

THE FEDERAL LAW ENFORCEMENT – INFORMER –

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

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This edition of *The Informer* may be cited as "10 INFORMER 12".
(The first number is the month and the last number is the year.)

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CASE SUMMARIES

Circuit Courts of Appeals

2nd Circuit

Giraldo v. Kessler, 2012 U.S. App. LEXIS 19383, September 14, 2012

Giraldo went to the hospital after she suffered a laceration above her eye. Suspecting domestic abuse, doctors contacted the police. Police officers interviewed Giraldo and her boyfriend and eventually arrested the boyfriend. After her treatment, the officers took Giraldo against her will to the district attorney's office where two prosecutors interviewed her. Even though Giraldo told the prosecutors she did not want to talk to them, they interviewed her for two hours before she was released. Giraldo sued the prosecutors for violating her civil rights.

The court held that the prosecutors were entitled to absolute immunity. Absolute immunity bars a civil suit against a prosecutor for advocacy conduct that is intimately associated with the judicial phase of the criminal process. This immunity covers conduct in court as well as conduct preliminary to the initiation of a prosecution that occurs outside of court. In this case, the actions by the prosecutors were well within their legitimate functions as advocates. The police had arrested Giraldo's boyfriend before the prosecutors interviewed her. Once that arrest occurred, legal decisions at the core of the prosecutorial function had to be made quickly. For example, the prosecutors had to determine whether to pursue the charges, and if so, make decisions concerning arraignment and bail. The prosecutors' interrogation of Giraldo was clearly in preparation for a court proceeding in which they would be acting as advocates.

Click [HERE](#) for the court's opinion.

3rd Circuit

U.S. v. Navedo, 2012 U.S. App. LEXIS 19121, September 12, 2012

While performing surveillance on an unrelated case, two police officers saw a man approach Navedo as he stood on the porch of his apartment building. The man pulled what appeared to be a gun out of his book bag and showed it to Navedo. Navedo never touched the gun and the officers did not see him do anything illegal. The officers got out of their car, identified themselves and approached the men on the porch. Both men ran. One officer caught the man with the gun. Another officer chased Navedo into the building and up to his apartment. The officer tackled Navedo in the doorway and both men landed inside his apartment. The officer arrested Navedo and then saw several firearms and ammunition in the apartment. Navedo was convicted of illegally possessing the firearms that were seized from his apartment.

The district court held that the officers had reasonable suspicion to stop and question Navedo because he was looking at the gun on the porch. The court concluded that Navedo's flight from

the officers elevated the reasonable suspicion into probable cause to arrest, and justified the officer's warrantless entry into his apartment where the firearms were seized.

The third circuit disagreed. While a suspect's flight from the police upon noticing them, plus some other indicia of wrongdoing can constitute reasonable suspicion, mere unprovoked flight from the approaching officers does not support probable cause to arrest. The officers had no reason to suspect that Navedo was involved in criminal activity. When the officers first saw Navedo standing on the porch, he was not doing anything unusual. After the other man pulled out the gun, Navedo never touched or possessed it and neither officer saw any conduct that would have suggested that he was doing anything illegal. Even if the officers had reasonable suspicion to believe Navedo was involved in criminal activity, they would have only been entitled to detain him to investigate and not arrest him. As a result, the officers lacked probable cause to arrest Navedo and the district court should have suppressed the firearms that were seized from his apartment following that arrest.

Click [HERE](#) for the court's opinion.

6th Circuit

Marcilis v. Township of Redford, 2012 U.S. App. LEXIS 18707, September 6, 2012

Federal and state law enforcement officers obtained warrants to search two residences for evidence of drug distribution. Marcilis sued the officers claiming that the officers used excessive force, lacked probable cause by relying upon stale information to obtain the warrants, seized items outside the scope of the warrants, and illegally detained individuals during the execution of the warrants.

The court disagreed and granted the officers qualified immunity. First, the use of handcuffs and display of firearms during the execution of the warrants did not constitute excessive force. The officers could have reasonably believed that these actions were necessary to control the situation because they were searching for weapons and drugs in both homes and they knew that one of the occupants had previously been convicted of assaulting a police officer.

Second, the officers established probable cause to search because the information provided by the confidential informant was verified through their independent investigation. The officers observed controlled drug purchases between the confidential informant and Marcilis and they found evidence of drug distribution after they searched the garbage outside both homes. In addition, the information in the search warrant affidavit was not stale because it detailed ongoing criminal activity, including evidence of a controlled buy from one of the homes within thirty-five hours before submission to the judge.

Third, the court held that the officers did not seize items outside the scope of the warrants. The officers may have reasonably believed that the money, photographs, weapons permits, marriage license and property deed contained information related to the sale and possession of narcotics, possession and ownership of firearms and the ownership of the searched homes.

Finally, the court held that the officers acted reasonably in detaining the occupants of the first house for the duration of the search, which lasted ninety minutes. The occupants of the second

house were detained for ten minutes, a reasonable amount of time, before the officers established probable cause and arrested them.

Click [HERE](#) for the court's opinion.

U.S. v. Scott, 2012 U.S. App. LEXIS 18947, September 10, 2012

After the police arrested Scott, a detective read Scott his *Miranda* rights and gave him an Advice-of-Rights form, which informed Scott of his right to remain silent and his right to have a lawyer present during questioning. Below the warning, the form included the question, "Having these rights in mind, do you wish to talk to us now?" Scott wrote, "no" underneath this question. The detective stopped the interview and transported Scott to the jail.

The next day, Scott was brought back to the detective's office where he was *Mirandized* again. This time Scott wrote "yes" under the question on the form that asked whether he wished to talk to the police. Scott then made several incriminating statements.

The court held that Scott had invoked his right to counsel when he wrote "no" in response to the question "Having these rights in mind, do you wish to talk to us now?" on the Advice-of-Rights form. According to the language of the question itself, the "no" response was related directly to "these rights," referenced in the question, which included the right to have a lawyer present during police questioning. If there was any ambiguity about Scott's right to have a lawyer present during questioning, it was from the form itself and not from Scott's invocation of that right. The form used by the police was far from clear and any ambiguity in the form could not be held against Scott.

The court remanded the case to district court to determine whether the police re-approached Scott after he invoked his right counsel or whether Scott re-initiated contact with the officers. If Scott initiated further discussion with the police, he waived his right to counsel. If Scott did not initiate further discussion with the police, he did not waive his right to counsel and the police were prohibited from re-approaching him.

Click [HERE](#) for the court's opinion.

Hensley v. Gassman, 2012 U.S. App. LEXIS 19025, September 11, 2012

Gassman went to Hensley's house to repossess a vehicle. At Gassman's request, two police officers were dispatched to provide a police presence during the repossession. Gassman told the officers that he had a repossession order and showed them a file, but the officers did not read any of the documents in it. While Gassman tried to tow the vehicle, Hensley got into the vehicle, started it and locked the doors. The officers told Gassman to pull the vehicle out of the driveway, and after he did, an officer broke one of the windows, opened the door and pulled Hensley out. Gassman towed the vehicle, which was returned to Hensley the next day after it was discovered that her payments were current. Hensley claimed that the officers' participation in the repossession caused an unreasonable seizure of her car in violation of the *Fourth Amendment*.

The court agreed and denied the officers qualified immunity. When a person tries to hold a police officer liable for participation in a repossession of his property, some kind of state action must be established. A police officer's presence during a repossession, by itself, is not enough to convert the repossession into "state action." However, the likelihood that state action will be found increases when the officer takes a more active role in the repossession, as occurred here. The officers' actions between the time they arrived and the time Hensley got in the car were more than mere police presence. For example, the officers ignored Hensley's protests that her car payments were current and told her that Gassman was still going to tow the car. In addition, breaking the car window, removing Hensley from the car and ordering her to remove her belongings from the car clearly constituted state action by the officers. The officers' participation in the repossession amounted to state action that resulted in the seizure of Hensley's vehicle.

The court then held that the seizure of Hensley's vehicle was unreasonable. The officers knew that the repossession was a private civil matter and they lacked any evidence that supported Gassman's claim that he was authorized to repossess the vehicle.

Finally, the court held that since 1992 it has been clearly established that state actors violate the *Fourth Amendment* by taking an active role in private repossessions when there is no apparent legal basis for such action.

Click [HERE](#) for the court's opinion.

King v. Taylor, 2012 U.S. App. LEXIS 19109, September 12, 2012

Officer Taylor shot and killed King while attempting to arrest him at King's house. The court held that Taylor was not entitled to qualified immunity against the plaintiffs' claim of excessive force.

After viewing the facts in the light most favorable to King, the court found that expert testimony and common sense could lead a jury to reject the officers' testimony that King was pointing a gun at them when Officer Taylor shot him.

First, the officers unequivocally testified that King pointed a gun at them while facing them. If the officers are to be believed, the bullet should have entered the left side of King's face and traveled to the right. In addition, because King was seated and at a lower position than Taylor, who was standing, the bullet should have traveled slightly downward through King's head. However, the bullet did not take this path. According to the autopsy report, the bullet entered the right side of King's face and traveled two and one half inches to the left and three inches upward. The path of the bullet is consistent with King being in a reclined position looking straight ahead, not at the officers when shot, rather than sitting up and looking toward the officers as they claimed. This body position is consistent with the plaintiff's theory that King was shot while lying on his couch, not making any threatening gestures toward the officers.

Second, the officers' testimony that King was pointing a gun at them before he was shot was called into dispute by expert testimony. After he was killed, King was found with a gun in his right hand, which was resting on his right hip. Two medical experts stated that the extent of King's head injury would have caused his outstretched arm to fall to the floor, not neatly into his lap. What exactly happened just before King was shot is a question for the jury because both sides' theories of what occurred are sufficiently supported by the evidence in the record.

Click [HERE](#) for the court's opinion.

U.S. v. Anderson, 2012 U.S. App. LEXIS 19212, September 13, 2012

Police officers arrested Anderson after he crashed his vehicle and then tried to flee from them on foot. An officer read Anderson his *Miranda* rights at the scene and again at the police station. Anderson waived those rights and made several incriminating statements. Anderson argued that the court should have suppressed those statements because his mental and physical condition at the time of his arrest prevented him from making a voluntary waiver of his *Miranda* rights.

The court disagreed. The arresting officer testified that Anderson was out of breath and had a scratch on his face, but other than that, was coherent. The officer who interviewed Anderson stated that Anderson appeared to understand his rights and that he did not appear to be traumatized or incoherent. Although Anderson had a swollen bump on his head, he declined medical treatment, did not complain about the injury and did not give any indication that the injury was affecting his ability to understand his *Miranda* rights and knowingly waive them.

Click [HERE](#) for the court's opinion.

7th Circuit

Betker v. Gomez, 2012 U.S. App. LEXIS 18636, September 5, 2012

Debbie Capol told Officer Gomez that her estranged sister, Sharon Betker, was a convicted felon and that she had a firearm in her home. Based largely on Capol's statement, Officer Gomez obtained a no-knock warrant to search Betker's home. A police officer shot Sharon's husband, Richard Betker, during the execution of the warrant. Richard Betker sued Officer Gomez under 42 U.S.C. § 1983 for violating his right to be free from unreasonable searches and seizures.

Betker claimed that Officer Gomez made a series of false or misleading statements in the affidavit that he submitted to obtain the no-knock search warrant and that without those statements, probable cause would not have existed. Betker supported this claim by producing sworn deposition testimony from Capol that contradicted information included in Officer Gomez's probable cause affidavit.

As required, the court viewed the facts in the light most favorable to Betker and held that Officer Gomez was not entitled to qualified immunity. The court noted that a reasonable jury could believe that Officer Gomez knowingly made a false statement by swearing that Capol saw her sister possess a firearm in her home within the last five days. In her deposition, Capol stated that she had not been in her sister's home in several years. Consequently, if a jury believed that Officer Gomez's statement was false, probable cause for the no-knock warrant would not have existed.

Finally, it was clearly established at the time of this search that a search warrant violates the *Fourth Amendment* if the requesting officer knowingly, intentionally, or with reckless regard for

the truth, makes false statements in the supporting affidavit, when such statements are necessary to establish probable cause.

Click [HERE](#) for the court's opinion.

8th Circuit

U.S. v. Mendoza, 2012 U.S. App. LEXIS 18957, September 10, 2012

Federal agents requested that a marked cruiser from the local police department stop a car they had under surveillance. The police officer conducted a traffic stop on the car because she thought that the vehicle's paper tag was improper. The driver gave consent to search and another officer found controlled substances in the car. Mendoza argued that the officer did not have reasonable suspicion or probable cause to conduct the traffic stop because the car displayed a valid temporary tag from another State.

The court disagreed. Whether reasonable suspicion exists for a traffic stop is determined by what the officer reasonably knows at the time of the stop, not what is discovered afterward. At the time of the traffic stop, the officer saw what appeared to be a paper tag in the car's rear window. The officer knew it was not an Iowa tag, and she was unable to identify the issuing State from a distance of fifteen or twenty feet. In addition, the large, handwritten block numbers on the tag, which the officer knew could be used to alter the date on the tag, aroused her suspicions. Given the tag's overall appearance, the officer thought it looked like something a person could have created on a printer. Combined with the officer's experience with falsified or fraudulent tags, these observations provided her with reasonable suspicion that the tag was not a valid registration document and supported the traffic stop.

Click [HERE](#) for the court's opinion.

U.S. v. Green, 2012 U.S. App. LEXIS 18958, September 10, 2012

After receiving a description of a suspected bank robber, a police officer saw a black male with a medium build and facial hair wearing white Nike tennis shoes walking two blocks away from a bank that had just been robbed. Each of these features matched the description of the bank robber. The officer stopped Green, ran a computer check on him, and discovered that he had two outstanding warrants for his arrest. The officer arrested Green and during the search incident to arrest found a large amount of cash in his pants pocket. Green later made several incriminating statements to other officers concerning his involvement in the bank robbery.

The court held that the officer had reasonable articulable suspicion to conduct a *Terry* stop on Green. The court commented that a *Terry* stop is justified when a suspect matches the description of a person involved in a crime near in time and location to the stop.

Click [HERE](#) for the court's opinion.

9th Circuit

Hooper v. Lockheed Martin Corporation, 2012 U.S. App. LEXIS 16003, August 2, 2012

Hooper sued Lockheed Martin under the qui tam provisions of the False Claims Act (FCA) 31.U.S.C. §§ 3729-3733. Hooper claimed that Lockheed violated the FCA by submitting a fraudulently low bid, based on knowing underestimates of its costs, to improve its chances in winning a contract with the United States Air Force. Lockheed claimed that the allegedly “false” estimates could not be the basis for liability under the FCA because an estimate is a type of opinion or prediction. Lockheed argued that estimates of what costs might be in the future are based on inherently judgmental information and a piece of purely judgmental information cannot be considered a false statement under the FCA.

The court agreed with Hooper and held that false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming the other elements of an FCA claim are met.

The First and Fourth Circuits have also held that FCA liability may attach in such a situation.

Click [HERE](#) for the court’s opinion.

Marquez v. City of Phoenix, 2012 U.S. App. LEXIS 19048, September 11, 2012

Lydia Marquez called the police after she heard screaming coming from the spare bedroom in her home. Inside the bedroom were her son Ronald, her adult granddaughter and her three-year old great granddaughter. Once at the house, the officers learned that Ronald was attempting to perform an exorcism on the three-year-old girl. The officers radioed for instructions, but after they heard the little girl screaming and crying, they decided to enter the bedroom. Inside the bedroom, the officers saw Ronald sitting on the bed, with the three-year-old, now silent and motionless, in a choke-hold. The granddaughter was naked in the corner screaming and her face showed evidence of a recent beating. One of the officers deployed his Taser in probe-mode against Ronald after he refused to let the child go. The Taser did not appear to affect Ronald and he attacked the officer. Over the next few minutes, during the ongoing fight, the officer continued to apply the Taser in drive-stun mode against Ronald. After the officers secured Ronald, they had to subdue the granddaughter, who was now trying to assault them. After the officers secured her, they found that Ronald had gone into cardiac arrest. Despite their efforts at resuscitation, he died. Marquez claimed that Taser should have warned that repeated exposure to its products could lead to sudden death due to cardiac failure and that the officers used excessive force against Ronald, in violation of the *Fourth Amendment*.

The court held that under Arizona law, Taser provided sufficient warnings about the dangers associated with prolonged or continuous exposure to the Taser device’s electrical discharge. These warnings covered exactly what happened in this case. In addition, a more detailed warning could have detracted from the officers’ ability to process the warnings that were given.

Although Ronald received nine five-second cycles from the Taser, two while it was ineffectively deployed in probe mode and seven when it was deployed in drive-stun mode, the court held that the officer’s use of force was reasonable. Applying the factors from *Graham v. Connor*, the

court determined this amount of force was reasonable because the officers had reason to believe a serious crime had occurred, Ronald was actively resisting arrest, and the officers could have reasonably believed that he posed an immediate risk to themselves and to others in the room.

Click [HERE](#) for the court's opinion.

11th Circuit

U.S. v. Franklin, 2012 U.S. App. LEXIS 18900, September 7, 2012

Police officers went to Franklin's fiancée's house to arrest him on a warrant for absconding from his conditional release while on parole. After seeing several cars in the driveway and lights on in the house, officers knocked on the front door but received no response. An officer went around to the back of the house and saw Franklin through a window as well as several firearms. The officers continued to knock on the front door for ten to fifteen minutes, receiving no response. An officer then telephoned Franklin several times using his cell phone number. At first, someone answered the cell phone and then immediately hung up. Franklin eventually spoke to the officers on his cell phone; a few minutes later Franklin came out of the house and the officers arrested him. Officers entered the house and seized the firearms that had been seen through the window. Franklin argued that the firearms should have been suppressed because the officers violated the *Fourth Amendment* by entering the house and seizing them without a warrant, his consent or exigent circumstances.

The court disagreed. A warrantless search is allowed where both probable cause and exigent circumstances exist. The officers had probable cause because Franklin was known to be a felon and he was seen in plain view in the presence of weapons that he had no right to lawfully possess. Exigent circumstances existed because the officers could have reasonably believed that the firearms would be removed or concealed before they could obtain a warrant. The officers knew that there was at least one other person in the house who had already shown the willingness to help Franklin avoid arrest by not answering the door.

Click [HERE](#) for the court's opinion.
