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1. Sharp v. Murphy: Indian Country Criminal Jurisdiction in Oklahoma

Presented by Robert Duncan and Henry McGowen, Attorney-Advisors / Senior Instructors, Federal Law Enforcement Training Centers, Artesia, New Mexico.

Sharp v. Murphy (previously known as Carpenter v. Murphy) is a pending case before the United States Supreme Court that will address deep questions of Indian Country criminal jurisdiction and the future of Indian law. This case serves as an ideal starting place for attorneys and law enforcement officers learning about Indian Country criminal jurisdiction. In this webinar, Robert Duncan and Henry McGowen will explore the history behind Indian Country as defined in 18 U.S.C. § 1151, the unique challenges that domestic dependent nations face in our constitutional structure, and the current status of Sharp v. Murphy.

Wednesday November 13, 2019: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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CASE SUMMARIES

Circuit Courts of Appeal

Second Circuit

United States v. Wallace, 937 F.3d 130(2d Cir. 2019)

Three New York City police officers were traveling in a patrol car when, at approximately 7:20 p.m., they saw a defective brake light on the vehicle in front of them and pulled the vehicle over. As two of the officers approached the vehicle, they saw scratches and dents all around the car and broken glass on the windshield. When the officers asked the driver, Wallace, for his driver's license and registration, Wallace provided his license, but stated that he did not have a copy of his registration.

While standing next the vehicle, the officers observed scratch marks and chipped paint on the top right corner of the driver's side door. The damage indicated to both officers that someone had pried open the door in order to forcibly enter the vehicle. The officers further observed that the registration sticker and inspection certificate on the windshield were damaged and faded. Both stickers appeared to have been peeled off and taped back onto the windshield.

When the officers asked Wallace about the condition of the stickers, he stated that the damage had been caused by a defogging spray, and explanation that one of the officers found inconsistent with his personal experience with defogging agents. When asked about the damage on the top right corner of the driver's side door, Wallace told the officers that it was caused on a prior occasion when he had to forcibly enter the vehicle after locking himself out of it.

Because of the damage to the registration sticker, the Vehicle Identification Number (VIN) printed on the registration sticker was only partially visible, although the officers were able to view the full VIN which was displayed on the dashboard from outside the vehicle. Based on their training concerning automobile crimes, the officers knew that a technique known as a "VIN swap" was often used to disguise a stolen vehicle. A VIN swap occurs when a VIN from one vehicle is removed and placed onto a stolen vehicle of a similar make and model. In the case of a VIN swap, the VIN that is visible on the vehicle's registration or dashboard may fail to match the VIN printed on other locations throughout the vehicle, such as the doorjamb or engine block, which may be more difficult to locate or impossible to remove. A successful VIN swap will disguise a stolen automobile if officers rely exclusively on the VIN that is outwardly visible rather than cross checking that number with an additional VIN when running a report on the vehicle.

The officers suspected Wallace's vehicle was stolen given their knowledge of VIN swaps and the various suspicious conditions, including: the signs of forced entry; Wallace's missing registration; and the damaged, taped-on condition of the registration stickers. Consequently, the officers decided to check if the VIN that was printed on the dashboard matched the VIN located on doorjamb of the vehicle. When the officers asked Wallace if he could open the driver's side door, he consented; however, the VIN label was missing from the doorjamb. At this point, the officers arrested Wallace under a New York statute that prohibited possessing a vehicle from which a VIN

label or sticker has been removed. The arrest occurred at approximately 7:29 p.m.. The officers impounded Wallace's vehicle and conducted an inventory search, which revealed a handgun and ammunition.

At approximately 7:22 p.m., one of the officers searched Wallace's name through law enforcement databases using a portable electronic device called a Rugby. The Rugby device returned a report that provided, among other information, Wallace's driver's license, license plate, and VIN. The information from the Rugby report matched Wallace's driver's license and the license plate the officers observed at the scene. Although it was clear that the Rugby report was run after the stop, it was not clear which officer ran the report or when the report was run in relation to the other events that occurred during the traffic stop.

The government charged Wallace with possession of a firearm and ammunition by a convicted felon.

Wallace filed a motion to suppress the evidence seized from his vehicle. Wallace argued that the officers unreasonably extended the duration of stop. Specifically, Wallace claimed that when the officers received the results of the Rugby report by 7:22 p.m., any reasonable suspicion that the vehicle may have been stolen had been dispelled. Consequently, according to Wallace, the remaining seven minutes of the stop constituted an unreasonable detention, rendering the evidence discovered during it inadmissible.

The court disagreed. The court relied upon the ruling in [Rodriguez v. United States](#), in which the Supreme Court held that "a police stop exceeding the time needed to handle the matter for which the stop was made" constitutes an unreasonable seizure under the Fourth Amendment. However, in [Rodriguez](#), the Court added that a traffic stop may be extended beyond the point of completing its mission "if an officer develops reasonable suspicion of criminal activity."

The court held that without the results of the Rugby report, the officers' extension of the traffic stop was supported by reasonable suspicion. First, the officers saw scratch marks on the upper-right portion of the driver's side door, which indicated to the officers that someone had forcibly entered the vehicle. Second, Wallace was unable to produce the registration for his vehicle. Third the vehicle's registration and inspection stickers were damaged, affecting the visibility of the VIN on the registration sticker. Fourth, when questioned about the condition of these stickers, Wallace stated that they had been damaged by a defogging spray, an explanation the officers found not to be credible.

Next, even assuming that all of the officers at the scene knew about the results of the Rugby report, the court concluded that the results of the Rugby report did not dispel the officer's reasonable suspicion that the vehicle was stolen. According to the officers, a Rugby report that a visible VIN on a vehicle is the same VIN that is registered to the driver does not automatically provide conclusive evidence that the vehicle is not stolen. Instead, as the officers testified, in the case of a VIN swap, a Rugby report could fail to identify a stolen vehicle because the report would provide information about a vehicle other than the vehicle that had been stopped. It is for this reason that an examination of a VIN in a non-public place, in a minimally intrusive location such as the doorjamb, may be helpful to determine if a vehicle has been stolen. The court recognized that under most circumstances, a Rugby report run during a traffic stop would confirm ownership of a vehicle and dispel any reasonable suspicion of auto theft. However, in this case, the court found the totality of the circumstances suggested that Wallace's vehicle may have been stolen and the results of the Rugby report were thereby inconclusive. As a result, court concluded that the

officers were justified in extending the duration of the traffic stop for the limited purpose of confirming the VIN on the doorjamb.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca2/17-0472/17-0472-2019-09-03.pdf?ts=1567522806>

Third Circuit

Pellegrino v. United States Transp. Sec. Admin., 937 F.3d 164 (3d Cir. 2019)

Nadine Pellegrino sued the Transportation Security Administration (TSA) and several Transportation Security Officers (TSOs) regarding an encounter at a security checkpoint and a private screening room at the Philadelphia International Airport. Pellegrino sued the United States under the Federal Tort Claims Act (FTCA) for the intentional torts of false arrest, false imprisonment, and malicious prosecution. The district court dismissed Pellegrino's claims against the government under the FTCA. The district court held that TSOs are not "investigative or law enforcement officer[s]" under the FTCA; therefore, the government was not liable for damages caused by their intentional torts.

Pellegrino appealed to the Third Circuit Court of Appeals.

In general, the federal government is immune from lawsuit. However, Congress enacted the FTCA, which waives the government's immunity from suit and allows individuals to sue the government for injuries "caused by . . . any employee of the Government." The government's waiver of immunity from suit is not absolute. The FTCA does not allow individuals to sue the government for intentional torts, unless the intentional tort is committed by an "investigative or law enforcement officer." The FTCA defines a law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." The issue before the court was whether TSOs are "law enforcement officers" under the FTCA.

First, the court noted that TSOs are officers by name, wear uniform with badges noting that title, and serve in positions of trust and authority. Although TSOs are designated as "employees" under the Aviation Security Act (ASA) and not "law enforcement officers," the court found there is no indication that only a specialized "law enforcement officer" as defined in the ASA qualifies as an officer of the United States under the FTCA.

Second, the court held that TSO screenings are searches under the Fourth Amendment and under the definition provided by the Supreme Court in [Terry v. Ohio](#). In [Terry](#), the Court found that "a careful exploration of the outer surfaces of a person's clothing all over his or her body" in an attempt to find weapons constitutes a "search." Here, the court found this to be an accurate description of the duties of a TSO, who are empowered by 49 U.S.C. § 44935(f)(1)(B)(v), to "thoroughly conduct" an exploration "over an individual's entire body."

Finally, the court held that TSOs' searches are "for violations of Federal law" given that their inspections are for items such as firearms and explosives, which is banned on aircraft pursuant to federal law.

Consequently, because the court held that TSOs are “officer[s] of the United States” empowered to “execute searches” for “violations of Federal law,” it reversed the decision of the district court and allowed Pellegrino’s lawsuit to proceed against the government.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca3/15-3047/15-3047-2019-08-30.pdf?ts=1567182606>

Fourth Circuit

United States v. Curry, 937 F.3d 363 (4th Cir. 2019)

Four uniformed police officers were on patrol in a neighborhood that had been the site of frequent gun violence, with six shooting and two homicides in the previous three months. The most recent homicide in the neighborhood had occurred ten days earlier. At around 9:00 p.m., the officers heard approximately six gunshots a few blocks away. The officers drove two to three blocks, arriving in the area from which they believed the shots originated, approximately thirty-five seconds later.

The officers exited their car and approached a group of men who were walking away from the area. The officers illuminated the men with their flashlights and ordered them to stop, raise their hands, and lift their shirts to expose their waistbands for any concealed weapons. When one of the men, Bill Curry, failed to comply, the officers attempted to frisk him for weapons. After Curry resisted the officers, a brief scuffle ensued and Curry was taken to the ground and handcuffed. The officers then recovered a silver revolver from the ground near Curry.

The government charged Curry with being a felon in possession of a firearm.

Curry filed a motion to suppress the firearm. Curry argued that the officers violated the Fourth Amendment by stopping and searching him without first establishing reasonable suspicion that he was engaged in criminal activity.

The district court agreed and suppressed the firearm. The court held that the officers lacked reasonable suspicion to justify the brief investigatory stop. The court reasoned that because the officers “had no particularized suspicion as to Curry” and were “not attempting to detain only Curry” but the other men as well, the stop could not be justified under [Terry v. Ohio](#). Although the court recognized that the officers had legitimate concerns for their safety, the court stated, “the Constitution requires a particularized and objective basis for suspecting the particular person stopped of criminal activity.” Because the district court held that the initial stop was unlawful, it did not consider whether the officers were later justified in searching Curry. The government appealed.

The Fourth Amendment requires that searches and seizures be reasonable. To determine the reasonableness of a search or seizure, a court must balance the government’s interest in conducting a search or seizure against the degree to which the search or seizure invades a person’s legitimate expectations of privacy. The court added that this balance depends upon the context within which a search or seizure occurs.

Depending on the context, law enforcement officers often need some suspicion of criminal activity to reasonably search or seize a person. For example, a vehicle may be stopped if officers reasonably suspect the driver committed a traffic violation. Once the vehicle is stopped, an

occupant may be frisked for weapons if officers reasonably believe the occupant is armed and dangerous. However, even without suspicion of criminal activity, a search or seizure may still be reasonable when “special governmental needs, beyond the normal need for law enforcement” justify the intrusion.

In this case, the court held that the government’s interest in responding to the shooting and preventing violence was an exigent circumstance that constituted a special need. Consequently, the court found that the officers acted reasonably in stopping Curry and the other men without individualized suspicion that any of them were involved in criminal activity. The court recognized that the officers were rushing to respond to shots fired seconds earlier in a densely populated residential neighborhood. The court noted the officers were faced with the prospect that an active shooter might continue to threaten the safety of the public. Even though one purpose of the officers’ actions that night may have included ordinary law enforcement, the immediate purpose of stopping Curry and the men and illuminating them with their flashlights was to protect the public and themselves from the threat posed by an active shooter.

Although the court reversed the district court’s decision to suppress the firearm because the officers’ stop was lawful, it remanded the case to the district court to determine whether the subsequent search of Curry was also lawful.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca4/18-4233/18-4233-2019-09-05.pdf?ts=1567708225>

Sixth Circuit

United States v. Clayton, 2019 U.S. App. LEXIS 26382 (6th Cir. MI August 30, 2019)

Detective Sutherland with the Battle Creek Police Department arrested Michael Clayton for a variety of offenses related to the sexual exploitation of three young women. At the police station, Det. Sutherland interrogated Clayton. Before any questioning, Det. Sutherland read Clayton his Miranda rights from a standard form used by the Battle Creek Police Department. Det. Sutherland told Clayton:

Before we ask you any questions, you must understand your rights.

1. You have the right to remain silent.
2. Anything you say will be use against you in court.
3. You have the right to talk to a lawyer before we ask you any questions.
4. If you cannot afford to have a lawyer, one will be appointed for you before any questioning if you wish.

Clayton acknowledged that he understood his rights. However, in giving these warnings, Det. Sutherland misread the third Miranda warning concerning the right to counsel. Det. Sutherland tracked the part of the form that stated, “[y]ou have the right to talk to a lawyer before we ask you any questions, but he omitted the following clause of the warning – “and to have him/her present with you during questioning.” Afterward, Det. Sutherland conducted two brief interviews of Clayton in which Clayton did not provide any material statements.

The next day, a special agent with Homeland Security Investigations (HSI) and a different Battle Creek Police Department detective interviewed Clayton. At the beginning of the interview, the

HSI agent told Clayton, “It’s my understanding that you were read Miranda, and you’re good to go . . . [y]ou still want to talk because this is your lifeline?” Clayton replied that he still wanted to talk. During the course of the one-hour interview, Clayton made incriminating statements to the officers.

The government charged Clayton with several offenses related to sexual exploitation of minors as well as drug and firearm offenses.

Clayton filed a motion to suppress the statements he made to the officers. Clayton claimed that by deviating from the Battle Creek Police Department’s standard Miranda form, Det. Sutherland did not properly inform him of his right to have an attorney present during police questioning. As a result, Clayton argued that his admissions to the officers as well as any physical evidence obtained because of them should have been suppressed. The district court denied Clayton’s motion and he appealed to the Sixth Circuit Court of Appeals.

In Miranda v. Arizona, the Supreme Court outlined the four warnings that an officer must give before questioning a suspect in custody. They are:

1. You have the right to remain silent,
2. Anything you say can be used against you in court,
3. You have the right to the presence of an attorney, and
4. If you cannot afford an attorney, one will be appointed for you before any questioning if you would like.

Ultimately the court held that while Detective Sutherland would have been better served to read the Miranda warnings exactly as provided on his department’s form, there is no specific formula or wording that an officer must use. The court noted that Miranda only requires that a defendant be informed of his right to “the presence of an attorney.” While Miranda clarified “presence” to include the right to consult with an attorney before and during questioning, Miranda does not require a warning exactly to that effect. Instead, concerning Miranda’s third and fourth warnings, the Supreme Court only requires that a police officer reasonably convey to a suspect that he has the right to consult with counsel, before any questioning, regardless of whether he can afford one. To determine whether a suspect’s right to counsel was reasonably conveyed to him, a court analyzes whether that warning effectively “communicated that the right to counsel carried forward to and through the interrogation.”

In this case, Det. Sutherland told Clayton that he had the right to consult with an attorney, as required by Miranda and that the right began immediately, before any questions could be asked. In addition, “nothing in the words used [by Det. Sutherland] indicated that counsel’s presence would be restricted [during] questioning,” which undermined Clayton’s argument. As a result, the court found that Det. Sutherland’s warning “reasonably conveyed Clayton’s right to have an attorney present, not only at the outset of interrogation, but at all times.” The court added the Third and Fourth Circuits Courts of Appeal have held that warnings in which officers told suspects, “you have the right to an attorney,” even without an express reference to the right to counsel during questioning, was sufficient to satisfy Miranda.

Clayton further argued that regardless of whether he was properly Mirandized, his statements were involuntary.

The court disagreed. The court found that the officers did not engage in any coercive conduct and there was no evidence to suggest that Clayton’s statements was involuntary.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/18-2237/18-2237-2019-08-30.pdf?ts=1567182643>

Ninth Circuit

United States v. Cano, 934 F.3d 1002 (9th Cir. 2019)

On July 25, 2016, Cano arrived at the San Ysidro Port of Entry from Tijuana. During primary inspection, Cano stated: "he was living in Mexico, working in San Diego, but going to L.A. on that day." Pursuant to a random Customs and Border Protection (CBP) computer referral, Cano was referred to a secondary inspection, where a narcotic-detecting dog alerted to the vehicle's spare tire. A CBP official removed the spare tire from the undercarriage of Cano's truck and discovered 14 vacuum-sealed packages, containing 14.03 kilograms of cocaine.

A CBP officer arrested Cano, seized his cell phone, and called Homeland Security Investigations, which dispatched Agents Petonak and Medrano to investigate. After arriving, Agent Petonak manually searched Cano's cell phone, noticing a "lengthy call log" but no text messages. Agent Petonak later stated that the purpose of his manual search was "to find some brief investigative leads in the current case," and "to see if there's evidence of other things coming across the border."

Agent Petonak questioned Cano, who stated that he was heading to a carpet store in San Diego to look for work; however, he could not provide the name or address of the store. While Agent Petonak questioned Cano, Agent Medrano conducted a second manual search of Cano's cell phone. Agent Medrano examined the call log and wrote down some of the numbers on a piece of paper. He also noticed two text messages that had arrived after Cano had reached the border, and he took a photograph of the messages. Next, Agent Medrano conducted a "logical download" of the phone using Cellebrite software. A Cellebrite search allows the user to access text messages, contacts, call logs, media, and application data on a cell phone and to select which types of data to download.

After Agent Petonak interviewed Cano, he reviewed the results of the Cellebrite download of Cano's phone by Agent Medrano. The Cellebrite results revealed that Cano had not sent any text messages and the call log did not contain any phone numbers that corresponded to carpet stores in San Diego.

Before trial, Cano filed a motion to suppress any evidence obtained from Agent Petonak and Medrano's warrantless searches of his cell phone at the border. The district court denied Cano's motion, ruling that the manual searches and the Cellebrite search of Cano's cell phone were valid border searches. Following his conviction, Cano appealed. Cano argued that the warrantless searches of his cell phone violated the Fourth Amendment because they were not valid border searches. Specifically, Cano claimed the agents were searching for evidence of a crime, not contraband that could be lawfully seized at the border.

The Ninth Circuit Court of Appeals noted that border searches constitute an exception to the Fourth Amendment's warrant requirement. The court added that border searches generally do not require any particularized suspicion of criminal activity as long as they are "routine inspections and searches of individuals or conveyances seeking to cross our borders." Finally, the court stated that border searches are reasonable under the Fourth Amendment because they occur at the border

and “are rooted in the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.”

The court cautioned that the sovereign’s right to conduct suspicionless searches at the border “does not mean, however, that at the border, anything goes.” Instead, the border search exception is limited in two ways. First, border searches may only be conducted by “persons authorized to board or search vessels,” which includes customs and border officials, but not general law enforcement officers. Second, a border search must be conducted in enforcement of customs laws and not for general law enforcement purposes.

First, as a general principle, the court held that cell phones, including the phone’s data, are subject to search at the border. The court recognized that one of the purposes of a border search is to interdict contraband entering the country. The court disagreed with the defendant’s premise that cell phones cannot contain contraband. Although cell phone data cannot hide physical objects, the court held that cell phone data can contain digital contraband, i.e. child pornography.

Next, as a general principle, the court held that manual searches of cell phones at the border are reasonable without individualized suspicion that the phone contains digital contraband. However, the court found that forensic searches of cell phones at the border require reasonable suspicion that the phone contains digital contraband. In [United States v. Cotterman](#), decided by the Ninth Circuit Court of Appeals in 2013, the court held that a warrantless forensic search of a laptop computer at the border required reasonable suspicion that the computer contained digital contraband. In this case, the court found no basis to distinguish a forensic cell phone search from a forensic laptop search.

Finally, as another general principle, the court held that the scope of a border search of a cell phone is limited to searching a phone to determine if it contains contraband and does not extend to searching a phone for evidence of past or future border-related crimes. The court recognized that this holding was in conflict with the Fourth Circuit Court of Appeals holding in [United States v. Kolsuz](#), decided in 2018 (See [6 Informer 18](#)). In [Kolsuz](#), the court held that a forensic search of the defendant’s phone under the border search exception was reasonable to locate evidence of an export violation that the government had already detected as well as evidence related to other ongoing attempts to violate export laws. The Fourth Circuit held that “the justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally.”

Against this backdrop, the court had to determine whether the agents’ manual and forensic searches of Cano’s phone were searches for digital contraband or searches for evidence of a crime, which exceeded the scope of a valid border search, as Cano claimed.

The court held that the first manual search of Cano’s phone fell within the scope of a search for digital contraband. Once Cano was arrested, Agent Petonak briefly searched Cano’s phone and saw that there were no text messages. The court reasoned that because child pornography may be sent via text message, Agent Petonak acted within the scope of a permissible border search by accessing the phone’s text messages.

Next, the court held that the second manual search of Cano’s phone conducted by Agent Medrano exceeded the scope of a search for digital contraband. While it was reasonable for the agents to open the phone’s call log to verify that the log contained a list of phone numbers and not surreptitious images or videos, the border search exception did not justify Agent Medrano’s

recording of the phone numbers and text messages for further investigation because that action had no connection to ensuring that the phone lacked digital contraband. As a result, the court held that the second manual search of Cano's phone was unreasonable as a border search under the Fourth Amendment.

Finally, the court held that if the Cellebrite search of Cano's phone qualified as a forensic search, the entire search was unreasonable under the Fourth Amendment. Although the agents had reason to believe that Cano's phone would contain evidence leading to additional drugs, they did not have an objectively reasonable suspicion that the digital data in the phone contained contraband. Absent reasonable suspicion, the court concluded that the border search exception did not authorize the agents to conduct a warrantless forensic search of Cano's phone, and evidence obtained through a forensic search should be suppressed.

In a footnote, the court stated that the issue of whether the Cellebrite search constituted a forensic search was disputed and that the district court passed on the issue without deciding it. Similarly, the court declined to rule on this issue because neither party briefed the issue to the court and because the court vacated Cano's conviction.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/17-50151/17-50151-2019-08-16.pdf?ts=1565975000>

United States v. Garay, 2019 U.S. App. LEXIS 27908 (9th Cir. CA September 17, 2019)

When police officers attempted to stop Nahach Garay for a traffic violation he refused to pull over instead leading the officers on a high-speed chase. The chase ended when Garay crashed his car into a ditch and attempted to flee on foot. The officers arrested Garay and discovered thousands of dollars of cash and certain quantities of four different illegal drugs on his person.

While waiting for a tow truck to arrive, officers searched Garay's car and found two loaded rifles, ammunition, and two cell phones, one of which was claimed by the passenger. The officers filled out a Vehicle Report on which they listed the two firearms but did not list any other property. Later, the officers booked the rifles, ammunition, and cell phones as evidence.

The officers obtained a warrant to search Garay's cell phone from a state court judge. In his affidavit, an officer described the high-speed chase, the drugs and cash found on Garay's person and the officer's knowledge, based on his training and experience, that individuals who possess firearms take pictures of them and communicate via text messages to further their criminal activity.

After the case was referred for federal prosecution, the government obtained a warrant to search Garay's cell phone from a federal magistrate. In her affidavit, a federal law enforcement officer stated that in her experience, as well as on the "collective experiences" of law enforcement agents that felons prohibited from possessing guns use mobile phones to coordinate buying and selling guns.

Garay's phone contained photographs that tied Garay to one of the firearms that was recovered from his car.

The government charged Garay with being a felon in possession of a firearm. Garay filed a motion to suppress the warrantless seizure of his cell phone.

First, Garay argued that the warrantless seizure of his phone was unreasonable because the officers used their authority to inventory the car's contents as a pretext to rummage for criminal evidence. Garay claimed the officers' failure to list the property found in his car on an inventory sheet, as required by department policy, supported his position.

Under the Fourth Amendment and relevant case law, it is well established that, once a vehicle has been impounded or towed, police officers are permitted to inventory the car's contents. However, to comply with the Fourth Amendment's reasonableness requirement, inventory searches "must not be used as a ruse for a general rummaging in order to discover incriminating evidence."

First, the court held that the failure to complete the inventory sheet, as required by department policy, did not automatically invalidate the inventory search. The court recognized that the officer who searched Garay's car complied with the department's inventory search policy in all material respects, for example: the officer obtained the tow truck driver's signature and noted the date and time of the driver's arrival; he obtained a file number for the inventory; and he checked a box on the relevant inventory form indicating that items of value were in the car before identifying and booking the items recovered for the car as "evidence / property." The court concluded that the officer's failure to complete the inventory sheet was not a material deviation from the department's inventory policy. The court supported its position by noting that the First, Fourth, Fifth, and Eleventh Circuits have expressly recognized that the failure to complete an inventory form does not automatically invalidate an inventory search. In addition, the court found that the Second, Seventh, Eighth, and Ninth Circuits have upheld inventory searches despite other comparable "administrative errors." In all of these cases, the courts found that administrative errors do not automatically invalidate inventory searches. Instead, there must be something to suggest that the police used an inventory search "in an after-the-fact attempt to justify a simple investigatory search for incriminating evidence."

Second, the court held that there was no evidence to suggest that the officers used the inventory search as a pretext to "rummage for evidence." The court found that the contents of Garay's wrecked car had to be removed and safeguarded before the car was towed from the crash site, which is the essence of an inventory search. In addition, because the site was also a crime scene, the items in the car were "sensibly" treated as evidence. Although the circumstances leading up to the search would have caused the officers to believe that Garay's car contained evidence of criminal activity, that expectation did not invalidate an otherwise reasonable inventory search. As a result, the court held that Garay's cell phone was lawfully seized as part of a valid inventory search.

Garay further argued that the affidavits supporting the search of the contents of his cell phone were inadequate. Specifically, Garay claimed that the affiants' beliefs on the basis of their training and experience "that that individuals who possess firearms take pictures of them and communicate via text messages to further their criminal activity," without explaining this training and experience in detail, should not have been considered by the judges who issued the warrants.

The court disagreed. The court commented that it has long held that affiants seeking a warrant may state conclusions based on training and experience without having to detail that experience. The court added that the circumstances leading up to the search of the car, including the chase, Garay's arrest, and the seizure of cash and drugs from Garay, coupled with the affiants' training and experience, provided probable cause to believe that criminal evidence might be found on Garay's cell phone.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/18-50054/18-50054-2019-09-17.pdf?ts=1568739705>

Tenth Circuit

United States v. Romero, 935 F.3d 1124 (10th Cir. 2019)

At approximately 5:30 p.m., a police officer drove past a church and saw a man standing at the front entrance, peering into the window. The officer knew the church was not holding services at the time and that there had been recent reports of theft and vandalism at other churches in the area. Based on this information, the officer drove into the church parking lot to investigate.

Upon arrival, the officer saw the man, later identified as Manuel Romero, crouching down to fill up a water bottle from the outdoor hose connected to the church. The officer saw that Romero had a pocket clip for a folding pocketknife on his waistband near his right hip and a linear bulge on his right bicep that the officer suspected was another knife.

When the officer asked Romero what he was doing, Romero told him that he was getting some water and charging his cell phone, gesturing to the items, which he held in each hand, respectively. The officer asked Romero if he had any weapons and Romero gestured to the pocket clip on his waistband. After the officer told Romero not to reach for the knife, Romero immediately lifted both hands to chest level. The officer then told Romero to put down his water bottle and phone so he could frisk Romero. When Romero hesitated, the officer told Romero that he needed to comply or that the officer would arrest him for “resisting [and] obstructing.” After Romero told the officer he did not want to go to jail, the officer pointed his taser at Romero and told him to put down the items in his hands. Romero put the phone and water bottle on the ground and turned around to face the church wall as directed by the officer. The officer then ordered Romero to the ground and Romero complied by immediately lowering himself to the ground. While Romero was lying on the ground, the officer frisked him and discovered a knife.

Ultimately, the officer determined that Romero was resisting and failing to obey his commands and arrested him for violating N.M. Stat. § 30-22-1(D). The officer searched Romero incident to arrest and found a handgun in Romero’s backpack. The government later charged Romero with one count of being a felon in possession of a firearm and one count of knowingly possessing a stolen firearm.

Romero filed a motion to suppress the handgun. Romero argued that the officer did not have reasonable suspicion to conduct a Terry frisk nor probable cause to arrest him under N.M. Stat. § 30-22-1(D). The district court denied Romero’s motion and he appealed.

First, the Tenth Circuit Court of Appeals assumed without deciding that the officer had reasonable suspicion to conduct a Terry frisk.

Second, the court agreed with Romero that the officer lacked probable cause to arrest him for violating N.M. Stat. § 30-22-1(D). New Mexico Stat. § 30-22-1(D) prohibits “[r]esisting, evading or obstructing an officer” by, among other things, “resisting or abusing [a] peace officer in the lawful discharge of his duties.” The New Mexico Court of Appeals has interpreted the phrase, “resisting or abusing” in section 30-22-1(D) to prohibit three types of conduct: (1) physical acts

of resistance; (2) the use of “fighting words” to attack an officer; and (3) as relevant in this case, the refusal to obey lawful police commands.

The court noted that New Mexico and Tenth Circuit cases provide few examples of what it means to refuse to obey lawful police commands, in violation of section 30-22-1(D). However, in each case where a defendant was found to have unlawfully resisted an officer, the commands given by the officer were clear and repeated, the defendant was given a reasonable opportunity to comply with the commands under the circumstances, and the defendant nonetheless overtly refused to comply.

Given these background cases, the court concluded that it was not objectively reasonable for a trained police officer to believe that Romero was resisting in violation of section 30-22-1(D). During their brief encounter, the officer issued five clear instructions to Romero. Romero complied with all of those commands except for the instruction that he put his hands on the wall, which became moot when the officer subsequently ordered Romero to go to the ground instead. Although Romero exhibited some frustration during the encounter, he complied with all of the officer’s orders within one minute. Consequently, the court concluded that the officer lacked probable cause to arrest Romero under section 30-22-1(D), which rendered the search incident to arrest unlawful under the Fourth Amendment.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca10/18-2180/18-2180-2019-09-05.pdf?ts=1567703029>
