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

June 2018

The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting https://www.fletc.gov/legal-resources.

This edition of *The Informer* may be cited as 6 INFORMER 18.

The Informer – June 2018

Case Summaries

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FLETC Talks

A brief review of United States Supreme Court cases involving a variety of Constitutional issues relevant to law enforcement officers.

1. **Minnesota v. Dickerson** (Plain-Touch Doctrine)

When a police officer detects contraband through his or her sense of touch during a lawful Terry frisk, does the Fourth Amendment permit the officer to seize it?

https://www.youtube.com/watch?v=3s4bDZ83krw

For the Court's opinion: https://supreme.justia.com/cases/federal/us/508/366/case.pdf

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2. **O'Connor v. Ortega (**Government Workplace Searches)

A discussion of the Fourth Amendment rights of government employees with regard to administrative searches in the workplace, during investigations by supervisors for suspected violations of agency policy rather than by law enforcement officers for criminal offenses.

https://www.youtube.com/watch?v=WeTm3GrzR4Q

For the Court's opinion: https://supreme.justia.com/cases/federal/us/480/709/case.html

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3. **New York v. Belton** (Search Incident to Arrest – Vehicles)

Can police officers lawfully search the passenger compartment of a vehicle and containers found within it after arresting the occupants?

https://www.youtube.com/watch?v=ngn9LATgI-M

For the Court's opinion: https://supreme.justia.com/cases/federal/us/453/454/case.html

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4. **Government Employees and Free Speech Rights**

   The First Amendment permits, in certain circumstances, government employees, to include police officers, to speak as private citizens on matters of public concern. Click on the link below for a discussion on the limitations a government employer can place on its employees right to free speech under the First Amendment.

https://www.youtube.com/watch?v=W6EBfL9_oPY

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FLETC Informer Webinar Schedule

1. Understanding the Administrative / Inspection Search (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia

This unique government authority and its limitations is, at times, misunderstood. This webinar will explain how, why and when an agency has the ability to conduct an administrative inspection. All are welcome to attend. Recommended for those agencies that possess an inspection power.

Thursday July 19, 2018 – 10:30 a.m. EDT

To participate in this webinar: https://share.dhs.gov/inspections/

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2. **Searching Cars Without Warrants (the Mobile Conveyance Doctrine / Carroll Doctrine / Automobile Exception) (1-hour)**

   Presented by Paul Sullivan and Patrick Walsh, Attorney-Advisors / Branch Chiefs, Federal Law Enforcement Training Centers, Glynco, Georgia

   In Collins v. Virginia, decided on May 29, 2018, the Supreme Court had to determine if a law enforcement officer could intrude upon the curtilage of a home and conduct a warrantless search of a motorcycle under the mobile conveyance doctrine. This webinar will review the history of the mobile conveyance doctrine, discuss Collins v. Virginia, and explain how the Collins opinion affects law enforcement officers in future investigations.

   Thursday July 26, 2018 – 3:00 p.m. EDT

   To participate in this webinar: https://share.dhs.gov/walsh/

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3. If you do not have a HSIN account, click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the event.
6. Even though meeting rooms may be accessed before an event, there may be times when a meeting room is closed while an instructor is setting up the room.
7. **If you experience any technical issues / difficulties during the login process, please call our audio bridge line at (877) 446-3914 and enter participant passcode 232080 when prompted.**

CASE SUMMARIES

United States Supreme Court

City of Hays v. Vogt, 2018 U.S. LEXIS 3208 (May 29, 2018)

Vogt was employed as a police officer with the City of Hays, Kansas. During an internal investigation, the Hays police chief compelled Vogt to provide a statement describing how Vogt had come into possession of a knife. Based on Vogt's compelled statement, as well as other evidence, Vogt was charged in Kansas state court with two felony counts related to his possession of the knife. Following a probable cause hearing, the state district court determined that probable cause was lacking and dismissed the charges.

Vogt filed a lawsuit under *42 U.S.C. § 1983* against the City of Hays claiming, among other things, that the use of his compelled statements to support the prosecution during the probable cause hearing violated his Fifth Amendment right against self-incrimination. The district court held that Vogt had not stated a valid claim under the Fifth Amendment because the incriminating statements were never used against him at trial. Vogt appealed.

The Tenth Circuit Court of Appeals reversed the district court. The court recognized that the Fifth Amendment's Self Incrimination Clause, which applies to the states through incorporation of the Fourteenth Amendment, protects individuals from being compelled to incriminate themselves in any "criminal case." The court added that this protection extends to police officers and prohibits the government from compelling officers to make incriminating statements in the course of their employment. Consequently, the court found, that as a law enforcement officer, Vogt was protected under the Fifth Amendment against the use of his compelled statements in a criminal case.

The Tenth Circuit Court of Appeals then held that the phrase "criminal case" includes probable cause hearings as well as trials. As a result, the court concluded that Vogt had adequately alleged a Fifth Amendment violation consisting of the use of his compelled statements in a criminal case. In its opinion, the Tenth Circuit Court of Appeals noted there is a split among the circuits on this issue. The 3rd, 4th, and 5th Circuits have held that the Fifth Amendment only provides rights at trial, while the 2nd, 7th, and 9th Circuits have held that certain pre-trial uses of compelled statements violate the Fifth Amendment.

The City of Hays appealed and the Supreme Court initially granted certiorari to determine "whether the Fifth Amendment is violated when compelled statements are used at a probable cause hearing." However, the Supreme Court subsequently dismissed the case as "improvidently granted" without issuing any opinion on the merits or deciding the issue presented. As a result, the Tenth Circuit's holding in Vogt's favor remains in effect and there remains a split among the circuits on this issue.

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/16-1495_e1pf.pdf

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Collins v. Virginia, 2018 U.S. LEXIS 3210 (May 29, 2018)

On two occasions, police officers attempted to stop a motorcycle after the driver committed traffic violations. However, in both cases, the driver increased his speed and eluded the officers. A few months later, one of the officers developed evidence that Collins was the person operating the motorcycle and went to Collins' house. While standing in the street, the officer saw a motorcycle covered with a tarp parked in the driveway. The officer walked up the driveway, lifted the tarp, and uncovered the motorcycle. The officer confirmed the motorcycle appeared to be the same one that had previously eluded him and recorded the motorcycle's vehicle identification number (VIN). A computer search of the VIN revealed the motorcycle had been stolen several years before. The officer arrested Collins for receiving stolen property.

After he was convicted, Collins appealed, arguing that the trial court should have suppressed the VIN information. Specifically, Collins argued that the officer violated the Fourth Amendment when he walked up the driveway onto the curtilage, without permission or a search warrant, and removed the motorcycle tarp to reveal the VIN.

The Supreme Court of Virginia disagreed and affirmed Collins' conviction. The court held that the officer's entry onto Collins' driveway and lifting the tarp was a valid warrantless search under the automobile exception to the Fourth Amendment's warrant requirement. The court commented that the United States Supreme Court has "never limited the automobile exception such that it would not apply to vehicles parked on private property." In addition, the Virginia Supreme Court noted that it "has held that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view."

Collins appealed to the Supreme Court. In an 8-1 opinion, the Court concluded that the automobile exception does not permit the warrantless entry of a home or its curtilage in order to search a vehicle located there.

The Court explained that this case involved two distinct areas of Fourth Amendment law: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home. In Carroll v. United States, decided in 1925, the Court held that the warrantless search of an automobile traveling on a public road was reasonable under the Fourth Amendment because the officers had probable cause to believe the vehicle contained illegal liquor. In subsequent cases, the "ready mobility" of vehicles served as the primary justification for the automobile exception. In South Dakota v. Opperman, decided in 1976, the Court introduced an additional justification for the automobile exception based on the government's regulation of vehicles that travel on public roads, such as periodic inspection and licensing requirements. However, with both justifications, the Court emphasized that both rationales applied only to automobiles and not to houses.

Next, the Court noted that a person's home is afforded the highest level of protection under the Fourth Amendment. In addition to the home itself, the court recognized that the curtilage of a home is afforded the same level of protection under the Fourth Amendment. Specifically, the Court considers curtilage "the area immediately surrounding and associated with the home" to be "part of the home itself for Fourth Amendment purposes." Consequently, when a law enforcement officer intrudes on the curtilage to obtain evidence, a Fourth Amendment search has occurred. The Court has held that such an intrusion is presumed to be unreasonable unless the officer has a warrant or an exception to the warrant requirement exists.

In this case, the Court held that the top portion of the driveway where Collins' motorcycle was parked was part of the curtilage. Based on the photographs in the record, the top portion of the driveway was enclosed on two sides by a brick wall, several feet high, and on a third side by the house. A side door provided direct access between this partially enclosed section of the driveway and the house. The court added that while a visitor attempting to reach the front door of the house would walk up the driveway, he would have to turn off before entering the enclosure, and instead proceed up a set of steps leading to the front door. When the officer lifted the tarp from the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abutted the house. In physically intruding on the curtilage of Collins' home to search the motorcycle, the court held that the officer not only invaded Collins' Fourth Amendment interest in the motorcycle, but also invaded Collins' Fourth Amendment interest in the curtilage of his home.

The court further held that the automobile exception did not justify the officer's intrusion onto the curtilage of Collins' home. Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it, the Court held that an officer must have a lawful right of access to a vehicle in order to search it under the automobile exception.

Although the Court reversed the judgment of the Virginia Supreme Court, the Court remanded the case for the state trial court to determine if the officer's warrantless entry onto the curtilage of Collins' house may have been reasonable for a different reason, such as the exigent circumstances exception to the warrant requirement.

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/16-1027_7lio.pdf

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Lozman v. City of Riviera Beach, 2018 U.S. LEXIS 3691 (June 18, 2018)

In June 2006, Lozman filed a lawsuit against the City of Riviera Beach attempting to invalidate the City's approval of a redevelopment plan, which affected his residence. In November 2006, the City Council held a regular public meeting and Lozman was granted to permission to speak during the "public comments" portion of the meeting. When Lozman began to speak about the recent arrest of a Palm Beach County Commissioner on corruption charges, one of the City Council members told Lozman that he could not speak about that incident. After Lozman told the council member, "Yes, I will," the council member directed a City police officer to remove Lozman from the meeting. After Lozman refused the officer's request to walk outside, the officer arrested Lozman and charged him with disorderly conduct and resisting arrest without violence. Although the state's attorney determined there was probable cause to arrest Lozman, the charges were dismissed because there was "no reasonable likelihood of a successful prosecution."

Lozman sued the City under 42 U.S.C. § 1983. Lozman alleged, among other things, that the City arrested him in retaliation for his opposition to the City's redevelopment plan, in violation of the First Amendment.

At trial, the jury found that the officer had probable cause to arrest Lozman for disturbing a lawful assembly under Fla. Stat. § 871.01. On appeal, the Eleventh Circuit Court of Appeals held that the jury's finding that there was probable cause to arrest Lozman was supported by the evidence. In addition, the court held that the jury's determination that Lozman's arrest was supported by probable cause defeated Lozman's First Amendment retaliatory arrest claim as a matter of law. Lozman appealed.

The issue presented to the Court was:

1. Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?

However, without deciding this issue, the Court held that the existence of probable cause did not automatically prevent Lozman from suing the City for First Amendment retaliation against him pursuant to an "official municipal policy" of intimidation under the circumstances of this case. The Court remanded the case to the Eleventh Circuit to determine whether a reasonable juror could find that the City formed a retaliatory policy to intimidate Lozman during its closed-door session, whether a reasonable juror could find that the arrest constituted an official act by the City, and whether the City proved that it would have arrested Lozman regardless of any retaliatory motive. In so ruling, the Court did not resolve a split among the circuits concerning the issue originally presented.

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/17-21_p8k0.pdf

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Carpenter v. United States, 2018 U.S. LEXIS 3844 (June 22, 2018)

The government charged Carpenter with several counts of armed robbery. At trial, the government's evidence included records from Carpenter's wireless cell phone carriers, which provided Carpenter's cell-site location information (CSLI) for 127 days. The CSLI indicated that Carpenter used his cellphones within a half-mile to two miles of several robbery locations during the time the robberies occurred. The government obtained these records with a court order issued by a magistrate judge pursuant to Section 2703(d) of the Stored Communications Act (SCA). A court order under §2703(d) does not require a finding of probable cause. Instead, the SCA authorizes a court to issue a disclosure order under §2703(d) whenever the government "offers specific and articulable and material facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation."

Carpenter filed a motion to suppress the CSLI evidence, arguing that the government violated the Fourth Amendment by not obtaining a search warrant based on probable cause to obtain this information.

The district court denied Carpenter's motion and he appealed.

The Sixth Circuit Court of Appeals, applying the third-party doctrine, held that Carpenter did not have a reasonable expectation of privacy in his CSLI because he shared that information with his wireless carriers. The court found that cell phone users voluntarily convey CSLI to third-party carriers as "a means to establish communication;" therefore, the court concluded that the government's collection of cell-site "business records" created and maintained by Carpenter's wireless carriers were not a search under the Fourth Amendment. Carpenter appealed to the Supreme Court.

The Court held that the government's acquisition of Carpenter's CSLI constituted a search under the Fourth Amendment. First, the court found that Carpenter had a reasonable expectation of privacy in his physical location and movements over the 127-day period, which the CSLI covered. The Court noted that tracking a person's past movements through CSLI was similar to many of the qualities of GPS monitoring. The court added that the accuracy of CSLI is quickly approaching GPS-level precision and that the Court had to take that fact into account in its holding.

Second, the Court recognized the digital technology that made it possible to track Carpenter's location and movements for such a period did not exist when the Court decided the cases establishing the third-party doctrine. Consequently, even though a person's CSLI is maintained by a third-party wireless carrier as a business record, the Court held that a person still maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.

Third, after finding that the acquisition of Carpenter's CSLI was a Fourth Amendment search, the Court stated the government must generally obtain a warrant supported by probable cause before acquiring such records. However, in this case the government obtained Carpenter's CLSI pursuant to a court order issued under 18 U.S.C. §2703(d), which required the government to show "reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation," which falls well short of the probable cause required for a warrant. Consequently, the Court held that an order issued under §2703(d) "is not a permissible mechanism for accessing CSLI;" therefore, before compelling a wireless carrier to turn over a subscriber's CSLI, the government must obtain a warrant.

It should be noted that the Court recognized that while the government will generally need a warrant to access CSLI, case specific exceptions may support a warrantless search of an individual's CSLI under certain circumstances. For example, the court stated that the "exigencies of the situation" might make the needs of the government so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.

The Court also acknowledged that its holding was narrow and did not express a view on matters not at issue in this case such as real-time CSLI or "tower dumps," whereby the government obtains a download of information on all the devices that connected to a particular cell site during a specific timeframe. In addition, the Court did not call into question conventional surveillance techniques and tools, such as security cameras. The Court stated that its ruling did not change the application of the third-party doctrine in non-CSLI contexts, nor did it address other types of business records that might incidentally reveal location information. Finally, the Court mentioned that its opinion did not consider other collection techniques involving foreign affairs or national security.

For the Court's opinion: https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

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Circuit Courts of Appeal

Second Circuit

United States v. Alexander, 2018 U.S. App. LEXIS 11093 (2d Cir. N.Y. May 1, 2018)

Alexander lived in a residential neighborhood in Staten Island, New York. The front of Alexander's house faced the street and a driveway ran alongside the house into the backyard. At the end of the driveway was a shed. Alexander used the part of the driveway in front of the shed for parking, barbeques, and relaxation. There was chain link fencing on three sides of the property but not on the side facing the street.

Between 3:00 a.m. and 3:30 a.m., two police officers saw Alexander and a woman standing in his front yard. A few feet away, another man and a woman sat in a car that was idling in the street, blocking Alexander's driveway. As the officers approached the group, they saw the man in the car attempt to put what appeared to be a baggie of drugs in his pants. The officers removed the occupants from the car and discovered a plastic baggie containing cocaine.

During this time, Alexander walked down his driveway, away from the officers, to put away a bottle of liquor he had been holding. While walking down the driveway, Alexander picked up a bag that had been left next to the house and walked toward the backyard. When he returned, Alexander did not have the bottle nor the bag with him.

When another officer arrived, he decided to look for the items that Alexander had moved. The officer walked down the driveway and found the liquor bottle around the back corner of the house, next to the home's back door. The officer later found the bag resting on a chair by the front corner of a shed. The chair was approximately four-feet from where the officer had found the bottle. The officer walked up to the bag and saw the butt of a gun sticking out of it. The officer searched the bag and found two guns inside.

The government charged Alexander with being a felon in possession of a firearm.

Alexander filed a motion to suppress the guns and the liquor bottle, arguing that the officer violated the Fourth Amendment by searching the curtilage of Alexander's home without a warrant or probable cause. The district court granted Alexander's motion as to the bottle, but denied it as to the guns, holding that the guns were not found on the curtilage of the house. Alexander appealed.

The curtilage is the "area adjacent to the home and to which the activity of home life extends." As such, the curtilage is considered part of a person's home and is afforded the same protection against unreasonable searches as the home itself. Consequently, a search of the curtilage that occurs without a warrant based on probable cause or an exception to the warrant requirement violates the Fourth Amendment.

In United States v. Dunn, the Supreme Court outlined a four-factor test which it instructed should be used to resolve curtilage questions. The factors were:

1. The proximity of the area claimed to be curtilage to the home;

2. Whether the area is included within an enclosure surrounding the home;

3. The nature of the uses to which the area is put; and

4. The steps taken by the resident to protect the area from observation by passing people.

In Florida v. Jardines, without reference to the Dunn factors, the Supreme Court held that Jardines' porch was part of the home's curtilage. Significantly, Jardines front porch was neither hidden from public view nor closed off to the public by a fence. The Second Circuit Court of Appeals felt that the lack of fencing, relevant to the second Dunn factor and the lack of steps taken to protect the area from public observation, relevant to the fourth Dunn factor, may suggest that these factors may be of limited significance in certain residential settings in determining the curtilage of a home.

Against this backdrop, the Second Circuit Court of Appeals held that the area where the officer found the guns was part of the curtilage of Alexander's home and reversed the district court's denial of Alexander's motion to suppress them. First, the court found the first Dunn factor favored Alexander, as the area in front of the shed, where the officer found the guns, was just a few steps away from Alexander's back door. Next, the court found the second Dunn factor neutral, but added that this factor was less useful in a residential setting. Third, the court found the third Dunn factor favored Alexander, as the driveway was occasionally used for recreation, such as hosting barbeques, and was continuous with the backyard area behind the house. Finally, the court found the fourth Dunn factor favored the government, as nothing prevented the public from viewing the area from the sidewalk in front of the property, nor did the chain link fence stop neighbors in adjacent properties from observing Alexander's back yard. Even though the fourth Dunn factor weighed against a finding of curtilage, the court still held that the area searched by the officer was within the curtilage primarily because the officer found the guns in an area just a few steps from the home in an area partially used for "intimate activities".

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca2/16-3708/16-3708-2018-05-01.pdf?ts=1525183207

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Third Circuit

United States v. Foster, 2018 U.S. App. LEXIS 14177 (3d Cir. PA May 30, 2018)

A business owner in a shopping plaza saw two men in a car acting suspiciously, called 911, and provided the vehicle's license plate information. A records check indicated that the vehicle had been reported stolen in an armed robbery and an email was sent to officers alerting them of that fact.

The next day, while on patrol in the shopping plaza, an officer saw the car reported in the email the day before with two black males inside it. The officer notified his dispatch and left to meet with other officers who responded to his radio call. When the officer returned to the parking lot, he saw the passenger, later identified as Foster, standing outside the vehicle. The driver was not in or near the car.

While officers detained Foster in the parking lot, another officer on patrol responded to a radio call regarding the car's missing driver. The officer began a search of the mixed commercial and residential area around the shopping plaza to locate the suspect, reported only as a black male.

The officer had received the email from the previous day, which noted that two potentially armed and dangerous black males were seen in a stolen car at the shopping plaza.

Within six minutes of receiving the alert about the missing driver, the officer saw a black male, later identified as Payton, walking along a road from the direction of the shopping plaza and about two-tenths of a mile from it. The officer watched Payton for approximately four minutes. During this time, Payton was the only pedestrian he saw in the search area matching the limited description relayed over the radio. In addition, none of the other officers reported seeing any pedestrians matching the suspect's description during this time. Finally, based on his experience, the officer knew that it was rare for pedestrians to be walking on the side of the road where he saw Payton. After communicating with his colleagues, the officer decided to stop Payton. After the officer handcuffed Payton, he transported him back to the shopping plaza for identification. In the meantime, the stolen car was transported to the police station. Officers searched the car and discovered a loaded rifle.

The government charged Foster and Payton with being felons in possession of a firearm. Both defendant's filed several pre-trial motions which the district court denied. On appeal, Payton argued that the officer violated the Fourth Amendment because the officer did not have reasonable suspicion to stop him because the only identifying information available before the stop was that a black male had fled the shopping plaza's parking lot.

In a consolidated opinion, the Third Circuit Court of Appeals disagreed. The court held that the totality of the circumstances known to the officer, combined with his experience as a law enforcement officer, provided him with reasonable, articulable suspicion to stop Payton.

First, within approximately six-minutes of receiving the alert, the officer saw a black male, later identified as Payton, walking along a road and coming from the direction of the shopping plaza. Second, the officer followed Payton for approximately four minutes and saw him walk beyond the commercial establishments towards a stretch of road with only residences. Third, at the time of the stop, Payton was two-tenths of a mile from the shopping plaza and no other officers had observed any other pedestrians in the defined search area matching the suspect's description. Fourth, the officer had fourteen years of experience patrolling the area around the shopping plaza and in that time the officer testified that it was rare to see anyone other than two white, special-needs adults walking along the stretch of road where the officer stopped Payton. Finally, the court held that it was reasonable for the officer to handcuff Payton and transport him back to the shopping plaza for identification purposes.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca3/16-3650/16-3650-2018-05-30.pdf?ts=1527699606

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Fourth Circuit

United States v. Louis, 2018 U.S. App. LEXIS 11325 (4th Cir. VA May 2, 2018)

Yvroseline Fergile, a U.S. citizen, was kidnapped in Haiti. A group of men forced Fergile at gunpoint into her car, beat her, and drove her to a house where they held her for seven days before she escaped. After Fergile escaped, Haitian police showed her a poster of a rap group that was discovered during their search of the house where she was held. Fergile identified two men in the poster, Louis and Tulin, whom she claimed were involved in her kidnapping.

Several weeks later, an agent with the Federal Bureau of Investigation (FBI) traveled to Haiti to investigate an unrelated kidnapping. While conducting that investigation, the agent learned of Fergile's kidnapping and began investigating it as well. When the agent interviewed Fergile, he showed her a photo array that contained a photo of Tulin which had been extracted from a scanned image of the rap poster that the Haitian police officers had previously shown her. Tulin was not in custody when the agent prepared the array, and the rap poster photo of Tulin was the only one the agent had available. Tulin's photo was dark, appeared blurry, and showed a jagged pixelated border from having been cropped and lifted from the rap poster. The other five filler-photos showed men with hairstyles similar to Tulin's, and several were taken against a dark background and had rough, pixelated borders to make them appeared cropped. Fergile identified Tulin from the array.

The government charged Louis and Tulin with kidnapping-related offenses. Prior to trial, Louis and Tulin filed a variety of motions, which the district court denied. After both defendants were convicted, they appealed several of the district court's rulings.

Specifically, Tulin argued that the district court should have suppressed Fergile's out-of-court identification of him. Tulin claimed that his right to due process was violated because the FBI's photo array was impermissibly suggestive, which resulted in an unreliable identification. Specifically, Tulin argued that his photo suggestively stood out in the array because it was darker and blurrier than the other photos.

In a consolidated opinion, the court recognized that to prevail, Tulin had to first establish the photo identification procedure was impermissibly suggestive. Next, even if the court determined that the identification procedure was impermissibly suggestive, the out-of-court identification would still be admissible if the identification was sufficiently reliable "to preclude the substantial likelihood of misidentification."

In this case, although Tulin's photo was dark and blurry, the court found that it did not look "strikingly different" from the five filler-photos. Instead, the court commented that the FBI did an acceptable job of creating a photo array that contained similar-looking photos. The headshot of Tulin that was taken from the rap poster was cropped so that it showed only his head and neck against a dark background, removing any context of the rap poster that might have been discovered from including Tulin's clothing or the text from the poster in the photo. In addition, Tulin's neutral expression in the photo was similar to those of the other individuals in the filler-photos. Finally, the filler-photos showed men of similar age, build, and complexion, with similar hairstyles.

Tulin also argued that the FBI's use of his photo from the rap poster that was shown to Fergile a few months earlier by Haitian police impermissibly suggested to Fergile that she should select Tulin's photo from the array.

The court disagreed, noting that a photo array is not impermissibly suggestive because it includes a photo of the suspect that the witness has already seen.

In conclusion, the court added that even if the photo array was impermissibly suggestive, Fergile's identification of Tulin in the photo array was nonetheless reliable. Fergile was able to see her captors and speak with them during the seven days she was held. In addition, Fergile showed a high level of certainty when she picked Tulin's photo from the array.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/17-4199/17-4199-2018-05-02.pdf?ts=1525287649

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United States v. Kolsuz, 2018 U.S. App. LEXIS 12147 (4th Cir. VA May 9, 2018)

United States Customs and Border Protection (CBP) officers detained Kolsuz at the Washington Dulles International Airport as he attempted to board a flight to Turkey. The officers knew that Kolsuz had been stopped previously while attempting to smuggle firearms parts out of the country. While conducting an outbound customs examination of Kolsuz's two checked bags, the officers found multiple firearms parts, including eighteen handgun barrels and one .22 caliber conversion kit. The officers knew the handgun barrels and conversion kit were listed on the United States Munition List (USML) and, therefore, could not be removed from the country without a federal license. The officers transported Kolsuz to a secondary inspection area, seized Kolsuz's iPhone, and scrolled through Kolsuz's recent calls and text messages. After the officers confirmed that Kolsuz had no export license or pending application for a license, the officers arrested him.

At that point an officer transported Kolsuz's phone four miles to the Homeland Security Investigations office where an agent conducted a forensic analysis of the phone by extracting the data it contained. The data extraction process lasted for one month and produced an 896-page report which included Kolsuz's personal contact lists, emails, messenger conversations, photographs, videos, calendar, web browsing history, and call logs along with a history of Kolsuz's physical location down to precise GPS coordinates. The government later charged Kolsuz with several criminal offenses related to the unlawful export of firearms parts.

Prior to trial, Kolsuz filed a motion to suppress the report generated by the forensic examination of his phone. The government argued that the warrantless search of Kolsuz' phone was lawful under the border search exception to the Fourth Amendment's warrant requirement. Kolsuz argued that once the officers arrested him, seized his phone, and transported it miles from the airport, the border search did not apply. Instead, Kolsuz claimed the warrantless search of his phone constituted a search incident to arrest, which required the officers to obtain a warrant based on probable cause.

First, the court explained that the border search exception applied even though the forensic search of Kolsuz's phone occurred at an off-site location over an extended period of time. Second, the court added that Kolsuz's arrest did not transform the examination of his phone under the border search exception into a search incident to arrest, which would have required a warrant under Riley v. California. Finally, the court held that the forensic search of Kolsuz's phone was justified because the officers had reason to believe Kolsuz was attempting to export firearms illegally. The court recognized that this type of transnational offense goes to the heart of the border search exception, which is justified, in part, by the government's interest in "protecting and monitoring exports from the country."

Alternatively, Kolsuz argued the privacy interest in smartphone data is so great that even under the border exception, a forensic examination of a phone is a non-routine search that requires a warrant based on probable cause.

Warrantless searches at the border are categorized as routine and non-routine. For example, searches of luggage, outer clothing, and personal effects are treated as routine. However, while the Supreme Court has not determined what makes a border search non-routine, lower courts have

focused primarily on how deeply the search intrudes into a person's privacy. For example, searches that are most invasive of privacy such as strip searches, alimentary canal searches, and x-rays are deemed non-routine and permitted only with reasonable suspicion of criminal activity.

The court found that the sheer volume to data stored on smartphones and other electronic devices is significantly greater than the amount of personal information that can be carried over the border and subjected to a border search. In addition, the court noted that smart phones and other electronic devices contain intimate details of a person's life to include financial records, medical records, and private emails, which can be revealed with a comprehensive forensic analysis. In this case, the report generated by the month-long extraction of data from Kolsuz's phone revealed 896 pages of sensitive data including personal contacts, photographs, web browsing history, and a history of Kolsuz's physical location. Consequently, the court held that the forensic examination of Kolsuz's phone constituted a non-routine border search. The court added that after oral argument in this case, the Department of Homeland Security adopted a policy that treats forensic searches of digital devices as non-routine border searches which must be supported by reasonable suspicion of activity that violates customs laws or in cases raising national security concerns.

Next, the court declined to decide the issue of whether the non-routine border search of Kolsuz's phone required something "more than reasonable suspicion," as Kolsuz advocated. Instead, the court found that at the time of the search there was case law indicating that the officers only needed reasonable suspicion of criminal activity to search Kolsuz's phone. As a result, the court held that "it was reasonable for the officers who conducted the forensic search of Kolsuz's phone to rely on the established and uniform body of precedent allowing warrantless border searches of digital devices that are based on at least reasonable suspicion."

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/16-4687/16-4687-2018-05-09.pdf?ts=1525890632

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Sixth Circuit

United States v. Sweeney, 2018 U.S. App. LEXIS 13849 (6th Cir. OH May 25, 2018)

Sweeney was convicted of raping his niece and sentenced to ten years in prison. After he was released, Sweeney contacted T.R., his fourteen-year old daughter, and began to send her sexually explicit messages and photographs. T.R. told her adoptive parents about Sweeney's conduct and they notified agents from the Department of Homeland Security (DHS). The DHS agents then contacted Sweeney's parole officer and reported this information to him.

During a meeting with his parole officer, Sweeney admitted he owned a cell phone and that he had left the phone at the homeless shelter where he lived. The parole officer, accompanied by DHS agents, went to the homeless shelter and seized Sweeney's phone. The DHS agents obtained a warrant to search the phone's media card and discovered evidence that supported T.R.'s allegations against Sweeney.

The government charged Sweeney with a variety of criminal offenses. Sweeney filed a motion to suppress the evidence discovered on his cell phone's media card. Sweeney argued that the parole officer who searched his room at the homeless shelter was impermissibly acting as a "stalking horse" to help the DHS agents evade the Fourth Amendment's warrant requirement in their investigation into his conduct.

The court disagreed. The court recognized that the Supreme Court has justified the warrantless search of probationers for two distinct reasons. First, the Supreme Court has held that the warrantless search of probationers is reasonable because it is based on the "special needs" of a state in administering its system of probation. However, such a "special needs" search must be related to those needs and not where law enforcement officers use a parole officer as a "stalking horse" to assist in an unrelated investigation.

Second, the Supreme Court has also held that the warrantless search of probationers is reasonable because they have a diminished expectation of privacy and the government often has legitimate interests in conducting these searches even when there is no "special need" related to the probationary system. A court will evaluate the totality of the circumstances to determine if a warrantless search of a probationer is reasonable under this theory.

In this case, the court held that the warrantless search of Sweeney's room was reasonable under either theory. First, the parole officer who searched Sweeney's room had a parole-related reason to do so based on the information he received from the DHS agents. The court concluded that just because the DHS agents wanted access to Sweeney's phone did not detract from the parole officer's legitimate interest in searching it. The court noted that the "stalking horse" exception does not prohibit police officers and probation officer from working together and sharing information. As a result, the court held that the parole officer was not acting as a "stalking horse." Second, the court found that the warrantless search of the homeless shelter for Sweeney's phone was reasonable under the diminished-expectation-of-privacy theory based on the totality of the circumstances.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca6/17-3768/17-3768-2018-05-25.pdf?ts=1527258631

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Seventh Circuit

United States v. Thurman, 2018 U.S. App. LEXIS 11397 (7th Cir. IL May 2, 2018)

A confidential informant (CI) purchased heroin from Thurman at his house in a controlled drug purchase. After confirming that the CI had purchased heroin inside, police officers entered Thurman's house and executed a search warrant that was contingent upon the completion of the controlled buy. The officers also arrested Thurman and transported him to the Chicago office of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for questioning.

Once inside the interview room, ATF agents removed Thurman's handcuffs and gave him a Gatorade. The officers then advised Thurman of his Miranda rights. Although Thurman refused to sign an advice-of-rights form, he told the agents that he wanted to cooperate with them. Thurman told the officers he had sold drugs out of his house and that he owned guns to protect his drug trade. During the interview, the agents asked for Thurman's consent to search his cell phone. Thurman refused to sign a consent-to-search form, but according to the agents he verbally consented to a search of his phone. In addition, Thurman showed the agents specific names and numbers in his phone that corresponded to some of his drug contacts. Thurman also told the agents that he had deleted text messages to the CI concerning the controlled drug buy earlier that day. The government subsequently conducted a forensic examination of Thurman's phone and reconstructed the deleted text messages between Thurman and the CI.

The government charged Thurman with several drug-related offenses.

Thurman filed a motion to suppress his incriminating statements to the agents, arguing that the agents questioned him after he invoked his Miranda rights.

The court ruled that the record adequately supported the district court's finding that Thurman did not invoke his Miranda rights. Specifically, because the agents' testimony was consistent, plausible, and unbiased, the court saw no clear error in the district court accepting it over Thurman's contrary version of events.

Alternatively, Thurman argued that even if he had not validly invoked his Miranda rights, his refusal to sign the advice-of-rights form established that he did not voluntarily waive them.

A waiver of Miranda rights can be express or implied. An implied waiver may be inferred from a suspect's understanding of his rights along with actions which show a desire to give up these rights, such as answering an officer's questions. In addition, refusal to sign an advice-of-rights form, by itself, is not enough to establish that a suspect's implied waiver was involuntary.

In this case, the court ruled that the record supported the district court's finding that Thurman understood his rights and voluntarily chose to relinquish them by answering the agents' questions. The court noted that the agents brought Thurman a Gatorade, released him from handcuffs, and acted professionally during the interrogation. Additionally, the court found that the voluntariness of Thurman's waiver was supported by the fact that he refused to sign the advice-of-rights form, which showed his ability to exercise his freewill.

Thurman also filed a motion to suppress evidence which was discovered during the search of his cell phone. First, Thurman argued that his refusal to sign the consent-to-search form established that he did not voluntarily consent to the search of his phone.

The court disagreed. Although Thurman refused to sign the consent-to-search form, the court held that the agents' testimony that Thurman verbally consented to a search of his phone was credible. The court noted that other courts have affirmed findings of consent despite a defendant's documented refusal to sign a form.

Second, Thurman argued that the agents' failure to record his verbal consent violated ATF's current policy of recording all custodial interrogations.

Again, the court disagreed. The court recognized that a recording would likely have resolved this issue but pointed out that the Constitution does not require such a policy. As a result, the court held that the ATF's decision to enact a policy that is more restrictive on its agents that required by the Constitution does not make the agents' past actions unlawful or their testimony not credible.

Third, Thurman argued that he did not voluntarily give his consent, but if he had, that his consent did not extend to a secondary forensic search of his phone.

The court held that the circumstances surrounding Thurman's consent established that it was voluntary. In addition, the court held that Thurman's actions and the circumstances of the investigation supported a finding that he consented to the forensic examination. Despite Thurman's refusal to sign the consent form, he verbally agreed to the search and affirmatively showed the agents specific names and phone numbers corresponding to his drug-related contacts. The court found that this conduct did not suggest Thurman's intent to limit the parameters of his

consent. In addition, because it was clear that the agents were investigating Thurman's recent drug sales, the court found that a reasonable person in his position would expect the agents to search his phone for recent deleted messages. Consequently, the court held that Thurman's consent extended to a forensic examination of his phone.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/17-1598/17-1598-2018-05-02.pdf?ts=1525298419

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United States v. Key, 2018 U.S. App. LEXIS 12466 (7th Cir. IL May 14, 2018)

Officers obtained information that Key was in a motel room with a fifteen-year-old girl that he had transported from Wisconsin in a rental car. The officers knew the motel had a reputation for prostitution and drug activity. When the officers arrived at the room they encountered Key, who gave the officers consent to enter his room and search for the girl. Inside the room, the officers saw a tablet on a dresser open to the website backpage.com, which they knew was commonly used to post prostitution advertisements. The officers also saw a large number of prepaid credit cards, used and unused condoms, and multiple cellphones. The officers did not find the girl but they encountered another young woman who told the officers that she and the fifteen-year-old girl were prostituting and that Key was their pimp. A short time later, an officer found the fifteen-year-old girl in a nearby restaurant. The officers then arrested Key and seized the tablet, prepaid credit cards, cellphones, and other evidence from his motel room.

The government charged Key with trafficking a minor across state lines with the intent that the minor engage in prostitution.

Key filed a motion to suppress the evidence from his motel room. Key claimed that the officers exceeded the scope of his consent, because the search for a fifteen-year-old girl would not require the officers to look at tablets, cell phones, or other handheld items.

The court held that based on the totality of the circumstances, the discovery and subsequent seizure of the evidence from Key's motel room was lawful under the plain view doctrine. First, the court found that the items were plainly visible to the officers when they lawfully entered Key's room. Second, the court noted that the officers explained how the incriminating nature of each item were immediately apparent to them when they saw it. For example, the officers testified that the tablet was open to backpage.com, a website well known for hosting prostitution. In addition, the officers testified that multiple cell phones, prepaid credit cards, and condoms are items typically used for prostitution. Finally, the officers testified that the motel was known to them to be one used frequently for prostitution and that rental cars are often used in prostitution and drug trafficking.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/16-3970/16-3970-2018-05-14.pdf?ts=1526319047

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Eighth Circuit

United States v. Garcia, 888 F.3d 1004 (8th Cir. NE 2018)

A police officer on patrol at the Amtrak station in Omaha, Nebraska received a tip that a male passenger aboard a train destined for Chicago might be transporting illegal drugs. The officer boarded the train and approached Garcia. While standing in the aisle next to Garcia's seat, the officer told Garcia he was not under arrest and asked Garcia, "Do you have a moment to talk to me?" Garcia replied, "yeah" and then handed his train ticket to the officer.

After the officer confirmed that a bag in the overhead compartment belonged to Garcia, the officer asked Garcia if he could search it. Garcia retrieved the bag from the overhead compartment, placed it on his seat, and opened it. Although reluctant to allow the officer to reach inside the bag, Garcia moved some clothing inside the bag to one side so the officer could get a better view into the bag. On two occasions the officer reached inside the bag and felt the bottom. Afterward, the officer asked Garcia to pull up a shirt that was in the bag. When Garcia moved the shirt, the officer saw a yellow object underneath it. When the officer asked Garcia about the object, Garcia told him that it was dirty laundry and moved the shirt back into its original position, covering the object. The officer then asked Garcia if he could touch the object. Garcia did not verbally respond but he reached into his bag and pulled his clothes back revealing the object again. At this point, the officer reached into Garcia's bag for a third time and touched the object. Suspecting the object was narcotics, the officer arrested Garcia, searched the bag, and discovered seven plastic-wrapped bundles of methamphetamine hidden inside a blue shirt.

The government charged Garcia with possession with intent to distribute methamphetamine.

Garcia filed a motion to suppress the evidence found in his bag. Garcia argued that the officer seized him without reasonable suspicion that he was engaged in criminal activity, in violation of the Fourth Amendment.

The court disagreed. First, when the officer approached Garcia on the train, he stood between Garcia's seat and the aisle. Because the train had limited aisle space and other passengers needed access to the aisle, the court found that the officer's positioning did not unreasonably limit Garcia's freedom of movement. Second, although the officer showed Garcia his badge, he did not display a weapon or physically touch Garcia until he placed him under arrest. Third, neither the officer's tone nor the language he used indicated that Garcia's compliance was necessary. The officer asked Garcia if he could search his bag, but the officer did not touch or exercise control over Garcia's luggage. Finally, when the officer approached Garcia, he explicitly stated that Garcia was not in trouble and there was no problem which indicated that Garcia was the focus of a particular investigation. As a result, the court held that the encounter between Garcia and the officer was consensual.

Garcia further argued that he did not voluntarily consent to the officer's search of his bag.

Again, the court disagreed, holding that Garcia voluntarily consented to the officer physically searching his bag. The court noted that Garcia was twenty-six years old, his answers to the officer's questions were appropriate, and there was no indication that he was of below average intelligence. In addition, Garcia was not under the influence of alcohol or drugs, and the entire encounter with the officer took place in less than four minutes.

Garcia further argued that even if he consented to a search of his bag, he only consented to a visual search by the officer; therefore, when the officer reached into his bag he exceeded the scope of Garcia's consent.

Even assuming that the officer exceeded the scope of Garcia's consent the first two times he reached into the bag, the court held that Garcia expanded the scope of the search by consenting to the officer's third reach into the bag, which revealed the drugs. After Garcia voluntarily moved the shirt, revealing the yellow object, he told the officer the object was dirty clothing and covered it. When the officer then asked Garcia if he could touch the object, Garcia did not answer, but instead reached back into his bag, moved some clothing aside, revealing the object to the officer again. The court concluded that when Garcia moved the clothes aside, after the officer asked to touch the object, it was reasonable for the officer to infer that Garcia was giving his consent for the officer to reach into his bag and touch it.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/16-4523/16-4523-2018-05-01.pdf?ts=1525188622

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United States v. Perez-Trevino, 2018 U.S. App. LEXIS 14033 (8th Cir. IA May 29, 2018)

The government charged Perez and ten other defendants with conspiracy to deliver methamphetamine. Prior to trial, Perez filed a motion to suppress evidence obtained during a traffic stop in Oklahoma. Another defendant, Castellanos filed a motion to suppress evidence obtained from the wiretap of a cell phone designated as Target Telephone #16.

Concerning Perez, a police officer stopped him for a traffic violation. During the stop, Perez and his passenger gave the officer conflicting stories as to their destination. The officer arrested Perez after he discovered that Perez did not have a valid driver's license. After the officer learned that the passenger's license was suspended, the officer decided to have Perez's car towed. Before the car was towed, the officer prepared to conduct an inventory search of the vehicle pursuant to his department's "Impoundment of Vehicles" policy. When the officer leaned inside Perez's car to begin the inventory, he smelled the odor of raw marijuana emanating from the center console area. The officer opened the center console and found a plastic bag containing a green leafy substance, which was later determined to be marijuana. The officer also found a one-dollar bill under the passenger seat that contained residue, later determined to be methamphetamine. Finally, the officer found a large cooler located on the backseat. The officer opened the cooler and found a bag containing over 800 grams of methamphetamine.

Perez argued that the inventory search of his car violated the Fourth Amendment because the police department's policy did not provide sufficiently standardized criteria for searching closed containers, such as the cooler, found inside his vehicle.

First, the court held that the department's towing policy provided sufficiently standardized police procedures for the officer to inventory the contents of Perez's car and its compartments.

Second, the court declined to decide whether the department's inventory policy specifically provided the officer with authority to open the cooler located on the backseat. Instead, the court held that by the time the officer opened the cooler, he had established probable cause to search Perez's car and its contents, to include the cooler, under the automobile exception the Fourth Amendment's warrant requirement. Under the automobile exception, a police officer may

conduct a warrantless search of a vehicle if he has probable cause to believe the vehicle contains evidence of criminal activity. In this case, the court concluded that the officer had probable cause to search the cooler because Perez and his passenger gave him contradictory statements as to their destination, he discovered marijuana in the center console, and he found the dollar bill containing apparent drug residue.

Concerning Castellanos, she argued that the government did not establish probable cause nor meet the necessity requirement in its wiretap application for Target Telephone #16.

The court disagreed. The application for the wiretap authorization order specifically named more than twenty individuals suspected in the conspiracy to distribute narcotics based on information from prior court-authorized wiretaps. The court added that the affidavit contained more than twenty-five pages, detailing information known to the task force officers that supported the application to intercept communications from Target Telephone #16.

The court further held that the government met the necessity requirement as outlined in 18 U.S.C. § 2518(3)(c). Prior to issuing a wiretap order, the court must make a determination that "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Here, the court found that the affidavit provided details of various investigative techniques used prior to requesting a wiretap of Target Phone #16 and agreed with the government's conclusion that the only reasonable method of developing the necessary evidence of criminal violations was to intercept communications from Target Phone #16.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/17-1289/17-1289-2018-05-29.pdf?ts=1527607829

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United States v. Edwards, 2018 U.S. App. LEXIS 14348 (8th Cir. MO May 31, 2018)

A confidential informant, (CI) who had previously provided reliable information, told a narcotics detective with the Columbia, Missouri Police Department that Edwards would be driving from Columbia to Jefferson City to obtain heroin from a woman named "Tasha". The detective followed Edwards to a house in Jefferson City owned by Natasha Terrell. Edwards entered the home and remained for thirty to forty-five minutes before driving back to Columbia. Later that evening, officers with the Jefferson City Police Department searched the trash outside Terrell's residence and discovered evidence consistent with drug trafficking. Based on this evidence, Jefferson City officers obtained a warrant to search Terrell's home, but did not execute it immediately.

One week later, the same CI told the same narcotics detective that Edwards again planned to travel to Tasha's house to obtain heroin. Again, the narcotics detective followed Edwards to Tasha's house. After Edwards left, Jefferson City police officers executed the search warrant at Terrell's house and discovered heroin, crack cocaine, and $7,000 cash. A second CI, who was present in the home during the search told officers that Edwards had left with approximately twenty grams of heroin.

While officers searched Terrell's home, the narcotics detective contacted a uniformed police officer and directed him to arrest Edwards. The officer located Edwards, conducted a traffic stop, and arrested him. The officer then searched Edwards' car and found four bags of heroin.

The government charged Edwards with possession with intent to distribute heroin.

Edwards filed a motion to suppress the evidence seized from his car. Edwards argued that the officers did not have probable cause to arrest him or conduct a warrantless search of his car.

The court disagreed. The court held that the information provided by the first CI, along with corroborating evidence obtained during the investigation, established probable cause to believe that Edwards committed a drug trafficking offense. Specifically, officers followed Edwards from Columbia to a residence in Jefferson City that was owned by a woman matching the name given by the CI. Additionally, a contemporaneous trash-pull corroborated the CI's suggestion that the residence was associated with drug activity. Although the officers did not need the information from the second CI to establish probable cause, this information corroborated other evidence established in the investigation.

The court further held that while the uniformed officer had not personally observed Edwards before the traffic stop, probable cause may be based on the collective knowledge of all law enforcement officers involved in an investigation. In this case, the narcotics detective communicated with the uniformed officer before the traffic stop, informing him that Edwards was under investigation for drug trafficking and that there was probable cause to believe that Edwards had just obtained drugs. As a result, the court held that because the officers collectively had probable cause, and the officer who conducted the traffic stop was included in the communications, Edwards' arrest was lawful.

The court added that the same probable cause that justified Edwards' arrest also justified the warrantless search of Edwards car under the automobile exception to the Fourth Amendment's warrant requirement.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/17-1455/17-1455-2018-05-31.pdf?ts=1527780626

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Ninth Circuit

United States v. Johnson, 889 F.3d 1120 (9th Cir. OR 2018)

Sheriff's deputies located Johnson, who had an outstanding arrest warrant, outside a hotel in Portland, Oregon. Officers followed Johnson as he drove to a nearby residence. While Johnson was inside, the deputies called the Portland Police Bureau (PBB) and requested assistance in arresting Johnson. After the officers arrived, they did not approach the residence. When Johnson exited, the officers followed him. When Johnson reached an intersection, the officers stopped Johnson by loosely boxing in his car, effectively blocking his ability to drive away. Although there was enough room for Johnson to pull his car to the side of the road, he instead parked in the lane of traffic, disrupting the flow of passing cars.

The officers arrested Johnson, searched him incident to arrest, and found $7,100 in cash in his pockets. When asked about the car, Johnson told the officers he had borrowed the car and that he did not know how to contact the owner. Because Johnson's car was blocking traffic and because Johnson could not provide contact information for the car's owner, the officers ordered it to be towed and impounded pursuant to PBB policy. Prior to the tow, the officers conducted an inventory search of the car pursuant to PBB policy. The officers found, among other things, a glass pipe with white residue and two cell phones in the interior of the car and a backpack and

duffel bag in the trunk. In their arrest reports, the officers stated they believed that the cash seized from Johnson, the cellphones seized from the interior of the car, and the bags seized from the trunk may have been connected to criminal activity and placed all of the items into "evidence."

One week later, the arresting officer applied for a warrant to search the bags seized from the trunk of Johnson's car. In his application, the officer confirmed that the items had been "seized pending further investigation," rather than for safekeeping. A judge issued the warrant and a search of the bags revealed a small safe that contained methamphetamine and drug paraphernalia.

The government charged Johnson with possession with intent to distribute methamphetamine.

Johnson filed a motion to suppress the evidence seized from his car. Johnson claimed that the officers' decision not to arrest him as he exited the residence, but instead to wait and conduct a traffic stop by physically boxing him in, was an unlawful pretext to justify impounding and conducting an inventory search of his car.

The court disagreed. First, the court held that the officers' explanations that the box-in technique was used to prevent flight and that the timing and manner of Johnson's arrest was coordinated to minimize the risks to officer safety were valid. Second, even if the box-in technique might have made it difficult for Johnson to pull to the side, he did not claim that it prevented him from doing so. The arresting officer testified that there was enough space for Johnson to have pulled closer to the curb when he stopped the car. Finally, before the stop, the officers did not know that Johnson would not be able to provide contact information for the car's owner. As a result, the court concluded that it was unlikely that the officers would have orchestrated a scenario in which they would get to tow Johnson's car unless they could have somehow known ahead of time that the car's owner would be unable to retrieve it.

Johnson further argued that even if the stop and impoundment of his car was valid, the officers conducted an inventory search as a pretext to obtain criminal evidence.

In the Ninth Circuit, a suspicionless inventory search does not permit officers to search or to seize items because they believe the items might be criminal evidence. Instead, the purpose of an inventory search must be unrelated to criminal investigations and focus on securing and protecting an arrestee's property, as well as protecting the police department against false claims of lost or stolen property. In addition, the court recognized that the PPB inventory policy does not permit officers to seize items as evidence "for prosecution," but instead "as personal property to be inventoried and secured" for the defendant.

In this case, the officers admitted that they searched and seized items from Johnson's car specifically to gather evidence of a suspected crime, not to safeguard Johnson's property. As a result, the court concluded that the officers' search of Johnson's car and the seizure of evidence from it could not be justified under the inventory-search doctrine. Because the government did not offer any justification for the seizure of Johnson's property other than the inventory-search doctrine, the court held that the evidence seized from Johnson's car should have been suppressed.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/15-30222/15-30222-2018-05-14.pdf?ts=1526317301

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Tenth Circuit

United States v. Hammond, 2018 U.S. App. LEXIS 12553 (10th Cir. CO May 15, 2018)

Two patrol officers pulled up behind a Chevrolet Monte Carlo stopped at a red light and noticed that the car had a brake light out. One of the officers ran a search of the car's license plate and learned that it had been seized in connection with a weapons possessions case a few weeks earlier and that a person named Ajohntae Hammond had been arrested as part of that case. The officer then ran a records check on Hammond and discovered that he had been suspected in a different weapons possession case and had been flagged in the system as a documented gang member. The officer also knew that there was an ongoing feud between sets of Bloods and Crips gangs.

The officers stopped the Monte Carlo for the brake light violation and they identified Ajohntae Hammond as the passenger. When the officers asked Hammond to exit the car, they saw that he was wearing clothing commonly worn by members of the Crips street gang. After Hammond exited the car, the officers frisked him and found a loaded handgun in the front pocket of his sweatshirt.

The government charged Hammond with being a felon in possession of a firearm.

Hammond filed a motion to suppress the handgun, arguing that the officers did not have reasonable suspicion that he was armed and dangerous when they ordered him out of the car and frisked him.

The court found that when the officers frisked Hammond they knew that (1) he was a confirmed gang member (2) who was a suspect in a prior weapons possession case and who had (3) recently been arrested in connection with another weapons case who was (4) riding in a car that had previously been seized in connection with Hammond's prior arrest, (5) while wearing gang colors which displayed his affiliation with a gang involved in an ongoing feud. Consequently, the court held that based on these facts, it was reasonable for the officers to frisk him for weapons.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/17-1102/17-1102-2018-05-15.pdf?ts=1526400036

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Eleventh Circuit

Montanez v. Carvajal, 2018 U.S. App. LEXIS (U.S. 11th Cir. FL May 9, 2018)

Officer Raible was driving his unmarked patrol car through a neighborhood that had been experiencing a rash of daytime burglaries when he saw two men whom he believed were about to break into a house. Officer Raible requested backup describing the situation as a "burglary in progress."

Officer Carvajal responded and met Officer Raible at a nearby gas station to formulate a plan for approaching the suspects. Afterward, the officers returned to the house and detained the two men near the back door. At this point, Officer Raible opened the door and went into the vestibule. From inside the vestibule, Officer Raible saw a second door, which led into the home's interior that was slightly ajar.

After arresting the two men, Officer Carvajal went into the vestibule and entered the home with several other officers. The officers swept the interior of the home for additional perpetrators or potential victims. During the four minutes it took for the officers to complete the sweep, they did not encounter any other persons inside the house. However, the officers saw in plain view what they believed to be marijuana and associated drug paraphernalia. The officers exited the house and reported what they saw to their supervisor. Various officers entered the house four additional times to view the marijuana and drug paraphernalia. After the last entry, an officer drafted an affidavit in support of a search warrant based on the officers' observations. A judge issued the warrant and the ensuing search of the house revealed a large quantity of cash as well as miscellaneous drugs and drug paraphernalia.

Montanez, the owner of the house, sued the officers claiming that the multiple, warrantless searches of his house violated the Fourth Amendment.

The court held that Officer Raible's initial entry into the vestibule and the officers' ensuing four-minute sweep of the home did not violate the Fourth Amendment. The court concluded that those entries were justified by the exigent circumstances created by the suspected burglary. When Officers Raible and Carvajal arrested the two men near the back door, they had no way of knowing whether they had just prevented a burglary that was about to happen, interrupted an ongoing burglary, or happened upon a burglary that had just concluded. Regardless, the court concluded that the officers faced a situation which made it reasonable for them to enter the house to search for additional suspects, potential victims, or both.

The court then held that after the officers completed their protective sweep, their subsequent entries were valid even though the exigency had passed. The court reiterated that the officers' first two entries, during which they saw the marijuana and paraphernalia in plain view, were justified under the exigent circumstances doctrine. The court concluded that Montanez lost any reasonable expectation of privacy in those area already searched; therefore, the officers could thereafter enter and re-enter the home to observe the contraband in plain view without violating the Fourth Amendment.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/16-17639/16-17639-2018-05-09.pdf?ts=1525890687

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United States v. Touset, 2018 U.S. App. LEXIS 13444 (11th Cir. GA May 23, 2018)

Federal agents obtained information from Yahoo and other sources that Karl Touset had received child pornography from someone in the Philippines. Based on this information, the Department of Homeland Security placed a "look-out" on Touset so that his luggage and electronic devices would be searched when he returned to the United States from a trip overseas. After Touset arrived on an international flight at the airport in Atlanta, Georgia, a Customs and Border Protection (CBP) officer inspected Touset's luggage. The officer manually inspected Touset's two iPhones and a camera, found no child pornography, and returned those devices to Touset. However, the officer seized Touset's two laptop computers, two external hard drives, and two tablets and submitted them for a forensic analysis. Forensic searches revealed child pornography on the two laptops and the two external hard drives.

Based on the information obtained from the forensic search of Touset's electronic devices, the government obtained a warrant to search Touset's home. During the execution of the warrant, federal agents found thousands of images and videos of child pornography.

The government charged Touset with several child-pornography-related offenses.

Touset filed a motion to suppress the evidence obtained from the warrantless searches of his electronic devices at the border, as well as the evidence seized from his home pursuant to the search warrant. The district court denied Touset's motions and he appealed.

The Supreme Court has held that it is reasonable under the Fourth Amendment to conduct routine searches of persons and their property without any level of suspicion at our borders. In addition, the court recognized that the Supreme Court has never required any level suspicion for a search of property at the border, however non-routine or intrusive the search might be. Finally, the court noted that the Supreme Court has never distinguished between different types of property that travelers attempt to bring into the United States. As a result, the court held that the CBP officer was allowed to submit Touset's electronic devices for forensic searches without any degree of suspicion and affirmed the district court's denial of Touset's motions to suppress.

The court refused to establish a rule that provided special treatment for electronic devices solely because many people own them or because electronic devices can store vast quantities of records or effects. Notably, the court distinguished a forensic search of electronic devices from a strip-search or an x-ray of a person, which requires reasonable suspicion. Although it may intrude on the privacy of an owner, the court concluded that a forensic search of an electronic device is a search of property. The court added that CBP officers bear the same responsibility for preventing the importation of contraband in a traveler's possession regardless of advances in technology. In conclusion, the court recognized the Fourth and Ninth Circuits have held that the Fourth Amendment requires at least reasonable suspicion for forensic searches of electronic devices at the border, but were not persuaded by the reasoning of those courts. (See U.S. v. Kolsuz and United States v. Cotterman).

Alternatively, the court held that the district court correctly denied Touset's motion to suppress because the government established reasonable suspicion to believe that Touset's electronic devices contained evidence of child pornography.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/17-11561/17-11561-2018-05-23.pdf?ts=1527091255

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