The Federal Law Enforcement Informer Podcast

Episode Number 2, November 2011

Welcome to episode number 2 of the Federal Law Enforcement Informer podcast.

My name is Ken Anderson, and I am an instructor in the Legal Division at the Federal Law Enforcement Training Center located in Glynco, Georgia. Today, John Besselman, who is the Chief of the Legal Division, and I, will be bringing you the November 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 podcast we will have our annual United States Supreme Court Preview, where we will cover law enforcement and criminal law cases to be decided by the Court in the October 2011 term.

We also have case summaries from the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th and 10th Circuit Courts of Appeals.

This month we are going to begin with the Supreme Court Preview. These cases will be decided by the United States Supreme Court during the October 2011 term.

The first case involves a *Miranda* custody issue. In *Howes v Fields*, the court will determine whether whether a prisoner is always "in custody" for *Miranda* purposes any time he is isolated from the general prison population and questioned about conduct that occurred oustide the prison. The court heard oral arguments in this case on October 4, 2011.

On October 12, 2011, the court heard oral arguments in *Florence v. Board of Chosen Freeholders*. The court will decide Whether the *Fourth Amendment* allows jail personnel to conduct strip searches of everyone admitted to the jail for any crime, even without any reason to believe that the person possesses hidden weapons or contraband.

In *Rehberg v. Paulk*, argued before the court on November 1, 2011, the court will decide whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent person is entitled to absolute immunity from a *Title 42 § 1983* claim for civil damages.

In *Perry v New Hampshire*, the court will decide whether the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances or only when the suggestive circumstances are orchestrated by the police. The court heard oral arguments in this case on November 2, 2011.

In *United States v. Jones*, arguably the most anticipated law enforcement case the Court will hear this term, the court will decide two issues related to GPS tracking. First, whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the *Fourth Amedment*. And second, whether the government violated Jones's *Fourth Amendment* rights by installing the GPS tracking device on his vehicle without a valid warrant or his consent. The court heard oral arguments in this case on November 8, 2011.

In *Messerschmidt v. Millender*, the court will decide whether officers were entitled to qualified immunity after they obtained a valid warrant to search the home of a gang-member for firearms and gang related items after he fired a sawed-off shotgun at his girlfriend. The court will hear oral arguments in this case on December 5, 2011.

Finally, the court will hear oral arguments in *Williams v. Illinois* on December 6, 2011. In *Williams*, the court will decide whether a state rule of evidence that permits an expert witness to testify about the results of DNA testing performed by non-testifying analysts violates the *Confrontation Clause*, when the defendant has no opportunity to confront the actual analysts.

Moving on to the case summaries, we will begin with three cases from the First Circuit Court of Appeals.

First, *U.S. v. Rogers*, decided on October 4, 2011.

Rogers sold a computer in which the buyer found what he believed to be child pornography. He gave the material to the local police who contacted the Naval Criminal Investigative Service (NCIS) because Rogers was a non-commissioned naval officer. While Rogers was on duty, local officers obtained a search warrant for his home. Rogers's commanding officer ordered him to report to two NCIS agents, and then to return to his home. Once at home, Rogers remained outside in his driveway, spoke to the officers and admitted to downloading the child pornography. Rogers then agreed to go the police station for more formal questioning. At the police station, an officer read Rogers his *Miranda* rights; he waived them and made more incriminating statements.

The court held that the officers deliberately planned to subject Rogers to questions, without the benefit of *Miranda* warnings under circumstances that would make it difficult for him to avoid answering them. They chose to execute their search warrant when Rogers was not home, then arranged for his commanding officer to order him to go home. A member of the armed services would not reasonably believe that he could disregard such an order, and once at his house would have felt that he had to answer the officers' questions. As a result, Rogers was in custody for

Miranda purposes. Because the officers did not provide him with *Miranda* rights, the court held that Rogers's statements made to the officers at the house should have been suppressed.

The court did not rule on whether or not Rogers's subsequent statements to the officers, at the police station, after he had been *Mirandized* were admissible. The court remanded the issue to the trial court to determine, if under the circumstances, the *Miranda* warnings given to Rogers were sufficient to convey to him that he was not required to speak to the officers, notwithstanding his earlier admissions.

Next is, *U.S. v. Garcia-Hernandez*, decided on October 12, 2011.

Officers obtained a search warrant for the defendant's house after they confirmed, through a confidential informant, that he possessed approximately thirty-five kilograms of cocaine. Officers drove an armored vehicle onto the defendant's front lawn, and then breached the front door with a battering ram. Other officers detonated noise-flash devices, causing windows in the residence to shatter. Eighteen officers participated in the operation. Officers ultimately found thirty kilograms of cocaine in the trunk of the defendant's car. The defendant argued that the cocaine should have been suppressed because the officers had violated the knock-and-announce rule by failing to alert the occupants before they forcibly entered the house.

The court, without ruling on whether the officers violated the knock-and-announce rule, held that even if the officers had, suppression of the evidence was not an available remedy. In *Hudson v. Michigan*, the Supreme Court held that the exclusionary rule is not applicable to knock-and-announce violations. The defendant argued that because of the officers' "Rambo-like" manner of entry, *Hudson* did not apply, and the evidence should have been suppressed. The court disagreed, holding that the rule in *Hudson* applies, even in situations where alleged violations of the knock-and-announce rule are accompanied by significant force.

The 7th and 9th Circuits agree with this holding.

Finally, in the First Circuit, is *Spencer v. Roche*, decided on October 18, 2011.

Officers arrested Spencer for a driving a motor vehicle without a license. Shortly after his arrest, a confidential informant told one of the officers that he had seen Spencer insert a package of crack cocaine into his anal cavity just before the arrest. After Spencer refused to allow the officers to search his body for the crack cocaine, they obtained a search warrant. The officers took Spencer to a hospital where a doctor performed a digital search with negative results. The doctor then ordered an x-ray of Spencer's abdominal area. The x-ray failed to show any foreign objects in Spencer's body. No drug related charges were ever filed against Spencer. Spencer sued the officers, arguing on appeal that the x-ray of his abdominal area was an unreasonable intrusion on his privacy, in violation of the *Fourth Amendment*.

The court held that the x-ray search of Spencer's abdominal area was reasonable under the *Fourth Amendment*. First, the court noted that an x-ray is routine medical procedure that is quick, painless and generally regarded as safe. Second, the x-ray was carried out by trained professionals in a hospital setting. Third, the evidence sought in the x-ray was needed to corroborate the officers' suspicions that Spencer had violated the state drug laws. Fourth, the search warrant, which Spencer never challenged, established the existence of probable cause to believe Spencer had drugs concealed inside his body. Finally, there was no less intrusive way in which the police could have verified their suspicions.

This month we have a single case from the Second Circuit Court of Appeals, *U.S. v. Simmons*, decided on October 26, 2011.

Officers went to an apartment after receiving a call that a person inside had a gun. The officers met Jamar Vaz, who told them that Simmons, his roommate, had displayed a gun during a dispute they had a few days earlier. Vaz wanted the officers to accompany him into the apartment so he could retrieve his belongings. The officers went into the apartment with their weapons drawn and saw Simmons lying on the bed in his room. Simmons got up and the officers pulled him out of the bedroom into the hallway. The officers asked Simmons about the gun and Simmons told them where it was located. One of the officers entered Simmons's bedroom and retrieved the gun.

The court held that under the public safety exception, Simmons's statements regarding the presence and location of the gun were admissible. The court noted that *Miranda* warnings do not have to be provided before an officer can ask a suspect questions that are reasonably prompted by a concern for the public safety or for the safety of the arresting officers. Here, the officers had reasonable safety concerns when they entered the apartment. The questions they asked Simmons were related to those concerns and not a pretext to collect testimonial evidence against him.

However, the court held that the officer's warrantless search for the gun in Simmons's bedroom violated the *Fourth Amendment*. Before the search was conducted, the officers had already effectively resolved their concerns for their safety. They had exercised control over Simmons and the premises, thereby neutralizing any threat that Simmons or the gun may have initially posed. There was nothing in the record to suggest that it would have been impracticable to continue securing the bedroom during the time necessary for one of the officers to obtain a search warrant. Additionally, the officers conceded they did not believe that anyone else was present in Simmons' bedroom that could gain access to the gun.

Moving on to the Third Circuit Court of Appeals, we also have one case, *Doe v. Luzerne County* decided on October 12, 2011.

Two officers went to a house to serve an arrest warrant. The house was in disarray and after the officers left, they discovered that their bodies were covered with fleas. The officers went to a local hospital to be decontaminated. While at the hospital, Doe's supervisor videotaped her, without her consent while she was undressed in the decontamination area. The supervisor claimed that he was making a training video, however no training video was ever produced. Afterward, the supervisor saved several still photographs and a video clip of Doe's decontamination in a public computer that could be viewed by anyone with access to the county network.

In deciding the issue for the first time, the court followed the Second, Sixth and Ninth Circuits, holding that Doe had a constitutionally protected privacy interest in her partially clothed body. Specifically the court held that under the *Fourteenth Amendment*, Doe had a reasonable expectation of privacy while she was in the decontamination area, particularly while in the presence of members of the opposite sex.

The court, however, held that the defendant did not unlawfully search or seize video images of Doe in violation of the *Fourth Amendment*. Because the supervisor filmed Doe for personal reasons and not in furtherance of any governmental investigation, his actions did not trigger the *Fourth Amendment*.

We have two cases from the Fifth Circuit Court of Appeals this month. First is *U.S. v. Carrillo*, decided on October 189, 2011.

While Carrillo was in jail on a parole violation, officers went to interview him about his involvement in a drug distribution conspiracy. On September 9, after being read his *Miranda* rights, Carrillo invoked his right not to be questioned without an attorney present. The officers stopped talking to him and left. The next day Carrillo told jailers that he wished to speak to the officers from the day before. The officers returned to the jail, advised Carrillo of his *Miranda* rights, which then led to a discussion about Carrillo's right to an attorney. Carrillo made three comments during this time. He told the officers, "I wish I had a lawyer right here," I wanted to see if we could push this thing to where I could get my lawyer," and "I wanted to see if you could work with me and push this deal to where I can get a lawyer and just sit down and talk about it." After one of the officers told Carrillo that he would get an attorney at his arraignment, Carrillo asked the officer what would happen if he agreed to talk to the officer now. The officer told Carrillo that he would just be cooperating and helping himself and once he got into the federal system he would get an attorney. Carrillo agreed to talk to the officers and made several incriminating statements.

The court recognized that Carrillo's three comments, when viewed separately, appeared to indicate that he was invoking his right to counsel. However, the court held that when considering the entire context in which Carrillo made the comments, a reasonable police officer

would not have understood him to be saying that he wanted to stop talking with the police without an attorney present.

Carrillo's comments to the officers were ambiguous at best. They expressed Carrillo's preference to have an attorney present, however, the fact that he kept talking to the officers indicated that he also wished to keep the interview going and not to end it by invoking his right to counsel. Carrillo re-initiated communication with the officers after he ended the interview the day before by invoking his right to counsel, so he was clearly aware of how he could end the interview. Carrillo was merely weighing the pros and cons of talking to the officers without an attorney present which he eventually decided to do.

The Fifth Circuit also decided *U.S. v. Zamora* on October 19, 2011.

Officers suspected that Zamora was part of a drug trafficking conspiracy that smuggled drugs from Mexico into the United States by car. Officers conducted surveillance on Zamora's residence after receiving a tip from a confidential informant that drugs might be located on the premises. Officers determined that the tip was reliable because the confidential informant had previously provided reliable information and they were able to corroborate certain aspects of the tip. Officers saw Zamora leave his residence in a car, followed him and then pulled him over for a traffic violation and as part of their drug investigation. During the stop, officers called in a drug-sniffing dog, which alerted on Zamora's car. However, a search of the car revealed no drugs. After the search, officers continued to question Zamora for approximately thirteen minutes. Zamora eventually signed a form consenting to a search of his residence. Officers searched the residence and discovered drugs.

Zamora argued that the contraband officers found at the residence should not have been admitted into evidence because it was discovered as the result of an unlawful traffic stop. The court disagreed, stating that the officers had two justifications for their initial stop. First, Zamora's car had an expired license plate on the back and no license plate on the front. Traffic violations like these give the police reasonable suspicion to stop a vehicle. Second, reasonable suspicion of drug trafficking arose from the informant's tip and the officers' corroboration of some of that information during their surveillance of Zamora's residence.

Next, the court determined that the officers' actions, after they stopped Zamora, were reasonably related to the reasons for the traffic stop.

First, the officers questioned Zamora about the license plate violations and performed a computer check on the vehicle. Once that was completed, the traffic violation no longer provided a sufficient reason to detain Zamora. However, the reasonable suspicion for the drug related offense remained which justified the officers' decision to call for the drug-sniffing dog. Once the drug-sniffing dog alerted on the vehicle, the officers had probable cause to search it for drugs. Even though the officers found no drugs in the vehicle, the thirteen-minute detention of Zamora, from the time the vehicle search ended until he signed the consent-to-search form for

his residence, was reasonably related to the purpose of the original stop. Because the officers' conduct was reasonable, they did not violate Zamora's *Fourth Amendment* rights and the evidence discovered at his residence was not the fruit of an unlawful stop.

Now here's John Besselman.

Thanks Ken.

In the Sixth Circuit Court of Appeals we have one case, *U.S. v. Beauchamp*, decided on October 25, 2011.

Officers were patrolling an area near a housing project at 2:30 a.m. because they had received complaints about illegal drug activity taking place there. An officer approached Beauchamp, who was standing with another individual. Beauchamp walked away without making eye contact with the officer. The officer radioed another officer and told him to stop the "suspicious subject." The officer saw Beauchamp two blocks away, ordered him to stop, and then told him to walk around the fence toward him. Beauchamp complied. The officer began to frisk Beauchamp for weapons. During the frisk, he asked Beauchamp if he could search him more thoroughly and Beauchamp consented. The officer found a plastic baggie containing crack cocaine down the back of his pants.

The court held that the officer did not have reasonable suspicion to detain Beauchamp; therefore, the stop was an illegal seizure that violated the *Fourth Amendment*. A person is seized when an officer restrains his freedom of movement by force or show of authority. In this case, the officer seized Beauchamp once he ordered him to stop and walk around the fence and Beauchamp complied.

In order to detain Beauchamp, the officer needed to have reasonable suspicion that he was engaged in criminal activity. The court held that the totality of the circumstances did not provide the officer with that reasonable suspicion. Although the officer saw Beauchamp in an area where there had been complaints of drug activity, he did not see him engage in any behavior consistent with buying or selling drugs. The officer saw Beauchamp interact with another person then walk away. Walking away from an officer, by itself, does not create reasonable suspicion.

The court further held that Beauchamp's consent to search was not obtained voluntarily. Beauchamp consented to the search while the officer was still conducting his frisk, and after another officer had arrived. The court stated that a person is not in a position to say no to a police officer whose hands are still on his body while another officer is standing a few feet away. The officer's search of Beauchamp was unreasonable under the *Fourth Amendment*.

In the Seventh Circuit Court of Appeals we also have a single case, U.S. v. McCauley decided on October 6, 2011.

Neeley reported that he had been assaulted by two men. An officer saw injuries consistent with an assault, and after receiving a detailed description of the men, went to the apartment where the assault occurred. The officer knocked on the door and the defendant, a man who fit the description of one of the assailants, opened the door. He quickly shut the door when the officer told him why he was there. The officer knocked on the door again and this time different man, who fit the description of the other assailant, opened the door. He also closed the door on the officer when the officer told him why he was there. A few minutes later, the defendant came out of the apartment and began to walk away from the officer. The officer handcuffed him and walked him toward his patrol car. Before he placed the defendant inside the patrol car, the officer patted him down and a plastic bag containing crack cocaine fell out of his pants leg.

The court held that the officer had probable cause to arrest the defendant. The officer received specific information about two individuals who had participated in a specific crime a few hours earlier, along with the location where it occurred and a description of the perpetrators. When the officer returned to the scene of the crime and encountered two individuals who matched the description provided by Neeley, it was reasonable for him to conclude that the defendant was one of the assailants.

This month in the Eighth Circuit Court of Appeals we have four cases. First, *Johnson v. Carroll*, decided on October 7, 2011.

Officers attempted to arrest Johnson's nephew. During this process, the nephew resisted and the officers physically took him to the ground. While he was on the ground, Johnson jumped onto his back to prevent the officers from arresting him. After Johnson failed to follow verbal orders by the officers to move, she was maced and physically removed from her nephew. Both were arrested and taken to jail.

The court held that the officers were not entitled to qualified immunity. The court concluded that as a matter of law, the officers' use of force was not objectively reasonable. There was no evidence that Johnson actively pushed the officers away from her nephew, threatened them or took any other action against them. Her attempts to interfere with her nephew's arrest did not amount to a severe or violent offense, as demonstrated by her arrest on a misdemeanor offense for obstructing legal process. The court stated that it would be up to a jury to determine whether the officers used excessive force against Johnson.

Next we have *U.S. v. Garreau*, decided on October 11, 2011.

Officers received a tip that Garreau was traveling with a stolen firearm in his vehicle. They also discovered that Garreau's driver's license was suspended and that he had an outstanding arrest warrant. An officer saw Garreau's vehicle, and after pulling him over for speeding, arrested him on the outstanding warrant. The officer performed an inventory search of the vehicle and found a firearm in a plastic bag under the spare tire, which was in a compartment under the carpet on the floor of the vehicle's trunk. The officer confirmed that the firearm was stolen.

The court held that the officer's search of the vehicle was a valid inventory search under the *Fourth Amendment*. The officer substantially followed his agency's policy governing inventory searches. The fact that the officer listed the stolen firearm in the evidence log as opposed to the inventory log, as required by the inventory policy was of no consequence. The court noted that inventory searches do not need to be conducted in a totally mechanical fashion. The officer's minor deviation from the policy was not unreasonable and it was not enough to make the search unlawful.

The court decided *U.S. v. Bowman* on October 28, 2011.

An officer stopped Bowman for speeding and a window tint violation. The officer noticed that Bowman smelled like air freshener, which the officer knew was often used to mask the odor of drugs. He also noticed that Bowman's breathing was fast-paced and his carotid artery was pulsing rapidly. The officer spoke briefly to the passenger in the car, who gave the officer a conflicting story as to where he and Bowman were going and how long they would be gone. Approximately fourteen minutes after the stop the officer issued Bowman a warning ticket. After issuing the ticket, the officer asked Bowman if he had time to answer a couple of quick questions, to which Bowman replied, yes. Bowman refused to allow the officer to search his car, but consented to a free air search of the car by Jake, a drug-sniffing dog. Jake alerted to the presence of drugs in the car. The officers eventually transported the car to a garage where they found cocaine in a compartment behind the rear seat.

The court held that the duration of the traffic stop, approximately fourteen minutes, was reasonable. During this time, the officer completed tasks related to the reason for the traffic stop. He did not ask Bowman any questions about possible criminal activity until after the stop was completed. The officer's questions after the stop resulted from his suspicions developed during the stop.

The court further held that the interaction between Bowman and the officer after the tickets were issued was a consensual encounter. Bowman agreed to talk to the officer after receiving the tickets while refusing to allow the officer to search his car. He then agreed to allow the drug-sniffing dog to search the car. This behavior clearly indicated that Bowman realized he was not required to comply with the officer's requests. The court noted that even if Bowman had been seized during this time, the officer had reasonable suspicion to detain him based on his observations during the stop.

Finally, the court held that the alert by the drug-sniffing dog created probable cause for the officers to search Bowman's car. Jake's handler testified at length about Jake's training and significant experience in the field. There was no basis to conclude that Jake was unreliable. A positive alert from a reliable drug-sniffing dog gives an officer probable cause to believe there are drugs present.

Finally, the Eighth Circuit decided *U.S. v. Perrin* on October 28, 2011.

During the execution of a search warrant, Perrin admitted to an officer that he possessed child pornography. The court held that Perrin was not in custody during the ten minutes of voluntary questioning that occurred in his bedroom. Prior to the interview, the officer had told Perrin and the other residents that they were free to leave the premises and did not have to answer questions if they stayed. A reasonable person in his position would have felt at liberty not to answer the officer's questions. As a result, no *Miranda* warnings were required before the officer interviewed Perrin.

In the Ninth Circuit Court of Appeals we have two cases, the first being *Mattos v. Agarano*, decided on October 17, 2011 in which the court heard two cases and consolidated them for disposition under this caption. In both cases, the court had to decide whether the use of a taser to subdue a suspect constituted an excessive use of force and then whether the officers were entitled to qualified immunity.

In the first case, *Brooks v City of Seattle*, an officer pulled Brooks over for a speeding, claiming that she was driving 32 miles-per-hour in a 20 mile-per-hour zone. The officer issued Brooks a citation and requested, per the municipal code, that she sign the citation as acknowledgement that she had received it. Brooks, who was seven months pregnant, denied that she was speeding and refused to sign the citation. Two other officers arrived on the scene and made the decision to arrest Brooks. After Brooks refused to get out of her car, the officers discussed where on her body to tase her because they knew she was pregnant. One of the officers then opened the car door and twisted Brooks's arm up behind her back while also removing the keys from the ignition. Brooks stiffened her body and grabbed the steering wheel to avoid the officer's efforts to remove her from the car. In the meantime, another officer applied his taser to Brooks's left thigh in drive-stun mode. The officer tased Brooks two more times in less than a minute. After the third tase, Brooks fell over in her car. The officers dragged her out, laying her face down on the street where they handcuffed her.

After applying the factors from *Graham v. Connor*, the court held that the officers' use of force was unreasonable. First, failing to sign a traffic citation for a minor speeding violation is not a serious offense. Second, at no time did Brooks pose an immediate threat to the safety of the officers or others. She did not threaten the officers and did not give any indication that she was armed. At most, the officers may have found Brooks to be uncooperative. However, after the officer grabbed her arm and removed the keys from the ignition, she no longer posed a potential threat to the officers. Finally, while Brooks engaged in some resistance to being arrested, she did not attempt to flee or behave violently against the officers. In fact, the officers had enough time to discuss where to tase Brooks after they realized that she was pregnant. Additionally, three tasings in such rapid succession provided no time for Brooks to recover from the pain she experienced, gather herself, and reconsider her refusal to comply.

Even though the officers' use of force was found to be excessive, the court held that they were entitled to qualified immunity on Brooks's *42 U.S.C § 1983* claim. When this incident occurred, in November 2004, the law was not sufficiently clear to put the officers on notice that tasing Brooks under these circumstances constituted excessive force. The court, however, agreed with the lower court, which held that the officers were not entitled to qualified immunity for Brooks's assault and battery claims under Washington state law.

In the second case, police responded to the Mattos residence after receiving a 911 call for a domestic dispute. Officers found Troy Mattos intoxicated outside the house. The officers entered the house with him to check on his wife. Mrs. Mattos told the officers that she was okay and asked the officers to get out of her house. While this was happening, another officer tried to arrest Mr. Mattos. As the officer moved in to arrest Mr. Mattos, he pushed up against Mrs. Mattos who had been standing between them. Mrs. Mattos put her arms up to keep her chest from coming in contact with the officer, while suggesting that everyone calm down and go outside to talk, so they would not wake up her children. The officer, without warning, then shot his taser at Mrs. Mattos in dart-mode. The officers arrested both parties, charging Mrs. Mattos with harassment and obstructing government operations. Both charges against her were eventually dropped.

The court held that under the circumstances it was not reasonable for the officer to deploy his taser against Mrs. Mattos. Mrs. Mattos was physically trapped between the officer and her husband. Her only physical contact with the officer occurred when she defensively raised her hand to prevent him from pressing his body against hers after he came into contact with her. Finally, even though it was plausible to do so, the officer failed to warn Mrs. Mattos before deploying his taser against her. The court has held that when an officer fails to warn a person before deploying his taser, under circumstances where it would be plausible to issue a warning, it weighs in favor of finding a constitutional violation.

However, like the decision in *Brooks*, the court held that the officer was entitled to qualified immunity. When this incident occurred, in August 2006, there was no Supreme Court or Ninth Circuit Court of Appeals decision addressing the use of a taser in dart mode. Additionally, it would not have been clear to a reasonable officer that deploying his taser in dart mode against Mrs. Mattos constituted excessive force.

The Ninth Circuit also decided *U.S. v. Reveles* on October 24, 2011.

Reveles, who is in the United States Navy, was accused of drunk driving on base. The Navy charged him in an Article 15, Uniform Code of Military Justice, proceeding, which is considered non-judicial punishment (NJP). Reveles was found guilty. Based on the same incident, the government subsequently charged him in federal court for drunk driving under the *Assimilative Crimes Act (18 U.S.C. § 13)*. Reveles pled guilty.

The court held that the government did not violate the *Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution* by prosecuting and convicting Reveles for a crime after the Navy punished him for the same offense. The court found that non-judicial punishment administered by the Navy under *10 U.S.C. § 815* is not criminal in nature. The court noted that the legislative history confirmed Congress' intent to make non-judicial punishment non-criminal. Congress intended non-judicial punishments to deal with minor infractions of discipline without resorting to criminal law processes.

Additionally, the non-judicial punishment statute is not sufficiently punitive as to transform it into a criminal penalty that would implicate the *Double Jeopardy Clause*.

We will wrap up the podcast with one case from the Tenth Circuit Court of Appeals, *U.S. v. Chavez*, decided on October 18, 2011.

A Wal-Mart employee called police to report a disturbance in the parking lot involving an intoxicated person who was driving a white Cadillac. An officer responded and saw a white Cadillac with the same license plate number as reported by the caller. The officer conducted a traffic stop and almost immediately determined that the driver, Chavez, was intoxicated. Before he arrested Chavez, the officer received consent to search the Cadillac's passenger compartment. After finding no contraband, the officer asked for consent to search the trunk. Chavez refused to consent. The officer then placed him under arrest for driving while intoxicated (DWI). Approximately fifty minutes had elapsed since the officer first encountered Chavez.

First, the court found that the tip provided by the Wal-Mart employee was reliable. The employee identified himself to the officer at the scene and provided detailed information that the officer was able to corroborate. These circumstances provided the officer with reasonable suspicion to conduct an investigatory stop.

Second, the court held that the officer did not impermissibly expand the scope of the initial stop. The officer had probable cause to arrest Chavez for DWI within nine minutes of initiating the stop. While the officer may have suspected that Chavez was involved in more than DWI, he was under no Constitutional duty to stop his investigation and arrest him for that offense the moment he had minimal evidence to establish probable cause.

Thanks John.

Thank you for listening to our podcast. Be sure to check out this month's Informer which also includes an article by Senior Legal Instructor Dean Hawkins, entitled, "Arrest and Detention of Material Witnesses". In the article Dean discusses Title 18 U.S.C. Section 3144 which authorizes federal law enforcement officers to lawfully arrest or detain material witnesses in criminal cases.

As always, feel free to call me at area code 912 267-3429 or email me at kenneth.a.anderson.gov with any comments or questions regarding this podcast or anything in The Informer.