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EDITOR'S COMMENTS

Welcome to the third installment of Volume 5 of *The Quarterly Review* (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The QR* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The QR* can be directed to Robert Cauthen at (912) 267-2179 or Robert.Cauthen@dhs.gov. You can join *The QR* Mailing List, have *The QR* delivered directly to you via e-mail, and view copies of the current and past articles in *The QR* by visiting the Legal Division web page at: http://www.fletc.gov/legal/legal_home.htm. This volume of *The QR* may be cited as "5 QUART. REV. ed.3 (2004)".

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SEARCH OF PERSONAL CONTAINERS INCIDENT TO A SEARCH WARRANT

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Scenario #1: You have a premises search warrant to search a business for documents. Through surveillance, you see the owner of the business carry a briefcase into the premises. Shortly thereafter, you serve the warrant and make entry. Inside, you find the owner's briefcase, search it, and find evidence inside.

Scenario #2: You have a premises search warrant to search a business for documents. You search the warrant and make entry. Inside, you encounter patrons and employees of the business. You also find various personal containers. You search a briefcase and find evidence. You also search a purse and find evidence.

Is the evidence seized in these scenarios admissible?

In other words, does the scope of a validly issued search warrant for a residence or business extend to containers found therein, when such containers (1) belong to a person associated with the premises, (2) belong to individuals who are not occupants of the premises, or (3) are merely found on the premises?

SEARCHES OF CONTAINERS GENERALLY

A properly issued search warrant authorizes the search of the described premises for the named items wherever they may reasonably be found. An exception to this general principle is that a premises warrant does not by itself justify the search of persons found on the premises if the

persons are not named in the warrant.¹

A warrant sufficiently describing the premises to be searched will justify a search of containers found therein and belonging to the occupant if the container might contain the described items.²

But what if the container belongs not to the occupant, but to some other person?

SEARCHES OF CONTAINERS BELONGING TO GUESTS OR EMPLOYEES

In the context of a lawful warrantless vehicle search, the scope of the search includes all containers therein, including the purse of a passenger.³ However, in his dissent, Justice Breyer stated that it would make a legal difference if the purse were attached to the defendant's person.⁴

Although the Supreme Court has not addressed the constitutionality of searches of containers of social guests or of non-residents incident to the service of residential or business search warrants,⁵ other courts have. The Federal Circuit Courts of Appeal are divided on the correct rationale to apply in these situations. These courts have generally used two tests for determining the constitutionality of container searches: the "physical possession" test and the "relationship" test.

The "Physical Possession" Test

This is a rather straightforward test which examines the physical proximity of the container to the visitor. Personal possessions belonging to

¹*Ybarra v. Illinois*, 444 U.S. 85 (1979)

²*United States v. Ross*, 456 U.S. 820 (1982)

³*Wyoming v. Houghton*, 526 U.S. 295 (1999)

⁴*Id.* at 308

⁵*United States v. Vogl*, 7 Fed. Appx. 861 (10th Cir. 2001)

the visitor and deemed to be in the visitor's possession are an extension of the person and may not be searched.

In the **Seventh Circuit** case of *United States v. Teller*,⁶ the police had an arrest warrant for the defendant's husband, and a narcotics search warrant for their residence. During the time of service of the search warrant, the defendant entered the home carrying a handbag. She walked into a bedroom where officers were searching, left the handbag on the corner of the bed, and left the room. Twenty minutes later, officers searched the bag and found narcotics. The Seventh Circuit upheld the search. The court held that defendant's purse was not an extension of her person when it was searched because it had been placed upon her bed and left in her bedroom while the arresting officers searched her bedroom. Thus, the court held that the purse was no more a part of her person that would have been a dress that she had worn into the room and then removed for deposit in a clothes closet. However, the court implied that if the handbag was actually on her person, it would not be subject to search pursuant to the search warrant.

In the **Eleventh Circuit** case of *United States v. Gonzalez*,⁷ officers served a search warrant at the Sanchez home. The court upheld a search of a locked briefcase the police knew belonged to brother-in-law Gonzalez, deeming it sufficient that items named in the warrant, documents and currency would fit within such a container.

This approach has been criticized for being "both too broad and too narrow."⁸ The rule provides blanket protection to those seeking to hide incriminating evidence because those individuals could avoid detection from lawful searches "through the simple act of stuffing it in one's purse or pockets." (Citations omitted). Similarly

the approach is too constrictive because "it would leave vulnerable many personal effects, such as wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage." (Citations omitted).

The "Relationship" Test

The second approach to determine whether the individual's container may be searched pursuant to a premises search warrant focuses on the officer's knowledge or understanding of that individual's "relationship" to the premises searched at the time the officers executed the search warrant. Using this principle, the courts conclude that the usual occupant or owner of a premises being searched loses his or her privacy interests in the belongings located there. However, a "mere visitor" retains a legitimate expectation of privacy regardless of whether the visitor is currently holding or has temporarily put down the belongings.

In *United States v. Micheli*,⁹ the **First Circuit** rejected the "physical possession" test. Secret Service agents had obtained a search warrant for Micheli's business premises. During the search, his briefcase was searched. He claimed that his briefcase was not within the scope of the search warrant. While the reviewing court did not assume that whatever was found on the premises necessarily fell within the scope of the warrant, it did find that the briefcase was properly searched. Micheli was the co-owner of the business, not a mere visitor. Thus, personal articles, such as his briefcase, were subject to search pursuant to the warrant. The court reasoned that the "appellant was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises. He had a special relationship in the place, which meant that it could reasonably be expected that some of

⁶397 F.2d 494 (7th Cir. 1968), cert. denied 393 U.S. 937
⁷940F.2d 1413 (11th Cir. 1991)

⁸*United States v. Vogl*, 7 Fed. Appx. 810, (10th Cir.2001)

⁹487 F.2d 487 (1st Cir. 1973)

his personal belongings would be there.”¹⁰

In *Micheli*, the focus of the court was on protecting citizens from unreasonable searches and seizures. This focus, the court said, is “hardly furthered by making its applicability hinge upon whether the individual happens to be holding or wearing his personal belongings after he chances into a place where a search is underway.”¹¹

In *United States v. McLaughlin*, the **Ninth Circuit** found that the agents had not exceeded the scope of the warrant in searching the briefcase of a co-owner of the business premises. The court distinguished co-owners from patrons stating, “Co-owners have control over premises not available to patrons, and their relationship to the location is more predictable and permanent.”¹²

Arguably, *Micheli* and *McLaughlin* support searches of containers (e.g., purses) of employees where the containers are not within close proximity of employees at the time of the search. Of course, the containers searched must be likely repositories of the evidence sought.

In addition, some courts have indicated that agents have no duty to determine ownership of a container found on the premises.¹³ However, if the officers know, or should know that the container belongs to a “mere visitor,” it may not be searched unless the police have grounds to believe that they have been utilized as a hiding place.¹⁴ Stated differently, “. . . this limitation on

the police authority to execute the warrant by searching into personal effects comes into play only if the police ‘knew or should have known’ that the effects belong to a ‘mere visitor.’”¹⁵

But, assuming the police do know the container belongs to a mere visitor, does it follow that the police may never search the container? Clearly not. Probable cause and exigent circumstances may justify the search. In *United States v. Young*,¹⁶ just as the police arrived to serve a search warrant, a woman left the rear door of the premises with a “bulging purse” and headed toward the woods. The court upheld the search of the purse because of exigency and probable cause, based on the fact that she was the wife of the prime suspect and acted in a suspicious manner.

In the **Eleventh Circuit** case of *Hummel-Jones v. Strobe*,¹⁷ the court found that patrons of a business do not have a significant relationship to the premises to be subject to the search warrant.

Summary

In **Scenario #1**, above, the search of the briefcase would clearly be lawful because it is on the premises subject of a search warrant, is a possible repository for the evidence sought, and the briefcase’s owner has a significant relationship to the premises.

As to **Scenario #2**, the outcome likely depends on which rationale the court follows.

Using the “**physical possession test**,” if the containers are not in the actual possession of, or close physical proximity to, a patron or social visitor, they may be searched.

¹⁰*Id.* at 432

¹¹*Id.* at 431

¹² 851 F.2d 283 (9th Cir. 1992) at 287

¹³ *United States v. Kralic*, 611 F.2d 343 (10th Cir. 1979) (warrant for shotgun in car, proper to search suitcase in trunk where “nothing in the record shows that the officer knew, or had reason to know, who owned either the Buick or the suitcase.”)

¹⁴ *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973)

¹⁵ LaFave, Third Edition, Section 4.10(b) (citation omitted)

¹⁶ 909 F.2d 442 (11th Cir. 1990) cert. denied, 502 US. 825

¹⁷ 25 F.3d 647 (8th Cir. 1994)

Using the “**relationship**” test, the containers may be searched if there is a relationship between them, or the owner, to the premises. If the containers are those of a “mere visitor” or “patron,” they may not be searched unless the police have grounds to believe that they have been utilized as a hiding place.

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CASE BRIEFS

UNITED STATES SUPREME COURT and CIRCUIT COURT UPDATES

SUPREME COURT

U.S. v. Flores-Montano
2004 U.S. LEXIS 2548
March 30, 2004

SUMMARY: The removal and search of an automobile fuel tank at the border does not require a showing of reasonable suspicion.

FACTS: Flores-Montano attempted to enter the United States at the Otay Mesa Port of Entry in southern California. A customs inspector conducted an inspection of the car which was then taken to a secondary inspection station.

At the secondary station, a second customs inspector inspected the gas tank by tapping it, and noted that the tank sounded solid. Subsequently, the inspector requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a hydraulic lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. After the gas tank was removed, the inspector hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. The process took 15 to 25 minutes.

Flores-Montano filed a motion to suppress asserting that the government was required to show reasonable suspicion to justify the search.

The Government conceded the lack of reasonable suspicion and argued only that reasonable suspicion was not required. The District Court granted the motion, holding that the removal and search of the gas tank required reasonable suspicion. The Ninth Circuit summarily affirmed.

ISSUE: Does a fuel tank search at the border require reasonable suspicion?

HELD: No.

DISCUSSION: “The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. ‘...searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.’ That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles’ fuel tank. Over the past 5^{1/2} fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry. Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25%.”

Flores-Montano urged that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank was an invasion of his privacy. But, “...the expectation of privacy is less at the border than it is in the interior. Automobiles seeking entry into this country may

be searched. Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment."

Flores-Montano also asserted that the disassembly and reassembly of his gas tank was a significant deprivation of his property interest because it might have damaged the vehicle. "He does not, and on the record cannot, truly contend that the procedure of removal, disassembly, and reassembly of the fuel tank in this case or any other has resulted in serious damage to, or destruction of, the property. According to the Government, for example, in fiscal year 2003, 348 gas tank searches conducted along the southern border were negative (*i.e.*, no contraband was found), the gas tanks were reassembled, and the vehicles continued their entry into the United States without incident." "While the interference with a motorist's possessory interest is not insignificant when the Government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the Government's paramount interest in protecting the border."

1st CIRCUIT

Isom v. Town of Warren
360 F.3d 7
February 25, 2004

SUMMARY: Police use of pepper spray to subdue an axe wielding subject was objectively reasonable even where the pepper spray use was ineffective and escalated to a situation where deadly force was ultimately necessary.

FACTS: An emotionally disturbed 33 year old entered a liquor store, approaching a female employee and asked if she was single and would like to go on a date. The employee explained she had a boyfriend. The subject left the store and retrieved an object wrapped in a newspaper from the trunk of his car. He came back into the store, placing the object on the counter. No customers were in the store. There were two female employees in the store. The subject, saying he had nothing to live for, told one employee to lock the doors while asking if they had a gun in the store. The subject pressed the wrapped object against one of the female employee's stomach and said he didn't want to have to hurt them. The other female employee managed to set off a silent alarm. The subject unwrapped an axe from the newspaper. The subject agreed to let the pregnant female employee go and then, as he had his head down on the counter, the other female employee also escaped.

As the second female employee fled from the store, she encountered a police Sergeant, who arrived in response to the alarm. The sergeant asked if the man inside was armed and was told he was carrying an axe. The sergeant entered the store with his gun drawn.

The subject was in the center of the store. The sergeant started talking to him. The subject was initially silent, but eventually gave his name and said 'he was going to die today.' The subject became non-responsive to the sergeant and held the axe tightly and raised up slightly. A second officer arrived and knelt down with his gun drawn next to the sergeant. Another officer stayed by the back exit. The sergeant and the second officer were continuously pleading with the subject to drop the axe. A Captain and a detective also arrived and entered the store. The detective also told the subject to drop the axe. The subject was non-responsive.

The detective reached over and took the sergeant's pepper spray from his belt and with the Captain's approval, sprayed the subject and yelled for him to put down the axe. The officers hoped the spray would allow the officers to get control of the subject. Instead, the spray had no effect on the subject, which caught the officers off guard. The subject then suddenly lifted the axe and charged toward the sergeant and the officer kneeling next to him. Both officers fired their guns and the subject fell and died soon afterwards.

ISSUE: Was the use of the pepper spray unreasonable in these circumstances?

HELD: No.

DISCUSSION: One basis of the § 1983 action was that the use of the pepper spray was unreasonable and escalated the situation to cause the death of the subject. The sergeant had testified that pepper spray was not an option for him and that he didn't think it would have been effective. The sergeant said since the subject still had an axe in his hand, spraying him would not have been an option for him. He did testify that pepper spray was an option for the detective. The sergeant did not testify that no reasonable police officer would have used pepper spray in these circumstances, but that in the position he was in, it was not an option he was considering. The court held that based on the totality of the circumstances, the use of the pepper spray was objectively reasonable.

(This was a case where qualified immunity was not applied and the case went to trial. The trial court did not rule on the defendants' qualified immunity claim prior to trial and the officers waived their qualified immunity claim by not raising it in their motion for judgment at the end of the plaintiff's case.)

3rd CIRCUIT

U.S. v. Lee

359 F.3d 194

February 20, 2004

SUMMARY: A person has no legitimate expectation of privacy in conversations with another person who consents to the recording of the conversations. There is no distinction between audio and visual surveillance. The government was not required, before resorting to video surveillance, to demonstrate that less intrusive investigative techniques were unlikely to succeed.

FACTS: The International Boxing Federation (IBF) crowns champions and publishes ratings of boxers within different weight divisions. These ratings are used to determine which boxers will fight in upcoming IBF championship bouts. Lee served on the IBF Executive Board, the championship committee, and the ratings committee.

The Federal Bureau of Investigation received information that boxing promoters were paying certain IBF officials to receive more favorable IBF ratings for their boxers. Using a cooperating IBF official, the FBI made audio and video recordings of three separate meetings between the cooperating official and Lee. A concealed camera and microphone installed in the living room of a hotel suite were used by the FBI to electronically monitor and record the meetings. The FBI did not obtain a warrant authorizing the installation or use of the equipment but instead relied on the consent of the IBF official. The government agents switched on the monitor and recorder only when the cooperating official was in the suite. During one meeting, the cooperating official was recorded handing the defendant cash that had originated as a bribe paid to the IBF by a Colombian boxing promoter. The defendant was convicted of conspiracy to engage in money laundering, interstate travel in aid of

rackeering, and filing false tax returns.

ISSUE: Did a Fourth Amendment violation occur when the FBI monitored and recorded meetings in a hotel room between the defendant and a government informant without a warrant?

HELD: No.

DISCUSSION: The Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. If a person consents to the presence at a meeting of another person who is willing to reveal what occurred, the Fourth Amendment permits the government to obtain and use the best available proof of what the latter person could have testified about. A person has no legitimate expectation of privacy in conversations with a person who consents to the recording of the conversations.

First, although the defendant had an expectation of privacy in the hotel suite so long as he was alone there, when the defendant allowed the informant to enter, any expectation of privacy vis-à-vis the informant vanished. Second, just as the defendant gave up any expectation of privacy in the things that he allowed the informant to hear, the defendant also gave up any expectation of privacy in the things that he allowed the informant to see. There is no distinction between audio and visual surveillance. Further, it does not matter for Fourth Amendment purposes whether the device is placed in the room or carried on the person of the cooperating individual. In either event, the recording device will not gather any evidence other than that about which the cooperating witness could have testified.

Here, the monitoring devices were installed in the suite's living room at a time when the defendant had no expectation of privacy in the premises. There is no evidence that conversations were monitored when the informant was absent from the room, and the informant was plainly

there at the time of the incriminating meetings shown on the tapes. The tapes do not depict anything material that the informant himself was not in a position to hear or see while in the room. Finally, the government was not required, before resorting to video surveillance, to demonstrate that less intrusive investigative techniques were unlikely to succeed.

4th CIRCUIT

U.S. v. Mayo
2004 U.S. App. LEXIS 5407
March 23, 2004

SUMMARY: Not every valid basis to stop equates to a valid basis to frisk. An additional determination—that there is a reasonable suspicion that the suspect is presently armed and dangerous—must be made before the suspect can be frisked.

Absent a reasonable suspicion of criminal activity, a police officer may not simply approach a citizen, as part of a police-citizen encounter, and frisk the citizen because the officer believes that his safety is at risk.

FACTS: Richmond P.D. Officers Cornett and Johnson spotted Mayo standing in the middle of the street. The accused was talking to someone else standing on the side of the street. Based on citizen complaints of drug dealing, the neighborhood had just been picked for special enforcement efforts by the department. This meshed with Officer Cornett's experience with the neighborhood. He "had recovered firearms and drugs in connection with three separate incidents" there and knew that there had been two shootings in the neighborhood in the last several weeks.

When Mayo saw the officers' car, he "reactively 'put his left hand into his left jacket pocket,

turned 180 degrees, walked out of the street and onto the (apartment) complex property that is posted no trespassing and through that property between two buildings.’”

Officer Cornett could see that the accused “either... had something heavy in (his) pocket or was pushing his hand down” into it. It looked to Officer Cornett as if Mayo was trying to “maintain control of a weapon while moving.”

The officers went around the corner to see if Mayo would come out that side of the complex. He did. When he saw the police car, he “immediately stopped, just froze in his tracks for a split second, then started walking along the side of the building.”

Officer Cornett approached the accused and asked to speak to him. Officer Johnson asked the accused to take his hand out of his pocket. Officer Cornett then asked the accused if he lived in the complex. Mayo’s response was “peculiar.” He did not answer the question. Instead, according to Officer Cornett, “Mayo’s eyes were extremely wide, his mouth was slightly agape, and it was almost like nothing registered with him. It was almost as if he was in shock.” Also, according to Officer Cornett, “Mayo’s shirt was ‘fluttering... as though he was shaking.’”

Officer Cornett told the accused he was going to pat him down, and the accused raised his hands halfway up. The accused had a pistol in his left jacket pocket, and he was arrested. The search incident to arrest produced crack cocaine and marijuana.

Mayo was charged with three counts of drug possession and one count of possessing a firearm in furtherance of drug trafficking. The lower trial court granted his motion to suppress all evidence as the fruit of an illegal stop and dismissed the charges. The Government appealed.

ISSUES: 1. Did the police have reasonable

suspicion to stop Mayo?

2. Did the police have reasonable suspicion to frisk Mayo?

HELD: 1. Yes.

2. Yes.

DISCUSSION: Reasonable suspicion to stop. The following factors, taken together, supported reasonable suspicion to stop: (1) Mayo’s presence in a high-crime area; (2) Mayo’s retreat; (3) his pocket that looked like it had something heavy in it; (4) his putting his hand in his pocket in such a way that it looked like he was the securing a weapon while he walked away; (5) Mayo’s second retreat when he spotted the officers after coming out the other side of the complex; and (6) his nervous and “peculiar” behavior when the officers approached him.

Reasonable suspicion to frisk. The same factors, of course, supported a reasonable suspicion that Mayo was presently armed and dangerous.

Valid frisk must follow valid stop. Because the same factors supported both stopping and frisking Mayo, this case provides a rare opportunity to make a valid point. It is well-understood that not every valid basis to stop equates to a valid basis to frisk. An additional determination—that there is a reasonable suspicion that the suspect is presently armed and dangerous—must be made before the suspect can be frisked. Not all potential criminals are armed.

The converse is less obvious, but also true: Not every valid basis to frisk means there is a valid basis to stop. Being armed is not always criminal. And, in the words of the court, “Absent a reasonable suspicion of criminal activity, a police officer may not simply approach a citizen, as part of a police-citizen encounter, and frisk the citizen because the officer believes that his safety is at risk.” The overall picture presented

by Mayo's behavior was that he was illegally armed. That picture provided reasonable suspicion to first stop and then frisk.

5th CIRCUIT

U.S. v. Froman
355 F.3d 882
January 5, 2004

SUMMARY: An unknowing, material misstatement in an affidavit for search warrant does not require suppression of the evidence. To establish probable cause, the government does not have to establish that a subscriber to a known child pornography web site actually downloaded unlawful images.

FACTS: A FBI agent discovered a child porn website named "CANDYMAN" whose home page advertised "adult, transgender, image gallery." "This group is for people who love kids. You can post any messages, pics or videos." The agent subscribed in an undercover capacity and within a few days had received over 300 emails containing images of child porn and over 100 video clips of child porn. The web site posted simple instructions to unsubscribe. Investigation identified Froman as having subscribed to the site for almost a month' using screen names "Littlebuttsue" and "Litletitgirly." The agent prepared an affidavit that included, among other facts, that all subscribers received all emails posted by other members of the group. The warrant was executed and agents found hundreds of child porn images on Froman's computer, hundreds of printed pictures that matched email postings to the "CANDYMAN" web site and a video clip of Froman having sexual intercourse with his 12 year old daughter. Subsequent investigation revealed that this video clip had been posted to child porn web sites and been downloaded over 500 times in Europe alone. At trial, it was discovered that

"CANDYMAN" did not automatically distribute all group emails to all members of the group, that there were down load options a member could execute and the FBI agent had received notice of these options when he subscribed to "CANDYMAN". The defendant argued that without this, there was no evidence he had ever downloaded child porn to support PC for the search.

ISSUE: Should the material misstatement require suppression of evidence obtained through the search?

HELD: No.

DISCUSSION: The court affirmed the conviction, agreeing with the district court findings that the FBI agent had no reason to believe the statement in the affidavit was false, and that even if the false statement was removed, there was still sufficient probable cause, based on (1) the nature of the website, which was solely to distribute child porn, (2) Froman had been a subscriber for almost a month, and (3) the screen names used by Froman. In rejecting Froman's argument that there was no probable cause to show he had downloaded child porn, the court said "Probable cause does not require proof beyond a reasonable doubt, but only a showing of the probability of criminal activity."

7th CIRCUIT

U.S. v. Jones
359 F.3d 921
March 5, 2004

SUMMARY: Mental state alone cannot render a confession involuntary. Government coercion must also be a factor. The mental state of a defendant is just one of many factors to consider when assessing the voluntariness of a confession. Other factors to consider are:

(a) the nature of the interrogation, (b) the length of the detention, (c) whether the interrogators used physical violence, (d) whether the interrogators informed the suspect of his rights, and (e) the suspect's age, education, and intelligence level.

FACTS: Jones was employed by the U.S Postal Service as a mail sorter in Milwaukee's main post office. In February 2001 he stole and cashed three American Express gift checks totaling \$250.00.

Postal inspectors conducted surveillance on Jones, who had been reassigned to the "rewrap" area where employees process damaged mail. Surveillance cameras observed him repeatedly leave his work area and go to another area where large greeting cards were stored and processed. Jones took envelopes back to his work station, opened them, and removed the contents. The surveillance tape recorded Jones open one envelope containing a K-Mart gift card.

On the same morning Jones was also caught opening an "identifiable" piece of mail that the postal inspectors had put into circulation through his work station. This consisted of a fake greeting card containing "marked" currency.

Jones was arrested. The K-Mart gift card and the "marked" cash were in his possession at time of arrest. A short time later he was in an interview room with Postal Inspectors Gill and Girardot. Jones sat across from Girardot at an interview table, while Gill, who wore his sidearm uncovered, sat at one end. The session lasted approximately one hour. Initially, Jones denied any wrongdoing. During the session the inspectors confronted Jones with the evidence, and Girardot yelled at him repeatedly. At the end of approximately one hour Jones confessed to stealing the American Express gift checks, the K-mart gift certificate, and the "marked" cash.

Jones moved to suppress his confession, arguing

that he had been coerced to confess by Gill's display of his weapon, and by Girardot's yelling. Jones also argued that as a union representative he had attended many such sessions, but an inspector never had been visibly armed. This convinced him that this interview was abnormal, and contributed to his "coerced" confession. However, during the suppression hearing, Jones testified that he "would not have taken a beating from the inspectors."

An earlier competency evaluation revealed that Jones suffered from paranoia, delusional behavior, and grandiose thoughts. Jones asked the court to consider his mental illness in assessing whether his confession was voluntary. The district court noted that Jones had been found competent to stand trial, and found that the postal inspectors had done nothing to take advantage of his mental state. The Motion to Suppress was denied.

On appeal Jones argued that because he had a mental health condition his confession was coerced, and should have been suppressed.

ISSUE: Should Jones' confession have been suppressed because he suffers from a mental health condition?

HELD: No.

DISCUSSION: Jones' confession was not coerced. The mental state of a defendant is just one of many factors to consider when assessing the voluntariness of a confession. Other factors to consider are: (a) the nature of the interrogation, (b) the length of the detention, (c) whether the interrogators used physical violence, (d) whether the interrogators informed the suspect of his rights, and (e) the defendant's age, education, and intelligence level. *United States v. Huerta*, 239 F.3d 865, 871 (7th Cir 2001). Applying these factors the Court found Jones's confession to be voluntary.

It is well established that mental state alone cannot render a confession involuntary; government coercion must also be a factor. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). The court found no such coercion. The totality of the circumstances dictated that Jones' statements were voluntary. The interrogation lasted only one hour; Jones was advised of his rights; he was not handcuffed during the questioning; he was in familiar surroundings; and, he was the one who ended the process. The Court took special notice of Jones' statement that he would not take a beating from the inspectors, which the court interpreted as proof of his composure.

There is no evidence that Jones was actually entertaining paranoid, delusional, or grandiose thoughts during the interrogation. Not once during his testimony during the suppression hearing did Jones mention that he had irregular thought patterns during the interrogation.

8th CIRCUIT

U.S. v. Martinez
358 F.3d 1005
March 2, 2004

SUMMARY: Use of a “ruse drug checkpoint”, which resulted in vehicle stops for observed traffic violations, which resulted in consent searches, was not illegal.

FACTS: Officers from the Phelps County, Missouri, Sheriff's Department participated in a drug interdiction program by placing signs along the highway indicating drug checkpoint ahead. In reality, there was no drug enforcement checkpoint. Instead, the signs were placed as a ruse to induce motorists engaged in drug-related activity to take an exit off the highway. Motorists who exited the highway and who also were observed committing a traffic violation were stopped.

Officers observed defendant's tractor trailer traveling eastbound come up to the exit ramp, roll through the stop sign at the top of the exit ramp, turn left across the overpass, and then turn left again on the entrance ramp to head westbound.

Observing the traffic violation, officers stopped defendant. During the encounter, defendant gave consent to a search of his truck. The officers found seventeen kilograms of cocaine and a small amount of crack cocaine in the trailer. Defendant was arrested.

ISSUE: Was the seizure of defendant and the search of his truck in violation of the Fourth Amendment.

HELD: No.

DISCUSSION: A traffic stop constitutes a “seizure” within the meaning of the Fourth Amendment, and therefore must be reasonable to survive constitutional scrutiny. A traffic stop based on probable cause is reasonable under the Fourth Amendment. It is well settled that any traffic violation, however minor, provides probable cause for a traffic stop.

There is no dispute that officers saw defendant commit a traffic violation. As a result, the officers had probable cause to stop the defendant. The fact that the officers may have believed he was carrying illegal drugs does not invalidate an otherwise valid stop. Furthermore, the officers' use of the deceptive signs does not make the stop illegal, as it is well settled that officers may use deception to uncover criminal activity.

U.S. v. Morones
355 F.3d 1108
January 21, 2004

SUMMARY: Removing a package from the mail stream and holding it for a dog sniff is a

“meaningful interference” with defendant’s “possessory interest” in the package and, therefore, a “seizure” under the Fourth Amendment. The seizure must be reasonable based upon facts of which the officer was aware at the time he acted.

FACTS: A Deputy Sheriff was conducting a random inspection at a FedEx facility. He removed a white package from the outbound conveyor belt. The package bore a handwritten label revealing the following: the sender paid cash; the package was being shipped “priority overnight”; the sender was identified as “Juan Sanchez”; the recipient was identified as “Avraham Sanchez”; and neither the sender’s nor the recipient’s telephone number was provided.

The Deputy set the package aside with several “control” packages, went to his vehicle in the parking lot, and retrieved his narcotics-trained canine. The dog alerted to the Sanchez package.

In his affidavit for search warrant, the Deputy included his training and experience in the field of narcotics investigation, the certification and accuracy of his drug dog, and the facts as stated above. The search pursuant to the warrant revealed methamphetamine.

The Deputy also later stated:

“Priority overnight” deliveries, which typically cost \$ 30- \$ 50 for a small package, are significantly more expensive than the more often used 2-day” delivery process. As such, priority overnight mailings are most commonly used by businesses, with pre-printed air bill labels and visible account information reflected on the air bill. In my experience, a very small percentage of legitimate “priority overnight” customers use cash to send their packages. In my experience, where cash is paid, the legitimate overnight customers nearly universally list

appropriate contact information, such as telephone numbers, so that they may be reached in the event the package is lost.

ISSUE: 1. Did the Deputy “seize” – for Fourth Amendment purposes – the package when he removed it from the mail stream and held it for the dog sniff?

2. Did the Deputy have reasonable and articulable suspicion that the package contained contraband when he seized it?

HELD: 1. Yes.

2. Yes.

DISCUSSION: The Deputy exercised “meaningful interference” with defendant’s “possessory interest” in the package – that is, he seized it – when he removed it from the mail stream and held it for the dog sniff. In this holding, the court cited *United States v. Jacobsen*, 466 U.S. 109 (1984) and *United States v. Gomez*, 312 F. 3d 920 (8th Cir. 2002). Therefore, the Deputy must justify the seizure as reasonable based upon facts of which he was aware at the time he acted.

As to the issue of reasonableness, the court held that the characteristics of defendant’s package, as articulated and explained by the Deputy, considered in light of his experience in drug interdiction, amount to the reasonable suspicion necessary to constitutionally seize the package. The court used the standard that the “totality of the circumstances” supported a determination of reasonable suspicion when evaluating those circumstances as they would be “understood by those versed in the field of law enforcement.”

9th CIRCUIT

U.S. v. Christian
356 F.3d 1103
January 28, 2004

SUMMARY: While failure to identify oneself cannot, on its own, justify an arrest, police officers may ask for, or even demand, a suspect's identification. Determining a suspect's identity is an important aspect of police authority under *Terry v. Ohio*, 392 U.S. 1 (1968). The officers' continued pressure on defendant to reveal his correct identity was not unreasonable during a *Terry* detention, when the circumstances indicated that the Defendant was providing incorrect information and that he was becoming nervous and fidgety during the questioning.

FACTS: Officers received information that Christian, was brandishing a firearm in an apartment building. The officers located the suspect and asked him for his identification. Christian claimed to have no identification on him, and he gave officers the name of Rick James and a birth date. The officers performed a records check, which came up with no one by the name of Rick James with the birth date supplied by Christian, in the two states where the defendant said he obtained his identification. Christian became increasingly nervous as officers questioned him about his identity and informed him that he was required to provide a correct name or he could face charges of false statements. Christian told officers that his identification was in his car. He gave officers permission to look inside a leather bag in the car's back seat and a pocket inside the car door, all of which contained wallets with differing names and birth dates for Christian. It was not until Christian was taken to the precinct and fingerprinted that he offered his true name.

ISSUE: Were the officers' demands for Christian's accurate identification reasonable

during a *Terry* stop?

HELD: Yes.

DISCUSSION: The officers detained Christian on a reasonable suspicion that he was the suspect accused of brandishing a gun. Requests for identification made during a *Terry* stop are not unreasonable so long as the requests are related to the detention. In this case, Christian became nervous and fidgety when questioned by officers about his identity, which aroused the officers' suspicions that he was lying. The Court held that the officers' suspicions that Christian was the suspect who brandished a gun were not dispelled during the stop, and new suspicions were aroused about the defendant's identity. Under this "heightened suspicion," the officers' continued pressing for Christian to provide proper identification was reasonable.

10th CIRCUIT

U.S. v. Palmer
2004 U.S. App. Lexis 4484
March 9, 2004

SUMMARY: Even though a "protective search" of a vehicle for weapons is limited in scope, facts may justify a search of the locked glove box for a weapon to which the suspect could gain access. The fact that the suspect is "under the control" of the officers does not eliminate the risk that he will gain access to a weapon. The time period in which the suspect "may gain immediate control" of a weapon is the *entire* period from the initial stop to the suspect's departure.

FACTS: While on patrol Officer Downe saw an automobile driven by Palmer traveling forty-six miles-per-hour in a twenty-five mile-per-hour school zone. Officer Downe activated his emergency lights and siren in an attempt to get

Palmer's attention. Palmer looked back at Officer Downe and pointed to himself, as if to ask, "me"? Officer Downe nodded and motioned for Palmer to pull over into a nearby parking lot.

Instead of turning into the parking lot, Palmer continued to drive, made a left turn at the next traffic light and accelerated. After Officer Downe re-activated his siren, Palmer crossed a lane of traffic and pulled into a parking lot. Palmer drove past twenty five empty parking spaces before he stopped at the far side of the lot. During this pursuit Officer Downe saw Palmer reach behind the seat then back toward the glove box, then lean forward as if reaching for something under the seat. When Officer Downe got out of his patrol car and approached Palmer's car he saw Palmer making movements under the seat and toward the glove box. Officer Downe saw Palmer's hand near the open glove box and saw Palmer close the glove box as he got up to the side of the car. Another motorist pulled up next to Officer Downe and told him that he had seen Palmer trying to hide something after Officer Downe had signaled him to stop. Officer Downe called for backup and conducted a record check on Palmer. The record check revealed that Palmer was an ex-convict, and had been considered armed and dangerous in the past. Officer Downe continued to observe Palmer moving back and forth in his seat and leaning toward the glove box and under his seat.

Once Officer Goad arrived for backup, Officer Downe explained to him what he had happened and asked him to check the inside of Palmer's vehicle. Officer Downe had Palmer get out of his vehicle, patted him down, and had him sit in his patrol car while Officer Goad searched the passenger compartment of Palmer's vehicle. Officer Goad found no weapons. Officer Downe then asked Officer Goad to watch Palmer while he searched the vehicle. During his search Officer Downe tried to open the glove box which was locked. Officer Downe removed the keys from the ignition and used them to unlock the glove box, where he found a loaded

semiautomatic handgun. Palmer was indicted for possession of a firearm by a convicted felon.

ISSUE: Did the search of the locked glove box for weapons exceed the scope of a permissible frisk of a vehicle?

HELD: No.

DISCUSSION: The specific facts and circumstances here supported the finding that Officer Downe had a reasonable and articulable suspicion that Palmer was dangerous and could gain control of a weapon. The observations by Officer Downe and the passing motorist clearly indicated that Palmer was trying to delay his encounter with the officer until he could hide something in his glove box. Once the record check on Palmer came back revealing that he was an ex-convict and had been considered armed and dangerous, Officer Downe had more than sufficient evidence to support a reasonable suspicion that Palmer was dangerous and was hiding a weapon in the glove box.

The main issue the court faced was whether the officer had reason to believe that the suspect "may gain immediate control" of a weapon in a locked glove box, while he was in the patrol car, detained by a police officer, while another officer looked in the glove box of the suspect's car. The court examined the facts of this case in light of the Supreme Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long* the Supreme Court held that the fact that the suspect is "under the control" of the officers does not eliminate the risk that he will gain access a weapon. Even more on point with these facts is that the time period in which the suspect "may gain immediate control" of a weapon is the *entire* period from the initial stop to the suspect's departure. If the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will have access to any weapons inside. *Long*, 463 U.S. at 1051-1052.

The court held that if the defendant had broken away from the officers, obtaining a gun from inside the glove box would have taken only a moment more than obtaining it from anywhere else within the passenger compartment. A locked glove box would delay the suspect, but a suspect who broke free from the officers could also seize the keys from the officers, or he may have another means of entry to the glove box. Additionally, the suspect would have access to the gun at the end of the encounter if he was only issued a citation and not arrested.

The court recognized that a “protective search” for weapons is limited in scope, but the fact that it is a limited search does not mean that the officers may not search the glove box. In order to conduct a valid protective search the officer conducting the search must have a reasonable suspicion that the suspect is dangerous and the protective search must be directed only to locations which may contain a weapon and to which the suspect may have access. Based on the information that the officers had in this case, Officer Downe was justified in searching the locked glove box as part of the protective search.

11th CIRCUIT

U.S. v. Acosta
2004 U.S. App. LEXIS 5595
March 25, 2004

SUMMARY: A law enforcement officer is not required to administer *Miranda* warnings to a suspect during a brief investigative detention in a public place when the suspect is not under arrest or circumstances comparable to formal arrest. An arrestee’s refusal to sign a written waiver of rights is not enough to constitute an invocation of rights.

FACTS: An undercover officer with the United States Customs Service High Intensity Drug

Trafficking Area Group (HIDTA) informed his fellow officers about a money laundering operation involving Acosta. After an investigation, including extensive surveillance, officers decided to stop Acosta and an accomplice, Sade, outside Sade’s apartment before they could drive away. Officers pulled their cars in behind the car in the parking lot, and five or six officers approached Acosta and Sade. At least one officer had his gun drawn, but all of the officers’ guns were re-holstered within seconds.

An officer told Acosta that he was not under arrest, but that they needed to speak with him about a money laundering investigation. Acosta gave his identification to the officers, and at some point they patted him down. During a consent search of the car, officers located two bags filled with currency totaling approximately \$278,000.00. Sade told the officers that he lived in the apartment that Acosta had just left, and he consented to the officers searching the apartment. Officers found a duffel-bag with a small padlock on it located inside of Sade’s apartment. Acosta consented to a search of the bag and handed the officers a set of keys. When the officers unlocked and opened the bag they found more currency and some pellets of what appeared to be heroin. At that point an officer read Acosta his *Miranda* rights and placed him under arrest. After being informed of his rights Acosta told the officers that the heroin belonged to him and that Sade was not involved.

Acosta was taken to headquarters where he was interviewed. Officer Ocasio asked Acosta to read a *Miranda* rights form aloud and to initial each paragraph as he went through the form. Acosta acknowledged that he understood his *Miranda* rights both by initialing each paragraph and also by reading the entire form aloud. The officer asked Acosta, “Do you want to waive your rights or not?” Acosta responded “No, I’m not going to waive my rights.” The officer responded, “Okay.” Acosta then stated, “I can

collaborate, I can talk with you now...” The officer then asked, “Do you want to talk to us?” Acosta responded, “I’ll talk with you...my interrogation...” Officer Ocasio tried to explain to Acosta what it meant for Acosta to waive his rights. Acosta then said, “I am going to cooperate with you at this moment, right at this very instant. To me everything you need, I can answer all your questions without the need to sign that I waive my rights because I am not going to waive my rights.” Officer Ocasio then interviewed Acosta. Acosta explained who had given him the bag containing the money and the heroin, and the person he was to deliver the money to. He also told Officer Ocasio he was to be paid \$10,000.00 for making the delivery.

Acosta moved to suppress all physical evidence seized from his person, the duffle bag that was seized from Sade’s apartment, and all of the statements he made after being confronted by officers outside Sade’s apartment, including the statements made after being arrested and informed of his *Miranda* rights.

ISSUE: 1. Were the officers required to read the suspect *Miranda* warnings during the stop?

2. Did Acosta’s refusal to sign a written waiver of *Miranda* rights form amount to an invocation of his rights?

HELD: 1. No.

2. No.

DISCUSSION: Acosta was stopped in the parking lot of an apartment building in broad daylight. The officers’ actions were visible to anyone in the area who chose to look. Officers did not have their guns drawn when they

questioned Acosta. Acosta remained standing the entire time. No physical force was used against Acosta. He was not handcuffed. He was not placed in a police car at the time. He was assured that he was not under arrest. The restraint to which Acosta was subjected during the *Terry* stop was the minimal amount necessary for such a stop. The stop did not involve the type of “highly intrusive” coercive atmosphere that require the *Miranda* warnings even before a formal arrest is made. The totality of the circumstances were such that a reasonable person in Acosta’s position would not have believed that he was utterly at the mercy of the police, away from the protection of any public scrutiny, and had better confess or else. No *Miranda* warnings were required at the time.

Although Acosta refused to sign a written waiver of rights form, he still waived his rights. An arrestee’s refusal to sign a waiver of rights form is not enough to constitute an invocation of rights. At one point Acosta stated “No I am not going to waive my rights.” Acosta then volunteered, “I can collaborate, I can talk with you now.” “I am going to talk with you now...” “I am going to cooperate with you at this moment, right at this very instant. To me everything you need, I can answer all your questions without the need to sign that I waive my rights because I am not going to waive my rights.” The officer testified that Acosta seemed to be hung up on one particular word and had refused to sign the waiver because he thought that if he signed, “he would not have rights to anything.” Because Acosta did not unambiguously and unequivocally invoke his right to remain silent or his right to counsel while being questioned, the District Court did not err in denying his motion to suppress.