Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

December 2016

The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals 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 Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting https://www.fletc.gov/legal-resources.

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The Informer – December 2016

Supreme Court Preview

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FLETC Informer Webinar Series

1. **Protective Sweeps**

   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   This webinar will explore the warrantless "protective sweep" doctrine as it has evolved from *Maryland v. Buie*. We will discuss the rule generally, and then look at differences in the application of the doctrine in different situations by reviewing cases from the various circuits.

   Date and Time: Friday, January 6, 2017, 2:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

2. ***Terry* Stops**

   2-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   This two-hour block of instruction focuses on the United States Supreme Court's landmark decision *Terry v. Ohio*. We will discuss the Court's holding, its applicability to law enforcement officers, and review some recent cases of interest involving *Terry* stops.

   Date and Time: Thursday, January 12, 2017, 2:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

3. **Federal Criminal Discovery for Law Enforcement Officers**

   1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   This one-hour block of instruction will discuss the federal criminal discovery rules to include: *Brady*, *Giglio*, the Jenks Act (18 U.S.C. § 3500), and Fed. Rule Crim. Pro. 16 and 26.2.

   Date and Time: Tuesday, January 24, 2017, 2:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

4. **Detentions Under the *Summers* Doctrine**

   1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division

   This one-hour block of instruction will discuss the detention of individuals during the execution of a search warrant under *Michigan v. Summers* (the *Summers* Doctrine).

   Date and Time: Wednesday, February 1, 2017, 2:30 p.m. EST

   To join this webinar: https://share.dhs.gov/informer

Bruce's Brownbag Webinar

Each week, Bruce-Alan Barnard selects a recent Federal case that is "hot off the press" and discusses the impact and possible lessons learned for law enforcement officers. This webinar series is intentionally offered over the lunch break, so pack your lunch on Wednesday, eat at your desk, and join us for an interesting discussion on cases involving the legal aspects of law enforcement. **The site is always running and you can download slides and recordings of previous webinars in the archives on the site.** We hope to see you every Wednesday!

1. **Wednesday January 4, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
2. **Wednesday January 11, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
3. **Wednesday January 25, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**
4. **Wednesday February 1, 2017 - 11:45 a.m. to 12:15 p.m. (EST)**

To join Bruce's Brown Bag Webinar: https://share.dhs.gov/bbw

FLETC Informer Rewind Wednesday

When the training schedule does not allow us to provide a "live" webinar, please join us for the broadcast of a previously aired webinar.

1. **Wednesday January 4, 2017 - 12:15 p.m. to 3:15 p.m. (EST)**
   Law Enforcement Legal Refresher (from December 8, 2016 – 3 hours)

2. **Wednesday January 11, 2017 - 12:15 p.m. to 1:15 p.m. (EST)**
   Protective Sweeps (from January 6, 2017)

3. **Wednesday January 25, 2017 - 12:15 p.m. to 2:15 p.m. (EST)**
   Terry Stops (from January 12, 2017)

4. **Wednesday February 1 - 12:15 p.m. to 1:15 p.m. (EST)**
   Federal Criminal Discovery (from January 24, 2017)

To join a Rewind Wednesday webinar: **https://share.dhs.gov/informer**

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Please check the FLETC Webinar Schedule and News section at: https://share.dhs.gov/informer for updates and the most current webinar-related news.

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5. You will now be in the meeting room and will be able to participate in the webinar.
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7. Training certificates will be provided at the conclusion of each webinar.

Supreme Court Preview

Use of Force: *42 U.S.C. § 1983* / Qualified Immunity / Provocation Rule

Los Angeles County, CA v. Mendez

Decision Below: 815 F.3d 1178 (9th Cir. 2016); http://cases.justia.com/federal/appellate-courts/ca9/13-56686/13-56686-2016-03-02.pdf?ts=1456941737

Los Angeles County Deputies Conley and Pederson were part of a team of police officers that went to a residence owned by Paula Hughes to search for Ronnie O'Dell, a wanted parolee. Deputies Conley and Pederson were assigned to clear the rear of Hughes' property and cover the back door of Hughes' residence. The deputies were told that a man named Mendez lived in the backyard of Hughes' residence with his pregnant wife. Deputies Conley and Pederson went through a gate and entered the backyard where they saw a small plywood shack. The deputies entered the shack without a search warrant, and without knocking and announcing their presence. Inside the shack, the deputies saw the silhouette of a man pointing, what appeared to be a rifle, at them. Deputies Conley and Pederson fired fifteen shots at the man, later identified as Mendez. Mendez and his wife both sustained gunshot wounds. The deputies later discovered that Mendez had been pointing a BB gun that he kept by his bed to shoot rats inside the shack.

Mendez and his wife sued Conley, Pederson and the Los Angeles County Sheriff's Department under *42 U.S.C. § 1983* claiming the deputies violated the *Fourth Amendment* by entering their dwelling without a warrant and then using excessive force against them.

The district court held the warrantless entry into the shack violated the *Fourth Amendment*, as it was not supported by exigent circumstances or another exception to the warrant requirement. The court then concluded the deputies did not use excessive force in violation of the *Fourth Amendment*, as it was reasonable for the deputies to mistakenly believe Mendez's BB gun was a rifle. Nonetheless, the court held that the deputies were liable for the shooting under the Ninth Circuit's provocation rule and awarded approximately four million dollars in damages. The provocation rule states,

> "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."

The district court held that because the officers violated the *Fourth Amendment* by entering the shack without a warrant, which proximately caused the injuries to Mendez and his wife, it was proper to hold the officers liable for their injuries.

In affirming the district court, the Ninth Circuit Court of Appeals commented, "[E]ven without relying on our circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause," which in the context of *§ 1983* should make officers responsible for the consequences of their actions.

Los Angeles County and the deputies appealed. The United States Supreme Court agreed to hear the case on December 2, 2016.

The issues before the Supreme Court are:

1. Whether the Ninth Circuit's provocation rule should be barred, as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined under *42 U.S.C. § 1983*.

2. Whether, in an action brought under *42 U.S.C. § 1983*, an incident giving rise to a reasonable use of force, (officers mistaking BB gun for a rifle) is an intervening event that breaks the chain of causation from a prior unlawful entry.

The Court granted certiorari in December 2, 2016 and has not yet scheduled oral arguments.

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CASE SUMMARIES

United States Supreme Court

Shaw v. United States, 2016 U.S. LEXIS 7431 (U.S. December 12, 2016)

Shaw had access to Stanley Hsu's bank statements, which contained Hsu's personal information. Using Hsu's personal information, Shaw opened an email account in Hsu's name, and then used this email account to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. Shaw subsequently transferred money out of Hsu's Bank of America account into the PayPal account he controlled.

The government charged Shaw with Bank Fraud under *18 U.S.C. § 1344(1)*.

The Bank Fraud Statute, *18 U.S.C. § 1344(1)*, makes it a crime to knowingly execute a scheme to defraud a financial institution.

Shaw argued that a prosecution under *§ 1344(1)* required the government to prove the defendant intended the bank to be the primary financial victim of his fraud, not a bank customer such as Hsu. The district court disagreed, as did the Ninth Circuit Court of Appeals, which affirmed Shaw's conviction. Shaw appealed the United States Supreme Court.

First, Shaw argued the bank fraud statute did not cover schemes to deprive a bank of customer deposits.

The Court disagreed. When a customer deposits funds, the bank ordinarily becomes the owner of the funds even though the customer retains the right to withdraw those funds. The bank then has the right to use those funds as a source of loans that help the bank earn profits. Consequently, a scheme to fraudulently obtain funds from a bank depositor's account normally is also a scheme to fraudulently obtain property from a financial institution under *18 U.S.C. § 1344(1)*, where, as here, Shaw knew the bank held the funds in Hsu's account and he misled the bank in order to obtain those funds.

Second, even though the bank did not incur a financial loss, the Court held that *§ 1344(1)* only requires proof of a scheme to defraud, not proof of actual financial loss or that the defendant intended to cause a financial loss.

Third, the Court held the government was not required to prove that Shaw knew the bank had a property interest in Hsu's account to establish that he intended to defraud a financial institution. The court noted it was enough for the government to show that Shaw knew the bank possessed Hsu's account, and that he made false statements to the bank, which caused the bank to release the funds unlawfully to Shaw.

Fourth, Shaw argued that the bank fraud statute requires the government to prove more than his simple knowledge that he would likely harm the bank's property interest. Shaw claimed the government was required to prove that he intended to harm the bank's property interest.

The Court rejected this argument. The Court held that, on its face, *18 U.S.C. § 1344(1)* clearly makes criminal the "knowing execution of a scheme to defraud."

Finally, while rejecting Shaw's positions regarding the interpretation *§ 1344(1)*, the Court nonetheless vacated Shaw's conviction and remanded the case to the Ninth Circuit to determine whether one of the trial court's jury instructions was improper.

For the court's opinion: https://www.supremecourt.gov/opinions/16pdf/15-5991_8m59.pdf

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Circuit Courts of Appeal

First Circuit

United States v. Swan, 2016 U.S. App. LEXIS 20843 (1st Cir. Me. Nov. 21, 2016)

Police officers suspected Swan, a local, elected official, was involved in a scheme to receive a kick-back from a businessman. After an undercover sting operation, two officers confronted Swan after she exited her car in a Laundromat parking lot. The officers asked Swan if she would be willing to talk to them about the case at the police station. Swan agreed, and accompanied by one of the officers, drove herself to the police station. At some point during the encounter, one of the officers came into possession of Swan's cell phone.

At the police station, the officers directed Swan to an interview room and shut the door. The officers told Swan that she was not under arrest, she was free to leave at any point, and it was "fine" if she did not want to have a conversation with them. Swan agreed to stay and speak with the officers, but when Swan asked whether she could have her cell phone back, the officers told her that they were only keeping the phone so Swan would not get distracted. A short time later, Swan's phone rang and as she reached to answer it, one of the officers told Swan he was just going to send the call to voicemail. Swan responded, "All right." Over the next ninety-minutes, Swan made incriminating statements to the officers. Near the end of the interview, Swan told the officers that she needed to call her husband. The officers returned Swan's phone and allowed her to call her husband. After finishing her call, Swan resumed her interview with the officers, retaining possession of her phone for the rest of the interview.

The government subsequently charged Swan with several counts of Hobbs Act extortion.

Swan filed a motion to suppress her incriminating statements. Swan argued the officers failed to advise her of her *Miranda* warnings before they interviewed her.

Police officers are required to provide *Miranda* warnings before conducting a custodial interrogation of a suspect. In this context, custody for *Miranda* purposes occurs when "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave."

In this case, Swan argued that she was in custody for *Miranda* purposes during her initial encounter with the officers in the parking lot. Without deciding this issue, the court noted that even if the confrontation in the parking lot was custodial, Swan was not entitled to a *Miranda* warning unless she remained in custody at the police station when she made the incriminating statements.

The court then concluded that Swan was not in custody for *Miranda* purposes at the police station. First, before questioning Swan, the officers told her that she was "not under arrest," that she was free to leave "at any point," and that it was "fine" if she did not "want to have a conversation" with them. The court found that these unambiguous statements would have led a reasonable person in Swan's position to understand that she was not in custody, regardless of what had occurred previously in the parking lot. In addition, the duration of the interview was relatively short, the number of officers present was not overwhelming, the officers never handcuffed Swan, and the officers closed the interview room door simply to ensure privacy.

Finally, even though the officers were holding Swan's phone, the officers told her it would be returned at the end of the interview and allowed Swan to use the phone to call her husband when she requested it. The court concluded that the officers' temporary possession of Swan's phone was not sufficient to render the interview custodial.

After considering these factors, the court concluded that a reasonable person in Swan's position would have felt free to terminate the interview and leave the police station. As a result, the court held that Swan was not subjected to a custodial interrogation; therefore, the officers were not required to provide her with *Miranda* warnings.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/14-1672/14-1672-2016-11-21.pdf?ts=1479762005

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Seventh Circuit

United States v. Thompson, 2016 U.S. App. LEXIS 21014 (7th Cir. Ill. Nov. 22, 2016)

As part of an investigation into a drug trafficking organization, federal agents were conducting surveillance on Marvin Bausley, whom they believed had approximately ten kilograms of cocaine in his car. The agents followed Bausley to an apartment building where they saw him park his car. A man later identified as Thompson, came out of the building wearing a black backpack and got into Bausley's car. Bausley drove once around the block and again stopped outside the apartment building. Thompson exited the car and entered the apartment building.

One of the agents entered the building shortly after Thompson, but did not see anyone in the lobby. The agent remembered that an apartment on the ninth floor had been of interest in their investigation, so the agent took the elevator to the ninth floor. When the agent exited the elevator, he saw Thompson and a woman waiting for the elevator. The agent had not seen Thompson earlier and did not recognize him as the man that had been in Bausley's car. Thompson and the woman got in the elevator and went down to the lobby. When Thompson exited the elevator in the lobby, other agents notified the agent on the ninth floor that the man who was in Bausley's car was now in the lobby.

The agent from the ninth floor went back to the lobby where he saw Thompson; however, Thompson did not have the backpack he had been wearing earlier. The agent detained Thompson and asked Thompson if he lived in the building. Thompson denied living in the building. Instead, Thompson told the agent he was there to visit a friend on the fourth floor. The agent then asked Thompson if he had just been on the ninth floor. Thompson told the officer that he not been on the ninth floor. The agent told Thompson that he was not under arrest and that he did not need to speak to the agents. The agent then frisked Thompson for weapons. The agent did not find any

weapons, but he discovered a key ring, which held Thompson's apartment key, and an electronic fob used to access the building's elevators. Again, the agent asked Thompson if he lived in the building and if he had just been on the ninth floor. Thompson answered "no" to both questions.

At this point, the agent asked Thompson if he would speak to the agents on the ninth floor, and Thompson agreed. Using the fob on the key ring, the agent accessed the elevator and Thompson and the agents went to the ninth floor. Thompson did not ask for his keys back and the agents did not handcuff him.

Once on the ninth floor, the agents asked Thompson if he lived in unit 902. After Thompson replied "no," the agent inserted Thompson's key into the lock of unit 902 and the door opened. The agent asked Thompson if anyone was inside the apartment, but Thompson did not respond. Two agents performed a sweep of the apartment, which lasted approximately 30-45 seconds. Finding no one in the apartment, the agents returned to the hallway. The agent then asked Thompson if they could speak inside the apartment, and Thompson agreed.

Inside the apartment, the agent again told Thompson he was not under arrest and that he did not have to talk to the agents. The agent then asked Thompson for consent to search the apartment. Thompson consented and signed a consent-to-search form. After signing the form, Thompson told the agents where cocaine, cash, and a gun were located in the apartment.

The government charged Thompson with possession with intent to distribute cocaine.

Thompson filed a motion to suppress the evidence seized from his apartment, claiming the agents committed a variety of *Fourth Amendment* violations.

First, Thompson argued that when he stepped out of the elevator in the lobby, the agent detained him without reasonable suspicion to believe he was involved in criminal activity.

The court held the agent had ample reason to believe that Thompson was engaged in criminal activity when he encountered Thompson in the lobby. First, agents saw Thompson get into a car with Bausley, whom they had reason to believe had just picked up a large amount of cocaine. Next, the agents saw Thompson enter the car wearing a backpack, circle the block with Bausley, go back into the apartment building, and then return to the lobby without the backpack. The court concluded these facts established reasonable suspicion to justify the *Terry* stop of Thompson in the lobby.

Second, Thompson argued the agent unlawfully frisked him in the lobby. An officer conducting a lawful *Terry* stop, may not automatically frisk the subject of the stop. A *Terry* frisk is lawful only if the officer can establish reasonable suspicion that the subject might be armed and dangerous.

The court held that when the agent encountered Thompson, he clearly had reason to believe that Thompson was participating in a drug trafficking operation. Based on that belief, it was reasonable for the agent to suspect that Thompson was armed because guns are known tool of the drug trade.

Third, Thompson argued that by taking his keys and accompanying him to the ninth floor, the agent unlawfully seized him and converted the *Terry* stop into an unlawful arrest without probable cause.

The court disagreed. Prior to taking his keys, the agent told Thompson that he was not under arrest and that he did not have to speak to the agent. In addition, Thompson never asked for his keys back and he voluntarily went with the agent to the ninth floor.

Fourth, Thompson argued that the agent violated the *Fourth Amendment* by putting the key in the lock of unit 902 and performing a sweep of the apartment before obtaining Thompson's consent to search.

The court recognized that placing the key in the lock of unit 902 constituted a *Fourth Amendment* search. However, because the privacy interest in the information held by the lock (*i.e.* verification of the key holder's address) is so small, officers do not need a warrant or probable cause to perform such a search.

The court further held the sweep of Thompson's apartment was lawful. The agents were involved in a long-term investigation of a large-scale drug trafficking organization. As the door was opening, the agent asked Thompson if anyone was inside and received no response. As Thompson had already lied to the agent about being on the ninth floor and about living in the building, the agents were justified in taking reasonable precautions to ensure their safety. In addition, the sweep of Thompson's apartment lasted only 30-45 seconds, and upon completing the sweep, the agents exited the apartment and obtained Thompson's consent to perform a full search.

Finally, Thomson argued that he did not voluntarily consent to the agents' search of his apartment.

The court held that Thompson's consent to search his apartment was voluntary. After being told he was not under arrest, Thompson accompanied the agents to the ninth floor and signed a consent-to-search form after the agents completed their sweep. The agents did not threaten or coerce Thompson into signing the consent form, and Thomson voluntarily directed the agents to the locations of the contraband inside the apartment.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/16-1105/16-1105-2016-11-22.pdf?ts=1479857447

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United States v. Patrick, 2016 U.S. App. LEXIS 21090 (7th Cir. Wis. Nov. 23, 2016)

Police officers obtained a warrant to arrest Patrick for a parole violation. The officers then obtained a second warrant, which authorized them to locate Patrick using cell phone data. The officers subsequently located Patrick sitting in a car on a public street after they used information obtained from a cell –site simulator.[1] The officers arrested Patrick and seized a firearm from him. The government later charged Patrick with possession of a firearm by a convicted felon.

Patrick filed a motion to suppress the firearm. Patrick argued the officers violated the *Fourth Amendment* by misleading the judge who issued the second warrant by not disclosing that the officers planned to use a cell-site simulator to locate him. Instead, Patrick claimed the officers implied to the judge that they planned to locate Patrick by using information provided by his cell phone service provider.

[1] A cell-site simulator, often called a Stingray, the trademark of one brand, "pretends to be a cell-phone access point and, by emitting an especially strong signal, induces nearby cell phones to connect and reveal their direction relative to the device.

The court disagreed. The *Fourth Amendment* requires that warrants be based "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the property or things to be seized." The court noted that officers are not required to state the "precise manner" in which warrants are executed. The manner of the search is subject only later to judicial review to determine its reasonableness. In addition, courts cannot limit or attempt to regulate how a search must be conducted. The court added that in this case the officers could have sought a warrant authorizing them to locate Patrick's cell phone without disclosing to the judge how they would do it.

Finally, the court recognized that there were other *Fourth Amendment* issues and concerns surrounding the use of cell-site simulators by law enforcement, which the court was not required to decide to resolve this case.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/15-2443/15-2443-2016-11-23.pdf?ts=1479934846

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Eighth Circuit

United States v. Craddock, 841 F.3d 756 (8th Cir. Mo. November 8, 2016)

While stopped at a stop sign, a police officer saw a green Pontiac enter the intersection and slow down as if to turn in his direction. Instead, the Pontiac hesitated for a moment, and drove straight through the intersection. Finding this behavior suspicious, the officer called in the Pontiac's license plate number and discovered that the vehicle was stolen. The officer followed the Pontiac but lost sight of it when it turned down a side street. The officer drove up and down nearby streets looking for the Pontiac. Approximately six-minutes later, the officer saw a man, later identified as Craddock, walking down the sidewalk. After passing Craddock, the officer saw the stolen Pontiac parked on the side of the street. The officer turned around and saw Craddock standing in the front yard of a residence approximately fifty-feet from the stolen Pontiac.

The officer approached Craddock and asked him what he was doing. Craddock appeared nervous and told the officer he was going home, but he could not provide the officer with his address. Believing that Craddock had just exited the stolen Pontiac, the officer handcuffed Craddock and frisked him for weapons. The frisk did not reveal a weapon, but the officer did feel what he believed to be a key fob in Craddock's pants pocket. The officer removed the key fob from the pocket and, after noticing that it had a Pontiac emblem, used it to unlock the stolen Pontiac. The officer searched the Pontiac and found a handgun on the floor next to the driver's seat. The government charged Craddock with being a felon in possession of a firearm.

Craddock filed a motion to suppress the evidence seized as a result of the frisk and the removal of the key fob from his pocket.

The court held that Craddock's proximity to the stolen vehicle and his demeanor when the officer approached him gave the officer reasonable suspicion to frisk Craddock for weapons. However, to seize items other than weapons, the officer conducting the frisk must have probable cause to believe that the item in "plain touch" is incriminating evidence. The item felt by the officer does not have to be contraband, but the incriminating character of the item must be immediately apparent.

Here, the court held the key fob's incriminating character was not immediately apparent by the officer upon plain feel. The officer testified that he was not able to see the person driving the Pontiac, or even identify if the person was male or female. The officer did not see Craddock exit the vehicle and Craddock did not flee when the officer approached him. Even though Craddock was relatively close to the stolen car and behaving nervously, feeling an unidentified key fob in Craddock's pocket did not provide the officer with probable cause to believe that the key fob belonged to the stolen Pontiac. The court commented that key fobs are extremely common items carried by many people every day. As a result, without more information, the court concluded the officer could not have reasonably associated the key fob with the stolen Pontiac at that point. It was not until the officer removed the key fob from Craddock's pocket and saw the Pontiac emblem that he connected the key fob with the stolen car.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3705/15-3705-2016-11-08.pdf?ts=1478620875

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United States v. Merrell, 842 F.3d 577 (8th Cir. Minn. Nov. 18, 2016)

Law enforcement officers found photographs containing child pornography on computers that belonged to Travis Guenthner. In some of the photographs, a woman's hands are visible touching a minor girl inappropriately. Guenthner told officers Merrell had sent him the photographs of the minor girl and that Merrell had produced them at his request.

The officers obtained a warrant for the search of "the person of Roxanne Merrell, specifically body views and photographs of her hands." Officers then took Merrell to the police station and recorded 47 photographs of her hands.

The government charged Merrell with production of child pornography.

Merrell filed a motion to suppress the 47 photographs of her hands taken during the execution of the search warrant. Merrell argued that the officers violated the *Fourth Amendment* because they exceeded the scope of the search warrant.

The court disagreed. While Merrell was correct that the *Fourth Amendment* requires a warrant to describe with particularity "the things to be seized," the court stated that officers are not required to explain the precise manner in which search warrants are to be executed. Courts generally leave the "details of how best to proceed" with the execution of a search warrant to the judgment of the officers responsible for the search. Here, the warrant authorized the officers to search "the person of Roxanne Merrell, specifically body views and photographs of her hands." The court concluded the manner in which the officers carried out the search did not exceed the scope of the warrant.

Merrell further argued that the photography process violated the *Fourth Amendment* because it was not reasonable for the officers to transport her to the police station or to touch her, in order to obtain the photographs.

Again, the court disagreed. Based on the totality of the circumstances, the court concluded the manner in which the officers executed the search warrant was reasonable. Even though the officers could have taken the photographs at Merrell's house, it was reasonable for the officers to transport her to the police station to take them. In addition, the limited physical touching of Merrell was limited to her hands during a twenty minute period.

Finally, Merrell argued that photographing her hands constituted an unduly suggestive identification procedure that violated her due process rights.

The court held that the photographing of Merrell's hands did not amount to an identification procedure because the photographs were not presented to an eyewitness for the purpose of identifying an alleged criminal perpetrator. Instead, the photographs were evidence obtained during the execution of a valid search warrant, and did not violate Merrell's due process rights.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3211/15-3211-2016-11-18.pdf?ts=1479486669

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United States v. Cook, 842 F.3d 597 (8th Cir. Minn. Nov. 22, 2016)

In the early morning hours, police officers on routine patrol saw an idling car parked in a high crime area. The officers could not determine if the car was occupied, and were concerned the car could be a target for a thief. The officers drove around the block, and as they approached the car a second time, they saw it contained two individuals. The officers parked behind the idling car, activated the "wig wag" setting for their vehicle's emergency lights, and got out of their vehicle. As the officers approached the car, Cook rolled down the driver's side window. The officers smelled marijuana and removed Cook from the car. The officers eventually arrested Cook and discovered marijuana and crack cocaine in the backseat of his vehicle. Subsequently, the officers obtained a warrant and found a firearm hidden in the car's center console.

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

Cook filed a motion to suppress the firearm, arguing that the officers discovered the firearm after illegally seizing him.

The court disagreed. A *Fourth Amendment* seizure occurs when an officer uses "physical force or a show of authority" to restrain a person's freedom of movement. The critical question is whether an officer's actions would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." In this case, the court concluded there was no *Fourth Amendment* seizure until the officers removed Cook from his car. By this time, Cook had voluntarily opened his window and the officers smelled marijuana coming from inside his car.

The court noted that the wig wag lights activated by the officers are different from the full light bar which is used to notify motorists in moving vehicles that they are required to stop. Here, the officers activated the wig wag lights in order to identify themselves as police officers. Consequently, the court found that a reasonable person seeing the wig wag lights under these circumstances would have thought that he was still free to ignore the police presence and go about his business.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3651/15-3651-2016-11-22.pdf?ts=1479832258

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