SJ Crime Quarterly

JAMES P. WILLETT
District Attorney

WINTER 2011
Volume VII, Issue 1

A quarterly newsletter presented by the San Joaquin County District Attorney's Office to communicate news among the county's law enforcement agencies

Contents

Cell Phone Search Incident to Arrest

People v. Diaz (2011) ___ Cal.4th ___

The mobile phone you find on that suspect may well have all the incriminating evidence you need for arrest and conviction. Or, it may uncover other victims and crimes to keep the detectives busy for months. Does that child abuser have text messages and pictures you'd like to see? Does that gang member have pictures of his gang posing in a family photo showing all their drugs and guns? Will a call history sew up a conspiracy investigation?

Continued, *Cell Phone Search*, p. 4

Probable Cause Not Negated By Innocent Explanation

In re J.G. (2010) 159 Cal.App.4th 1056

One afternoon in Anaheim, officers were investigating earlier gang criminal activity in an area claimed by the ATC gang. They saw four youths run around the corner and heard someone yell, "He's over there!" One of the officers had spoken with the minor a couple of time previously at his high school and knew him to be a member of ATC. The minor was carrying a brick and one of the others was carrying a piece of a lamp.

The officers were not in uniform and were in an unmarked car. One in the group pointed north, and the group turned to run in that direction. They apparently did not see or recognize the officers. The officers drove to where the group had gone, and found them walking. They drew their weapons and ordered the four on the ground. Besides the objects they'd earlier seen, they found a third in the group to be carrying a rock. They arrested the four. They believed the four were chasing someone, but found no victim.

The minor was charged with a misdemeanor violation of PC 12024, carrying a deadly weapon with the intent to assault someone. He moved to suppress evidence, but his motion was denied. He pled to the charge and appealed.

The Court of Appeal affirmed. The arrest was lawful because the officers had probable cause to believe the group was chasing someone. It did not matter that the police observations were also consistent with a number of innocent explanations. What mattered was whether the circumstances warranted suspicion of a crime and whether "a reasonable and prudent man could entertain that suspicion honestly and strongly."

Detention For Search Unduly Prolonged

People v. Jahansson (2010) 189 Cal.App.4th 202

A Santa Clara County narcotics enforcement team was watching a house suspected of dealing narcotics. One of the tenants was on probation with a search waiver. While watching the house, they saw the defendant and a man drive up in a car and park in front of the house. They walked toward the front door, which the officers couldn't see. The men stayed 20-30 minutes, likely inside the house, before returning to their car and driving away. During this time, one or both of them were seen taking items between the car and the house.

A while later, the probationer left the house and walked toward a strip mall. Officers stopped him, advised of their intent to search the house, and questioned him as to what they might expect. He told them there was at least one person in the house and some methamphetamine.

While waiting to search the house, though, officers saw the defendant and her companion drive up to the house again. Officers were outside the house wearing police vests, and they became concerned that the people in the car might alert anyone in the house that police were outside. To avoid any such trouble, the officers detained and handcuffed the pair.

Upon first contacting the defendant, the officer noticed nothing unusual. Then the officers did a protective sweep of the house, leaving one to guard the detainees. The sweep took five-to-ten minutes. Then the investigating officer returned to talk further with the detained people. Since the defendant had several symptoms of being under the influence of a stimulant, he arrested her under HS 11550. A search incident to arrest located methamphetamine and paraphernalia, resulting in additional charges. Jahansson moved to suppress evidence and the trial court granted her motion. When the trial court dismissed the charges, the People appealed.

Contnued, *Jahanssan*, p. 4

Stop Valid Despite Permit in Window

People v. Greenwood. (2010) 189 Cal.App.4th 742

Officers in the Los Angeles area ran the license of a car in front of them. The DMV reported that the car's registration had expired two years before.

The officer conducting the stop saw the permit in the window, but erroneously believed such permits were issued only for the purpose of allowing time to get a smog check. The officer also erroneously believed the permits were only valid for driving to and from locations for smog checks and repair. Since the stop was late at night when no such businesses were open, the officer believed the car to be operating outside the permit's restrictions.

The stop revealed the driver to have a PCP cigarette and he was arrested. He was charged with possessing PCP and several prior convictions were alleged.

He filed a motion to suppress evidence, alleging the stop was invalid because the officer saw the permit in the window. The trial court denied his motion.

He entered a plea admitting the PCP charge and a strike prior and was sentenced to prison. He appealed, claiming his motion should have been granted.

The Court of Appeal affirmed. The officer conducting the stop was aware of information from the DMV that the car's registration was expired. That, alone, provided probable cause for the stop. The permit in the window did not render the stop invalid. The court stated, "An innocent explanation for a possible registration violation does not preclude an officer from effecting a stop to investigate the ambiguity."

(Editor's Note: As in *In re J.G.* on p. 2, probable cause is not negated by an innocent explanation for the apparent unlawful activity.)

What if Police Create the Exigency?

Kentucky v. Kling, pending in the U.S. Supreme Court

In September of 2010 the U.S. Supreme Court granted certiorari in a case that will refine the "exigent circumstances" exception to the search warrant requirement for entering homes.

We know that police customarily cannot enter a home without a warrant. There are exceptions to this requirement, though, such as consent or exigent circumstances. But what if the exigent circumstance justifying the entry would not have existed but-for police conduct?

In Lexington Kentucky, police were conducting a buy-bust operation targeting drug sales at an apartment complex. After an informant made a buy, an undercover officer gave the signal to arrest the seller. The suspect went down a breezeway, the officers lost sight of him, and they heard a door slam. Although the undercover officer radioed the others that the suspect had entered the back *right* apartment, the pursuing officers were not near their radio. They knew he'd gone into one of two apartments, but weren't sure which one.

From the back *left* apartment there was a strong smell of marijuana. Since this was consistent with the door having just been opened and closed, the officers focused on the left apartment. They knocked loudly on the door and announced themselves a police. Then they heard movement in the apartment consistent with the destruction of evidence. (The state opinion gave no further description of the noise.)

The officers forced entry and found marijuana, cocaine, crack cocaine, and other evidence in plain view. The state court of appeals, affirmed denial of the suppression motion and the state's high court agreed to review the case.

At the outset, the "hot pursuit" exception was rejected. There was no evidence that the suspect knew of the officers' presence, so there was no incentive for him to destroy evidence or confront pursuing officers.

Continued, *Kentucky v. Kling*, p. 5

Jahanssan, continued from p. 2

The Court of Appeal first held that the initial detention was lawful. However, beyond that, the law only allowed officers to continue the detention if (1) the pair were found to be occupants, or (2) there were any "specific articulable" facts connecting them to the unlawful activity underlying the search. The officers observed nothing that established the two were any more than visitors. Since the detention was unlawfully prolonged, the Court of Appeal affirmed the order suppressing the evidence.

New Chief Justice

In January, then-Governor Schwarzenegger appointed Justice Tani Cantil-Sakauye as Chief Justice of the California Supreme Court, elevating her from her previous post a a justice on the Court of Appeal in Sacramento. Chief Justice Cantil-Sakauye grew up in Sacramento and attended college and law school at U.C. Davis.

Review Granted in *Schmitz*

October's issue of *SJ Crime Quarterly* reported a case from Orange County concerning a car search. The Court of Appeal had held a parolee as a rear passenger does not entitle police to search the entire interior of the car. The state supreme court granted review in December, so the Court of Appeal case is no longer authority. The state supreme court can be expected to write an opinion addressing the issue.

***Cell Phone Search*, continued from p. 1**

In *People v. Diaz* the California Supreme Court has equated the electronic data on a cell phone with all other items in an arrestee's personal possession.

At 2:50 p.m. Ventura County deputies saw Diaz involved in a controlled buy of ecstasy. When arrested, he had ecstasy, marijuana, and a cell phone on his person. When interviewed at the station at 4:18 p.m., he denied any knowledge of the drug transaction. At 4:23 p.m., a deputy looked at the text messages on the seized phone and read a message that appeared to quote a price for the ecstasy sold.

After his motion to suppress evidence was denied, he entered a guilty plea and appealed. The Court of Appeal affirmed and the California Supreme Court granted review.

Looking at the U.S. Supreme Court precedents, the California court needed to decide whether a cell phone search was the search of an arrestee's person or of the possessions within his immediate control. For the former, a warrantless search was allowed, but the latter required a warrant. Cases addressing the former involved searches of clothing and a cigarette package. The case establishing a warrant requirement for possessions addressed the search of a footlocker.

The court's majority said a warrantless search was allowed because a cell phone as "personal property immediately associated with [the arrestee's] person."

The opinion's "immediately associated with the person" distinction is critical. Though the supreme court opinion does not discuss the point, the lower court's opinion pointed out that its "incident-to-arrest" justification would not apply to laptop computers. So the operative question—for now—would appear to be whether the device can be carried in the suspect's pocket. Expect the law to change. The best advice is to always get a warrant. If you have time to look for an exception, you also have time to get a warrant.

Continued, *Cell Phone Search*, p. 5

***Cell Phone Search*, continued from p. 4**

A word of caution, however. Especially now that warrantless searches are allowed, arrestees have a great incentive to remotely alter or delete a phone's contents. While the suspect sits in custody, his friends or relatives could be punching buttons. So, when booking that phone, attempt to seal it from outside interference. When searching it, it is important to guard against later charges that the police or prosecution have altered the data. Here is a protocol recommended by experts in the area:

•Determine your authority to search. If searching incident to arrest, make the arrest, search as soon as practical, and seize the phone as evidence.

•Turn off any autolock and deactivate any passwords on the phone.

•"Image" (digitally copy) the phone before you search. If you don't have an imager, get one.

•When searching, obtain the phone's "live data" information:

1. IMEI and ICCID number
2. Carrier and phone number
3. Blue tooth and WI-FI addresses
4 Account's e-mail addresses
5. Phone's text message handle
6. The "me" address book entry
7. List of text messages
8. List of e-mails

•Disable cell tower communication.

•Pull SIM card.

•Record internet access history.

•Record photos.

•Burn photos onto storage media (like CD)

•Write report detailing all the above.

***Kentucky v. Kling*, continued from p. 3**

Kentucky's supreme court first looked at whether the odor alone justified the warrantless entry. It did not. Odor alone can justify a warrantless car search. Also, odor alone can justify a warrantless home entry if public safety is at issue, such as where the smell is of an active methamphetamine lab. Yet, absent safety concerns, odor alone cannot justify a warrantless home entry.

Next, the Kentucky court examined the exigent circumstances issue. They began with the well-accepted principle that police may not manufacture an exigency with the intent to escape the warrant requirement. Yet, the Kentucky court identified a conflict among courts as to the role of any "bad faith" involved in the causation. They adopted the test that, assuming the officers were acting in good faith, was it nevertheless "reasonably foreseeable" that their good faith action would trigger the exigent circumstance?

Applying that rule in *Kling*, they said that yes, it was reasonably foreseeable that the sound of evidence destruction would ensue. Without the police knocking and announcing themselves, there would have been no reason to destroy either the evidence of the drug sale or the evidence behind the marijuana smell. The Kentucky Supreme Court therefore held that the trial court should have granted the motion to suppress evidence.

The U.S. Supreme voted to consider a single question presented by *Kling*:
"When does lawful police action impermissibly 'create' exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?"

The parties and various others have submitted briefs in the case and oral argument is in January of 2011. So an opinion can be expected some time this year.

Night-Vision Goggles Are Not Fourth Amendment Violation

People v. Lieng (2010) 190 Cal.App.4th 1213

Mendocino County sheriff's deputies received information of a possible marijuana growing operation near a rural house near Willits. At 3:00 a.m. Sergeant Bruce Smith walked up a long driveway off a highway wearing night-vision goggles. Next to the defendant's house he saw a large metal shed with bright light shining through the cracks. He heard loud fans running and smelled a strong marijuana odor. The driveway had a "No Trespassing – Keep Out" sign at its entrance, but there was no closed gate and the driveway was used by three other houses.

About a week later, he walked up the same driveway at 12:00 a.m. with night goggles and saw and smelled the same things. This time, though, he saw a pickup outside the shed registered to a defendant.

Based on these observations, he received and executed a search warrant, uncovering the reported growing operation. After their motions to quash the warrant and suppress evidence were denied, two defendant admitted felony marijuana charges.

The defendants first claimed the driveway was in the curtilage of the house and the sergeant's observations were illegal. The Court of Appeal looked to four factors: (1) the driveway's proximity to the house; (2) enclosures around the house; (3) uses of the area being observed; and (4) steps taken to protect the area from observation. Since none of these weighed in favor of defendants' privacy claims, the Court of Appeal affirmed the trial court finding that the driveway was not within the curtilage of the house that where there is a reasonable expectation of privacy.

Continued, *Night-Vision Goggles*, p. 8

Proper Response to Threatened School Shooting?

Huff v. City of Burbank (2011) ___ Fed.3d ___

Officials at a high school called Burbank Police regarding a rumor that a student, Vincent Huff, who had been bullied, threatened to "shoot up" the school. Vincent had been absent for two days.

Officers went to the boy's home and knocked on the door. There was no answer and no answer when they called the house phone. So they called the mother's cell phone. She answered and they told her they were there to talk to her son. She hung up and then, two minutes later, walked out of the house with her son.

The lead officer asked if they could go in and talk about the rumored threat, but the mother refused. The officer asked if there were any guns in the house. The mother said she would go get her husband and went back into the house. Two officers followed. A second two, believing consent had been given, then followed.

After talking with the people, the officers were satisfied there was no threat and left. But the family sued, alleging a Fourth Amendment violation.

After a court trial, the district court ruled for the defendants, finding the entry was justified by the exigent-circumstances warrant exception. The Ninth Circuit reversed, finding that any such conclusion was mere speculation. Further, the entry was not justified by the emergency exception because there was no reasonable belief entry was needed to "protect or preserve life or prevent serious bodily injury."

The second two officers, however, were entitled to qualified immunity because they were reasonable in erroneously believing the first two had been given consent.

A dissenting justice argued that the law regarding the emergency exception had not yet been "clearly established."

Qualified Immunity Granted & Denied

Liberal v. Estrada (2011) ___ Fed.3d ___

Liberal sued the City of Menlo Park and seven of its officers after a traffic stop. He was driving with passengers after 1:00 a.m. and stopped at a traffic light. His front windows were down and his rear windows were tinted.

Officer Estrada travelling the other way used his overhead lights while making a U-turn to follow the car. Liberal made a couple of quick turns, stopped in a parking lot, pulled behind a building, and turned his lights off. The officer pulled in behind the car and shone his spotlight on it. Then he got out and, with his hand on his gun, ordered everyone in Liberal's car to put their hand out the windows. He asked Liberal for his license and registration. When he asked why he'd been pulled over, Estrada accused him of trying to flee.

Other officers responded to a call for backup. Estrada and Officer Keegan took Liberal out of the car, forced him against the car, and handcuffed him.

Unaware that Officer Keegan was recording the conversation, Estrada berated Liberal, calling them "three little punks." He told him he would not have been stopped had he not tried to flee. Estrada told him, "That's the way I do business."

After un-cuffing him, Estrada asked Liberal for consent to search the car. Liberal was placed in the rear seat of a patrol car during the search. A thorough search by about six officers found nothing illegal.

Estrada then administered a field sobriety test on Liberal.

After about 45 minutes, Liberal and friends were allowed to leave. No citation was issued.

Liberal sued the city and seven officers in federal court, alleging federal and state law violations. The district court granted summary judgment for the officers as to some claims, but denied others.

Continued, *Liberal v. Estrada*, p. 8

Ninth Circuit Reversed

Premo v. Moore (2011) ___ U.S. ___,
Harrington v. Richter (2011) ___ U.S. ___

In both *Premo* and *Harrington* the defendants had been convicted of murder. They sought relief in the federal court after they'd exhausted their avenues in state court.

Premo involved an Oregon defendant who pleaded guilty to a homicide charge and was sentence to life imprisonment. Filing for habeas corpus relief, he claimed he received ineffective assistance of counsel for his lawyer having failed to move to suppress his confession. His claims were denied, noting that his other admissible confession still might have subjected him to the death penalty had he not accepted the plea deal.

In *Harrington*, the defendant was convicted of murder in California. At trial, he surprised the prosecution with a self-defense theory. Rebutting his testimony, the prosecution presented evidence that the blood splatters at the scene were inconsistent with the defendant's story. In his habeas corpus petition, he claimed his trial counsel was ineffective for failing to retain and call his own expert to testify as to the blood evidence. The lower courts rejected those claims noting, among other things, that a competent attorney would not have foreseen a need for such an expert.

In both cases, though, the Ninth Circuit Court of Appeals reversed. The Ninth Circuit concluded that each defendant was entitled to the habeas corpus relief sought because both suffered from ineffective assistance of counsel. Their lawyers' performances weere so poor, ruled the court, that they were denied a fair trial.

But the U.S. Supreme Court reversed the rulings of the Ninth Circuit. Besides other errors, the Supreme Court held that the Ninth Circuit failed to afford proper deference to the attorneys' professional decisions. The Ninth Circuit improperly used hindsight in critiquing their judgments.

***Liberal v. Estrada*, continued from p. 7**

Officers Keegan and Estrada appealed the denial of summary judgment as to Liberal's state claims of assault and battery.

The Ninth Circuit ruled it had no jurisdiction to review summary judgment as to some of the state law claims. As for the state false imprisonment claim, though, the Ninth Circuit held state law allowed a federal appeal as to whether the discretionary immunity principle found in state law required summary judgment for the officers.

Summary judgment was properly denied with respect to Officer Estrada's traffic stop because that stop violated a clearly established federal right. Summary judgment was also properly denied with respect to the federal excessive force claim. Further, there was a triable issue as to whether the length of the unlawful detention violated the Fourth Amendment. Also, since Liberal's consent was not lawfully obtained, qualified immunity did not block the suit concerning the search.

The suit could also go forward with respect to the state false imprisonment claim. The officers were not entitled to the normal immunity state law affords concerning discretionary decisions. This is because the decision to make the car stop was not within their discretion.

One justice concurred in most of the opinion, but dissented as to the false imprisonment claim. The majority had concluded that denial of summary judgment on that claim was a "final judgment," which would allow federal review. The dissenting justice disagreed as to that conclusion.

DAI's Barela President of WSATI

In December 2010 Investigator Assistant Jennifer Barela was elected to a two-year term as president of the Northern California chapter of the Western States Auto Theft Investigators' Association (WSATI). Along with law-enforcement representatives, WSATI communicates with car rental and insurance companies to prevent auto theft in the region.

Such cooperation is critical in combatting auto theft. Insurance companies are an extremely valuable clearing house for information shared across jurisdictions.

Congratulations Jennifer!

***Night-Vision Goggles*, continued from p. 6**

The defendants also claimed that use of the night-vision goggles was a Fourth Amendment violation. They tried to equate the goggles with thermal-imaging technology, which has been held to be an unlawful warrantless search technique. The Court of Appeal answered that, unlike thermal-imaging devices, night-vision goggles cannot "see through" walls. The goggles, the appellate court stated, were a method of enhancing legal viewing methods. The goggles, they said, were more like using binoculars or a flashlight. Warrantless use of such enhancing devices has long been upheld.

EDITOR
Kevin A. Hicks
Deputy District Attorney
San Joaquin County
209.468.2432
Kevin.Hicks@sjcda.org

News and articles of local law enforcement interest and assistance invited and encouraged.

OFFICE OF THE DISTRICT ATTORNEY
SAN JOAQUIN COUNTY
JAMES P. WILLETT
222 E. Weber Ave., Room 202
Stockton, CA 95202
Phone: 209.468.2400 Fax: 209.465.0371