
THE FEDERAL LAW ENFORCEMENT - INFORMER -

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

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CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

United States v. Mouscardy, 2013 U.S. App. LEXIS 14252 (1st Cir. Mass. July 15, 2013)

A person called 911 and reported a man was assaulting a woman on a street corner. When police officers arrived, they found a man and woman fitting the description provided by the 911 caller. The officers detained the man, who refused to provide identification or tell the officers his name. After a few minutes, the man became visibly agitated, nervous and fidgety and refused an officer's request to remove his hand from his jacket pocket. When the officer attempted to conduct a *Terry* frisk, the man fled. The officers apprehended the man, later identified as Mouscardy, and recovered a small handgun Mouscardy removed from his jacket pocket during the chase. Mouscardy was charged with being a felon in possession of a firearm.

Mouscardy argued the officers did not have reasonable suspicion to detain him, the duration of the stop was unreasonable, and the initiation of the *Terry* frisk was unlawful.

The court held the officers had reasonable suspicion to support a *Terry* stop. A few minutes after receiving the 911 call, the officers found a man and woman at the location described by the caller. Based on these facts, it was objectively reasonable for the officers to suspect Mouscardy was involved in criminal activity.

The court further held the duration of the stop was reasonable. The purpose for stopping and questioning Mouscardy was to investigate a reported assault. The officers diligently performed their investigation; however, Mouscardy's unresponsiveness to the officer's reasonable questions prevented the officers from completing their investigation more quickly. Mouscardy could not complain about a delay he caused.

Finally, the court held the officers had reasonable suspicion to believe Mouscardy had a weapon. The officers responded to a report of a man beating a woman in the street. When an officer has reasonable suspicion a crime of violence has occurred, the same facts that supported the initial stop will also support a *Terry* frisk. In addition, Mouscardy's failure to identify himself, his refusal to remove his hand from his jacket pocket and his nervous and agitated behavior were relevant factors to support the reasonable belief Mouscardy might be armed and dangerous.

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

United States v. Carrigan, 2013 U.S. App. LEXIS 14677 (1st Cir. Mass. July 19, 2013)

An individual called 911 and reported a man driving an Acura attempted to rob him at gunpoint. The caller described the assailant and provided a license plate number for the Acura. Within thirty minutes, police officers located the unoccupied Acura parked on the street. A short time later, a man fitting the description of the assailant got into the Acura and drove away. Police officers followed the Acura and saw the driver turn into a residential driveway and turn off the

headlights in what the officers believed was an attempt to avoid marked police cars stationed at an intersection the driver had been approaching. After the driver pulled to the end of the driveway, he backed down the driveway, opened his door briefly and then accelerated back up the driveway.

Several police officers, some with their weapons drawn approached the Acura, identified themselves and told the driver to raise his hands. One of the officers opened the passenger's side door, turned off the ignition and put the car in park. Another officer pulled the driver, later identified as Carrigan, out of the driver's side door. The officer handcuffed Carrigan, pushed him to the ground and performed a *Terry* frisk. The officer found a loaded handgun in Carrigan's jacket pocket. Carrigan was charged with being a felon in possession of a firearm.

Carrigan argued the officers lacked reasonable suspicion to stop him, and what began as a *Terry* stop became a *de facto* arrest without probable cause when the officers forcefully pulled him out of the car and handcuffed him.

The court disagreed. Carrigan fit the description of the assailant provided by the 911 caller and was driving the car described by the 911 caller with the same license plate number. Once Carrigan got into the Acura, the officers saw him pull into a driveway in an attempt to avoid marked police cars at an upcoming intersection, then act suspiciously once he was in the driveway. The information provided by the 911 caller combined with the officer's observations once Carrigan got into the Acura provided the officers reasonable suspicion to initiate a *Terry* stop.

In addition, the court held the forceful seizure of Carrigan and the use of handcuffs did not turn the lawful *Terry* stop into a *de facto* arrest. The officers had a reasonable belief such measures were necessary to protect their safety because Carrigan had not put the car into park, the engine was still running when the officers approached it, the driveway was narrow and the officers believed Carrigan was armed. Consequently, the officers acted reasonably in making sure Carrigan was seized and handcuffed as part of the *Terry* stop.

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

2nd Circuit

Zalaski v. City of Hartford, 2013 U.S. App. LEXIS 14898 (2d Cir. Conn. July 23, 2013)

Members of the Animal Rights Front (ARF), carrying a 6 x 4 foot banner, appeared at a charity fundraising run to protest the treatment of animals by one of the event's co-sponsors. A police officer asked the protestors to move from a walkway to a nearby grassy knoll because the protestors were partially obstructing access to the registration and refreshment area. After two ARF members refused to move, the officer arrested them for criminal trespass and misdemeanor obstruction of free passage. The charges were later dismissed and the two ARF members sued the police department and arresting officer for false arrest, malicious prosecution and interference with free expression.

The district court held the arresting officer did not violate the plaintiffs' *First Amendment* rights because the officer's request for the protestors to move was content-neutral, and a reasonable time, place and manner restriction. The district court further held even if the officer's conduct

did violate the *First Amendment*, the officer was entitled to qualified immunity because a reasonable police officer in his position could have thought the relocation request was lawful.

The district court further held the officer had probable cause to arrest the protestors for disorderly conduct, although the officer charged the protestors with two other criminal offenses.

The court of appeals, while not ruling whether the officer had probable cause to arrest for disorderly conduct, held the officer was entitled to qualified immunity because he had arguable probable cause to arrest the protestors. Even when it is determined probable cause to arrest does not exist; a police officer will still be entitled to qualified immunity if the officer can establish there was arguable probable cause to arrest. Arguable probable cause exists if either it was objectively reasonable for the officer to believe probable cause existed or if officers of reasonable competence could disagree on whether the probable cause test was met.

Here, the court concluded when the officer saw individuals holding a large banner partially blocking access to the registration and refreshment area, it was reasonable to believe probable cause existed to arrest the individuals for disorderly conduct.

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

5th Circuit

United States v. Cotton, 2013 U.S. App. LEXIS 13537 (5th Cir. Tex. July 2, 2013)

Cotton was driving his rental car, when without changing lanes or slowing his speed as required by Texas law, he passed a police officer parked on the side of the road. The officer, having already received a tip Cotton might be carrying drugs, conducted a traffic stop. The officer twice asked Cotton for consent to search the car. Cotton replied both times the officer could search his luggage. After locating and searching luggage located in the backseat of the car, the officer examined the driver's side rear door for evidence of contraband and saw loose screws and tool marks on the door's panel. The officer pried back the panel and discovered crack cocaine. The officer arrested Cotton who then made incriminating statements to the officer.

Cotton argued the officer exceeded the scope of his limited consent to search when, instead of only searching his luggage, the officer searched the entire car for contraband.

The court agreed. Cotton's consent only allowed the officer to search anywhere in the car luggage might be found and then search the luggage. However, the video evidence and the officer's own testimony revealed the officer discovered the loose screws and tool markings on the door panel after he had located and searched Cotton's luggage. The court concluded the officer impermissibly expanded the scope of Cotton's consent by examining the driver's side rear door after he had already located and searched Cotton's luggage. Consequently, the court held the drugs discovered during the officer's unlawful search should have been suppressed as well as Cotton's incriminating statements.

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

6th Circuit

United States v. Jeter, 2013 U.S. App. LEXIS 13893 (6th Cir. Ohio July 10, 2013)

Police officers noticed a group of individuals loitering in the parking lot of a shopping center. The shopping center was located in an area from which the police department had received many complaints pertaining to robberies, thefts, drug activity and loitering. As part of a larger police operation to address the loitering issue by saturating the parking lot with police officers, two officers in a marked police car approached Jeter, who was exiting the parking lot on a bicycle. One of the officers asked to speak with Jeter; however, Jeter did not respond. The officers pulled their police car in front of Jeter, which blocked Jeter from leaving the parking lot. As the officers got out of their car, Jeter paused briefly, dropped his bicycle and then ran away. The officers chased Jeter down an alley. As Jeter ran, the officers saw him clutching the right front pocket of his shorts. When the officers caught Jeter, they frisked him and recovered a handgun from the right front pocket of Jeter's shorts. Jeter was charged with being a felon in possession of a firearm.

Jeter claimed the officers illegally seized him when they first approached him on his bicycle and again when the officers caught him after the foot chase. As a result, Jeter argued, the handgun should have been suppressed.

The court disagreed. Regarding Jeter's first encounter with the officers, the court noted, a suspect must submit to an officer's show of authority to be seized under the *Fourth Amendment*. Here, Jeter's momentary pause before fleeing from the officers could not be considered submission to the officers' authority, especially when Jeter did not attempt to talk to the officers, but rather ignored the officers and their request to speak with him. Consequently, because Jeter was not seized, there could be no *Fourth Amendment* violation.

Next, the court ruled Jeter was lawfully seized when the officers apprehended him after the foot chase. The court held Jeter's flight, combined with the grabbing of his front pants pocket in a high crime area gave officers reasonable suspicion to conduct a *Terry* stop. The court found there was no evidence to support Jeter's claim the officers provoked Jeter to flee, based in part on Jeter's admission that he ran because he had a gun. Because the officers had reasonable suspicion to stop Jeter once he fled, Jeter was legally seized, and the gun found in his pocket was not the fruit of the poisonous tree.

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

7th Circuit

Rabin v. Flynn, 2013 U.S. App. LEXIS 13802 (7th Cir. Ill. July 9, 2013)

After a police officer saw Rabin carrying a holstered gun on his hip in public, the officer handcuffed and detained Rabin for approximately ninety minutes while the officer and two back-up officers sought to confirm the validity of Rabin's carrying license. None of the officers were familiar with the unique license Rabin possessed, one carried primarily by private detectives and security officers. When the officers confirmed Rabin's license was legitimate, he was released.

Rabin sued Officers Flynn, Quinlan and Knepper for unlawful arrest, arguing the officers should have known about the type of license he possessed and released him as soon as he presented it. Rabin also sued the officers for using excessive force, claiming his handcuffs were overly tight and exacerbated a pre-existing medical condition.

The court held the three officers were entitled to qualified immunity on Rabin's unlawful arrest claim. The court concluded even if the officers had known what type of license Rabin had, it was still reasonable to detain Rabin while the officers verified the legitimacy of the license. Even though the length of Rabin's detention was unfortunate, it was largely caused by the government's failure to have an efficient system of license verification. There was no evidence the individual officers were responsible for the prolonged verification process.

The court further held Officers Flynn and Quinlan were entitled to qualified immunity on Rabin's excessive force claim, but Officer Knepper was not. Rabin claimed he told Officer Knepper the handcuffs were too tight and about his pre-existing neck and hand injuries. Given that Rabin was already handcuffed, no reasonable officer who was aware of Rabin's medical condition would have believed exacerbating Rabin's medical problems by keeping the handcuffs as tight as they were was necessary to ensure officer safety. While Officer Knepper was not entitled to qualified immunity, the court stated he would have an opportunity at trial to dispute Rabin's claim or explain why he did not loosen the handcuffs.

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

United States v. Sabo, 2013 U.S. App. LEXIS 15609 (7th Cir. Ind. July 31, 2013)

Suspecting Sabo was smoking marijuana in his trailer, a police officer knocked on the trailer door. Sabo opened the door and stood in the doorway, physically blocking the officer's entry. The officer asked Sabo, "Do you mind if I step inside and talk with you?" Sabo said nothing, but instead stepped back and to the side and left the door open. The officer entered the trailer and immediately noticed a strong odor of marijuana and several guns leaning against a wall. Knowing Sabo was a convicted felon, the officer had Sabo sit on the couch while the guns were secured. The officer then obtained a warrant and seized marijuana from the trailer. Sabo was charged with several drug and firearm offenses.

Sabo argued the officer violated the *Fourth Amendment* when the officer entered his trailer without consent.

The court disagreed, holding Sabo's non-verbal response to the officer's question constituted implied consent for the officer to enter his trailer. The court commented that on more than one occasion it had found that the act of opening a door and stepping back to allow an officer to enter was sufficient to demonstrate consent.

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

8th Circuit

United States v. French, 719 F.3d 1002 (8th Cir. Mo. July 9, 2013)

Police officers arrested French. After advising French of his *Miranda* rights and obtaining a signed waiver, the officers interviewed French about two bank robberies and a shooting. A few hours later, French signed a statement admitting he participated in both robberies and intentionally shot a security guard. Officers did not electronically record French's interview, even though recording equipment was available in the building.

French argued the district court improperly admitted his statement into evidence. French claimed his *Fifth Amendment* right to due process was violated when police officers failed to capture his statement on audio or video tape even though the officers had the equipment and opportunity to do so.

The court disagreed, holding, "The Constitution does not mandate electronically recording a defendant's custodial interrogation." In addition, the court noted, "Other circuits have held that incriminating statements are not inadmissible simply because the police failed to record or take notes of the conversations."

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

United States v. Bausby, 2013 U.S. App. LEXIS 14011 (8th Cir. Mo. July 11, 2013)

When a man drove past Bausby's house, he saw a motorcycle inside the chain-link fenced front yard that resembled a motorcycle stolen from him two months earlier. The motorcycle had a "For Sale" sign next to it. The man called the police and waited for officers to arrive.

When officers arrived, the man gave the officers the Vehicle Information Number (VIN) for his stolen motorcycle. The officers entered Bausby's front yard through an unlocked gate in the chain-link fence. The officers walked up to the front door of the house, which was only accessible after entering the fenced-in front yard. After knocking on the front door and receiving no answer, the officers checked the VIN on the motorcycle. The officers confirmed the VIN on the motorcycle matched the VIN provided by the man and confirmed that it matched the VIN reported to the police by the man. The officers also saw several automobiles in an unfenced driveway shared with a neighboring house. Some of the vehicles had missing VINs and one of the vehicles had been reported stolen.

The officers obtained a warrant, searched Bausby's house and discovered a shotgun. Bausby was charged with being a felon in possession of a firearm.

Bausby claimed the officers' warrantless entry into the chain-link fenced front yard of his house violated the *Fourth Amendment*. Bausby argued that area constituted the curtilage of his home and the officers entered it without a warrant, consent or an exception.

The court held the area of the front yard where the motorcycle was displayed did not constitute the curtilage of Bausby's house. Even though the motorcycle was close to the house and the front yard was enclosed with a chain-link fence, these factors were outweighed by the fact that Bausby took affirmative steps to draw the attention of the public to the front yard of his house.

First, Bausby used the front yard to display the motorcycle and other items he was selling to the public who passed by his house. The court stated, “What a person knowingly exposes to the public, even in his own home, is not a subject of *Fourth Amendment* protection.”

Second, while the front yard was fenced, the fence was only a four or five-foot chain-link fence and not a fence designed to limit the observation of those passing by.

Because the front yard of Bausby’s house where he displayed the stolen motorcycle was outside the curtilage of the home, the officers were allowed to enter that area to observe the motorcycle and its VIN more closely without violating the *Fourth Amendment*.

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

United States v. Mathias, 2013 U.S. App. LEXIS 15623 (8th Cir. Iowa July 31, 2013)

A police officer received information from an anonymous source that led him to believe Mathias was growing marijuana in the back yard of his home. A tall fence constructed of vertical wooden slats spaced approximately a quarter-inch apart surrounded Mathias’ back yard. After the officer’s initial attempts to view Mathias’ back yard were unsuccessful, the officer contacted a neighbor living on the adjacent property to the north of Mathias’ home. The officer obtained the neighbor’s permission to walk along the neighbor’s southern property line. However, the officer was unaware Mathias’ fence was set approximately eighteen inches south of the property line. As a result, when walking along the north side of the fence, the officer was physically trespassing along an eighteen-inch strip of grass and weeds on Mathias’ property.

While on the eighteen-inch strip, the officer looked through the gap in the wooden slats into Mathias’ back yard. The officer saw a number of potted marijuana plants. The officer obtained a warrant, searched Mathias’ home and recovered marijuana plants, scales, packaging material and cash. Mathias was indicted for conspiring to manufacture marijuana.

Mathias moved to suppress the evidence seized from his home, arguing he had a reasonable expectation of privacy in the eighteen-inch strip of land because it was part of the curtilage of his home.

The court disagreed. While the strip of land was close to Mathias’ home, it was not included within Mathias’ fence, there was no indication Mathias’ put the strip of land to any use commonly associated with the home, and there was no indication Mathias made any effort to protect the strip of land from observation by others. Consequently, the court held the strip of land constituted an open field, and *Fourth Amendment* protection does not extend to open fields.

Mathias also argued the officer’s actions while standing on the strip of land constituted a trespassory search, in violation of the *Fourth Amendment*. In *U.S. v. Jones*, the Supreme Court held a physical trespass for the purposes of gathering information constitutes a trespassory search prohibited by the *Fourth Amendment*. However, a *Jones* trespassory search requires the officer’s intrusion to be into a constitutionally protected area. As the police officer was within an open field when he looked through Mathias’ fence, his actions did not constitute a trespassory search.

Finally, Mathias argued the officer’s observations from the strip of land violated the reasonable expectation of privacy he had in his back yard.

Again, the court disagreed. The officer lawfully observed Mathias' backyard from the strip of land on the other side of Mathias' fence. While the presence of the fence established Mathias had a subjective expectation of privacy in the back yard, the gaps in the fence through which his back yard could be seen unaided, rendered this expectation of privacy objectively unreasonable.

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

10th Circuit

United States v. Briggs, 2013 U.S. App. LEXIS 13488 (10th Cir. Okla. July 2, 2013)

While on patrol in a high crime area, two police officers saw two men walking toward them. Although the officers were in an unmarked car, the car was identifiable as a law enforcement vehicle as it had tinted windows, light bars on the front and back windows and police lights on its fog lights and mirrors. Upon seeing the police car, the men immediately turned onto a cross street. One of the men, later identified as Briggs, repeatedly looked over his shoulder at the officers and grabbed at the waistline of his pants. As the officers got closer, the men picked up their pace and then split up and began to walk in different directions. When the officers got out of their car, Briggs continued to walk away from the officer and grab at his waistline. After one of the officers asked the men to come over and speak with them, Briggs turned, faced the officers and began to back away while the other man took off running. One of the officers drew his firearm and told Briggs not to run. Briggs said he would not run and then told the officer, "I've got a gun on me." The officer recovered a handgun from Briggs' waistline, the same area Briggs had been grabbing. Briggs was indicted for being a felon in possession of a firearm.

Briggs claimed the officers violated his *Fourth Amendment* rights by detaining him without reasonable suspicion that he was engaged in criminal activity; therefore, the handgun should have been suppressed.

The court disagreed. Briggs was seized for *Fourth Amendment* purposes when the officer drew his firearm, pointed it at Briggs and told Briggs not to run. By the time this occurred, the officers had reasonable suspicion to detain Briggs because Briggs and the other man were walking in a high crime area; the men changed direction and picked up their pace upon seeing the police vehicle; Briggs repeatedly grabbed at his waistline; the two men took divergent paths after turning away from the officers, when the officers asked to speak with the men, Briggs turned and backed away, and the other man fled after the officers got out of their car. The court stated none of these factors alone would have justified detaining Briggs; however, when taken together they provided a particularized, objective basis for concluding criminal activity was afoot and that further investigation was warranted.

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

United States v. Nicholson, 2013 U.S. App. LEXIS 14153 (10th Cir. N.M. July 12, 2013)

Nicholson was stopped at a red light at a busy intersection in the left-turn lane. Nicholson planned to make a left turn onto Main Street, which had multiple lanes in each direction. When the traffic light changed, Nicholson made a left turn onto Main Street's outermost right lane. Although the intersection had no markings or instructions to indicate a driver must maintain and

complete a turn by remaining in the left lane, a police officer stopped Nicholson. The officer believed Nicholson violated a city ordinance by failing to enter the left lane on Main Street when completing his left turn. As the officer approached Nicholson's car, he smelled marijuana. The officer asked Nicholson to get out of the car, and when Nicholson opened his door to get out, the officer saw two glass pipes commonly used for smoking methamphetamine in the driver's door pocket. After Nicholson refused consent to search his car, the officer allowed Nicholson to leave, but seized his car. The officer obtained a warrant, searched Nicholson's car and discovered methamphetamine, marijuana seeds, a scale and a handgun. Nicholson was charged with several drug and firearm related offenses.

Nicholson argued the city ordinance he was cited as violating did not prohibit the left turn he made; therefore, the traffic stop violated his *Fourth Amendment* rights.

The court agreed. The officer stopped Nicholson on the assumption the city ordinance required a driver making a left turn to complete the turn in the leftmost lane. Despite the many statutory provisions that regulate turns, the court held none specifically prohibited the type of left turn made by Nicholson. As a result, the traffic ordinance relied upon by the officer did not provide a legal basis to stop Nicholson. The court noted mistakes of law made by a police officer are objectively unreasonable. The court further stated, "Requiring law enforcement personnel to know the law they are asked to enforce comports with a basic policy of fairness. If a defendant is presumed to know the law, we must expect as much from law enforcement."

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

Courtney v. State of Oklahoma, ex rel., Department of Public Safety, 2013 U.S. App. LEXIS 14229 (10th Cir. Okla. July 15, 2013)

During a traffic stop, Courtney told the police officer he had a gun in the trunk of his car. The officer seized the gun and arrested Courtney for possession of a firearm by convicted felon, under Oklahoma law, after the officer learned Courtney had been adjudicated delinquent of a felony as a juvenile approximately twelve years prior. The district attorney ordered Courtney released from jail and never filed any criminal charges. Courtney's gun was returned to him almost a year after his release.

Courtney sued the officer, for among other things, arresting him without probable cause in violation of the *Fourth Amendment*. Courtney also sued the State of Oklahoma for conversion, as his firearm was not returned to him for almost one year after his release.

The court held the officer was not entitled to qualified immunity. While Oklahoma law prohibits the possession of firearms by convicted felons, a juvenile adjudication over ten years old does not qualify as an underlying felony. When the officer arrested Courtney, he knew the felony on Courtney's record was disposed of as a juvenile adjudication and it was over ten years old. Therefore, the court concluded, based on the facts known to him at the time of arrest, the officer lacked probable cause to arrest Courtney for possession of a firearm by a convicted felon.

The court further held Oklahoma's felon-in-possession statute is not ambiguous insofar as persons adjudicated delinquent for a felony as juveniles are only prohibited from possessing firearms for ten years. The information known to the officer at the time of arrest made clear Courtney's juvenile adjudication fell into this category. As a result, the court concluded it was

clearly established the officer lacked probable cause to arrest Courtney of violation of the felon-in-possession statute.

The court also held the district court improperly dismissed Courtney's claim for conversion. It was undisputed that even after Courtney had been released from jail and it had been determined it was legal for him to possess a firearm, the State retained possession of his firearm for almost one year.

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