became aware of the threat, they need only have *reasonable suspicion* to believe there is a dangerous person on the premises; i.e., probable cause is not required.[9] This is significant because reasonable suspicion is a relatively low level of proof that requires only a "moderate chance,"[10] which is "considerably less" than a 50% probability.[11] There is, however, an exception to this rule: If officers were aware of the threat *before* they entered, they cannot conduct a sweep unless they had *probable cause*.[12] As the California Supreme Court explained, "[W]hen the entry of a house for officer safety is based on exigent circumstances, the officers must have probable cause to believe that a dangerous person will be found inside."[13]

SPECIFIC FACTS: While reasonable suspicion is not a demanding level of proof, it does require that officers be able to articulate a specific reason to believe there was someone on the premises who posed a threat.[14] For example, in *U.S. v. Delgado-Perez* the First Circuit ruled that a sweep was unlawful because "there is no indication in the testimony that the pre-arrest 'intel work' resulted in any evidence that another person might be present in the home at the time of the arrest, let alone that another dangerous person would be."[15] In contrast, the Sixth Circuit in *U.S. v. Taylor* upheld a sweep because officers "had seen several people upon entering, and their prior surveillance and search of [the] home

[7] See *Maryland v. Buie* (1990) 494 U.S. 325, 334; *U.S. v. Ford* (D.C. Cir 1995) 56 F.3d 265, 269 ["[The vicinity sweep] requires no probable cause or reasonable suspicion"].

[8] See *Maryland v. Buie* (1990) 494 U.S. 325, 333; *U.S. v. Lemus* (9th Cir. 2009) 582 F.3d 958, 963.

[9] See *Maryland v. Buie* (1990) 494 U.S. 325, 327; *People v. Celis* (2004) 33 Cal.4th 667, 678. Compare *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 314 [the "mere possibility without more" that others are in a house is not enough].

[10] See *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371; *U.S. v. Jeter* (6th Cir. 2013) 721 F.3d 746, 751.

[11] See *United States v. Sokolow* (1989) 490 U.S. 1, 7; *Kansas v. Glover* (2020) __ US __ [140 S.Ct. 1183, 1188] ["The reasonable suspicion inquiry falls considerably short of 51% accuracy"]; *U.S. v. Santillan* (2nd Cir. 2018) 902 F.3d 49, 56 ["The reasonable suspicion standard is not high and is less demanding than probable cause, requiring only facts sufficient to give rise to a reasonable suspicion that criminal activity may be afoot."].

[12] See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.1 [the lower standard of reasonable suspicion applies once the officers were inside]; *Sharrar v. Felsing* (3rd Cir. 1997) 128 F.3d 810, 824 ["Predictably, where the courts have differed in permitting protective sweeps incident to arrests outside the home is on the quantity and quality of the articulable facts necessary to justify the sweep, rather than on the underlying standard."].

[13] *People v. Celis* (2004) 33 Cal.4th 667, 680 Note: This issue was presented in *Celis,* but the court, having concluded that the sweep was not even supported by reasonable suspicion, declined to address it.

[14] See *People v. Maier* (1991) 226 Cal.App.3d 1670, 1675 [sweep must be based on "articulable and reasonable facts"]; *U.S. v. Moran Vargas* (2nd Cir. 2004) 376 F.3d 112, 116 ["[T]he government was obligated to establish specific and articulable facts that warranted the agents' belief that there was someone hiding in the bathroom who posed a danger to them"]; *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 264 ["The government has pointed to nothing in the record from which a reasonable police officer could have inferred that there was a specific danger of unknown third-parties hiding in Gandia's apartment."].

[15] (1st Cir. 2017) 867 F.3d 244, 253.

suggested that it had been a hub for a drug-trafficking organization."[16]

Sweep based on lack of information: A sweep cannot be justified on grounds that officers had no information about occupants on the premises, and were therefore unable to rule out the possibility of a threat. As the Tenth Circuit observed, "[T]here could always be a dangerous person concealed within a structure. But that in itself cannot justify a protective sweep, unless such sweeps are simply to be permitted as a matter of course."[17] For example, in *U.S. v. Ford*[18] an officer testified that he conducted a sweep because he "didn't know if there was anybody back there. I wanted to make sure there was no one there to harm us." But the desire to "make sure" that something will not happen is not the same thing as having grounds to believe so.

Sweep based on reasonable inference: The existence of a threat to officers may, however, be based in part on reasonable inferences from facts, and the officers' training and experience in determining the significance of those facts. As the Supreme Court observed, "Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers."[19] For example, in *U.S. v. Thompson* the court upheld a protective sweep because the suspect did not respond when he was asked if anyone was in the apartment, and then officers learned that he had lied when he told them he did not live there.[20] Similarly, in *U.S. v. Hollis* the court ruled that officers reasonably believed that there were other people in the house since the officers reasonably believed it was a drug house "with a "high level of activity."[21]

There's someone inside

Having discussed the basic principles of protective sweeps, we will now look at the types of proof that may suffice to establish reasonable suspicion.

Sounds: Proof that an unseen person is on the premises is commonly based on the sound of people conversing inside,[22] or hearing an occupant warn others that officers had arrived; e.g., "It's the fucking pigs."[23] Other examples include hearing "fast moving footsteps" (the officer testified that he "couldn't determine how many people [because] there were footsteps running about the house"[24]), and hearing a "commotion" inside.[25]

Parked cars: Officers saw a car parked in the driveway, and it was registered to someone other than the suspect. Examples: (1) Officers "observed two cars [and a trailer] parked sufficiently close to the residence to create a reasonable possibility that former occupants of the vehicles might be inside."[26] (2) "There were seven vehicles parked on the property at 1:00 in the morning."[27] (3) A car belonging to possible gang associate parked outside.[28]

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[16] (6th Cir. 2012) 666 F.3d 406, 410.
[17] *U.S. v. Nelson* (10th Cir. 2017) 868 F.3d 885, 889.
U.S. v. Moran Vargas (2nd Cir. 2004) 376 F.3d 112, 117 ["lack of information cannot justify a protective sweep"].
[18] (D.C. Cir. 1995) 56 F.3d 265, 270, fn.7.
[19] *United States v. Cortez* (1981) 449 U.S. 411, 418. Also see *U.S. v. Pile* (8th Cir. 2016) 820 F.3d 314, 317.
[20] (7th Cir. 2016) 842 F.3d 1002. Also see *U.S. v. Taylor* (6th Cir. 2012) 666 F.3d 406, 410 [the home had been "a hub for a drug-trafficking organization"].
[21] (11th Cir. 2015) 780 F.3d 1064, 1069.
[22] See *People v. Mack* (1980) 27 Cal.3d 145, 149 [heard "multiple voices" inside garage].
[23] *People v. Dyke* (1990) 224 Cal.App.3d 648, 659. Also see *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396, fn.7 ["It was also reasonable for the officers to infer that Hoyos was trying to warn others inside"].
[24] *U.S. v. Lopez* (1st Cir. 1993) 989 F.2d 24, 26, fn.1.
[25] *U.S. v. Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193.
[26] *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866.
[27] *U.S. v. Jones* (4th Cir. 2012) 667 F.3d 477, 485. Also see *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1014 ["Three vehicles, not one, were parked in the driveway"].
[28] *U.S. v. Tapia* (7th Cir. 2010) 610 F.3d 505, 511.

MOVEMENT SEEN: Officers saw the type of movement inside the house that commonly indicates the presence of a person; e.g., "Officers observed window blinds move in both an upstairs and downstairs window within a short period. Because [the arrestee] was descending the stairs when officers entered the residence, it was reasonable for officers to conclude that [he] was not the person who moved the downstairs blind."[29]

MULTIPLE PERPETRATORS, SOME OUTSTANDING: As noted, proof that an unseen person is on the premises may also be based on circumstantial evidence. Some examples: The arrestee was wanted for a crime committed by two or more people, some of whom had not yet been apprehended; e.g., the suspect "habitually pursued his criminal activities with accomplices,"[30] the officers "had yet to encounter Paopao's suspected confederate,"[31] the "officers reasonably believed that at least six men were involved in the distribution of cocaine,"[32] "a number of codefendants were unaccounted for,"[33] the arresting officer "knew that there were at least four suspects in the flat, and that one of the suspects had attempted to flee by way of the upper floor of the duplex. He could thus deduce that there was an easy means of access between the two floors, and he could not be certain that all of the occupants of the duplex had been accounted for and secured."[34]

MULTIPLE OCCUPANTS, SOME OUTSTANDING: Circumstantial proof is commonly based on officers seeing several people on or about the premises when they arrived and, although some of these people had been detained, the officers could not know whether they had detained everyone.[35] Other examples: Officers "were told that [the suspect's] sister was asleep upstairs and also that there were two other owners of the home who were not present,[36] officers knew that the arrestee had a roommate who was also wanted on an outstanding warrant."[37]

PARKED CARS: The presence of cars in or about the premises might indicate that there are other people inside; e.g., officers saw "numerous cars and individuals entered and exited the lot, which meant that at any given time the officers might have lacked an accurate count of suspects present."[38]

INFORMATION FROM NEIGHBORS OR INFORMANT: A neighbor, motel desk clerk, or reliable informant said that two or more people were on the premises; e.g., a reliable informant "had advised officers that Henry would have weapons and that Henry's 'boys' or 'counterparts' might be with him."[39] Although officers must consider the arrestee's assertion that no one else was on the premises, they are not required to accept it as true.[40]

SUSPECT EVASIVE: When asked if anyone else was on the premises, the arrestee did not respond or was

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[29] *U.S. v. Waters* (8th Cir. 2018) 883 F.3d 1022, 1026. Also see *U.S. v. Burrows* (7th Cir. 1995) 48 F.3d 1011, 1013 [officer "observed a curtain moving in an upstairs window"].
[30] *People v. Maier* (1991) 226 Cal.App.3d 1670, 1675.
[31] *U.S. v. Paopao* (9th Cir. 2006) 469 F.3d 760, 767. Also see *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 ["officers reasonably believed that at least six men were involved in the distribution of cocaine"]; *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1014 ["a number of codefendants were unaccounted for"].
[32] *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396. Also see *People v. Mack* (1980) 27 Cal.3d 145, 150-51 ["[The officers] knew Bowden had been arrested for an armed robbery in which shots were fired and that his accomplices had escaped. He believed these dangerous fugitives might be in the garage."].
[33] *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1014.
[34] *U.S. v. James* (7th Cir. 1994) 40 F.3d 850, 863.
[35] *People v. Block* (1971) 6 Cal.3d 239, 245.
[36] *People v. Baldwin* (1976) 62 Cal.App.3d 727, 743.
[37] *U.S. v. Denson* (10th Cir. 2014) 775 F.3d 1214, 1219.
[38] *U.S. v. Mata* (5th Cir. 2008) 517 F.3d 279, 289.
[39] *U.S. v. Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284. Also see *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 5 ["informant had told the officers that defendant was living with a woman, that other persons frequented the apartment"].
[40] See *U.S. v. Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["[I]n our opinion, the officers would have been entitled to sweep the house even if Richards said that no one else was home."].

evasive; e.g., suspect "gave vague or conflicting answers to simple questions about his itinerary,"[41] "Richards twice failed to answer [the officer's] question about whether anyone else was in the house,"[42] the suspect "repeatedly gave hesitant, evasive, and incomplete answers."[43]

The person inside is dangerous

In addition to having reasonable suspicion that an unaccounted for person was on the premises, officers must have had reason to believe that the person posed a threat to them. In the words of the Supreme Court, "[T]here must be articulable facts which would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[44] The following circumstances are ordinarily sufficient:

FIREARM ON PREMISES: Officers saw a firearm or ammunition on the premises.[45]

DRUG HOUSES: It may be that any people hiding in drug houses are armed or dangerous.[46]

EVASIVE ANSWER ABOUT WEAPONS: An occupant gave an evasive answer when asked if there were any weapons on the premises.[47]

REFUSAL TO ADMIT: The occupants refused to admit officers after they announced their authority and purpose.[48]

DANGEROUS ASSOCIATES: The arrestee associated with people who were known to be armed or dangerous; e.g., drug dealers.[49]

HISTORY OF VIOLENCE: The arrestee "habitually pursued his criminal activities with accomplices in a most dangerous manner."[50]

INFORMATION FROM INFORMANT: A reliable informant told officers the occupants were armed or would resist arrest.[51]

In addition, it may be reasonable to believe that the hidden person is dangerous if the following circumstances existed:

(1) **OFFICERS IDENTIFIED THEMSELVES**: They identified themselves in such a manner that anyone on the premises would have known who they were.

(2) **NO RESPONSE**: The officers reasonably believed there was someone other than the arrestee on the premises, yet no one else came forward.

(3) **VIOLENT CRIME**: They reasonably believed that the arrestee or his associates were now, or had been, involved in crimes involving weapons or violence, including drug trafficking.[52]

Although not sufficient to establish that someone on the premises is dangerous, the courts sometimes point out that officers who are entering the premises are on the suspect's "turf." As the Supreme Court observed, "The risk of danger in the context of an

[41] *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763.
[42] *U.S. v. Richards* (7th Cir. 1991) 937 F.2d 1287, 1291.
[43] *U.S. v. Suitt* (8th Cir. 2009) 569 F.3d 867, 872.
[44] *Maryland v. Buie* (1990) 494 U.S. 325, 334.
[45] See *People v. Dyke* (1990) 224 Cal.App.3d 648, 654; *U.S. v. Lawlor* (1st Cir. 2005) 406 F.3d 37, 42.
[46] See *U.S. v. Hollis* (11th Cir. 2015) 780 F.3d 1064, 1069.
[47] See *U.S. v. Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [occupant "shrugged" when asked about weapons].
[48] See *U.S. v. Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017.
[49] See *People v. Ledesma* (2003) 106 Cal.App.4th 857, 865 ["ongoing narcotics activity"]; *People v. Mack* (1980) 27 Cal.3d 145, 151 [officers knew that one of the occupants "had been arrested for an armed robbery in which shots had been fired," and that weapons taken in a recent burglary might be inside]; *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1014 ["Members of the drug ring were believed to be armed and in the general area."]; *U.S. v. Castillo* (9th Cir. 1989) 866 F.2d 1071, 1081 ["one of De La Renta's co-conspirators had hired an assassin to kill a DEA Agent"].
[50] *People v. Maier* (1991) 226 Cal.App.3d3 1670, 1675.
[51] See *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 312; *U.S. v. Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284.
[52] See *People v. Maier* (1991) 226 Cal.App.3d 1670, 1675 ["Mr. Maier habitually pursued his criminal activities with accomplices in a most dangerous manner."]; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 865-67 [officer reasonably believed that "drug users and those who associate with them are apt to have weapons in the house"].

arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings."[53]

Sweep Procedure

Because the only lawful objective of a protective sweep is to locate and secure "unseen third parties who may be lurking on the premises,"[54] officers must limit their search as follows:

QUICK AND CURSORY: The search must be limited to a "quick" and "cursory" inspection of places in which a person might be hiding. In other words, "The protective sweep must cover no more than those spaces where police reasonably suspect a person posing danger could be found, and must last no longer than the police are otherwise constitutionally justified in remaining on the premises."[55]

For example, the courts have ruled that officers might search between a mattress and box spring,[56] but not a refrigerator or drawer.[57] The search must also be conducted promptly. For example, in upholding a sweep in *U.S. v. Arch*, the Seventh Circuit noted that the officers "did not dawdle" and proceeded quickly through the motel room."[57]

NO "LEAST INTRUSIVE MEANS" REQUIREMENT: A protective sweep will not be invalidated on grounds that officers might have been able to eliminate the threat by some less intrusive means, such as quickly leaving the premises after making the arrest, or guarding the door to a room in which a person was reasonably believed to be hiding. Nor will a sweep be deemed unlawful on grounds that officers could have avoided the necessity of a search by waiting to make the arrest outside the premises.[58] Still, a sweep might be invalidated if the officers acted unreasonably in failing to recognize and implement the less intrusive means.[59]

MULTIPLE SWEEPS: Officers will sometimes decide to make more than one pass through the premises. For example, they might initially look only in obvious places, such as closets. If no one is found, they might conduct a second pass, looking in less obvious places; e.g., behind curtains, in crawl spaces. It appears the courts will permit multiple sweeps if they are satisfied that the second sweep was not a pretext to look for evidence.[60]

SEIZE WEAPONS, EVIDENCE: Officers may temporarily seize any weapons in plain view.[61] If officers see other evidence in plain view while conducting the sweep, they may seize it if they have probable cause that it is evidence of a crime.

IF SOMEONE IS FOUND: If officers find someone on the premises they may, depending on the circumstances, detain him, arrest him, pat search him, or escort him out of the building. Furthermore, if the person is reasonably believed to be dangerous, there is authority for conducting a search of the area within his "grabbing area" for weapons.[62]

IF NO ONE IS FOUND: Officers must terminate the sweep after checking all the places in which a person might reasonably be found; i.e.,"If no one is found, then the exigency has ended"]. [63] POV

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[53] *Maryland v. Buie* (1990) 494 U.S. 325, 333.
[54] *Maryland v. Buie* (1990) 494 U.S. 325, 327.
[55] *U.S. v. Scroggins* (5th Cir. 2010) 599 F.3d 433, 441.
[56] See *U.S. v. Garcia-Lopez* (5th Cir. 2010) 809 F.3d 834, 839.
[57] *U.S. v. Atchley* (6th Cir. 2007) 474 F.3d 840, 850-51.
[58] See *U.S. v. Gould* (5th Cir. 2004) 364 F.3d 578, 590.
[59] See *United States v. Sharpe* (1985) 470 U.S. 675, 686 ["[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it"].
[60] See *U.S. v. Paopao* (9th Cir. 2006) 469 F.3d 760, 767 [second sweep permitted when, after the first sweep, the officer "was not secure in the notion that no one was left in the apartment"].
[61] See *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 314.
[62] See *U.S. v. Hernandez* (2nd Cir. 1991) 941 F.2d 133, 137; *U.S. v. Crooker* (1st Cir. 1993) 5 F.3d 583, 584.
[63] See *People v. Seaton* (2001) 26 Cal.4th 598, 632. Also see *Maryland v. Buie* (1990) 494 U.S. 325, 327; *People v. Bennett* (1998) 17 Cal.4th 373, 384-88;

Recent Cases

People v. Henderson

(2020) __ Cal.5th __ [2020 WL 4355709]

Issue

Did an officer violate *Miranda* in obtaining a confession from a murder suspect?

Facts

Reginald and Peggy Baker, an elderly couple, were watching television in their Cathedral City mobile home when Paul Henderson broke in and shouted, "Don't yell or scream and no one will get hurt." After Henderson tied them up, ransacked their home, and took their "bingo money," he killed Mr. Baker and tried to break Ms. Baker's neck. She survived by playing dead. Henderson was later arrested after a resident of a homeless shelter notified officers that Henderson, a fellow resident, had admitted to him that he had committed the crimes.

Two Cathedral City officers interrogated Henderson at the police station. After waiving his *Miranda* rights, Henderson admitted that he was in Cathedral City when the crimes occurred. But when asked if he was at the trailer park, he replied, "Um, there's some things that I, um, want um . . ." An officer then asked if he had gone into the trailer park on the night of the murder, and Henderson responded, "Uh, want to speak to an attorney first because I take responsibility for me, but there's other people that ..." Henderson did not finish the sentence because one of the officers interrupted him and asked, once again, if he was accepting responsibility for what happened to the Bakers. No response.

The interview continued and Henderson eventually confessed. When his motion to suppress his confession was denied, the case went to trial. He was found guilty and sentenced to death.

Discussion

It is basic *Miranda* law that officers must immediately stop interrogating a suspect in custody who invokes his right to consult with an attorney. It is also settled that an invocation will not result if the request for counsel was equivocal or ambiguous. Prosecutors argued that Henderson's words were ambiguous because they could be interpreted to mean he was willing to talk about *his* actions in the Bakers' home, but he did not want to talk about the actions of the "other people."

The California Supreme Court acknowledged that "various cases have held that a suspect's use of equivocal words or phrases does not constitute a clear request for counsel." For example, it pointed out that statements such as the following have been deemed equivocal or ambiguous: "If you can bring me a lawyer . . ."[1] "I think it'd probably be a good idea for me to get an attorney,"[2] "I think it's about time for me to stop talking,"[3] and "maybe I should talk to a lawyer."[4]

The question, then, was whether Henderson's request for an attorney was ambiguous. Obviously, not. Said the court, Henderson "used no such equivocal language here. He clearly stated 'I want to speak to an attorney first.'" Accordingly, the court ruled that Henderson's confession was obtained in violation of *Miranda*, and it overturned his conviction.

In a concluding statement, the court said, "To be clear, after being admonished and waiving their rights, suspects may give halting or reluctant answers. They may give responses that the questioners suspect are false. Officers are permitted to encourage a subject to talk and to challenge statements as untrue. What they cannot do is brush aside a clear invocation."

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[1] *People v Sauceda-Contreras* (2012) 55 Cal.4th 203, 219.
[2] *People v. Bacon* (2010) 50 Cal.4th 1082, 1105.
[3] *People v. Stitely* (2005) 35 Cal.4th 514, 535.
[4] *Davis v. United States* (1994) 512 U.S. 452, 462.

People v. Bowen

(2020) 52 Cal.App.5th 130

Issue

Did officers have grounds to initiate an emergency "ping" on a suspect's cellphone?

Facts

Quentin Bowen placed a newspaper ad looking for someone to board his dog, Dash. A man identified as Dennis N. answered the ad and agreed to take care of Dash for $100 per week. At first, everyone was happy, especially Dash. Bowen would visit him frequently, and Dennis enjoyed his company and had become very attached to him. Plus, Dennis was earning some extra money. Or so he thought. After being stiffed for four months, he complained to Bowen who clubbed him on the head and stabbed him eight times in the neck. Dennis and Bowen fled in different directions. Not surprisingly, Dash followed Dennis. Witnesses phoned 911. Santa Rosa police and paramedics responded.

Before Dennis was taken to the hospital, he told officers that Bowen's cell phone number was on Dash's dog tag. An officer obtained the number and asked Bowen's service provider to conduct an emergency "ping." The ping disclosed that Bowen's phone was currently near the Santa Rosa Creek Trail. Several officers converged on the location and found Bowen. They also found his bloody knife.

Bowen was charged with, among other things, attempted murder. When his motion to suppress the knife was denied, the case went to trial and he was convicted.

Discussion

Bowen argued that the knife should have been suppressed on grounds that it was obtained as the result of an unlawful search. Specifically, he argued that a "search" occurred when, at the officer's direction, his cell phone provider pinged his phone, thereby disclosing his current whereabouts. And this resulted in the seizure of the knife.

This might have been the first case in which this issue was directly presented. As the court pointed out, "The parties do not cite any California cases addressing whether obtaining real-time CSLI [Cell Site Location Information] constitutes a search, and we are unaware of any published authority on this issue." It was, however, unnecessary for the court to resolve this issue. Instead, it ruled that Bowen's flight with his bloody knife into a populated area constituted an exigent circumstance that warranted an emergency ping. As the court explained, under California law a warrant is not required to access electronic communications data when officers reasonably believed "that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information." Bowen's conviction was affirmed.

U.S. v. Curry

(4th Cir. 2020) 965 F.3d 313

Issues

(1) Did officers have grounds to detain a person who was leaving a location from which gunshots had just been fired? (2) Under what circumstances, if any, may officers detain a person on grounds of exigent circumstances?

Facts

At about 9 P.M., four officers on patrol in Richmond, Virginia heard five or six gunshots coming from a public housing complex about three blocks away. The officers were aware that six shootings and two homicides had occurred in the complex over the past three months, and the most recent homicide occurred just eleven days earlier.

The officers arrived about a minute later and they saw several people in the area, including a few men who seemed to be walking away. At about this time, dispatch reported that several people who lived in the area had called 911 and reported hearing "random gunfire," but none of the callers had seen the shooter or shooters.

One of the men who was walking away was Billy Curry. According to the officers, Curry was walking at a normal pace, his hands were in plain view, and he made no furtive gestures. Nevertheless, one of the officers ordered him—in an "authoritative tone"—to "let me see your hands." There is some uncer-

tainty as to whether Curry complied, although he did *start* to raise his hands. In any event, when the officer instructed him to pull his shirt up, Curry did not lift it all the way up. So the officer pat searched him and felt a "hard object like the butt of a handgun." It was, in fact, a handgun. After Curry was arrested and charged with possession of a firearm by a felon, he filed a motion to suppress the weapon on grounds that it was discovered during an illegal detention. The motion was granted and the government appealed to the Fourth Circuit.

Discussion

It was undisputed that Curry was detained when the officer *ordered* him to show his hands. The issue, then, was whether, at that point, the officer had sufficient grounds to believe that Curry was the shooter or was otherwise involved in the incident.

Although detentions are permitted if officers have "reasonable suspicion"—which is a relatively low level of proof—a suspicion will not be deemed reasonable unless officers are able to articulate one or more facts that support it. But because the officers here did not have a physical description of the shooter, and because Curry made no furtive gestures and was not walking at an "accelerated pace," the officers plainly had insufficient reason to believe he was involved in the incident.

As a backup argument, the government contended that the detention was lawful because there were exigent circumstances. Specifically, prosecutors claimed that officers who are responding to a shots fired call ought to be able to detain people who are leaving the area, even it there was no specific reason to believe they were involved.

While the firing of a gun in a public place is dangerous and may also indicate that someone might have been shot, the fact remained that the officers who detained Curry were unable to cite any reason to believe that he was the shooter or even an accomplice. Consequently, the court ruled that the detention was not justified by exigent circumstances. Said the court, "Allowing officers to bypass the individualized suspicion requirement based on the information they had here—the sound of gunfire and the general location where it may have originated—would completely cripple a fundamental Fourth Amendment protection and create a dangerous precedent."

Comment

This was not a difficult case. And yet, the court's opinion spanned ninety-nine pages, with four separate concurring opinions, and one dissenting opinion. Most of this discussion focused on the issue of whether the detention was justified by "community caretaking." However, as we have discussed many times, there is no "community caretaking" exception to the warrant requirement. Instead, whenever officers seek to justify a search or seizure because of an emergency, the only exception is exigent circumstances. And it is settled that exigent circumstances exist only if the need for an immediate police response outweighed its intrusiveness. The California Supreme Court made this clear last year in *People v. Ovieda*[5] when it pointed out that that the United States Supreme Court "has only recognized community caretaking searches in the context of vehicle impound procedures."

U.S. v. Rickmon

(7th Cir. 2020) 952 F.3d 876

Issue

Under what circumstances can a ShotSpotter alert provide officers with grounds to detain people in the vicinity of the shooting?

Facts

At about 4:30 A.M., an officer on patrol in Peoria, Illinois received a "ShotSpotter" alert on his in-car computer. The officer was near that location and he immediately headed there. While en route, dispatch reported that it, too, had received the initial alert and a second one reporting that three shots had been

[5] (2019) 7 Cal.5th 1034, 1048.

fired from the same area. Almost immediately, officers were notified that a 911 caller had confirmed that shots had been fired, that one person was seen leaving on foot, and that others were leaving in vehicles.

As the officer turned onto the street, he saw the headlights from a car that was located about 300 feet from the location. As the car started heading in his direction, the officer turned on his emergency lights and "veered" into the oncoming lane, thereby blocking the car. The driver stopped, and a passenger—later identified as Tererill Rickmon—"pointed backwards" and yelled "they are down there." Looking down the street, the officer saw a crowd of about 15-20 people. After things settled down, the officer obtained consent from the driver to search the vehicle. Under the passenger's seat, he found a nine-millimeter handgun. As the result, Rickmon was charged with possession of a firearm by a felon. When his motion to suppress the handgun was denied, he pled guilty.

Discussion

The court explained that ShotSpotter "is a surveillance system that uses sophisticated microphones to record gunshots in a specific area. After a device detects the sound of gunfire, it relays the audio file to a server in California, where an individual determines whether the sound is a shot. If that individual confirms the sound is a gunshot, he or she will transmit the alert to the local police department."

Rickmon argued that the handgun should have been suppressed because the officer had nothing more than a "hunch" that the occupants of the car were involved in the shooting. The court acknowledged that the officer "had no reason to suspect that any weapons used in the shooting were in this car," and that the driver and Rickmon complied with the officer's commands and "neither moved suspiciously nor gestured threateningly." Nevertheless, the court ruled that, even if a single ShotSpotter alert would not justify a detention, the officer was aware that there had been a second ShotSpotter alert from the same location, and that an anonymous 911 caller had confirmed the report that people were fleeing.

Accordingly, the court ruled that "the circumstances here—the reliability of the police reports, the dangerousness of the crime, the stop's temporal and physical proximity to the shots, the light traffic late at night, and the officer's experience with gun violence in the area—provided reasonable suspicion to stop Rickmon's vehicle." The court added, "We have repeatedly emphasized in our decisions that the inherent danger of gun violence sets shootings apart from other criminal activity."

Comments

At the hearing on the motion to suppress, there was testimony that ShotSpotter "is not always accurate," and that "the record here does not demonstrate how often the Peoria Police Department received incorrect ShotSpotter reports or anything else attesting to the reliability of the system." The court acknowledged that "[i]n some future decision, we may have to determine ShotSpotter's reliability where a single alert turns out to be the only articulable fact in the totality of circumstances. [But] this is not that case, given that 911 calls corroborated the ShotSpotter reports here."

One other thing: Dispatch had also received a 911 report in which the caller provided more information about the car's direction of travel in relation to the shooting. But because the dispatcher did not notify the responding officers of this particular call, the court could not consider it in determining the legality of the stop.

People v. Johnson

(2020) 50 Cal.App.5th 620

Issues

(1) Does the odor of marijuana from inside a vehicle provide officers with probable cause to search it for marijuana? (2) Is it illegal to transport marijuana in a vehicle in a *closed*—but not *sealed*—container?

Facts

A Stockton police officer noticed a man sitting in a car parked by the side of a road. When the officer saw that the vehicle did not have a registration tag,

he pulled behind it and activated his emergency lights. The driver, Dammar Johnson, immediately stepped outside, and the officer ordered him to get back inside. Johnson refused and became "agitated," so the officer "grabbed [his] arm to maintain control," at which point Johnson "tensed and pulled away." After "some resistance," Johnson was placed in the patrol car.

The officer testified that, while standing outside the vehicle, he could smell the odor of marijuana. So he entered and, on the center console, he found a plastic bag containing about two grams. Although the bag was not sealed shut, it was "knotted at the top." While searching for more marijuana, the officer found a loaded handgun in the rear cargo area.

Johnson filed a motion to suppress the gun on grounds that the officer did not have probable cause to believe that he possessed marijuana in violation of California law, and therefore his entry and search of the car was illegal. When his motion was denied, he pled no contest to possession of a firearm by a felon. He appealed the ruling.

Discussion

Because California law generally permits adults to possess one ounce or less of marijuana,[6] probable cause to search a place or thing for marijuana can exist only if officers had probable cause to believe the marijuana was possessed in violation of one of the California statutes that still criminalize possession.[7] Thus, Johnson argued that the officer's search of his car was unlawful because the officer had insufficient reason to believe that the marijuana inside was possessed illegally. The court agreed.

MORE THAN ONE OUNCE: Although the odor of marijuana provided the officer with probable cause to believe there was marijuana inside the vehicle, the court ruled that he did not have probable cause to believe the marijuana in the vehicle weighed more than one ounce. As the court explained, "[T]he odor of marijuana alone no longer provides an inference that a car contains contraband because individuals over the age of 21 can now lawfully possess and transport up to 28.5 grams of marijuana."

It is, of course, possible that an officer who detects an unusually strong odor of marijuana in a vehicle might reasonably believe—based on training and experience—that the amount must have exceeded one ounce. Furthermore, the odor of *burnt* marijuana from a vehicle might constitute probable cause to believe that the driver or other occupant had been smoking marijuana while the car was moving. And this, too, is illegal.[8] But, as the court pointed out, there was nothing in this case that would support either of these conclusions.

WHAT'S AN "OPEN" CONTAINER? Possession of even a small amount of marijuana in the passenger compartment of a vehicle is unlawful if it was in an "open" container.[9] Unfortunately, neither the Health and Safety Code nor the Vehicle Code define what constitutes an "open" container. Until now, it was arguable that a container of marijuana, like a container of an alcoholic beverage, is "open" unless it was *sealed*. But the court in *Johnson* ruled that a container of marijuana is "open" only if it lacked "a lid or some other type of cover or material separating the content from the outside such that there is no barrier to accessing the content." And because a plastic bag constitutes "a barrier" to accessing the contents, it ruled that a bag that is "knotted" is not "open." Accordingly, the court ruled that the marijuana and handgun in the vehicle should have been suppressed.

Comment

The court in *Johnson* also pointed out that, even if the baggie had not been knotted, the officer still would not have had probable cause to search the vehicle because the existence of an open container of marijuana in a vehicle is unlawful only if officers

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[6] See Health & Safety Code § 11362.1 *et seq*.
[7] See Health & Safety Code § 11362.3; Veh. Code § 23222(b).
[8] See Health & Safety Code § 11362.3(a)(7-8); Veh. Code § 23221.
[9] See Health and Safety Code § 11362.3(a)(4); Veh. Code § 23222(b).

had probable cause to believe the vehicle was being "driven."[10] But the court explained that this statute did not apply because the officer "testified the car was parked when he first saw and approached it and there was no evidence presented to indicate defendant had driven the car with the marijuana baggie inside."

One other thing: In the recent case of *U.S. v. Talley*,[11] the federal district court for the northern division of California ruled that a search for marijuana that is lawful under California law does not become unlawful merely because marijuana remains illegal under federal law. Although rulings by district courts do not provide binding authority, the court's ruling appears correct.

U.S. v. Blakeney

(4th Cir. 2020) 949 F.3d 851

Issues

(1) Did a search warrant affidavit for a blood draw establish probable cause to believe that a DUI suspect was impaired? (2) Did the affidavit establish probable cause to search the Event Data Recorder in the suspect's car?

Facts

Blakeney was the driver that car spun out of control and crashed into an oncoming car in Maryland, just outside of the District of Columbia. (The investigation was handled by the United States Park Police (USPP)). The court described the crash scene as "catastrophic" and explained that the front end of Blakeney's car, including its engine, and "had completely separated from the rest of the vehicle." The lone passenger in Blakeney's car was pronounced dead at the scene. Blakeney and the driver of the other car were injured.

The first officer on the scene saw Blakeney sitting in the driver's seat, and noticed that he was "staring blankly." Another USPP officer detected an odor of alcohol from the passenger compartment, and EMS personnel reported that Blakeney had "become combative" when they tried to treat him, and that he appeared to be under the influence of alcohol.

After the investigating officer arrived at the scene and had conducted a preliminary investigation, he sought a telephonic warrant for a DUI blood draw. The facts he recited to the issuing judge were summarized by the court as follows: "Blakeney had been removed from the driver's seat of his car with a heavy odor of alcohol, and that he "had been combative and had to be restrained in order for EMS personnel to address his injuries"; the car he was driving had "crossed over the raised, curb, center median and struck [the oncoming car] causing a motor vehicle crash, with injuries." The court issued the warrant. The sample of Blakeney's blood tested at .07%.

Blakeney's car was towed to a police impound lot. About three weeks later, the investigating officer obtained a warrant to search the vehicle's Event Data Recorder (EDR).[12]

In his affidavit, the officer said that the data complied by the EDR was "needed by the crash reconstructionist to determine the underlying cause of the crash," and he explained that EDRs are "capable of recording and storing several parameters existing while the vehicle is in motion, at the time of the crash and five seconds prior to the crash," and it provided "diagnostic codes present at the time of the crash, headlight status, engine RPMs, vehicle speed, brake status and throttle position."

The judge signed the warrant and, based on the recovered data, the crash reconstructionist was able to testify that Blakeney was going at least 79 m.p.h.

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[10] See Health and Safety Code § 11362.3(a)(4); Veh. Code § 23222(b).

[11] (2020 N.D. Cal.) __ F.Supp.3d ___ [2020 WL 3275735].

[12] Note: California Vehicle Code section 9951(b) defines an EDR as a device "installed by the manufacturer of the vehicle [that]: (1) Records how fast and in which direction the motor vehicle is traveling. (2) Records a history of where the motor vehicle travels. (3) Records steering performance. (4) Records brake performance, including, but not limited to, whether brakes were applied before an accident. (5) Records the driver's seatbelt status. (6) Has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communications system when an accident occurs." Also see *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1086, fn.4.

in the five seconds before the crash, and that his car's braking system had slowed the car down to 68 m.p.h. at the moment of impact.

After he was charged with vehicular homicide and reckless driving, Blakeney filed a motion to suppress the blood test results and the data obtained from the EDR on grounds that the affidavit for the warrant failed to establish probable cause. He also argued that the EDR data was irrelevant because it described "nothing more than a car accident" and had provided "no information about its cause." The motions were denied, and Blakeney was found guilty. He was sentenced to three years in prison.

Discussion

On appeal, Blakeney renewed his argument that the search warrant affidavits failed to establish probable cause to believe he was impaired. Specifically, he contended that probable cause requires "more than the simple fact of a car accident" since "car accidents—whether minor or severe—occur for all kinds of reasons unrelated to alcohol-induced negligence, and that the warrant application here failed to rule out alternative explanations, such as mechanical failure."

That is true, said the court, but it pointed out that "the severity of the accident," "the significance of the driver error involved" and Blakeney's combativeness "took the warrant application out of the realm of just a garden-variety car accident and into probable cause to believe that [a criminal] offense had been committed." Said the court, "Jumping the median isn't a small thing. It's not just weaving over the solid line. Jumping the median and crashing headlong into someone else is a factor that may contribute to probable cause."

Blakeney also argued that the odor of alcohol from the passenger compartment should not have been considered in determining the existence of probable cause "because the smell of alcohol was associated with the car rather than his person," that the odor was detected only after he had been removed from the scene by ambulance, and that the odor "was at least as likely to signify that his passenger had been drinking as it was to indicate his own intoxication." The court disagreed, saying that "[a]n officer who smells alcohol in the passenger compartment of a now-crashed car in which two people have been driving reasonably may infer that either or *both* individuals were drinking at the time of the crash." Consequently, the court ruled that both search warrant affidavits had established probable cause to believe the Blakeney was driving while under the influence of alcohol, and it affirmed his conviction.

U.S. v. Moore-Bush

(1st Cir. 2020) 963 F.3d 29

Issue

Must officers have a search warrant to install and monitor a pole camera across the street from a suspect's home?

Facts

While investigating a report that Daphne Moore-Bush was selling firearms illegally, ATF agents installed a surveillance camera atop a public utility pole across the street from her home in Massachusetts. Although the camera was directed at the front of the house, it was positioned so that it could not "see" anything inside. Nor could it record audio. The camera was in continuous operation for about eight months.

As the result of the surveillance, agents obtained proof that Moore-Bush was engaging in money laundering and was exchanging drugs for firearms. This information was later used by agents to obtain wiretap authorization, to conduct cell phone tracking, and to obtain court orders for the installation and monitoring of pen registers and phone traps. Based on the collected evidence, Moore-Bush was arrested and charged with, among other things, conspiracy to distribute and possess heroin and cocaine base.

Before trial, she filed a motion to suppress the evidence which the court granted because (1) the surveillance lasted eight months, (2) the camera focused on the driveway and front of the house, and (3) the camera had the ability to "zoom in so close that [it] could read license plate numbers." The Government appealed to the First Circuit.

Discussion

For many years, officers did not need a warrant to install surveillance cameras so long as they recorded things that could have been seen by passersby. This rule, however, was called into question in 2018 when the Supreme Court ruled in *Carpenter v. United States*[13] that a warrant was required to obtain cell site location information (CSLI) from cellphone providers. In its discussion of the issue, the Court said that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." This ruling, according to Moore-Bush, meant that a warrant was required to utilize the pole camera outside her home because, per *Carpenter,* people can reasonably expect privacy from such surveillance.

The court disagreed, pointing out that the Supreme Court in *Carpenter* said it was not overturning its longstanding rule that a "search" does not result when police surveillance merely allows officers to see things that are exposed to public view. In addition, the Court in *Carpenter* said it was not calling into question "conventional surveillance techniques and tools, such as security cameras."

Accordingly, the court in *Moore-Bush* ruled that, because pole cameras "are a conventional surveillance technique and are easily thought to be a species of surveillance security cameras," there was nothing in *Carpenter* that could be interpreted as requiring a search warrant to install and monitor one in front of the defendant's home.

Finally, Moore-Bush argued that a warrant should be required if officers use a pole camera for an extended period of time, especially if the camera was, as here, monitored 24-hours a day. The court pointed out, however, that "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

Accordingly, the court ruled that the district court judge who ordered suppression of the pole camera images "transgressed a fundamental Fourth Amendment doctrine that what one knowingly exposed to public view does not invoke reasonable expectations of privacy protected by the Fourth Amendment."[14]

In another recent case, *United States v. Trice*, the Sixth Circuit ruled that a warrant was not required to install a surveillance camera, disguised as a smoke detector, in the apartment hallway of a suspected drug dealer.[15] The officers installed the camera to confirm that the suspect, Trice, lived in the apartment. For that reason, they rigged the camera so that it was triggered by a motion detector, and they made sure it did not record anything in the interior of Trice's apartment.

Shortly after it was activated, the camera recorded Trice leaving the apartment and walking directly to a nearby parking lot where he sold drugs to a CI. This information was used to obtain a warrant to search the apartment. During the search, officers found methamphetamine, heroin, and crack cocaine. When Trice's motion to suppress the drugs was denied, he pled out.

First off, the court ruled that, because the front door to the apartment building was unlocked, the officers did not need a warrant to enter the building or hallway. It then ruled that the officers did not need a warrant to install and monitor the camera in the hallway since it recorded only what residents and visitors could have seen. Said the court, "[Trice] had no reasonable expectation of privacy in the apartment's unlocked common hallway" and, furthermore, the camera "recorded nothing beyond the fact of Trice's entry and exit in the apartment and did not provide law enforcement any information they could not have learned through ordinary visual surveillance." POV

[13] (2018) __ U.S. __ [138 S.Ct. 2206].

[14] Note: The court also ruled that *Carpenter* did not apply for another reason: it applies only when the fruits of covert surveillance are in the hands of a third party, such as a cell phone provider. But in *Moore-Bush* (as in almost all pole camera cases) the images were in the possession of the police. Said the court, *Carpenter* "explicitly framed its holding in terms of the third-party doctrine, a doctrine not relevant here."

[15] (6th Cir. 2020) __ F.3d __ [2020 WL 4188041].

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