Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

April 2016

THE FEDERAL LAW ENFORCEMENT -INFORMER-

A MONTHLY LEGAL RESOURCE AND COMMENTARY FOR LAW ENFORCEMENT OFFICERS AND AGENTS

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The Informer – April 2016

Article

The Fifth Amendment and Compelling Unencrypted Data, Encryption Codes and/or Passwords (Part 2)...5

By Robert Cauthen, Assistant Division Chief, Office of Chief Counsel/Legal Division, Federal Law Enforcement Training Centers, Glynco, Georgia

Case Summaries

Circuit Courts of Appeals

First Circuit

United States v. Sanchez: Whether officers had reasonable suspicion to conduct a *Terry* stop and *Terry* frisk of the defendant, and whether the booking officer was required to *Mirandize* the defendant before asking him standard booking questions...............11

United States v. Cardona: Whether an officer established reasonable suspicion the defendant was presently armed and dangerous to support a *Terry* frisk............................12

Fifth Circuit

United States v. Danhach: Whether officers lawfully entered and remained inside the defendant's warehouse while conducting a "knock and talk" interview...........................13

Seventh Circuit

United States v. Rivera: Whether officers established probable cause to conduct a warrantless search of the defendants' garage and vehicle...14

United States v. Hill: Whether an officer established reasonable suspicion to conduct a *Terry* stop of the defendant, and then probable cause to arrest him......................................15

United States v. Guidry: Whether an officer unlawfully prolonged the duration of a traffic stop to allow another officer to conduct a dog sniff of the defendant's vehicle..........16

Eighth Circuit

United States v. Mshihiri: Whether an officer established probable cause to obtain a search warrant, and whether the defendant was in custody for *Miranda* purposes when officers interviewed him at the airport...17

United States v. Diriye: Whether officers established reasonable suspicion to conduct a *Terry* stop of the defendant after he intruded upon an active crime scene............................18

United States v. Campos: Whether moving the defendant's bicycle off a sidewalk so it would not impede pedestrian traffic constituted a *Fourth Amendment* search.................19

Ninth Circuit

United States v. Lara: Whether the warrantless search of a probationer's cell phone violated the *Fourth Amendment*..19

United States v. Lundin: Whether officers conducted a lawful "knock and talk" after they went to the defendant's house with the intent to arrest him without a warrant, and whether exigent circumstances justified the officers' warrantless entry and search of the defendant's backyard and patio area..20

Tenth Circuit

United States v. Carloss: Whether officers violated the *Fourth Amendment* after they ignored "No Trespassing" signs and went onto the porch of the defendant's house to conduct a "knock and talk" interview..22

United States v. Mendoza: Whether the defendant's consent to search was valid................23

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1. Law Enforcement Legal Refresher Training

2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This webinar focuses on *Fourth* and *Fifth Amendment* law and is designed to meet the training requirements for state and federal law enforcement officers who have mandated two-hour legal refresher training requirements.

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The Fifth Amendment and Compelling Unencrypted Data, Encryption Codes and/or Passwords

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Part 2 of 2

Part 1 of this article looked at the Fifth Amendment Self-Incrimination Clause and three United States Supreme Court decisions that form the underpinnings of the legal analysis concerning documents and data on electronic devices. Part 2 will discuss federal case law governing whether, and if so how, the government can compel a suspect or defendant to disclose a password or encryption code or produce an unencrypted version of data already lawfully in the government's possession.[1]

ELECTRONIC OR DIGITAL DOCUMENTS, WRITINGS, AND DATA

We live in a digital and increasingly paperless world. Computers, tablets, electronic storage media, electronic devices, and cell and smart phones have permeated, perhaps saturated, our business and personal cultures. Documents, data, communications, and writings – potential evidence of crimes – are created, transmitted, and stored electronically. What if the government lawfully obtains the device but can't access the data on it because it is password protected? What if access to the data is accomplished, but it is gibberish because it is encrypted? Can the defendant/suspect be compelled to provide the password/encryption code? Can the defendant/suspect be compelled to provide an unencrypted version of the data already in the government's lawful possession?

Only a few federal courts have addressed these questions.

COMPELLING THE PRODUCTION OF A PASSWORD OR ENCRYPTION CODE

***Doe v. United States*, 487 U.S. 201, 108 S. Ct. 2341 (1988)**

In this case, the government filed a motion for an order directing Doe to sign a consent directive authorizing banks in the Cayman Islands and Bermuda to disclose records of his accounts.

The Supreme Court held that compelling Doe to sign the consent directive was not protected by the privilege against self-incrimination because neither the form itself nor the act of signing it were testimonial communications. The Court stated that compelling Doe to sign the form was "more like 'be[ing] forced to surrender a key to a strongbox containing incriminating

[1] This article will not address whether third parties, such as technology companies or internet service providers (ISPs) can be compelled to give the government access to another's password protected devices and files and unencrypted data.

documents' than it is like 'be[ing] compelled to reveal the combination to [petitioner's] wall safe.'" *Doe*, footnote 9 at 219.

Is a password or encryption code the key to the strongbox or the combination to the wall safe?

***United States v. Kirschner*, 823 F. Supp. 2d 665 (E.D. Mich. 2010)**

In this child pornography case, a grand Jury issued a witness subpoena (not a subpoena duces tecum) commanding Kirschner to appear and testify. It required him to provide "…all passwords used or associated with the…the computer…and any files." Kirschner filed a Motion to Quash the subpoena asserting his Fifth Amendment privilege against self-incrimination. The district court agreed with Kirschner and quashed the subpoena.

The court held that testimony providing a password is a "testimonial communication." The password itself is testimonial evidence because it reveals the contents of the mind.[2] The court's ruling turns on a traditional view of what is "testimonial." "In this case, the government is not seeking documents or objects – it is seeking testimony from the defendant, requiring him to divulge through his mental processes his password – that will be used to incriminate him." The court reasoned that compelling Kirschner to testify to the password is more like compelling him to provide the combination to the wall safe than the key to the strongbox containing incriminating documents.

The court also held that a grant of act of production immunity under 18 U.S.C. §6002 is insufficient to overcome the defendant's Fifth Amendment protection. Even if the password was not, in and of itself, incriminating, it may lead to incriminating evidence becoming a link in the chain of evidence. In other words, any files or data discovered by accessing the computer would be a "derivative use" of compelled testimonial evidence, the password.

***United States v. Pearson*, 2006 U.S. Dist. LEXIS 32982 (N.D.N.Y. 2006)**

Pursuant to several search warrants, investigators seized numerous computers and storage media, including thumb drives and CDs. Some files on them were password protected. A second superseding indictment contained over 70 counts. The government issued a trial subpoena for "Any and all passwords, keys, and/or log-ins used to encrypt any and all files…." The defendant filed a Motion to Quash the subpoena based on the Fifth Amendment privilege against self-incrimination.

The government argued that, based on e-mails they had seized, the passwords would be so lengthy and complicated the defendant likely wrote them down. Therefore, as a document previously, voluntarily created, it would not be testimonial evidence. The defendant did not respond to that argument but, instead, argued that "[w]hile the content of the seized materials may not be protected by the Fifth Amendment because the production of said materials was not compelled or testimonial," the "act of producing the decryption information … would violate the Fifth Amendment because it would 'communicate testimonial aspects as to the existence of the documents, possession or control of the documents, or the authenticity of the documents.'"

[2] See also *SEC Civil Action v. Huang*, 2015 U.S. Dist. LEXIS 127853 (E.D. Pa. 2015); *U.S. v. Rogozin*, 2010 U.S. Dist. LEXIS (W.D.N.Y. 2010).

The court addressed the Fifth Amendment issues, but then reserved ruling on the Motion to Quash until after a further hearing.

The court noted that, by proceeding directly to the "act of production" argument, defendant essentially conceded that the password itself carries no Fifth Amendment privilege.

The court stated the testimonial aspect of production is minimized if not eliminated when the existence, ownership, control, or authenticity of the document (or thing) is a "forgone [gone]" conclusion.

"[T]he act of producing [otherwise unprivileged documents] in response to a subpoena may require incriminating testimony in two situations: (1) if the existence and location of the subpoenaed papers are unknown to the government; or (2) where production would implicitly authenticate the documents." Because the files were already in the government's possession, because forensic examination had established the existence and use of encryption software on the files, and because the government had information from the defendant that he intended to encrypt certain files, knowledge of the actual password would add little to what the government already knew about their existence and location. The court decided to hold a factual hearing to determine whether the government can authenticate the files by evidence other than the production of the password. There is no further order on the defendant's Motion to Quash.

The last action on the case was an appeal of a restitution amount awarded after a guilty plea. *United States v. Pearson*, 570 F. 3d 480 (2d Cir. 2009).

Can the suspect be compelled to provide the password or encryption code? Probably so, if the government can satisfy the court that it's written down or otherwise documented and, therefore, not a compelled testimonial communication and can either establish the "foregone conclusion" doctrine to overcome the act of production privilege or if the court grants use and fruits immunity.

COMPELLING THE PRODUCTION OF AN UNENCRYPTED VERSION OF A DOCUMENT ALREADY IN THE LAWFUL POSSESSION OF THE GOVERNMENT

What if, rather than compelling a password or encryption code, the government seeks instead to compel the production of an unencrypted version of a document or data already in its lawful possession?

***In re: Grand Jury Subpoena to Boucher*, 2009 U.S. Dist. LEXIS 13006 (D. Vt. 2009)**

In this child pornography case, an initial border search revealed a file named "2yo getting raped during a diaper change," which had last been opened 6 days before. A consent search of a laptop computer, including part of a Z drive[3], revealed suspected child pornography. The laptop was seized and a search warrant obtained, but the subsequent search of Z drive was blocked by password.

The government issued a grand jury subpoena for "all documents, whether in electronic or paper form, reflecting any passwords used or associated with" the seized laptop. Boucher sought to

[3] On request, Boucher entered the password to the Z drive and allowed the agent to view it.

quash the subpoena, asserting his Fifth Amendment privilege against self-incrimination. The Magistrate Judge granted the motion and quashed the subpoena. The government appealed to the district court.

In its appeal, the government stated that "it does not in fact seek the password for the encrypted hard drive, but requires Boucher to produce the contents of his encrypted hard drive in an unencrypted format by opening the drive before the grand jury." Then, in oral argument and post-argument submissions, the government stated that it intended only to require Boucher to provide an unencrypted version of the drive to the grand jury.[4]

The district court held there is no question the contents of the laptop were voluntarily prepared or compiled and are not testimonial, and therefore not protected by the Fifth Amendment. The district court also held the "foregone conclusion" doctrine applies because the government already knew of the Z drive and the files on it[5], and can establish authenticity because the laptop was in Boucher's car, he had already admitted it was his, and he had previously provided the government with access to the Z drive.

***United States v. Fricosu*, 841 F. Supp. 2d 1232 (D. Colo. 2012), appeal denied by, stay denied by *Fricosu v. United States*, 2012 U.S. App. LEXIS 3561 (10th Cir. Colo. Feb. 21, 2012)**

In this real estate fraud/mortgage fraud case, three computers were seized pursuant to a search warrant. One of the computers, the one found in Fricosu's bedroom, was password protected. The government sought a writ pursuant to the All Writs Act, 28 U.S.C. § 1651, to compel production of the unencrypted contents of the computers.

Fricosu's ex-husband was serving a sentence in state prison. A telephone conversation between him and Fricosu was taped not long after the search warrant was served. During the conversation, Fricosu said things that established that the computer was hers and that she knew the files were there and password protected. In addition, the registry key of the computer identified it as hers.

The district court held that the All Writs Act enables the court to issue orders to effectuate an existing search warrant. The court also held the contents of the computer were not privileged because they were voluntarily prepared or compiled. The court held the government had met its burden of showing by a preponderance of the evidence that the "foregone conclusion" doctrine applied to overcome any "act of production" protection. The government knew of the existence and locations of the files. There is no requirement that the government know of the specific content of any specific files. The government can independently establish the authenticity of the documents on the computer.

The court issued the Writ but prohibited the government from using Fricosu's act of producing

[4] Perhaps the government again changed the request because it was concerned that the act of opening it up in front of the grand jury would communicate to them that Boucher knows the password, knows there are protected files, and that he has access to them, triggering "act of production" and "derivative use" protections.
[5] The court held that the government does not have to show it knows of the incriminatory *contents* of the sought files.

the unencrypted documents/data against her in any way.[6]

***In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011: U.S. v. John Doe*, 670 F.3d 1335 (11th Cir. 2012)**

In this child pornography case, a search warrant was issued to seize all digital media, as well as any encryption devices or codes necessary to access such media. Certain portions of the data on the hard drives of Doe's seized laptops and external hard drives were encrypted and inaccessible.[7]

A grand jury subpoena duces tecum was issued requiring Doe to produce the "unencrypted contents" of the devices and "any and all containers and folders thereon." In response, Doe invoked his Fifth Amendment privilege against self-incrimination. A show cause hearing was held at which the government requested the district court grant Doe immunity pursuant to 18 U.S.C. §6002, limited only to the use of Doe's production of the unencrypted contents but not to the use of the contents as evidence in a criminal prosecution. (In other words, no derivative use immunity.) The focus of the hearing was "whether the Fifth Amendment would bar the government from establishing before a petit jury—say, if Doe were indicted for possession of child pornography in violation of 18 U.S.C. § 2252—that the decrypted contents (child pornography) were Doe's because (1) the hard drives belonged to Doe (which was not in dispute), and (2) contained child pornography. Doe contended the establishment of point (2) would constitute the derivative use of his immunized grand jury testimony. That is, by decrypting the contents, he would be testifying that he, as opposed to some other person, placed the contents on the hard drive, encrypted the contents, and could retrieve and examine them whenever he wished."[8] The district court issued the order on the government's terms. Doe again refused to decrypt the contents asserting the use of the contents as evidence against him would be a derivative use prohibited by the Fifth Amendment.[9] The district court held Doe in contempt and ordered him incarcerated. Doe appealed.

On appeal, the Eleventh Circuit reversed the district court's order holding Doe in contempt. The court held that the decryption and production of the contents is testimonial and privileged. Doe's production of the unencrypted files would be more than just a physical, nontestimonial transfer. Requiring Doe to use a decryption code is akin to compelling the combination to a wall safe because both demand the use of the contents of the mind, and the production could imply incriminating factual statements.

The court held the "foregone conclusion" doctrine was not applicable because the explicit and implicit factual communications associated with decryption and production were not foregone conclusions. The government failed to show with "reasonable certainty" that it knew any files existed at all (the specific file name is not necessary), knew any files were located on the encrypted hard drives[10], could independently authenticate any such files, or that Doe could access and decrypt any such files.

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[6] In response, Fricosu claimed to not remember the password. About a month later, her ex-husband handed police a list of passwords one of which worked rendering the Fifth Amendment issues moot.

[7] The contents were encrypted using software called "TrueCrypt."

[8] *Doe at 1339*.

[9] Doe also asserted that he was unable to decrypt the contents.

[10] On cross-examination, the government's forensic examiner testified that blank space appeared as random characters and conceded that it could not be distinguished from encrypted data.

Regarding the grant of immunity, the court held the act of production immunity granted was not synonymous with "use and derivative use" immunity under 18 U.S.C. §6002. Use and derivative use immunity establishes the critical threshold to overcome an individual's invocation of the Fifth Amendment privilege against self-incrimination. No more protection is necessary; no less protection is sufficient. There is no provision under §6002 for just "act of production" immunity. The limited immunity grant under § 6002 was insufficient to overcome Doe's protection.

INVESTIGATIVE PRACTICES

Even though the law on applying well established Fifth Amendment self-incrimination principles to passwords and encryption codes is in its infancy, there is guidance in the relatively few federal cases that criminal investigators can use when confronted with these circumstances.

When relevant data is believed to be on a device, ask for passwords and encryption codes. Ask the target or suspect.[11] Ask the owner or apparent owner of the device. Determine if others have knowledge of, access to, and use of the device, and ask them. The Fifth Amendment is not violated if the response is voluntarily.

Look for and seize passwords and encryption codes. People have so many user names and passwords these days that they often write them down or otherwise record them and keep them handy for use when required, especially when, as in *Pearson*, the password is lengthy and complicated. Or, in the alternative, they use the same password for access to multiple accounts, devices, folders, and documents.

A search warrant should specifically authorize the search for and seizure of passwords and encryption codes.

Establish the "foregone conclusion" doctrine. Gather facts that establish the suspect's ownership of, possession of, access to, and/or use of the device, knowledge of the contents on the device, knowledge that the data is password protected or encrypted, and the ability to decrypt the contents. The court must be convinced to a reasonable certainty[12] that the act of production protection will add nothing to what the government already knows and can prove.

When confronted with password protected or encrypted data and the suspect/defendant refuses to give the password or encryption code, ask for an "unencrypted copy" of the data. A grand jury subpoena duces tecum will work when issued prior to the indictment. A trial subpoena duces tecum will work after formal charging.

Immunity under 18 U.S.C. §6002 will overcome potential act of production protection. In order to avoid "derivative use" protection and be able to use the produced unencrypted data as evidence in the criminal prosecution, establish the same facts as those required for the "foregone conclusion" doctrine.

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[11] *United States v. Gavegnano*, 305 Fed. Appx. 954 (4th Cir. 2009) (unpublished decision); *United States v. Furman*, 2015 U.S. Dist. LEXIS 31099, 2015 WL 1061956, at *2 (D. Minn. Mar. 11, 2015)(government obtained password for locked device by asking defendant for it); *United States v. Graham*, 2014 U.S. Dist. LEXIS 88796, 2014 WL 2922388, at *3 (same).

[12] In *Fricosu*, supra, the court applied a preponderance of the evidence standard.

CASE SUMMARIES

Circuit Courts of Appeal

<u>First Circuit</u>

<u>United States v. Sanchez</u>, 2016 U.S. App. LEXIS 5392 (1st Cir. Mass. Mar. 23, 2016)

A confidential informant (CI) called Officer Templeman and reported that an Hispanic male standing near a green Ford Taurus on the corner of Main and Calhoun Streets had a black semiautomatic handgun in his waistband and crack cocaine in his pocket. The CI described the man as being approximately 5'5" tall, and wearing a white t-shirt and black cargo-style pants. When Officer Templeman asked the CI how he knew about the gun and the crack, the CI replied that he had personally "seen" them. The CI had given Officer Templeman reliable information in the past that had led to arrests and convictions for drug and firearms related crimes. In addition, Officer Templeman knew the CI's name, phone number and address, and as far as Templeman knew, the CI had never given him false information.

After receiving the tip, Officer Templeman and other officers immediately went to the location indicated by the CI. Once there, the officers saw a green Ford Taurus and a man matching the description provided by the CI. Officer Templeman recognized the man as Sanchez, a suspected gang member with a known felony conviction for a drug offense. After conducting surveillance for ten minutes, Officer Templeman saw Sanchez touch his waistband in a way that reminded Templeman how he checks his own waistband when he carries a concealed handgun. In addition, Templeman saw the outline of an object under Sanchez's shirt near his waistband. Based on these observations as well as his training and experience, Officer Templeman directed the other officers to detain and frisk Sanchez. One of the officers frisked Sanchez and found a handgun in Sanchez's waistband. The officer then arrested Sanchez and discovered crack cocaine in Sanchez's pocket during the search incident to arrest. The total time from the CI's call to Sanchez's arrest was approximately 15 minutes.

The officers transported Sanchez to the jail. During the intake process, the booking officer asked Sanchez a series of standard biographical questions. In addition to asking Sanchez his name, date of birth, social security number, height and weight, the booking officer asked Sanchez if he was employed. Sanchez told the booking officer that he was a "drug dealer." The booking officer did not ask any follow-up questions concerning this remark and completed the booking process.

Sanchez was charged with several criminal offenses.

Sanchez filed a motion to suppress the firearm, cocaine and his "drug dealer" statement.

First, Sanchez argued information provided by the CI did not provide the officers reasonable suspicion to detain and then frisk him.

The court disagreed. Reasonable suspicion can be established by an informant's tip if the tip possesses sufficient indicia of reliability. Here, Officer Templeman knew the informant's identity, contact information, and that the informant's tips had proven reliable in the past. In addition, the CI gave detailed information concerning Sanchez's physical appearance, location,

gun and drug possession, which the CI stated he had personally observed. Finally, while conducting surveillance, Officer Templeman saw Sanchez touch his waistband in a manner consistent with checking for a concealed gun, and he knew that Sanchez's felony conviction prohibited him from lawfully possessing any firearms. Based on these facts, the court concluded the officers established reasonable suspicion to conduct a *Terry* stop and a *Terry* frisk on Sanchez.

Second, Sanchez argued that his "drug dealer" statement should have been suppressed because the officers had not advised him of his *Miranda* warnings before questioning him during booking process.

Again, the court disagreed. *Miranda* warnings must be provided when a person is subjected to custodial interrogation. Here, neither side disputed that Sanchez was in custody at the time of booking. However, the court noted it is well-settled that routine booking questions seeking background information are not considered "interrogation" for *Miranda* purposes. The booking questions exception is driven by the premise that questions concerning an arrestee's name, date of birth, social security number and employment status "rarely elicit an incriminating response, even when asked after arrest." In this case, the booking officer only asked Sanchez routine questions to complete the booking process, not to strengthen the government's case against Sanchez, as the booking officer did not ask any follow-up questions when Sanchez told him that he was employed as a drug dealer.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-1107/15-1107-2016-03-23.pdf?ts=1458763208

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United States v. Cardona-Vicente, 2016 U.S. App. LEXIS 5750 (1st Cir. P.R. Mar. 29, 2016)

A police officer conducted a traffic stop after he saw the driver of a Jeep was not wearing a seatbelt, a violation of Puerto Rico law. The officer received the vehicle's registration from the driver; however, the driver could not produce a driver's license. When the officer went around to the back of the Jeep to check the registration sticker, he saw Cardona, the passenger, grabbing at a fanny pack that was around his waist. Based on his experience, the manner in which Cardona grabbed the fanny pack led the officer to believe it contained a gun. In addition, Cardona appeared to be nervous. The officer asked Cardona if he had a license to carry a firearm. Cardona did not reply, but he looked down and acknowledged non-verbally that he did not have a license to carry a firearm. The officer then ordered Cardona out of the vehicle, touched the fanny pack and felt a gun. The officer unzipped the fanny pack and found a loaded handgun, ammunition, cash and fourteen baggies of cocaine. Cardona was arrested and charged with drug and firearm offenses.

While he conceded the traffic stop was lawful, Cardona claimed the evidence seized from the fanny pack should have been suppressed because the officer lacked reasonable suspicion to conduct a *Terry* frisk.

The court disagreed. The court noted several facts that became apparent to the officer as the traffic stop progressed which were sufficient to establish reasonable suspicion that there was a gun in Cardona's fanny pack. First, the driver of the Jeep could not produce a driver's license, suggesting the vehicle may have been stolen. Second, Cardona appeared nervous during the

stop. Third, the officer saw Cardona was clutching the fanny pack in a manner that, based on his experience, was consistent with there being a gun inside it. Finally, with his suspicions aroused, the officer asked Cardona if he had a license to carry a firearm. Cardona increased the officer's suspicions when he evasively looked down and then non-verbally gesturing with his head, admitting that he did not have a license. The court concluded this sequence of events was sufficient to establish Cardona was armed and dangerous; therefore, the officer was justified in ordering him out of the vehicle and touching the fanny pack.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-1188/15-1188-2016-03-29.pdf?ts=1459267204

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Fifth Circuit

United States v. Danhach, 2016 U.S. App. LEXIS 4421 (5th Cir. Tex. Mar. 9, 2016)

The Houston Police Department (HPD) and the Federal Bureau of Investigation (FBI) suspected Danhach and Kheir were involved in an organized retail theft operation. During their investigation the agents discovered a warehouse where they believed Danhach and Kheir were storing stolen property. After agents surveilling the warehouse saw Kheir and another man enter the warehouse, the agents approached and knocked on the door in an attempt to gain entry. Kheir opened the door and allowed the agents to enter the warehouse. Once the agents were inside the warehouse Kheir gave them permission to walk back to the main warehouse area to locate the unidentified worker that Kheir had indicated was there. When the agents entered the main warehouse area, they saw what immediately appeared to be stolen property and other items consistent with an organized retail theft operation. The agents then asked for and received Kheir's oral consent to search the entire warehouse. Sometime later, the agents obtained a warrant to search the warehouse and seized evidence that tied Danhach and Kheir to the stolen property operation.

The government indicted Danhach and Kheir for a variety of federal criminal offenses.

Danhach argued the evidence seized from the warehouse should have been suppressed. Danhach claimed the agents' observations, which established probable cause to obtain the search warrant, occurred after the agents unlawfully entered the warehouse.

The court disagreed. First, the agents' initial entry into the warehouse was lawful because the agents utilized the "knock and talk" technique. The court noted this technique is a reasonable investigative tool when officers seek an occupant's consent to search or when officers reasonably suspect criminal activity. Here, one of the agents testified they received Kheir's permission before they entered the warehouse, and this testimony was supported by surveillance video. Second, it was uncontested that once inside the building, Kheir gave the agents permission to walk back to the main warehouse area. Consequently, the court concluded the agents were lawfully inside the warehouse when they saw evidence of stolen property and other evidence of a stolen property operation, which they used to establish probable cause to obtain the search warrant. Alternatively, the court added the agents' observations were lawful because Kheir voluntarily consented to a full search of the warehouse. It was undisputed that Kheir was in charge of the warehouse, and while Kheir declined to sign a consent-to-search form, the court noted this refusal did not automatically withdraw Kheir's previous oral consent.

For the court’s opinion: http://cases.justia.com/federal/appellate-courts/ca5/14-20339/14-20339-2016-03-09.pdf?ts=1457569834

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Seventh Circuit

United States v. Rivera, 2016 U.S. App. LEXIS 4828 (7th Cir. Ill. Mar. 16, 2016)

A confidential informant (CI) arranged to purchase cocaine from Duenas. The CI drove to Duenas’ house, parked outside, went into the garage and discussed the transaction with Duenas and Rivera. After a short meeting, the CI went back outside to get the money for the purchase of the cocaine. However, instead of going back into the garage, the CI got into his car and drove away. The CI phoned the agents who were monitoring his movements and told them there was cocaine in Rivera’s truck, which was parked inside Duenas’ garage. The agents immediately went to Duenas’ house where they arrested Duenas outside the open garage and Rivera inside it. The agents then searched the garage and seized two kilograms of cocaine from Rivera’s truck. Between the CI’s departure from the garage and the agents’ arrival, approximately three minutes had elapsed.

The government charged Duenas and Rivera with conspiracy to possess and distribute cocaine.

The defendants filed a motion to suppress the evidence seized from Rivera’s truck, arguing the agents’ warrantless searches of Duenas’ garage and Rivera’s truck violated the *Fourth Amendment*.

The court disagreed. Once the CI told the agents that there was cocaine in Duenas’ garage, the court found the agents had probable cause to search the garage. The agents then could have obtained a warrant to search the garage by including this information in their search warrant application to the magistrate judge. However, the court concluded exigent circumstances existed which made the agents’ warrantless entry into Duenas’s garage and subsequent search of the garage and Rivera’s truck reasonable. Specifically, the court found the delay caused by the agents drafting the search warrant application and presenting it to a magistrate judge might have prompted Duenas and Rivera to move the drugs to another location once they realized the CI might not be returning to complete the transaction. The court stated, “The important point is that had time permitted, the agents would without question *have* obtained a warrant.”

It is significant to note that the court rejected the agents’ warrantless entry and search under the consent-once-removed doctrine upon which the district court relied to deny the defendants’ motion to suppress the evidence. Under the consent-once-removed doctrine,

> “If an informant is invited to a place by someone who has authority to invite him and who thus consents to his presence, and the informant while on the premises discovers probable cause to make an arrest or search and immediately summons help from law enforcement officers, the occupant of the place to which they are summoned is deemed to have consented to their presence.”

The court added,

> “At first glance the doctrine of "consent once removed" is absurd. If one thing is certain it's that Duenas and Rivera would never have consented to the entry of

> federal drug agents into Duenas's garage, where the drugs to be bought by the informant were stored. The doctrine thus cannot, despite its name, be based on consent."

Although the court considered the term "consent-once-removed" to be misnamed, the court recognized the doctrine to have some validity even though the agents' entry and searches here were valid under the doctrine of exigent circumstances. However, the court could not find a case that mentioned "consent-once-removed" in which the decision in favor of the government could not have been supported on other grounds such as actual consent, exigent circumstances, or inevitable discovery. In light of these decisions, the court was "inclined to think that the term 'consent-once-removed' is not only opaque, but expendable."

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/15-1740/15-1740-2016-03-16.pdf?ts=1458158466

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United States v. Hill, 2016 U.S. App. LEXIS 5073 (7th Cir. Ill. Mar. 21, 2016)

Hill robbed a bank and got away with $134,000 in cash. However, as Hill fled, a red dye pack exploded in the bag containing the cash. As a result, most of the bills were stained red. Several days later, Hill went into a casino with a backpack and a Santa hat filled with thousands of dollars of dye-stained bills. Hill went to a slot machine and fed the bills into the machine. A casino employee thought it was strange that Hill was not playing the slot machine. Instead, Hill was cashing out and receiving vouchers for the amount of money he had put into the slot machine. The employee also noticed that the bills Hill was feeding into the slot machine were stained red. The employee notified a supervisor who contacted a police officer who was working as a security officer at the casino. The officer approached Hill and saw him holding red-stained bills, still wrapped in bank bands. The officer asked Hill why his bills were red and where he had gotten the money. Hill told the officer he had found the money while changing a tire near a lake. The officer found Hill's story suspicious. In addition, the officer knew from his law enforcement experience that bank employees often attempt to hide red-dye packs among stolen money during robberies. The officer then led Hill away, along with his bag and Santa hat to an interview room. The officer questioned Hill and eventually searched Hill's bag and Santa hat, recovering a large quantity of dye-stained bills.

The government indicted Hill for money laundering, bank robbery and transporting stolen money in interstate commerce.

Hill filed a motion to suppress his arrest, the searches of his backpack and Santa hat, as well as his initial statements to the officer at the cash-out area. Specifically, Hill argued the officer's initial conversation with Hill was an arrest for which the officer did not have probable cause. Alternatively, even if the initial encounter was not an arrest, Hill argued the officer did not have reasonable suspicion to perform a *Terry* stop. Finally, Hill argued the officer did not have probable cause to remove Hill to the interview room where the remainder of the stolen bills were discovered.

First, the court held the officer's initial encounter with Hill at the cash-out area was a valid *Terry* stop. When the officer approached Hill, he knew that a casino employee had seen Hill placing red-stained bills into a slot machine that he was not playing, but instead cashing out and receiving vouchers. In addition, the officer knew from experience that dye packs are often used

to mark stolen currency and it was suspicious to have a person using a slot machine as a "change machine." Based on these facts, the court concluded the officer had reasonable suspicion to approach Hill and conduct a *Terry* stop.

Next, the court held that by the time the officer escorted Hill to the interview room, he had established probable cause to arrest Hill. When the officer approached Hill in the cash-out line, he saw that Hill was holding a stack of bills stained with red dye and wrapped in bank bands. When the officer asked Hill about the stained bills, Hill told the officer an unlikely story about how he supposedly obtained the bills. These new facts, combined with the facts the officer already knew when he approached Hill established probable cause to believe that Hill had committed or was committing a crime.

Finally, the court held the searches of Hill's backpack and Santa hat were lawful. A search incident to arrest is valid if it does not extend beyond "the arrestee's person and the area within his immediate control." Here, when he was detained, Hill was holding the bag containing the dye-stained bills and was exercising immediate control over it. Consequently, the court concluded the officer's search of those items was valid incident to Hill's arrest.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-2019/14-2019-2016-03-21.pdf?ts=1458577869

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United States v. Guidry, 2016 U.S. App. LEXIS 5322 (7th Cir. Wis. Mar. 22, 2016)

An officer stopped a car driving without license plates. When the officer approached the car, he recognized Guidry, the driver from a previous traffic stop. The officer also knew Guidry was a suspected drug user and dealer. During the stop, the officer smelled a faint odor of marijuana, but he did not believe he had probable cause to search Guidry's car. Instead, the officer obtained Guidry's driver's license and vehicle information. The officer went back to his car where he called for a drug-detection canine unit. The canine officer arrived with her drug-detection dog, Bud, five-minutes later, while the officer was still preparing Guidry's citation. The canine officer directed Guidry to exit his car, and Guidry stepped out, but he left the driver's side door open. As soon as Bud passed the open car door, he alerted and then indicated the presence of drugs by sitting down in front of the door. Bud then got up, approached the car and put his head into the car through the open door. Guidry told the officers he had smoked marijuana at home immediately before the traffic stop and that he had some marijuana in his car. The officers searched Guidry's car and found marijuana as well as heroin, powder cocaine, and crack cocaine, individually packaged in clear plastic baggies.

Based on Guidry's statements during the stop, the evidence seized from his car, and the testimony of two confidential informants (CIs) who admitted to purchasing drugs from Guidry at his house, officers obtained a warrant to search Guidry's residence.

Officers searched Guidry's residence and seized heroin, powder cocaine, crack cocaine, and marijuana. A woman present at Guidry's residence told the officers that Guidry maintained another residence where Guidry had drugs and prostituted women. The officers obtained a warrant to search Guidry's second residence based on the woman's statements and the evidence seized at his first residence.

The government charged Guidry with several drug and prostitution related offenses.

Guidry filed motions to suppress the evidence seized from his car and residences.

First, Guidry argued the officers violated the *Fourth Amendment* by unlawfully prolonging the duration of the traffic stop and then by allowing the drug-detection dog to search the interior of his car.

The court disagreed. The court held the dog sniff did not prolong the traffic stop. The canine officer arrived with Bud five minutes after being called, and when she arrived, the officer was still preparing Guidry's traffic citation. Even if the traffic stop had been prolonged by the dog sniff, the court found the officer had established reasonable suspicion to believe Guidry had drugs in the car when he smelled the faint odor of marijuana when he first encountered Guidry. As a result, the officer would have been justified in extending the duration of the stop for a reasonable time to confirm or dispel his suspicions with the dog's assistance. Next, the court held dog the sniff of Guidry's car was lawful. When Guidry got out of the car, he left the door open. In addition, the canine officer kept Bud on his leash and did not allow Bud to jump into Guidry's car. Finally, by the time Bud's head entered Guidry's car, the officers had probable cause to search the interior as Bud indicated the car contained drugs while sniffing outside the car.

Second, Guidry argued the officers did not establish probable cause to search his residences.

Again, the court disagreed. In both instances, the court found that the CIs' information was reliable as they were known to the officers, they obtained their information through first-hand observations, and some of their information was corroborated through other sources.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/15-1345/15-1345-2016-03-22.pdf?ts=1458678651

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Eighth Circuit

United States v. Mshihiri, 2016 U.S. App. LEXIS 4625 (8th Cir. Minn. Mar. 14, 2016)

After Mshihiri became a suspect in a mortgage fraud investigation, federal agents applied for warrants to search his residence and laptop computer. The affidavit in support of the search warrant included information provided by a confidential informant (CI) who claimed that he participated in the mortgage fraud scheme with Mshihiri. The affidavit also included information from bank and real estate records that corroborated information provided by the CI.

The agents coordinated with Customs and Border Protection (CBP) officers to interview Mshihiri and to execute a search of his laptop computer upon Mshihiri's return from Tanzania. When Mshihiri arrived at the Minneapolis-St. Paul International Airport, a CBP officer intercepted him at the immigration entry point, led him to baggage claim, and then escorted him to a reception area. At the reception area, the agents identified themselves and presented their credentials to Mshihiri. The agents asked Mshihiri if he would be willing to speak to them, explaining to Mshihiri that he was not under arrest or obligated to answer questions. Mshihiri agreed to be interviewed and voluntarily accompanied the agents to an interview room. The agents sat across the table from Mshihiri who sat in a chair next to the door. Speaking in a normal tone and volume, the agents asked Mshihiri several questions about the suspected

mortgage fraud. During the forty- five minute interview, Mshihiri did not request a break, try to use his cell phone, ask to consult an attorney, or call his wife so that she could call an attorney for him. The agents abruptly ended the interview after one of the agents changed his tone of voice and accused Mshihiri of lying. The agents left the interview room and Mshihiri went back through the passport control area in the main terminal.

The government charged Mshihiri with a variety of offenses including bank fraud, mail fraud, and wire fraud.

Mshihiri filed a motion to suppress evidence seized as a result of the search warrants and the statements he made during his interview with the agents. Mshihiri argued the affidavit in support of the search warrants failed to establish probable cause and that the interview with the agents constituted a custodial interrogation in which he was not first advised of his *Miranda* rights.

The court disagreed. First, the court held the affidavit in support of the search warrants established probable cause. The court concluded that the CI's first-hand knowledge of Mshihiri's involvement in the mortgage fraud scheme established the CI's reliability and basis of knowledge for the information he provided the agents. In addition, the court noted the CI's information was corroborated by a variety of independent financial documents.

Second, the court held Mshihiri was not in custody for *Miranda* purposes during the interview with the agents. In agreeing with the district court, the court found that the agents told Mshihiri that he was not under arrest; Mshihiri entered the interview room voluntarily and was seated next to the door throughout the questioning; the agents were dressed in casual clothing and did not display their weapons; most of the forty-five minute interview was calm and conversational, and Mshihiri was never handcuffed or placed under arrest.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/14-3802/14-3802-2016-03-14.pdf?ts=1457969484

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<u>United States v. Diriye</u>, 2016 U.S. App. LEXIS 4789 (8th Cir. Minn. Mar. 16, 2016)

Officers responded to a report of a suspicious vehicle in a parking lot, which matched the description and license plate of a vehicle connected to an armed home invasion and robbery three days earlier. When the officers arrived, they removed two people they discovered sleeping in the vehicle. Approximately fifteen minutes later, while the officers were awaiting the arrival of a supervisor for instructions to search the vehicle, Diriye walked up to the suspect vehicle and got inside it. The officers immediately approached the vehicle, ordered Diriye out and handcuffed him. While standing outside the car, Diriye shifted his body to keep his right side away from the officers. Suspecting that Diriye was armed, one of the officers frisked him and recovered a loaded handgun from Diriye's right pants pocket. Diriye was charged with being a felon in possession of a firearm.

Diriye filed a motion to suppress the handgun, arguing the officers only discovered it after conducting an unlawful *Terry* stop.

The court disagreed, holding the officers had reasonable suspicion to conduct a *Terry* stop on Diriye. First, Diriye bypassed an active crime scene and entered a suspect vehicle that had not yet been secured or searched by law enforcement officers. Second, the suspect vehicle matched

the description of a vehicle connected to an armed home invasion and robbery three days prior. Based on the totality of the circumstances, the court concluded the officers had reasonable suspicion to believe criminal activity was afoot by Diriye's blatant disregard for the active crime scene by siting in the suspect vehicle connected to recent criminal activity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2385/15-2385-2016-03-16.pdf?ts=1458142252

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<u>United States v. Campos</u>, 2016 U.S. App. LEXIS 5199 (8th Cir. Mo. Mar. 22, 2016)

When officers responded to a call for a man in need of medical attention, they found Campos lying on the sidewalk next to a fallen bicycle. Campos told the officers he did not need medical attention; however, Campos was incoherent which caused the officers to suspect that he was under the influence of drugs. When one of the officers moved the bicycle to keep it from blocking the sidewalk, an unzipped bag that was attached to the handlebars fell open. Without touching the bag, the officer saw that it contained a gun. The officer removed the gun and found a second gun along with a digital scale with residue and a syringe containing residue and blood. After Campos told the officers his name, they discovered that he was a convicted felon. The officers arrested Campos for being a felon in possession of a firearm.

Campos filed a motion to suppress the evidence discovered in the bag attached to his bicycle. Campos argued the officer conducted an unlawful search when he moved the bicycle, which allowed the officer to see the contents of the bag.

The court disagreed, holding that the officer's movement of the bicycle did not constitute a search under the *Fourth Amendment*. The court found the officer needed to move Campos' bicycle because it was impeding pedestrian traffic in violation of a city ordinance. Although the officer incidentally caused the bag to move by picking up the bicycle, the officer did not touch, squeeze, or manipulate the bag in any way. Consequently, once the officer moved Campos' bicycle and the unzipped bag came open, the firearm it contained was in plain view.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-1346/15-1346-2016-03-22.pdf?ts=1458660658

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<u>Ninth Circuit</u>

<u>United States v. Lara</u>, 2016 U.S. App. LEXIS 3995 (9th Cir. Cal. Mar. 3, 2016)

Lara was placed on probation after being convicted of possession for sale and transportation of methamphetamine in violation of California law. Two probation officers arrived unannounced at Lara's home after he failed to report for an appointment with one of the officers. Lara's probation agreement required him "to submit [his] person and property, including any residence, premises container or vehicle under [his] control, to search and seizure at any time of the day or night by any law enforcement officer, probation officer, or mandatory supervision officer, with or without a warrant, probable cause, or reasonable suspicion." After announcing that they were at the house to conduct a probation search, one of the officers ordered Lara to sit on the couch while the other officer examined a cell phone he saw on a table next to the couch. The officer stated that it was his department's policy to search probationers' cell phones during

home visits. The officer reviewed several text messages on Lara's phone and discovered messages containing three photographs of a handgun lying on a bed. The text messages suggested that Lara was attempting to sell the handgun to another individual. The officers searched Lara's house but they did not find the gun; however, the officers found a folding knife, the possession of which violated the terms of Lara's probation. The officers arrested Lara for possessing the knife and seized his cell phone. The officers submitted Lara's cell phone for forensic testing which revealed GPS coordinates embedded in the photographs of the gun. The officers eventually seized a loaded handgun that resembled the gun depicted in the photographs from Lara's mother's home.

The government charged Lara with being a felon in possession of a firearm and ammunition.

Lara filed a motion to suppress the gun and ammunition on the ground that it had been seized as the result of the illegal searches of his cell phone by the probation officer and the forensic lab.

The court agreed. Probationers do not completely waive their *Fourth Amendment* rights by agreeing as a condition of their probation to submit their person and property to search at any time upon request by a law enforcement officer. Specifically, any search made pursuant to a condition of probation must still meet the *Fourth Amendment's* reasonableness requirement. Consequently, the court concluded the issue was not solely whether Lara accepted the cell phone search as a condition of his probation, but whether the search that he accepted was reasonable.

First, because Lara was on probation, he had a reduced expectation of privacy concerning searches of his person and his property. Second, although Lara had a reduced expectation of privacy in these areas, Lara still had a substantial privacy interest in his cell phone and the data it contained. Third, Lara's probation agreement did not clearly authorize cell phone searches, and the terms "container" or "property" could not be interpreted so broadly to include Lara's cell phone and the information it contained. Finally, even though probationary searches support the government's interests in combating recidivism and integrating probationers back into the community, in this case, Lara's privacy interest in his cell phone and its data was greater.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/14-50120/14-50120-2016-03-03.pdf?ts=1457028170

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United States v. Lundin, 2016 U.S. App. LEXIS 5236 (9th Cir. Cal. Mar. 22, 2016)

A woman told an officer that Lundin had come to her home earlier that evening and abducted her at gunpoint. After a short time, the woman stated Lundin brought her home and warned her not to call the police. After corroborating some of the woman's story, the investigating officer believed he had probable cause to arrest Lundin for burglary, false imprisonment, kidnapping, and several other crimes. The officer issued a be-on-the-lookout (BOLO) and an arrest request for Lundin just before 2:00 am.

Upon receiving the BOLO, an officer from another law enforcement agency went to Lundin's home. The officer saw a vehicle matching the description of Lundin's truck parked in the driveway and saw that lights were on inside the house. The officer called for backup, and two other officers arrived just before 4:00 a.m. With the intent to arrest Lundin, the officers

approached Lundin's front door without a warrant. While standing on the porch the officers knocked loudly, waited thirty seconds for an answer, and then knocked more loudly. After the second knock, the officers heard several loud crashing noises coming from the back of the house. The officer ran to the back of the house and found Lundin. The officers handcuffed Lundin and placed him in the back of a patrol car. The officers went back and searched the patio area where they found two handguns lying among several five-gallon buckets that had been knocked over.

The government indicted Lundin on a variety of criminal offenses.

Lundin filed a motion to suppress, among other things, the two handguns the officers seized from the patio. The district court granted Lundin's motion, and the government appealed.

The government argued the officers were entitled to stand on Lundin's front porch and knock on the door under the "knock and talk" exception to the warrant requirement. The government then argued that the crashing noises the officers heard in the back yard created exigent circumstances, which allowed the officers to enter and search the back patio area of Ludin's house. The government further argued the warrantless search of the back patio area was a valid protective sweep.

The court disagreed. The "knock and talk" exception to the warrant requirement allows officers to "encroach upon the curtilage of a home for the purpose of asking questions of the occupants." This exception is based upon an implied license in which a homeowner consents for others, to include law enforcement officers, to approach their home, knock promptly, wait briefly to be received and then leave unless invited to enter. Here the court concluded the officers exceeded the scope of the "customary license" to approach a home and knock.

First, the court found that unexpected visitors are customarily expected to knock on the front door of a home during normal waking hours. While officers might have a reason for knocking that a resident would consider important enough to justify an early morning disturbance in some circumstances, that was not the case here. Instead, the officers knocked on Lundin's door around 4:00 a.m. without evidence that he generally accepted visitors at that hour, and without a reason that a resident would ordinarily accept as sufficient to justify the disturbance, specifically to arrest the resident. Second, the scope of the implied license to approach a home and knock is generally limited to the "purpose of asking questions of the occupants," and officers who knock on the door of a home for other purposes generally exceed the scope of the customary license and do not qualify for the "knock and talk" exception. As a result, the court held the "knock and talk" exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant.

The court pointed out that it was not prohibiting officers from conducting "knock and talks" when the officers have probable cause to arrest a resident, but do not have an arrest warrant. The court stated an officer would not violate the *Fourth Amendment* by approaching a home at a reasonable hour and knocking on the front door with the intent to merely ask the resident questions, even if the officer had probable cause to arrest the resident.

The court then held that exigent circumstances did not justify the officers' entry and search of the patio area. Exigent circumstances cannot justify a warrantless search when the officers "create the exigency by engaging . . . in conduct that violates the *Fourth Amendment*." First, the officers had no reason other than hearing the crashing noises coming from the backyard to believe there was an exigency that allowed them to enter and search the patio area. Second, it

was the officers' knock on the door that caused Lundin to make the crashing noises. Consequently, as the officers were in violation of the *Fourth Amendment* when they knocked on Lundin's door, the court concluded the officers created the exigency which led to the seizure of the handguns.

Finally, the court held the warrantless search of the patio area was not justified as a protective sweep as Lundin had already been handcuffed and placed in a police car and the officers had no reason to believe there was anyone else present who posed a threat to them.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/14-10365/14-10365-2016-03-22.pdf?ts=1458666156

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Tenth Circuit

United States v. Carloss, 2016 U.S. App. LEXIS 4547 (10th Cir. Okla. Mar. 11, 2016)

Officers received information that Carloss, a convicted felon, possessed a machine gun and was selling methamphetamine. Two officers went to the home where Carloss was living in an attempt to interview him. Carloss lived in a single-family dwelling, and while there was no fence or other barriers around the house or yard, there were several "No Trespassing" signs placed in the yard and on the front door. In response to their knocks on the front door, a woman, Heather Wilson, exited the back door of the house and met the officers in the side yard. A few minutes later Carloss exited the house, and joined the officers and Wilson in the side yard. The officers told Carloss why they were there and asked if they could search the house. Carloss told the officers they would have to ask the owner of the house, Earnest Dry, if they could search it. When the officers asked Carloss if they could go into the house to speak to Dry, he replied, "sure." At no time did Carloss or Wilson point out the "No Trespassing" signs or ask the officers to leave. Once inside the house, the officers waited in Carloss' room while Carloss went to get Dry. While in Carloss' room, the officers saw drug paraphernalia and a white powdery substance that appeared to be methamphetamine. After Dry refused to give the officers consent to search, the officers left. However, based on the drug paraphernalia the officers saw in Carloss' room, they obtained a warrant to search Dry's house. During the search pursuant to the warrant, officers seized drugs, firearms and ammunition. The government indicted Carloss and Dry on a variety of drug and weapons offenses.

Carloss argued that the search of his home pursuant to the warrant was unlawful because the officers obtained the warrant based on information that they obtained in violation of the *Fourth Amendment* when they trespassed onto the curtilage of his home to knock on the front door.

The court disagreed. First, law enforcement officers, like any member of the public, have an implied license to enter a home's curtilage to knock on the front door, in an attempt to speak with a home's occupants. Second, the court found the United States Supreme Court holding in *Florida v. Jardines* did not prohibit law enforcement officers from conducting knock and talk interviews. Instead, *Jardines* held that the license to approach a home and knock on the front door does not allow officers to perform a search of the interior of the house from the porch with the enhanced sensory ability of a trained dog. The court concluded that *Jardines* did not apply in this case, as the officers did not attempt to gather information about what was occurring inside the house from the front porch by using a trained dog or any other means. The officers simply went to the front door and knocked, seeking to speak consensually with Carloss.

Third, the court noted that it is well established that "No Trespassing" signs do not prohibit law enforcement officers from entering privately owned "open fields." As a result, the officers were entitled to enter any part of the yard that might be considered "open fields." Concerning the "No Trespassing" sign that was on the front door of the home, the court could not find any authority supporting Carloss' claim that a resident can revoke the implied license to approach his home and knock on the front door by posting a "No Trespassing" sign on it. As a result, the court held the presence of a "No Trespassing" sign, by itself, cannot convey to an objectively reasonable officer, or a member of the public, that he cannot go the front door and knock, seeking to speak consensually to an occupant.

Finally, the court held that Carloss voluntarily consented to the officers following him into the house. The officers were dressed in plainclothes, never drew their weapons and they never touched or threatened Carloss in any way. In addition, Carloss was aware that he could refuse the officers' request because he had just declined to give the officers broader general consent to search the house when he told the officers they would have to ask Dry for permission to do that.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/13-7082/13-7082-2016-03-11.pdf?ts=1457719342

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United States v. Mendoza, 2016 U.S. App. LEXIS 5597 (10th Cir. Okla. Mar. 25, 2016)

A state trooper stopped Mendoza for speeding. Mendoza drove a half mile before pulling over, and the trooper noticed food and trash in the passenger seat, suggesting that Mendoza had been trying to avoid stopping on the way to his destination. In addition, Mendoza appeared to be nervous and was visibly shaking when he handed his driver's license to the trooper. After the trooper recognized the car was a rental, he asked Mendoza for the rental agreement, but Mendoza mistakenly gave him his insurance document before handing him the rental agreement. When the trooper asked Mendoza about his travel plans, he realized what Mendoza told him was inconsistent with information contained in the rental agreement. The trooper issued Mendoza a written warning, and as Mendoza was preparing to leave, the trooper asked him, "Can I ask you a question?" Mendoza agreed to speak with the trooper and eventually gave the trooper consent to search his car. The trooper asked Mendoza to wait in his patrol car and told him to honk the horn if he wanted the trooper to stop the search. In the meantime, a second trooper arrived to assist with the search.

The troopers found two ice chests in Mendoza's car, one in the trunk and one in the back seat. They opened the ice chest from the trunk and found that it contained wrapped fish and shrimp. The troopers also noticed the chest showed signs of tampering. First, one of the hinges was broken and the lip of the inner lining was partially separated from the outer shell. Second, one screw was missing while several others looked as if they had been taken in and out multiple times. In addition, the troopers knew that smugglers sometimes use seafood to mask the presence of drugs. After removing the seafood and placing it on the ground, one of the troopers used an upholstery tool to pry the inner and outer liners farther apart. As he separated the liners, the trooper saw that the lining contained spray foam that did not originally come with the ice chest. When he pried the lining farther apart, the trooper saw the corner of a black, taped bundle. The trooper had encountered similar bundles in the past containing drugs. The trooper tore open the outer lining of the chest and found 13 bundles containing marijuana. The trooper

then dismantled the second ice chest in a similar manner and found two bundles containing methamphetamine. Mendoza did not honk the horn at any time during the search.

The government charged Mendoza with possession with intent to distribute methamphetamine and marijuana.

Mendoza argued the evidence seized from the ice chests should have been suppressed.

First, Mendoza argued his consent to search was not valid because it was obtained after the trooper unlawfully prolonged the duration of the traffic stop.

The court disagreed. The court found the trooper established reasonable suspicion during the stop to believe that Mendoza might be involved in criminal activity. Among other things, the court noted that Mendoza drove for a half mile before pulling over, he was extremely nervous during the stop, and his travel plans did were not consistent with information on the car's rental agreement. As a result, the court held Mendoza's detention up to the consent search was lawful.

Second, Mendoza argued the trooper exceeded the scope of his consent by removing the packaged seafood from the first ice chest and prying open the lining.

Again, the court disagreed. A general consent to search a car includes closed containers located within the vehicle. Here, Mendoza consented to a general search of his car without any limitations or restrictions. In addition, Mendoza had been told that he could stop the troopers' search at any time by honking the horn in the patrol car, and although he had a clear view of the troopers' actions, he never did. Finally, the trooper's further separation of the already separated inner and outer lining of the ice chest did not permanently damage it. Once the trooper saw the black bundle in the lining of the first ice chest, he had probable cause to search the chest regardless of the scope of Mendoza's consent.

Third, Mendoza argue the troopers violated the *Fourth Amendment* by destroying the second ice chest during the search without probable cause that it contained evidence.

The court disagreed, holding that it was reasonable for the troopers to dismantle the second ice chest after they had found drugs in the modified lining of the first ice chest.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-7042/15-7042-2016-03-25.pdf?ts=1458921668

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