The Federal Law Enforcement Informer Podcast

Episode Number 1, October 2011

Welcome to episode number 1 of the Federal Law Enforcement Informer podcast.

My name is Ken Anderson, and I am an instructor in the Legal Division. Today, John Besselman, who is the Chief of the Legal Division, and I, will be bringing you the October 2011 issue of The Informer.

The Informer is produced every month by the Legal Division of the Federal Law Enforcement Training Center.

It is dedicated to providing law enforcement officers with quality, useful, and timely reviews of United States Supreme Court and federal Circuit Courts of Appeals cases, interesting developments in the law, and legal articles written to clarify or highlight various issues.

In this issue we have case summaries from the 5th, 6th, 7th, 8th, 9th and 10th Circuit Courts of Appeals.

Before we begin, however, I would like to dedicate this podcast to the memory of Frank Connelly.

Frank, a legal instructor at the FLETC Artesia, and for several years the lead instructor for the Police Legal Advisors Training Program, passed away on October 10, after a long and courageous struggle against a cruel and relentless disease.

If Frank had been an ordinary person, then these ordinary words would do. If he had lived an ordinary life, then these ordinary sentiments would suffice. But these expressions fall woefully short of conveying our respect for Frank and our profound sadness at the loss of this extraordinary man, whose wit, good nature, dedication, generosity, insight, and intellect are already so sorely missed. He touched so many lives in such positive ways, and his legacy is his significant contribution to the greater good through his life of dedicated public service.

This month we are going to start with the 5th Circuit Court of appeals and U.S. v. Macias, decided September 27, 2011.

An officer conducted a traffic stop on Macias for failing to wear a seatbelt. During the stop, the officer searched the vehicle and arrested Macias after he discovered an illegal firearm.

The court held that the search of the vehicle violated the *Fourth Amendment* because the officer unreasonably extended the duration of the stop by asking Macias and his passenger questions that were unrelated to the reason for the stop. The officer asked Macias if he was employed,

what kind of work he did, and if he owned his own business. The officer asked the passenger about her mother, who was the registered owner of the vehicle, and how long she and Macias had been in a relationship, how many children she had, and why had her mother not accompanied them on their trip. These questions were not related to the seatbelt violation or to the purpose or itinerary of Macias's trip and they unreasonably prolonged the duration of the stop.

The court also held that after the stop, the officer did not develop reasonable suspicion that Macias was involved in criminal activity that would have allowed him to prolong the duration of the stop. The officer stated that Macias appeared to be unusually nervous for someone pulled over for a seatbelt violation. The court noted that extreme nervousness, by itself, is not sufficient to support reasonable suspicion.

Finally, the court held that Macias's consent to search the vehicle was not valid. The court found that Macias's consent to search resulted from of his illegal detention; therefore, it was obtained involuntarily and not an independent act of freewill.

Moving on to the 6th Circuit, we have Cochran v. Gilliam, decided September 2, 2011.

The court held that officers were not entitled to qualified immunity after they violated Cochran's *Fourth Amendment* rights by assisting his landlord in wrongfully seizing all of his personal property during the execution of an eviction order.

Cochran's landlord obtained an eviction order against him for failure to pay the rent. Officers went with the landlord to assist him in taking possession of the house. Once at the house, however, the officers also helped the landlord remove all of Cochran's personal property that was inside so it could be sold to satisfy back-rent that was owed. The eviction order did not cover the disposition of Cochran's personal property inside the house or the issue of back-rent.

When police officers take an active role in a seizure or eviction, they are no longer merely passive observers and they may not be entitled to qualified immunity. In this case, there was neither a court order permitting the officers' conduct nor any exigent circumstances in which the government interest would outweigh Cochran's interest in his property.

The officers went beyond their role of keeping the peace during the repossession of the house when they interfered with Cochran's property in violation of the *Fourth Amendment*. The officers threatened to arrest Cochran if he interfered with the landlord's removal of his property and were photographed carrying items out of the house and loading them into the landlord's truck. In addition, an officer bought Cochran's television from the landlord at the scene for one hundred dollars. The officers' involvement in assisting the landlord in seizing all of Cochran's personal property was unreasonable because there was no legal basis for such action.

In the 7th Circuit we have three cases, beginning with U.S. v. Richardson, decided September 2, 2011.

During a pat-down, an officer felt a small hard lump in the suspect's pants pocket. The officer removed the object that turned out to be a packet containing crack cocaine.

The court held that the officer lawfully removed the crack cocaine from the defendant's pocket even though when he first felt it, he was unsure what the object was. Even if Richardson had

argued that the officer could not have reasonably believed the object was a weapon, this circuit has held that an officer who feels a small hard object during a pat-down may have reasonable suspicion to believe the object is a weapon.

Next the court decided U.S. v. Stallworth, on September 6, 2011.

Stallworth was a police officer who took money in exchange for protecting a drug dealer during drug transactions. The drug dealer was actually an undercover federal agent and Stallworth was charged with a variety of offenses.

The court held that Stallworth was not entitled to a jury instruction on the defense of entrapment. While a jury could have found that the government induced Stallworth to commit the crimes, the court noted that Stallworth was already predisposed to commit them. He was not an innocent person lured by the government into committing those crimes. Stallworth showed no reluctance in assisting the drug dealer; he profited from his participation and he even provided tips on how the drug dealer could avoid being caught in future drug transactions. Additionally, the undercover officer's inducement was not great. Stallworth was offered a reasonable amount of money for what was expected from him.

Finally, the court decided U.S. v. Clark, on September 15, 2011.

Officers arrested McCormick for a drug offense and she agreed to provide them with information on Clark, who was her supplier. McCormick gave the officers Clark's first name, a physical description of him and the truck he drove, as well as the route he always took when delivering drugs to her house. Officers monitored several telephone calls between McCormick and Clark on the day Clark was supposed to arrive at her house with ten ounces of cocaine. Officers positioned along Clark's expected travel route confirmed his physical description and description of his truck previously provided by McCormick. When Clark pulled into McCormick's driveway, officers ordered him out of the truck, handcuffed him and placed him in the back of a police car. A drug-sniffing dog alerted to the presence of drugs in the truck and officers found ten ounces of cocaine inside a plastic bag hidden behind a dashboard panel.

The court held that the officers were entitled to search Clark's truck without a warrant under the automobile exception to the *Fourth Amendment*. The court found that McCormick was not an ordinary informant because she had bought large quantities of drugs directly from Clark on multiple occasions. Additionally, the officers corroborated the most significant details of her story. They listened in on her phone call to Clark and heard her place an order for ten ounces of cocaine to be delivered by Clark himself two days later. Two days later Clark appeared at McCormick's house, driving a truck she had previously described, having driven the route she said he would take. With this information, the officers had probable cause to believe that Clark had arrived at McCormick's house to deliver cocaine.

In the 8th Circuit we have two cases, starting with U.S. v. Brown, decided September 2, 2011.

Brown stabbed two men and drove away in a Chevy Blazer. An officer later located Brown at a friend's house and arrested her on an unrelated warrant while he continued his investigation into the stabbing. The officer used his flashlight to look into the windows of the Blazer where he saw a knife and a pair of brass knuckles.

The court held that the officer had probable cause to enter the parked vehicle without a warrant and seize the weapons he saw inside it. The court stated that the officer's looking through the parked car's windows was not a search under the *Fourth Amendment*. Additionally, the incriminating nature of the knife and brass knuckles was immediately apparent because the officer knew that Brown was implicated in a recent stabbing and that possession of brass knuckles was illegal. The officer then had probable cause to enter the vehicle, without a warrant and seize the weapons.

We also have U.S. v. Huerta, decided September 13, 2011.

While conducting a routine inspection of mail packages, a United States Postal Inspector noticed a suspicious package. The Inspector first noticed the package because its seams were taped, it had a handwritten label, and it was mailed from California. Upon further examination the Inspector noticed that it had been mailed from a post office with a different zip code than the return address, it was addressed to an individual at a hotel, it consisted of two boxes that had been taped together to form one box and one of the numbers in the return address had been scratched out. Without moving the package, the Inspector searched an electronic database and discovered that the return address on the package was valid but the name of the return addressee was not associated with that address. The Inspector called the sender's telephone number, as listed on the package, but the number was no longer in service. The Inspector then removed the package from the mail cart, seizing it under the *Fourth Amendment*, and took it to another building so a canine could sniff it for drugs. The canine did not alert on the package so the Inspector decided to conduct a controlled delivery to the addressee at a local hotel.

Once at the hotel, the defendant initially admitted that he was expecting a package, but refused to consent to a search of it and later denied knowing anything about it. The Inspector obtained a search warrant for the package, which contained methamphetamine.

The sole issue on appeal was whether the Postal Inspector had reasonable suspicion to seize the package when he removed it from the mail cart and took it to the other building. The *Fourth Amendment's* protection against unreasonable searches and seizures extends to packages placed in the mail. A law enforcement officer may seize a package for investigative purposes if he believes the package contains contraband.

The court held that the Inspector had reasonable suspicion to seize the package. Through his more than seven years of experience of investigating mail containing narcotics, he learned that people sending contraband through the mail often use fictitious names, addresses and telephone numbers to avoid detection by law enforcement. When taken together, all of the suspicious factors articulated by the Inspector supported a reasonable suspicion that the package contained contraband.

Now, here is John Besselman.

Thanks Ken, now the 9th Circuit cases, U.S. v. Rodgers, decided September 7, 2011.

An officer conducted an investigatory stop, suspecting that Rodgers was driving a stolen vehicle. After determining that the vehicle was not stolen, the officer asked Rodgers, who was fifty-one years old, what his relationship was to his female passenger. The female passenger appeared to

be twelve to fourteen years old, the area was known for juvenile prostitution and it was 3:30 a.m. Rodgers told the officer that the female passenger was just a friend who needed a ride. The passenger told the officer that she was nineteen years old, but that she did not have any identification on her. She gave the officer a date of birth that was consistent with her claim that she was nineteen years old. When the officer ran a check on her information, he learned that there was an outstanding arrest warrant for a person with the same name, and month and day of birth, but not the same year. The officer, unsure if the passenger was the same person on the warrant, decided to search the vehicle in an attempt to locate any identification for her. The officer never found any identification however; he did find methamphetamine, drug paraphernalia, and an illegal firearm and arrested Rodgers. The passenger was arrested on the outstanding warrant.

The court held that the officers did not have probable cause to support a warrantless search of Rodgers's car under the automobile exception to the warrant requirement. The officer did not identify any fact or observation that caused him to believe that the female passenger had any identification and that it was inside Rodgers's car. The officer did not see the passenger trying to hide anything inside the car, she made no furtive movements, and there was no paper or objects appearing to be identification in plain view. Although officer never recovered any identification for the passenger, he still arrested her on the warrant when he was initially reluctant to do so. There was no indication that the officer searched the passenger herself, the most likely place to find identification, before they searched Rodgers's car.

Next, the court decided U.S. v. Dugan, on September 20, 2011.

Officers arrested Dugan for illegally growing and selling marijuana. Dugan also had a business dealing in firearms and was convicted of shipping and receiving firearms, through interstate commerce while using a controlled substance in violation of *18 U.S.C. § 922(g)(3)*.

The court held that *§ 922(g)(3)* did not violate Dugan's *Second Amendment* right to right to bear arms. The *Second Amendment* right to bear arms is not unlimited. Because Congress may constitutionally deprive felons and mental ill people of the right to posses and carry weapons, the court concluded that Congress may also prohibit illegal drug users from possessing firearms. Unlike people who have been convicted of a felony or committed to a mental institution and face lifetime bans, an unlawful drug user may regain his right to possess firearms simply by ending his drug abuse.

In our next case, the court decided U.S. v. Baker, on September 20, 2011.

Baker was convicted of misdemeanor possession of methamphetamine and sentenced to three years' probation. A condition of his probation required him to submit to suspicionless searches of his person, property, residence, vehicle and personal effects at any time of day or night by a probation officer or any federal, state or local law enforcement officer.

A suspicionless search of a parolee does not violate the *Fourth Amendment*. Because there is no constitutional difference between parole and probation for purposes of the *Fourth Amendment*, the court held that this condition of Baker's probation did not violate the *Fourth Amendment*.

And finally, the Ninth Circuit decided U.S. v. Krupa, on September 30, 2011.

A woman contacted the military police after her ten-year-old daughter and five-year-old son, who were living on base with her ex-husband, had not arrived at the train station as previously arranged. Military police went to the home and discovered that the father, a service member, was out of the country. Krupa, a civilian, told police that he was taking care of the children while their father was away. The home was in disarray and police were concerned when they saw thirteen computer towers and two laptops in the home. Krupa gave the officers consent to seize the computers.

The next day, during the forensic examination of one of the computers, the investigator found an image he suspected to be child pornography along with a sexually suggestive website label. However, before the investigator could finish searching all of the computers he was hospitalized. The next day Krupa revoked his consent to search the computers. The investigator obtained a search authorization from the Military Magistrate and found twenty-two images of child pornography. A subsequent search warrant obtained by the FBI uncovered additional child pornography images and movies.

The court held that Military Magistrate could have reasonably concluded that there was probable cause to issue the search authorization. The investigators assertion that he had found an "image of suspected contraband," implicitly referring to child pornography, in computers seized from a home for which there had been a report of child neglect, and where there was no custodial parent present, created a fair probability that contraband or evidence would be found in the computers.

Editors Note: This opinion replaced the opinion issued on February 7, 2011 as reported in the March 2011 issue of The Informer.

Moving on to the 10th Circuit we have two cases. First, Mascorro v. Billings, decided on August 31, 2011.

An officer saw Mascorro's seventeen-year-old son, Joshua, driving without taillights at 11:30 p.m. and attempted a traffic stop. Joshua did not stop, but instead drove two blocks to his parents' house, ran inside and hid in the bathroom. While both parties dispute what exactly happened, officers eventually entered the house without a warrant and arrested Joshua.

The court held that the officers were not entitled to qualified immunity after they entered Mascorro's home without a warrant to arrest her son for driving without taillights. The court did not find any circumstances that created an exigency that would have allowed the officers to enter the house without a warrant. The intended arrest was for a minor traffic violation, committed by a minor with whom the officer was acquainted. There was no evidence that could have potentially been destroyed and there were no officer or public safety concerns. The warrantless entry based on hot pursuit was not justified.

Additionally, it would have been clear to a reasonable officer, at the time the officers entered the Mascorro house, that their entry was unlawful under the circumstances presented. No reasonable officer would have thought pursuit of a minor for a mere misdemeanor traffic offense constituted the sort of exigency permitting entry into a home without a warrant.

Finally, we will wrap up the podcast with U.S. v. Burleson, decided on September 12, 2011.

Shortly before midnight, while patrolling a residential neighborhood, an officer saw three men come out of an alley and begin walking down the middle of the street. One of the men was carrying a pit bull without a leash. The officer stopped the men to inform them that they were not allowed to walk down the middle of the street and to ask them why they were carrying the dog. The officer was aware of previous dog thefts that had occurred in the city and of other property crimes that had occurred in that neighborhood. The men told the officer that they did not have leash for the dog, which satisfied the officer. The officer then asked the men for their names and requested a warrants check from dispatch. Dispatch notified the officer that Burleson had an outstanding arrest warrant. While he was being handcuffed, Burleson told the officer that he had two handguns and some ammunition in his waistband and pockets.

The district court suppressed the handguns and ammunition. The court concluded that the officer exceeded the permissible scope of the *Terry* stop after he told the men that they could not walk down the middle of the street and then satisfied his suspicions about the dog. The court found that the men did not do anything further to raise additional suspicion of criminal activity, therefore the officer had no lawful basis for continuing the detention to run a warrants check. Additionally, the court held that the warrants check was inappropriate because the cooperative nature of the men did not give the officer any objective reasons to be concerned for his safety.

The court of appeals disagreed. First, the court held that an officer may perform a warrants check on a pedestrian during the course of a lawful *Terry* stop. In this case, the *Terry* stop had not ended by the time the officer asked the men for their names and requested the warrants check. Although the officer had told the men is was illegal to walk down the middle of the street, he still had the option to issue a citation or a verbal warning, depending on what transpired during the rest of the stop, to include the results of the warrants check.

Regarding the second basis for the stop, an investigation into whether the dog had been stolen, it was reasonable for the officer to obtain the men's names and confirm their identifies in case the dog was later reported stolen. The officer testified that he asked the men for their identities for this purpose.

Second, the court held that officers are permitted to conduct a warrants check during a *Terry* stop regardless of whether they have officer-safety concerns. The court stated that while officer-safety concerns are often cited as a reason for requesting a warrants check during a *Terry* stop, it is not the only reason. Allowing warrants checks during *Terry* stops also promotes the strong government interest of solving crimes and bringing offenders to justice. Here, the officer was entitled to determine whether any of the men were evading justice and as it turned out, Burleson was.

Thank you for listening to our podcast. Feel free to contact me at area code 912 267-3429 with any comments or questions or email me at kenneth.a.anderson.gov .