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

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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. You can join *The Informer* Mailing List, and have *The Informer* delivered directly to you via e-mail by clicking on the link below.

This edition of *The Informer* may be cited as 2 INFORMER 22.

The Informer – February 2022

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FLETC Informer Webinar Schedule – March 2022

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1. Kansas City Police Officer Found Guilty of Manslaughter: Why was Detective Eric DeValkenaere Found Guilty?

Presented by Debora Gerads, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

This webinar will review the circumstances surrounding the fatal shooting of Cameron Lamb by Detective Eric DeValkenaere on December 3, 2019, and Detective DeValkenaere's subsequent prosecution. This webinar will also review several other recent cases in which police officers were found liable for death or injuries to suspects.

Wednesday March 9, 2022: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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

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2. If you have a HSIN account, enter with your login and password information.
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4. Enter your name and click the "Enter" button.

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CASE SUMMARIES

Circuit Courts of Appeals

First Circuit

United States v. Congo, 21 F.4th 29 (1st Cir. 2021)

Special agents from the United States Drug Enforcement Administration (DEA) executed a no-knock search warrant on an apartment located 42 Washington Avenue in Old Orchard Beach, Maine. The agents entered using a ram to force the door open and found seven people inside the apartment, including Aboubacar Congo. The agents searched the entire apartment and recovered more than ten grams of fentanyl and more than thirty-three grams of cocaine base, as well as drug paraphernalia. While searching one of the bedrooms, the agents found a backpack on the floor which was determined to be Congo's based on a search of its contents.

Inside the backpack, the agents found a storage unit bill and key, several cell phones, a New York City parking receipt, and a New York City toll invoice. Agents subsequently searched the storage unit that corresponded to the storage unit bill and key, seizing a pistol, ammunition, documents bearing Congo's name, a digital scale and a small bag containing THC.

The government subsequently charged Congo with several criminal offenses including conspiracy to distribute cocaine base and fentanyl. Congo filed a motion to suppress the evidence seized by the agents, claiming that the evidence seized from the storage unit was derived from information obtained from the unlawful search of his backpack. Congo also argued that the agents did not establish the need for a no-knock provision when they executed the search warrant. The district court denied Congo's motion and he appealed.

First, Congo argued that the affidavit to the search warrant did not establish probable cause that he was a member of the conspiracy; therefore, when the officers realized the backpack on the bedroom floor of the apartment belonged to him, they should have stopped searching it immediately.

The First Circuit Court of Appeals disagreed. It is well established that, generally, "any container situated within residential premises which are the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items [listed] in the warrant."

Here, the court found that many of the items listed in the attachment to the warrant, which detailed items to be seized, were things that could reasonably be thought to be contained within a backpack. For example, cell phones were specifically listed as "items to be seized," and the agents found cell phones in the backpack. The other items, a storage unit bill and key, a New York City parking receipt, and a New York City toll invoice, fell under several of the categories of evidence contained in the warrant, including "[d]ocumentary or other items of personal property that tend to identify the person(s) in the residence, occupancy, control or ownership of the respective locations to be searched," and "records . . . and receipts relating to the transportation, ordering, purchase, sale or distribution of controlled substances, and the acquisition, secreting, transfer, concealment and/or expenditure of proceeds derived from the distribution of controlled substances." The fact that Congo was not identified as a co-conspirator was not relevant to the question of whether his backpack, a container located in an apartment subject to a valid search

warrant, was properly searched by the agents. Consequently, the court held that the search of Congo's backpack was lawful.

Next, Congo argued that the affidavit to the search warrant did not establish the need for a no-knock provision. Law enforcement officers generally must knock when executing a search warrant, but a "no-knock" entry will be considered reasonable if the officers "have a reasonable suspicion that knocking and announcing their presence under the circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

In this case, the court held that the affidavit to the search warrant contained facts that established the agents had reasonable suspicion to believe that knocking and announcing would be dangerous and could lead to the destruction of evidence. First, the affidavit contained information from two sources who claimed that Congo likely had a gun and had behaved violently, or bragged about doing so, in the past. Second, the agent who drafted the affidavit attested that, based on his training and experience it was common for drug dealers to keep weapons in order to protect their drugs or the proceeds of drug sales. Third, when the agents executed the warrant, they did not know the identities of all of the apartment's residents; therefore, they could not know if these individuals had criminal histories or possessed weapons. Finally, the affidavit established that the bedroom where Congo and his partner stayed was in close proximity to the bathroom, making destruction of evidence a concern.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/20-2184/20-2184-2021-12-17.pdf?ts=1639780211

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Fifth Circuit

United States v. Meals, 21 F.4th 903 (5th Cir. 2021)

Stephen Meals used a Facebook messaging application to discuss with A.A., a fifteen-year-old, their previous sexual encounters and their plans for future encounters. Facebook discovered these conversations on its own and sent copies of Meals's messages to the National Center for Missing and Exploited Children (NCMEC) via a "cyber tip."

NCMEC reviewed the messages provided by Facebook and then forwarded them to local law enforcement in Corpus Christi, Texas, where both Meals and A.A. lived. An investigator obtained a search warrant for the Facebook accounts of Meals and A.A., which revealed additional conversations confirming Meals's sexual relationship with A.A. The investigator then obtained a second warrant based upon the additional evidence to search Meals's electronic devices, home, and a trailer. The second search uncovered child pornography on Meals's devices consisting primarily of images of A.A. that Meals apparently produced. The government subsequently charged Meals with several child pornography-related offenses.

Meals filed a motion to suppress the evidence discovered on his electronic devices. Meals argued that Facebook and NCMEC violated his Fourth Amendment rights by acting as government agents when they searched his messages without first obtaining a warrant. The district court denied the motion under the private search doctrine. Specifically, the district court held that the search did not violate Meals's Fourth Amendment rights because Facebook was not the government nor acting as an agent for the government. In addition, even if NCMEC were a government agent,

neither its conduct nor law enforcement's review of Meals's messages exceeded the scope of Facebook's initial search. Meals appealed.

The Fourth Amendment applies to the government, not private citizens. Consequently, under the private search doctrine if a non-government entity violates a person's expectation of privacy, discovers evidence, and turns over the evidence to law enforcement, the evidence can be used to obtain warrants or prosecute. There are two exceptions to the private search doctrine. First, if the "private actor" who conducted the search was acting as an agent of the government when the search was conducted, the private search doctrine does not apply. Second, if the government, exceeds the scope of the private actor's original search without a warrant and discovers new evidence, the private search doctrine does not apply to the new evidence, and the new evidence may be suppressed.

In this case, the Fifth Circuit Court of Appeals held that Facebook was a "private actor" and not a government agent when it searched Meals's messages. Even though 18 U.S.C. § 2258A(a) requires electronic communication service providers like Facebook to send a cyber tip to NCMEC for all instances of child exploitation that they discover on their platforms, it does not compel nor coercively encourage these providers to search actively for such evidence. Instead, the court recognized that § 2258A(f) contains language indicating that service providers like Facebook are not required to monitor their customers or affirmatively search their accounts for evidence of child exploitation. Given this disclaimer, the court held that Facebook conducted a private search when it searched Meals's messages.

Next, the court found that NCMEC is a private, nonprofit corporation, not a government entity. However, the court added that even if NCMEC was acting as a government agent, it did not exceed the scope of Facebook's private search when it reviewed the same content initially reviewed by a Facebook employee and forwarded to NCMEC in the cyber tip. Consequently, the court held that the district court correctly denied Meals's motion to suppress.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca5/20-40752/20-40752-2021-12-30.pdf?ts=1640889159

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Betts v. Brennan, 22 F.4th 577 (5th Cir. 2022)

Early in the afternoon of November 23, 2018, Officer Ross Brennan stopped Timothy Betts for speeding. Officer Brennan exited his cruiser and asked Betts to exit his truck. Initially, Betts complied. Once Betts was outside the truck, Officer Brennan explained he had stopped Betts for going thirteen miles per hour over the speed limit. Betts immediately disagreed, arguing there was "no way" he was going that fast. After a short exchange, Betts sat back down in the driver's seat of the truck, angled toward Officer Brennan.

Betts, continuing to argue about the stop, handed his driver's license, insurance, and registration documents to Officer Brennan, who then stepped away from the truck. At this point, Officer Brennan asked Betts to stand at the back of the truck. Betts refused, saying, "I'm fine . . . I'm not causing you no threat . . . ." Officer Brennan moved slightly closer and, over Betts's protests, told him to "go walk to the back of the truck or I'm going to make you walk to the back of the truck."

Betts replied that Brennan had no reason or authority to order him to do that. This exchange continued for several seconds, with Officer Brennan repeatedly commanding Betts to walk to the

back of the truck "for my safety and your safety." Betts refused. As the argument continued, Officer Brennan leaned closer to the truck and grasped Betts's arm while again ordering him to exit. Betts jerked his arm away and told Officer Brennan not to touch him. When Officer Brennan again tried to approach him, Betts stood up to exit his truck, clenched his fist, and told Officer Brennan that he "might want to call [his] people."

Officer Brennan shouted to Betts to turn around and put his hands behind his back. Betts stood near the driver's compartment at a 45-degree angle away from Officer Brennan with his hands raised over his head. Officer Brennan repeatedly ordered Betts to put his hands behind his back, and after several commands Betts did so. Officer Brennan then repeatedly told Betts to turn and face him. Betts did not do so but instead kept his body at an angle. Officer Brennan repeated this command several more times, warning Betts that he would tase him if Betts did not comply. When Betts did not comply, Officer Brennan deployed his taser, hitting Betts in the upper leg.

Betts screamed and fell to the ground. Betts complied with Officer Brennan's commands to turn over on his stomach. Officer Brennan handcuffed Betts, warning that if he continued to resist, Betts would be tased again. The entire encounter, from the initial stop to Betts's arrest, lasted approximately four minutes. Betts later pled guilty to resisting arrest.

Betts sued Officer Brennan, among others, claiming that Officer Brennan violated the Fourth Amendment by tasing him. Officer Brennan filed a motion for summary judgment based upon qualified immunity. Officer Brennan argued that his single tase of Betts was a reasonable amount of force under the circumstances and not in violation of clearly established law.

The district court disagreed, concluding that Officer Brennan's use of force was objectively unreasonable under the Fourth Amendment because Betts had been stopped for a minor traffic infraction, posed no threat or flight risk, and was "at most" passively resisting when he was tased. The district court also found that Officer Brennan's actions were clearly established as unlawful in Hanks v. Rogers, decided by the Fifth Circuit Court of Appeals in 2017. Officer Brennan appealed.

A police officer is entitled to qualified immunity unless: 1) the officer violated a statutory or constitutional right of the plaintiff; and 2) the right was clearly established at the time of the violation. Officer Brennan argued that the district court ruled incorrectly with respect to both prongs. The Fifth Circuit Court of Appeals (the court) agreed.

In Graham v. Connor, the Supreme Court held that whether an officer has used excessive force in violation of the Fourth Amendment depends on "the facts and circumstances of each particular case," including a non-exhaustive list of factors, such as: (1) "the severity of the crime at issue"; (2) "whether the suspect poses an immediate threat to the safety of the officers or others"; and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight."

In this case, the court found that, of the Graham factors, the extent of Betts's resistance was the most important to analyzing the reasonableness of Officer Brennan's use of his taser. After reviewing other Fifth Circuit excessive force cases dealing with active and passive resistance by suspects, the court disagreed with the district court's conclusion that Betts's resistance was "at most passive."

The court noted that Betts adopted a confrontational stance from the beginning of the stop by repeatedly contesting why he had been stopped, ignoring dozens of Officer Brennan's commands, while disputing his authority. In addition, Betts accused Officer Brennan of lying, batted his hand

away, warned Officer Brennan to call other officers, and dared Officer Brennan to tase him. Most importantly, Betts repeatedly disputed Officer Brennan's power to order him to stand behind the truck. Faced with an angry driver, Officer Brennan reasonably wanted to get Betts away from the driver's compartment where a weapon might easily be hidden.

The court added that other factors also established that Officer Brennan's use of force was reasonable. For example, Officer Brennan did not tase as a first resort. Specifically, he did not immediately resort to using his taser "without attempting to use physical skill, negotiation, or even commands." The court recognized that the speed with which an officer resorts to force is "relevant in determining whether that force was excessive to the need." In this case, the court found that Officer Brennan "properly use[d] 'measured and ascending actions that correspond[ed] to [Betts's] escalating verbal and physical resistance.'" Officer Brennan tried to get Betts to stand behind the truck by invitation, explanation, command, and even by grasping his arm. In addition, Officer Brennan warned Betts more than once that he would be tased if he did not comply with his orders. Only when all those lesser options appeared to have failed did Officer Brennan use his taser. Finally, Officer Brennan tased Betts only once, which was enough to subdue Betts and allow Officer Brennan to handcuff him. Consequently, the court concluded that Officer Brennan did not violate the Fourth Amendment by tasing Betts one time in order to arrest him; therefore, he was entitled to qualified immunity.

In reaching this decision, the court reviewed footage from Officer Brennan's body camera as well as footage from a security camera from outside the building where the stop occurred:

https://www.ca5.uscourts.gov/opinions/pub/21/21-30101-bodycam.mp4

https://www.ca5.uscourts.gov/opinions/pub/21/21-30101-repairshop.mp4

Next, the court added that, even assuming Officer Brennan violated the Fourth Amendment, its holding in Hanks did not clearly establish that Officer Brennan's single tase of Betts violated the Fourth Amendment. The court held that the facts in Hanks were too factually dissimilar to the facts and circumstances that Officer Brennan faced to put it "beyond debate" that Officer Brennan's use of force was excessive.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca5/21-30101/21-30101-2022-01-13.pdf?ts=1642098717

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Seventh Circuit

United States v. Cole, 21 F.4th 421 (7th Cir. 2021)

Illinois State Police Trooper Clayton Chapman stopped a vehicle driven by Janhoi Cole for following too closely to another vehicle, in violation of Illinois law. Cole produced his Arizona driver's license and a California registration document for the vehicle. When asked about the documents issued by two different states, Cole offered, "I'm a chef. I spend most of my time between Los Angeles and Maryland and New York at work. But I genuinely had a job in Arizona. And I keep this driver's license because of the expiration date."

Approximately four minutes into the stop, Trooper Clayton began to ask Cole about his travel plans. Cole told the trooper that he was going to Maryland because he was a personal chef and

that was where his boss lived. When asked where his trip began, Cole did not answer the question initially, but said that he had met up with some family and friends in Colorado. Cole eventually told Trooper Chapman that his trip began in Maryland and that was where he was going. When Trooper Chapman asked Cole where he lived, Cole said that he spent most of his time in Los Angeles and that he was planning to move to Florida. Cole added that he was a chef and that he went wherever he got a job. When Trooper Chapman asked him why he did not fly, Cole told him that he had a car and that he travels with pots sometimes because he was a chef. Trooper Chapman thought that Cole's travel details sounded vague and made up. In addition, Cole appeared extremely nervous during the stop. Among other physical symptoms, Cole was breathing heavily, and his neck was sweaty.

Less than nine minutes into the stop, Trooper Chapman told Cole that he was going to issue him a warning. He explained, though, that they would have to relocate to a nearby gas station for safety reasons. Cole returned to his own car, and they drove separately to the gas station. At the gas station, Trooper Chapman called for a K-9 unit. While waiting, Trooper Chapman continued questioning Cole about his travel plans. He regarded Cole's answers as increasingly suspicious. He also learned from dispatch that Cole had been arrested three times on drug trafficking charges. About 45 minutes after the stop began, the K-9 unit arrived, and a drug sniffing dog alerted on Cole's car. Officers searched the car and found large quantities of methamphetamine and heroin.

The government charged Cole with possession with intent to distribute 500 grams or more of methamphetamine and heroin. Cole filed a motion to suppress the drugs found in his car and his statements during the stop. Cole argued that the trooper unlawfully initiated the stop and then unreasonably prolonged it without reasonable suspicion of criminal activity. The district court denied Cole's motion. Cole appealed.

On appeal, a three-judge panel of the Seventh Circuit Court of Appeals reversed the district court's denial of Cole's motion to suppress. Subsequently, a majority of the judges of the Seventh Circuit Court of Appeals vacated the panel's opinion and voted to grant a rehearing in front of the entire Seventh Circuit Court of Appeals (the court) sitting *en banc*.

First, Cole argued that the district court failed to consider the speed of other cars, traffic, and road conditions when it held that Trooper Chapman lawfully stopped him for following too closely behind another vehicle. The court noted that it was not relevant whether Cole actually violated the statute but whether the trooper reasonably believed that he saw Cole commit a traffic violation. At the suppression hearing, Trooper Chapman testified that Cole was less than two car lengths behind the vehicle in front of him when he decided to stop him. The court added that the magistrate judge credited Trooper Chapman's testimony and made an express finding of fact that Cole was following too closely behind the other vehicle. Cole did not challenge this finding on appeal.

Next, Cole argued that Trooper Chapman unlawfully prolonged the duration of the traffic stop by inquiring about Cole's travel plans.

In Rodriguez v. United States, the Supreme Court (the Court) held that the "mission" of a traffic stop is "to address the traffic violation that warranted the stop and attend to related safety concerns." An officer's tasks within that mission include "determining whether to issue a traffic ticket" and pursing "ordinary inquiries" incident to the stop. Typical ordinary inquiries incident to a traffic stop "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."

However, because it was not at issue in Rodriguez, the Court did not decide if asking a driver travel-plan-related questions were among the ordinary inquiries of a traffic stop.

Although Rodriguez did not address whether travel-plan questions were permissible during a traffic stop, the Court provided a framework for answering that question. Specifically, the Court found that lower courts faced with this issue should ask, "whether, in the totality of circumstances, reasonable travel-plan questions, like the other ordinary inquiries of a stop, are justified by the traffic violation itself or by the 'related' concerns of '[h]ighway and officer safety.'"

Applying the Rodriguez framework in this case, the court held that travel-plan questions are routine inquires that reasonably relate to the underlying traffic violation and roadway safety; therefore, such questions ordinarily fall within "the mission of a traffic stop." First, the court found that travel-plan questions provide important context for the violation at hand. For example, if "a driver was speeding in order to get his pregnant wife to the hospital", then perhaps this "extenuating circumstance" might persuade the officer to issue a warning or simply release the driver." Also, a driver's travel plans may affect an officer's assessment of roadway safety concerns beyond the immediate violation. For example, an officer investigating a broken taillight, has a legitimate interest in knowing whether the driver is two miles from home or halfway through a cross-country trip. The court added that every circuit that has faced this issue of whether travel-plan questions ordinarily fall within the mission of a traffic stop since Rodriguez was decided has reached the same conclusion (1st, 3d, 5th, 8th, and 11th Circuits). Finally, the court cautioned that an officer's travel-plan questions, like the officer's other actions during the stop, must remain reasonable based on the totality of the circumstances surrounding the stop.

Applying these principles here, the court held that Trooper Chapman's travel-plan questions during the initial roadside detention fell within the mission of the traffic stop and did not unlawfully prolong the traffic stop.

First, Trooper Chapman questioned Cole about the basic details of his travel, which were relevant to the traffic violation and roadway safety. It was only after Cole provided evasive, confusing, inconsistent, and improbable answers to some of these questions that Trooper Chapman asked follow-up questions. Under these circumstances, the court held that Trooper Chapman's travel-plan questions were reasonable, rejecting Cole's argument that the trooper was "conducting a fishing expedition" for information that might establish reasonable suspicion to prolong the stop.

Next, the court did not address whether Trooper Chapman's additional questions at the gas station stayed within the mission of the stop. Instead, the court concluded that less than nine minutes into the stop, Trooper Chapman developed reasonable suspicion that Cole was involved in criminal activity, which occurred before they drove to the gas station. As a result, held that Trooper Chapman had a lawful basis to prolong the duration of the stop to conduct a dog-sniff at the gas station.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/20-2105/20-2105-2021-12-17.pdf?ts=1639776616

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United States v. Ahmad, 21 F.4th 475 (7th Cir. 2021)

Deputy Derek Suttles was conducting drug interdiction on the interstate near South Jacksonville, Illinois. He saw an RV with a dirty Idaho license plate traveling Interstate 72 and followed it so

he could read the plate. Syed Ahmad was driving the RV. His two children and his cousin Muhammad Usama were passengers.

Ahmad exited the interstate and pulled into a truck stop. He and Usama left the RV and went into the convenience store. Deputy Suttles parked nearby and entered the store to use the bathroom. He saw Ahmad and Usama but did not approach them. Deputy Suttles returned to his squad car, ran the RV's license plate, and learned that it was registered to an elderly couple from Idaho. A store employee then approached Deputy Suttles and told him that Ahmad and Usama were acting strangely and appeared to be waiting for Deputy Suttles to leave. Eventually Ahmad and Usama returned to their RV.

Now suspicious, Deputy Suttles waved Ahmad and Usama over, and Ahmad complied. Deputy Suttles said that he was "working drug interdiction" and that Ahmad "was free to leave at any time but that [he] wanted to ask him a few questions about his trip." Ahmad agreed to talk, telling Deputy Suttles that he was traveling with his two children and Usama from Houston to Columbus, Ohio, to visit family. He said that they first flew to Idaho because it was cheaper to rent the RV there. This story aroused Deputy Suttles's suspicions so he asked to see Ahmad's driver's license and the rental agreement. While Ahmad returned to the RV to retrieve the documents, Deputy Suttles called another K-9 officer to see if he and his drug dog, Kilo, were nearby.

When Ahmad returned, he gave Deputy Suttles his license and the rental agreement. A few minutes passed while Deputy Suttles ran a warrant check, which came back clean. While still retaining his documents, Deputy Suttles asked Ahmad for consent to search the RV. Ahmad gave permission, but Deputy Suttles did not immediately begin to search. Instead, he asked Ahmad to summon Usama from the RV. Ahmad did so. At this point, Deputy Suttles made the same prefatory comments that he had to Ahmad, telling Usama that he was free to leave but that he would like to ask a few questions about their trip.

About 15 minutes into the encounter, the K-9 officer arrived with Kilo. The officers asked Ahmad if Kilo could sniff around the outside of the RV and Ahmad consented. Kilo quickly alerted to the presence of drugs. At that point, Ahmad and Usama were detained while the RV was searched. A large quantity of marijuana was discovered, and the officers placed Ahmad and Usama under arrest. Throughout the entire encounter, Deputy Suttles spoke in a friendly and conversational tone and never drew his weapon.

The government charged Ahmad and Usama (the defendants) with possession with intent to distribute more than 100 kilograms of marijuana. The defendants filed a motion to suppress the evidence seized from the RV. The defendants argued that Ahmad was unlawfully seized under the Fourth Amendment when Deputy Suttles retained his driver's license and the rental agreement. As a result, the defendant's argued that Ahmad's consent to search the RV, which was obtained during this time, was involuntary. The district court disagreed and denied the motion. Ahmad subsequently pleaded guilty, reserving the right to appeal the denial of the suppression motion.

A person is seized under the Fourth Amendment when, viewing the totality of the circumstances surrounding the encounter, a reasonable person would have believed that he was not free to leave.

In this case, the Seventh Circuit Court of Appeals agreed with the district court that Ahmad's encounter with Deputy Suttles was consensual and did not become a Fourth Amendment seizure until Kilo alerted and he and Usama were detained while the officers searched the RV. Consequently, the court held that Ahmad's consent to search was voluntary. The court based this holding on the fact that: (1) Deputy Suttles's initial questioning up until Ahmad's arrest occurred

in a public place, a truck stop parking lot; (2) Deputy Suttles spoke in normal, conversational tones, never raised his voice, and made no verbal commands; (3) Deputy Suttles did not physically touch Ahmad or restrain his movement; (4) Deputy Suttles did not draw his weapon and he was the only officer on the scene until the K-9 officer arrived with Kilo, by which time Ahmad had already consented to the search; (5) Deputy Suttles told Ahmad that he was free to leave and never indicated otherwise until after Kilo alerted; and (6) Deputy Suttles's retention of Ahmad's license and rental agreement did not automatically transform the otherwise consensual encounter into a Fourth Amendment seizure.

While the court recognized that the retention of a person's identification documents could turn a consensual encounter into a seizure, it was critical to analyze how long, and under what circumstances, the person's documents were retained. Here, Deputy Suttles held Ahmad's driver's license and RV rental agreement for only a few minutes before Ahmad consented to the search.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/19-3490/19-3490-2021-12-22.pdf?ts=1640190617

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United States v. Jones, 22 F.4th 667 (7th Cir. 2022)

Officers Andrew Brenneke and Duane Romines received an arrest warrant for Whitney Gosnell for violating the terms of her probation. Gosnell was described as 5'3" tall, weighing 130 to 140 pounds. After receiving an anonymous tip that Gosnell was staying at a particular motel, the officers went to the motel around 8:45 p.m. The motel manager told the officers that Gosnell was staying in a room with Larry Jones and his son. The officers conducted a warrant check, which revealed that Jones had arrests dating back to the 1990s and was listed as a "known resister," "convicted felon," and "substance abuser."

The officers went to Jones's motel room, knocked on the door several times and called out "Larry," but did not receive a response. Officer Brenneke knew Jones's street name, so he called out, "Hey, Crunch," and Jones responded, "What?" The officers replied, "It's police. We're not here for you," to which Jones said, "She's not here. She can't be here." At this point, the officers had not yet told Jones that they had an arrest warrant for Gosnell.

The officers asked Jones to open the door and Jones complied within one minute. The officers were in full uniform with their guns holstered and spoke to Jones in conversational tones during the encounter. The officers reiterated to Jones that they were not there for him, showed him the arrest warrant for Gosnell, and explained that they would like to verify that Gosnell was not there. The officers spent approximately 15 to 20 seconds explaining that they would like to search anyplace in the room where a person could hide. At some point, Officer Romines told Jones that they "would not open small drawers and things like that." Jones repeated that Gosnell was not there, but eventually said, "That's fine," and moved away from the door.

After entering the motel room, the officers looked in the kitchenette, bathroom, and shower. Officer Romines then lifted up one of two beds but found nothing underneath. There was a six-to-ten-inch gap between the beds and the floor. Before Officer Brenneke checked under the second bed, Jones stated, "Well, she couldn't be under there." Officer Romines responded, "She could be under there, just like she could have been under the first one." Officer Brenneke lifted the second bed and saw a firearm.

The government eventually charged Jones with possession of a firearm by a convicted felon. Jones. Jones filed a motion to suppress the firearm, claiming that the officers committed several Fourth Amendment violations. The district court denied the motion and Jones appealed.

First, Jones argued that he was seized for Fourth Amendment purposes either: 1) when he opened the door to his room; or 2) when the officers showed him the arrest warrant for Gosnell. Jones claimed that his seizure, at either point, was unreasonable; therefore, it rendered any consent he gave to the officers to enter the room invalid.

The Seventh Circuit Court of Appeals held that Jones was not seized when the officers knocked on his door. The time between when the officers first knocked and when Jones opened the door was, at most, a minute and a half. The officers spoke in a conversational, non-threatening tone and made it clear to Jones that they were not there for him. The court concluded that a reasonable person in Jones's position would have felt free to decline the officers' request to open the door.

The court further held that Jones was not seized when the officer showed him the arrest warrant for Gosnell. The officers sought entry to the room based on Jones's consent, not on the grounds that they were executing a warrant. In addition, there was no evidence that Jones relied on the warrant before saying, "That's fine," and stepping away from the door. Finally, Jones did not dispute that the officers told him that they were not there for him and that he told the officers, "She's not here," before he opened the door. The court found that this exchange indicated that Jones understood the difference between a search warrant and an arrest warrant, and that he felt free to decline the officers' requests.

Second, Jones claimed that his consent to search was not voluntary. Again, the court disagreed. When Jones opened the door, the officers explained that they were looking for Gosnell and would like to "verify" that she was not inside. Jones responded, "That's fine," and stepped away from the door. Based on these facts, the court held that Jones voluntarily consented. The court added that
the presentation of the arrest warrant for Gosnell did not render Jones's consent involuntary. The officers simply informed Jones that they had an arrest warrant for Gosnell, but their request to search the room was still optional.

Third, Jones claimed that the officers exceeded the scope of his consent to search the room. When officers obtain consent, they may look in any area that could reasonably contain the item or person whom they are seeking. In this case, Jones clearly knew that the officers were looking for Gosnell and the officers told him that they would look only "where a person could be." Consequently, the court held that a reasonable person in Jones's position would likely believe that looking under the beds in Jones's room was well within the scope of his consent.

Finally, Jones argued that he expressly limited the scope of his consent when he stated that Gosnell "couldn't be under there" before Officer Brenneke lifted the second bed. If a person's attempt to withdraw his consent is vague or ambiguous, officers may continue their search under the initial grant of consent. In this case, the court found that a "reasonable observer" might have interpreted Jones's comment as an attempt to limit his consent. However, the court added that an equally logical interpretation was that Jones was simply dismissing the possibility that the officers would find Gosnell under the bed. Consequently, the court held that Jones did not satisfy his burden of showing that the scope of his consent did not include looking under the bed.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/21-1293/21-1293-2022-01-06.pdf?ts=1641493880

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Tenth Circuit

United States v. Fernandez, 20 F.4th 1298 (10th Cir. 2021)

Drug Enforcement Administration (DEA) Special Agent Jarrell Perry was on duty on October 27, 2017, at the Greyhound bus terminal in Albuquerque, New Mexico. Arriving buses often stop for a layover and passengers disembark so that the bus may be cleaned and refueled in a maintenance area. During this time, Agent Perry looks at luggage on the buses for signs of drug trafficking after the buses have been serviced but before the passengers reboard.

When a bus arrived that morning for a layover, Agent Perry boarded the bus after the passengers got off and began examining the luggage stored inside. Agent Perry saw a large black duffel bag in the overhead compartment near the rear on the driver's side of the bus. Agent Perry noticed that the bag had no name tag and when he lifted the bag, it felt very heavy. Suspecting that the bag contained illegal narcotics, Agent Perry returned the bag to the overhead compartment and exited the bus.

Agent Perry reboarded the bus as the passengers began to get back on. As the passengers were taking their seats, Agent Perry approached each of them, identified himself as a law enforcement officer, asked about travel plans, and sometimes asked to search the passenger's belongings. When Agent Perry approached Jesus Fernandez, who was seated near the middle of the bus, he asked Fernandez if he had any luggage with him. Fernandez replied, "I don't got nothing with me today." Agent Perry repeated the question; again, Fernandez denied having luggage. Agent Perry then said, "OK, so you don't have any luggage." Fernandez said, "Nah."

After no passenger claimed the black duffel bag that had piqued his interest, Agent Perry grabbed it and, starting from the rear of the bus, carried the bag up the aisle, asking each passenger about the bag. Once he reached Fernandez, Agent Perry asked if the bag was his and Fernandez replied, "Yeah, that's my bag," and asked, "You want to check it out?" At that point, Agent Perry asked for and received permission from Fernandez to search the bag. Inside the bag, Agent Perry found an oblong bundle wrapped in brown tape which he recognized as consistent with the packaging of illegal drugs. Agent Perry arrested Fernandez. As he was being arrested, Fernandez said, unprompted, "That's not my bag, that's not my bag."

The government charged Fernandez with possession with intent to distribute methamphetamine. Fernandez filed a motion to suppress the evidence from the duffel bag, claiming that Agent Perry seized the bag in violation of the Fourth Amendment when he grabbed it from the overhead compartment and carried it from passenger to passenger. In addition, to support his motion to suppress, Fernandez subpoenaed all recordings from Greyhound surveillance cameras on the morning of October 25. However, Greyhound responded with recording from only a few of the cameras. In response, Fernandez filed a motion to hold the government responsible for the destruction of the missing video-surveillance footage on the ground that Greyhound was acting as a government agent with respect to its handling of the surveillance cameras and video recordings.

The district court denied Fernandez's motion to suppress the evidence seized from the duffel bag, holding that Agent Perry's actions did not violate Fernandez's Fourth Amendment rights because

Fernandez had abandoned the bag. The district court further held that Greyhound was not acting as an agent of the DEA with respect to the video recordings; therefore, any failure by Greyhound to properly preserve the recordings could not be attributed to the government. Fernandez appealed.

A warrantless search of abandoned property is reasonable under the Fourth Amendment. In the Tenth Circuit, abandonment occurs if either: (1) the owner subjectively intended to relinquish ownership of the property; or (2) the owner lacks an objectively reasonable expectation of privacy in the property. In this case, the court concluded that, to determine abandonment, the question was whether a reasonable officer in Agent Perry's position would have believed that Fernandez had relinquished any property interests in the bag based on his voluntary words and actions.

The Tenth Circuit Court of Appeals affirmed the district court's ruling that Fernandez abandoned his bag through his words and actions. Significantly, the court found that Fernandez "responded three times in English, clearly and unambiguously" to Agent Perry that he did not have any luggage with him. The court added the fact that the bus was not crowded, yet the bag was located several rows behind Fernandez's seat on the opposite side of the bus, which indicated that Fernandez was subjectively trying to disassociate himself from the bag. Given these facts, the court held that it was reasonable for Agent Perry to conclude that Fernandez had abandoned any rights he had in the bag before Agent Perry removed it from the overhead compartment and carried it up the aisle.

Next, the court affirmed the district court's ruling that Greyhound was not acting as an agent of the DEA with respect to the preservation and production of the surveillance video requested by Fernandez. First, there was no evidence that the DEA had any contact with Greyhound regarding how to respond to Fernandez's request for the preservation of the video surveillance footage from October 25 nor how to respond to the subpoena in which the video was requested. Instead, there was uncontested testimony that the DEA agents did not even know about Fernandez's request or subpoena before Greyhound responded to the subpoena. Next, there was no evidence that the DEA ever communicated with Greyhound regarding how to respond to such requests, much less evidence that Greyhound had trained or advised its personnel on the matter.

Finally, there was no evidence that the DEA had ever communicated with Greyhound regarding where to place cameras, how to record what the cameras detected, or how to preserve video recordings. The only relevant contact between Greyhound and the DEA regarding the general operation of the surveillance system was that Agent Perry had provided 100 blank discs when a Greyhound employee had said that the terminal was out of discs on which to download a video requested by the DEA. There was no evidence that Agent Perry placed any condition on the use of the discs. To the contrary, a Greyhound employee testified that she had never provided a disc to the DEA but had used the discs on several other occasions to download videos of noncriminal incidents. Regardless, the court added that the only purpose that could be served by the DEA in supplying discs to Greyhound would be to facilitate its preservation of information. The court noted that it would be "bizarre" to use this act as a ground for holding the DEA responsible for Greyhound's failure to preserve information for Fernandez.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/20-2106/20-2106-2021-12-17.pdf?ts=1639762230

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