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The Informer – January 2016

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FLETC Informer Webinar Series

1. Exigent Circumstances: Part I (Introduction / Emergency Exigency)

Bruce-Alan Barnard will begin a three-part series on the exigent circumstances exception to the *Fourth Amendment's* warrant requirement. In this two-hour webinar, Bruce will provide a general overview of exigent circumstances and specifically discuss “emergency” exigent circumstances. In the following months, Bruce will conduct Exigent Circumstances Part II: Destruction Exigency, and Exigent Circumstances Part III: Hot Pursuit and various other exigencies, both two-hours in duration.

Dates and Times: Wednesday February 3, 2016 2:30 p.m. EST

Friday February 19, 2016 2:30 p.m. EST

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2. Search and Seizure Update

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This course will review and analyze current federal cases involving *Fourth Amendment* searches and seizures.

Date and Time: Thursday February 18, 2016 2:30 p.m. EST

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



3. Exigent Circumstances: Part II (Destruction Exigency)

In this two-hour webinar, Bruce-Alan Barnard continues his discussion of the exigent circumstances exception to the *Fourth Amendment's* warrant requirement, focusing on the destruction exigency.

Date and Time: Wednesday March 2, 2016 2:30 p.m. EST

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When Police Interface With Citizens Exercising Their Rights

By

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Simon Glik was taken into custody after he exercised his right to make an audio-visual recording of police officers making an arrest in a city park. Shawn Northrup was seized and cited after he holstered a pistol to his side in a state that allowed him to openly carry a firearm. Then came the big surprise for the officers – lawsuits. The officers could not articulate a reasonable restriction on the rights.¹

The law is not new. The founding fathers promised the people certain rights, later guaranteed in the U.S. Constitution. First, whether by coincidence or not, is the First Amendment’s right to not only speak out about government abuses, but also gather information about how government officials perform their duties. Second, is the right to bear arms, or self-defense. Skip the Third Amendment (no quartering of soldiers in private homes) and the discussion can turn to reasonable restrictions.

What could restrict the right in this case?

- Driving down Main Street, Jones saw Officer Smith conducting a traffic stop and decided to record the event. Jones parked beside the road, but before he could start recording, Smith ordered him to move his car. Jones shouted back, “No! I’m exercising my First Amendment right to record public officials performing their duties!”

The Fourth Amendment protects people from unreasonable searches and seizures, not reasonable ones. Depending on a law against parking by the road – Jones could be cited or even arrested.

The determinative issue under the Fourth Amendment is whether the search or seizure was objectively reasonable – and objective reasonableness always depends on the facts. Facts supporting the elements of a criminal statute puts an arrest within the range of reasonable options. What if Officer Smith stopped the car based on reasonable suspicion that the occupants were armed robbers? An order for bystanders to disperse would seem reasonable.² Or what if Smith lawfully stopped a car and one of the occupants got out and started recording? Officers can control the driver and passengers in the car.³

The Fourth Amendment’s objective reasonableness standard gives police officers power and protection from civil liability. It should not take a lot of explaining why seizing Glik and

¹ See *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) and *Northrup v. City of Toledo*, 785 F.3d 1128 (6th Cir. 2015).

² See *Gericke v. Begin*, 753 F.3d 1, 8 (2014)(The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure - - for example, a command that bystanders disperse).

³ *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)(passenger could be ordered out of a car during a traffic stop); see also *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(driver could be ordered out of a car during a traffic stop).

Northrup was unreasonable. While their conduct was annoying or even unsettling, they did nothing wrong. The better question is what keeps officers from using their very *discretionary* Fourth Amendment powers as a retaliatory measure against someone for ... say, exercising a right?

Consider this ...

- Officer Smith was making an arrest in a federal park. Jones walked up to within five-feet of Smith and voiced his opinion that the arrest was an abuse of government power: “That’s f---ed up!” Smith ordered Jones to move back. “F--- you!” Jones responded in predictable prose, “I’m exercising my First Amendment right!” Officer Smith arrested Jones not only for disobeying an order, but also dropping the *f-bombs* on Smith.⁴

An arrest for refusing to leave the immediate scene of an arrest was reasonable; but an arrest for shouting expletives was not. Where matters of public interest are concerned, the First Amendment protects *free expression*.⁵ After all, why should police officers be more immune from hateful language than presidents? Still, probable cause to arrest only depends on whether the facts known to the officer at the time supports an *arrestable* offense, not whether the officer arrested the suspect for the right one.⁶ The facts supported an arrest. End-of-story ... or is it?

What if Officer Smith’s underlying motive for arresting Jones was for his colorful description of the arrest? Obviously, police officers should not use their Fourth Amendment arrest powers because they fear, dislike, or disagree with the views of others. Still, the Supreme Court has never held that there is a right to be free from a retaliatory arrest that is otherwise supported by probable cause. The lower federal courts of appeals are split on the issue.⁷ Smith, therefore, could request qualified immunity - - the officer’s defense to standing trial for a constitutional tort. Unless the law clearly establishes where liability begins, the case should be dismissed.

While the extent of protections under the First and Second Amendments have yet to be determined, they at least remove free expression and self-defense from the list of reasons for searching or seizing someone. Absent some other *objectively reasonable reason*, a Fourth Amendment violation will prevail. Moreover, there is not an automatic firearm exception. An investigative detention (*Terry Stop*) requires at least reasonable suspicion that a crime is afoot; a limited search for weapons (*Terry Frisk*) requires reasonable suspicion that the suspect is presently armed and dangerous.

What is missing ... ?

- An anonymous informant reported that a juvenile at a bus stop had a gun. The informant identified the bus stop and said that the kid was wearing a plaid shirt. Officer Smith responded and saw someone matching the tipster’s description. Other than the anonymous tip, however, Smith had no reason to believe the kid was violating the law,

⁴ *U.S. v. Poocha*, 259 F.3d 1077 (9th Cir. 2001).

⁵ See *Snyder v. Phelps*, 562 U.S. 443 (2011).

⁶ *Devenpeck v. Alford*, 543 U.S. 146 (2004).

⁷ The U.S. Supreme Court has never held that there is a right to be free from a retaliatory arrest that is otherwise supported by probable cause. *Reichle v. Howards*, 132 S.Ct. 2088 (2012). The federal courts of appeals are split on the issue. *Dukore v. D.C.*, 799 F.3d 1137 (D.C. Cir. 2015).

but performed a stop and frisk anyway. The frisk revealed a gun. State law prohibited juveniles from carrying a concealed firearm and Smith arrested the young man.⁸

Missing is *reasonable* suspicion. Reasonable means *reliable*, and the tip was only reliable in its assertion that there was a kid, matching the informant's description, at the bus stop. Smith could establish the tipster's reliability by waiting and watching, or he could approach the suspect like anyone else (i.e., a consensual encounter), and look for facts corroborating the caller's assertion of *illegality*. Nervousness and a bulge at the suspect's waistband, along with everything else, should be enough to establish reasonable suspicion that the kid is committing a crime and that he is presently armed and dangerous.

What is missing here ...?

- Officer Smith stopped Jones for speeding. Dispatch reported that he had a license to carry a concealed firearm. A National Rifle Association (NRA) sticker was also on Jones' windshield. Smith frisked Jones for weapons.

While a lawful traffic violation is enough to temporarily seize everyone in the car, carrying a firearm in accordance with state law and a NRA membership falls short of reasonable suspicion that Jones is presently armed and *dangerous*. The frisk is not reasonable.

Try one more...

- Tennessee law allowed anyone with a permit to carry a handgun in a state park. A handgun was defined as a firearm with a barrel length less than 12-inches that was designed to be fired with one hand. Jones went to a park one day. He had an AK-47 pistol with a 30-round clip slung across his chest. The barrel met the legal limit for a pistol by $\frac{1}{2}$ inch. Jones also painted the tip of the barrel orange (*the law didn't say he couldn't*) and to catch any suspicious officer who might try to stop him, he carried a recording device. Officer Smith promptly stopped and frisked Jones. After confirming that the gun *narrowly* met the definition of a handgun, Jones was released.⁹

The Constitution requires reasonable suspicion of a crime, not that a crime occurred. Jones did his best to look suspicious and cannot cry foul after Officer Smith took the bait long enough to confirm or deny the suspicion. The barrel length, its orange tip, and the large banana clip could lead an officer to reasonably suspect that the weapon did not meet the legal definition of a handgun, or that it was an illegal weapon disguised as a toy. The same facts supported a frisk.

One might claim that police officers have to make tough choices when interfacing with citizens exercising their rights, especially in a situation where one citizen is carrying a firearm and another is chastising the officer for not doing more to protect the public. But the truth is that officers have no choice, unless there is a reasonable restriction on the right.

⁸ *Florida v. J.L.*, 529 U.S. 266 (2000)

⁹ *Embodry v. Ward*, 695 F.3d 577 (6th Cir. 2012).

CASE SUMMARIES

Circuit Courts of Appeal

Fourth Circuit

United States v. Williams, 2015 U.S. App. LEXIS 21560 (4th Cir. N.C. Dec. 14, 2015)

At 12:37 a.m., two officers patrolling separately saw two vehicles traveling close together and speeding on I-85 near Charlotte, North Carolina. One officer stopped the lead vehicle, driven by Williams' brother. The other officer stopped the second vehicle, a rental car, driven by Williams. The officer issued Williams a written warning and returned Williams' driver's license and rental agreement at 12:54 a.m. As Williams was about to leave, the officer asked Williams for consent to search his car. Williams refused. The officer then told Williams he was not free to leave and that a dog-sniff would be conducted on his car. After the drug-dog alerted to the presence of narcotics, the officers searched Williams' car and discovered crack cocaine in the trunk.

The government indicted Williams for possession with intent to distribute crack cocaine.

Williams claimed the officers violated the *Fourth Amendment* because they did not establish reasonable suspicion to extend the duration of the traffic stop after the officer issued him the written warning for speeding. As a result, Williams argued, the evidence discovered in the trunk of the rental car should have been suppressed.

The court agreed. The officers testified they established reasonable suspicion to extend the duration of the stop because Williams was traveling in a rental car, at 12:37 a.m., on a "known drug corridor." First, the court noted Williams' use of a rental car, by itself, was of minimal value to the reasonable suspicion analysis because neither officer explained why Williams' use of a rental car led them to believe he might be involved in criminal activity. For example, the officers did not testify that based on their training and experience drug traffickers often use rental cars to avoid asset forfeiture laws or for other reasons.

Second, while drug traffickers travel on interstate highways, so do many more innocent motorists. Because there is nothing inherently suspicious about driving at night on an interstate highway, officers must rely on their training and experience to link interstate-highway travel to more specific characteristics of drug trafficking. However, in this case, neither officer provided any testimony linking travel on an interstate highway with drug trafficking, nor did they claim that drug traffickers have some disproportionate tendency to travel late at night. As a result, the court concluded the officers failed to articulate why Williams' driving at 12:37 a.m., on an interstate highway created reasonable suspicion of criminal activity.

The officers also testified they thought it was suspicious that the rental agreement for Williams' car was set to expire later that day, requiring the car to be returned in New Jersey, but that Williams was traveling in the opposite direction. The court held the fact that Williams' travel plans were likely to exceed the initial duration of the rental agreement did not support reasonable suspicion that he was involved in criminal activity. When the officer mentioned the expiration of the rental agreement, Williams told the officer he planned to renew the agreement

once he got to Charlotte, later that day. In addition, the officer knew the Williams' car was rented through Hertz, a well-known car rental business with locations nationwide.

Finally, the officers testified that when asked for his address, Williams told the officers he lived in both New York and New Jersey, and then gave the officers a post office box address that was different from the address on his New York driver's license,

The court concluded this factor did not support reasonable suspicion that Williams was involved in criminal activity because neither officer explained how using a post office box address or living in New York and New Jersey raised some suspicion of criminal activity.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4049/14-4049-2015-12-14.pdf?ts=1450123231>

United States v. Stover, 2015 U.S. App. LEXIS 22071 (4th Cir. Md. Dec. 18, 2015)

Two uniformed Prince Georges' County officers were on patrol in a marked police car in an area where several violent robberies had recently occurred. Around 1:00 a.m., the officers saw a vehicle double-parked in a parking lot of an apartment building. The officers saw a man in the driver's seat and a woman in the front passenger seat. The officers continued their patrol, but returned a few minutes later to check on the car. The officers saw the occupants were still in the car and noticed the car had Virginia license plates. The officers decided to investigate the occupants to see what was going on because of the car's out-of-state license plates, the area's high-crime reputation, the late hour and because the car was double parked. The officer parked the police car at a 45-degree angle, three feet behind Stover's car, blocking it in. The officer then activated the car's emergency lights and illuminated the side of Stover's car with a spotlight. At this point, Stover opened the driver's side door, got out of his car and opened the driver's side back seat door of his car. The officers ordered Stover to get back inside his car because they could not see what Stover was doing while he was standing between both open doors of his car. Instead of complying with the officers' commands, Stover walked toward the front of his car away from the officers. As one of the officers approached Stover from behind, he saw Stover throw a gun to the ground. The officer pointed his own gun at Stover and again ordered Stover to get back inside his car. Stover complied with the officer's command and got back into his car. The officers recovered a loaded handgun on the ground in front of Stover's car. The government indicted Stover for being a felon in possession of a firearm.

Stover filed a motion to suppress the handgun recovered by the officers.

Stover argued the officers seized him under the *Fourth Amendment* when they pulled their marked police car behind his car, blocking him in. Because the officers lacked reasonable suspicion to seize him at this point, Stover claimed the handgun the officers recovered from the ground in front of his car should have been suppressed as the fruit of an illegal seizure.

The government countered by arguing the officers did not seize Stover for *Fourth Amendment* purposes until after Stover threw the handgun on the ground; therefore, the handgun was lawfully recovered abandoned property.

One of the ways a *Fourth Amendment* seizure occurs is when a person submits to an officer's show of authority.

To determine whether an officer's show of authority is sufficient to trigger the *Fourth Amendment*, the court will examine the totality of the circumstances to see if a reasonable person would have felt free to terminate the encounter with the officer and leave. If the court concludes that a reasonable person would not feel free to terminate the encounter, the court must then determine when the person submitted to the officer's show of authority. It is only at this point that the person is seized under the *Fourth Amendment*.

In this case, the court found when the officers pulled their marked police car behind Stover's car, blocking it in, a reasonable person in Stover's position would not have felt he was free to terminate the encounter with the officers and leave.

However, when Stover exited his car, he ignored the officers' commands to get back inside his car and walked away from the officers. Only after Stover dropped his gun, did he comply with the officers' commands and submit to their show of authority by getting back inside his car. The court concluded it was at this point that Stover was seized for *Fourth Amendment* purposes. As a result, because the officers did not seize Stover until after he discarded the handgun, the court held the handgun was admissible at trial.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4283/14-4283-2015-12-18.pdf?ts=1450467075>

United States v. Rush, 808 F.3d 1007 (4th Cir. W. Va. Dec. 21, 2015)

Marquita Wills contacted local police officers and requested that they remove Kenneth Rush from her apartment. Wills told the officers that Rush, who had been staying with her for the previous two nights, was dealing drugs from her apartment. Wills told the officers she was afraid of Rush, but she did not indicate that Rush had committed any crime against her or threatened her in any way. Wills gave the officers the key to the apartment and signed a consent-to-search form.

The officers went to Wills' apartment, entered with the key and found Rush asleep in the master bedroom. When Rush asked the officers why they were in the apartment, one of the officers told Rush that they had a warrant to search the apartment, even though the officer knew this was not true. After telling Rush they had a warrant, the officers searched the apartment and found crack cocaine and digital scales. When questioned by the officers, Rush admitted the drugs belonged to him and that he had sold crack cocaine from the apartment. At the completion of the search, the officers left without arresting Rush, who agreed to meet with the officers later and provide them information about his supplier.

The government eventually charged Rush with possession with intent to distribute cocaine.

Rush filed a motion to suppress the evidence seized from Wills' apartment, arguing the officers warrantless search violated the *Fourth Amendment*.

Although the government agreed that Rush's *Fourth Amendment* rights were violated¹, the government argued the officer acted in good faith to protect Wills; therefore, the good faith exception the exclusionary rule should apply.

¹ Even though Wills consented to the search of her apartment, Rush had the right to object to the search because he was a present co-occupant of the apartment. See *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). The officers

The court noted the United States Supreme Court had applied the good-faith exception to the exclusionary rule to certain cases involving isolated negligence by officers and in cases “when the police act with an objectively reasonable good-faith belief that their conduct is lawful.”

However, the court held this case “bears no resemblance to the previous applications of the good-faith exception.” First, the court found the search of the apartment was due to the intentional decision of one of the officers to lie to Rush about the existence of a search warrant. Second, the court held there could be no doubt that a reasonable officer would know that deliberately lying about the existence of a warrant would violate the *Fourth Amendment*, as courts since 1968 have taken a negative view of law enforcement officers misleading individuals about having valid warrants. Because the officer’s lie to Rush about the existence of a search warrant was deliberate, contrary to long-standing case law and objectively unreasonable, the court concluded the good-faith exception to the exclusionary rule did not apply and that suppression of the evidence recovered from the apartment was warranted.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca4/14-4695/14-4695-2015-12-21.pdf?ts=1450728115>

Sixth Circuit

Bachynski v. Stewart, 2015 U.S. App. LEXIS 22492 (6th Cir. Ohio December 23, 2015)

Officers arrested Bachynski for murder. After an officer read Bachynski her *Miranda* rights, she requested an attorney and the officers did not ask her any questions. Approximately two hours later, two different officers approached Bachynski in her cell and asked her if “she had been given an opportunity to use a phone to contact her attorney.” Bachynski told the officers she did not have a phone, so one of the officers offered her a phone to call her family and a phone book to find an attorney. During this time, Bachynski told the officer, “I want to talk to you.” The officer contacted the state prosecutor, obtained approval to speak to Bachynski and took her to an interview room. The officers read Bachynski her *Miranda* rights and asked her if she wanted to speak with them without an attorney present. Bachynski reiterated that she wanted to talk to the officers, acknowledging that she had initially requested an attorney, but that she had changed her mind and that she would rather talk to the officers than get an attorney. Bachynski signed a waiver of her *Miranda* rights and confessed her involvement in three murders.

At trial in state court, Bachynski’s confession was admitted against her and she was convicted. On appeal, Bachynski argued, among other things, that her confession should have been suppressed because the officers interrogated her after she invoked her right to counsel.

The Michigan Court of Appeals disagreed. The court held that the officer’s communication with Bachynski in her holding cell was not an “interrogation” or the “functional equivalent of interrogation” because it solely involved helping her acquire an attorney. After that, it was Bachynski, not the officers, who insisted on speaking about the case. At that point, the court held Bachynski voluntarily, knowingly and intelligently waived her *Miranda* rights.

unconstitutionally denied Rush the opportunity to object to the search by falsely stating that they had a warrant. See *Bumper v. North Carolina*, 391 U.S. 543, 548-50, (1968).

Bachynski filed a petition for a writ of habeas corpus in federal district court, claiming that the Michigan state courts unreasonably admitted her confession in violation of her *Fifth Amendment*. The district court agreed, and the State appealed.

The Sixth Circuit Court of Appeals reversed the district court, holding that the officers did not engage in “interrogation” or the “functional equivalent of interrogation” when they went to Bachynski’s cell to provide her the tools to obtain an attorney. The court found that when a suspect invokes her right to counsel, there is nothing wrong with offering to get her an attorney or the tools to hire one, as such an offer facilitates the exercise of the right to counsel. Here, the officers had no reason to think Bachynski would say something incriminating or reconsider her invocation of counsel when they made this offer. Finally, the court noted it has previously held that an officer’s questions “principally aimed at finding the suspect an attorney,” did not constitute an “interrogation.”

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca6/15-1442/15-1442-2015-12-23.pdf?ts=1450892932>

Eighth Circuit

United States v. Davison, 808 F.3d 325 (8th Cir. Mo. December 8, 2015)

The owners of a store reported to police that two occupants of a pick-up truck had been doing “donuts” in their parking lot, then parked the truck and in their lot and walked north on Tracy Street. Police dispatch discovered the truck had been reported stolen and relayed this information to officers in the area. An officer drove to the store and obtained a description of the two suspects from the owners. After conducting a brief surveillance of the truck to see if the two occupants would return, the officer decided to drive around the neighborhood to see if he could locate anyone matching their descriptions. While driving north on Tracy Street, the officer saw two individuals, later identified as Eric Davison and Kelly Hall, who matched the store owners’ description. When Davison and Hall saw the officer, they avoided eye contact and changed their route, walking west on Eighth Street. Although somewhat suspicious of the pair, the officer decided to canvass the area, looking for others who matched the description of the individuals provided by the storeowner. After the officer drove around the neighborhood without seeing anyone who matched the storeowners’ description, the officer turned south onto a street one block east of Tracy Street where he again saw Davison and Hall walking north. Curious as to why the pair seemed to be walking in a circle, the officer drove around the block twice more to observe their behavior. After the officer saw Davison and Hall walk through the yard of a residence that he knew was a “drug house,” he decided to stop and question them about the stolen vehicle.

The officer stopped Davison and Hall and immediately frisked Davison for weapons. When the officer felt an object consistent with a firearm in the right breast pocket of Davison’s coat, Davison said, “I’m so stupid.” The officer asked Davison if he was a convicted felon, and Davison admitted that he had been released from prison four months earlier. The officer arrested Davison and found a loaded handgun, ammunition, methamphetamine and a syringe on Davison during the search incident to arrest.

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

Davison claimed the firearm should have been suppressed because the officer did not have reasonable suspicion to first conduct a *Terry* stop and then to conduct a *Terry* frisk for weapons.

The court disagreed. First, the court found that the officer conducted substantial surveillance before he decided to stop and question Davison and Hall, the only individuals in the area who matched the storeowners' description of the occupants of the stolen truck. Second, Davison and Hall appeared to be walking a circle, near the stolen truck, in an area known to the officer for high amount of crime. Third, Davison and Hall avoided eye contact with the officer and attempted to evade the officer by walking through the yard of a known drug-house. Based on these facts, the court concluded the officer established reasonable suspicion to conduct a *Terry* stop to question Davison and Hall about the stolen truck.

Next, the court held the officer conducted a valid *Terry* frisk because he established reasonable suspicion to believe Davison might be armed and dangerous. First, the officer reasonably suspected that Davison had stolen the truck. In the Eighth Circuit, when officers encounter suspected car thieves, they also may reasonably suspect that those individuals might possess weapons. Second, the officer stopped Davison and Hall after observing them walk through the yard of a known drug-house in a high-crime area where recent shootings had occurred, including one that targeted police officers.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/15-1292/15-1292-2015-12-08.pdf?ts=1449592254>

Tenth Circuit

Mocek v. City of Albuquerque, 2015 U.S. App. LEXIS 22435 (10th Cir. N.M. Dec. 22, 2015)

In November 2009, Mocek, who had a practice of refusing to show his photo identification at airport security checkpoints, arrived at the Albuquerque airport for a flight to Seattle. Mocek gave his driver's license to a travel companion, who then went through security. At the security checkpoint, Mocek gave the Transportation Security Administration (TSA) agent his boarding pass, but told the agent he did not have identification. The TSA agent directed Mocek to a different line where another TSA agent began an alternative identification procedure. After Mocek refused to offer other proof of identity, such as a credit card, the TSA agent told Mocek that if his identity could not be verified, he would not be allowed through the checkpoint. At this point, Mocek began to film the encounter with a camera. The TSA agent ordered Mocek to stop filming, and when Mocek refused, the agent requested assistance from the Albuquerque Aviation Police Department (AAPD). While waiting for AAPD officers, other TSA agents arrived and ordered Mocek to stop filming, with one agent attempting to grab the camera out of Mocek's hand. Mocek remained calm, continued to record and would not identify himself. When AAPD officers arrived, the TSA agent told them Mocek was "causing a disturbance," would not put down the camera, and was "taking pictures" of all the agents. As one of the officers began to escort Mocek out of the airport, the officer asked Mocek for his identification. Mocek told the officer he did not have any identification on him. The officer then told Mocek he was under investigation for disturbing the peace and was required to present identification. Mocek told the officer he wished to remain silent and wanted to speak to an attorney. The

officer arrested Mocek. At some point, Mocek's camera was seized by officers who deleted the video recordings.

Mocek was ultimately charged with disorderly conduct, concealing name or identity, resisting an officer's lawful commands and criminal trespass. At trial, Mocek introduced the video recordings of the incident, which he recovered using forensic software, and was acquitted on all counts.

Mocek sued several TSA agents and AAPD officers, claiming among other things, that the agents and officers violated the *Fourth Amendment* by arresting him without probable cause to believe he had committed a crime.

The court disagreed, holding the TSA agents and AAPD officers were entitled to qualified immunity.

The court recognized the "uniquely sensitive setting" involved in this case while stating that "order and security are of obvious importance at an airport security checkpoint." Against this backdrop, the court found that under New Mexico law, the officer initially had reasonable suspicion to detain Mocek for disorderly conduct. Although Mocek claimed he was calm the entire time, the AAPD officer was entitled to rely on the TSA agents' statements to him that Mocek was "causing a disturbance" and that he refused to stop filming the agents. In addition, the officer saw that at least three TSA agents had left behind other duties to deal with Mocek, which the court noted was especially problematic in this setting. Finally, the court found that a reasonable officer could have believed that Mocek's filming invaded the privacy of other travelers, or posed a security threat.

Next, once the officer established reasonable suspicion to investigate Mocek for disorderly conduct, the court concluded the officer was justified in asking Mocek to identify himself. However, when Mocek refused, the court had to determine if the officer then had probable cause to arrest Mocek for concealing his name or identity under *N.M. Stat. Ann. § 30.22.3*.

The court found that New Mexico courts have not precisely defined what it means to furnish "identity" under § 30.22.3 and that the courts have not specified what identifying information might be appropriate in all situations.

While the Tenth Circuit doubted that Mocek's failure to produce identification during a stop for suspicion of disorderly conduct violated § 30.22.3, the court noted that it was unclear as to what type of identification a person would need to show an officer during such a stop. As a result, the court concluded that any mistake the officer might have made in believing that Mocek's failure to produce identification established probable cause to arrest was a reasonable one, which entitled the officer to qualified immunity.

Mocek's suit also claimed the officer arrested him in retaliation for exercising his alleged *First Amendment* right to film at a security checkpoint. Without deciding whether Mocek actually had a *First Amendment* right to film at the airport security checkpoint, the court held the officer was entitled to qualified immunity. Regardless of any subjective motivation the officer might have had for arresting Mocek, the court concluded the officer could have reasonably believed that he was entitled to arrest Mocek as long as he established probable cause of a criminal violation. As previously discussed, the court found the officer could have reasonably believed he had probable cause to arrest Mocek for violating *N.M. Stat. Ann. § 30.22.3*.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca10/14-2063/14-2063-2015-12-22.pdf?ts=1450807559>

Eleventh Circuit

United States v. Johnson, 806 F.3d 1323 (11th Cir. Fla. December 1, 2015)

Robert Johnson and Jennifer Sparks mistakenly left their cell phone in a Wal-Mart store. Linda Vo, a store employee found the phone. Sparks sent a text message to phone, requesting its return. Vo called the number indicated on the text message and made arrangements with Sparks to return the phone. After speaking with Sparks, Vo looked at the digital photographs stored in a photo album on the phone, in an attempt to identify the woman to whom she was planning to return the phone. In the photo album, Vo saw pictures of a young female who was nude in some of the photographs, as well as one video of a young girl eating ice cream.

Instead of meeting Sparks to return the phone, Vo showed the images on the cell phone to her fiancé, David Widner. Afterward, Widner took the phone to the police department, where he told two civilian employees at the front booth that he wanted to file a report about cell-phone images that he believed to be child pornography. Widner scrolled through the entire photo album he had previously viewed with Vo to show the employees the photographs and one video he believed were child pornography. The employees gave the phone to Detective O'Reilly who looked at only those images contained within the same photo album that Widner had viewed. However, O'Reilly viewed the video of the young girl eating ice cream as well as a second video that neither Vo nor Widner had previously viewed. After concluding the phone contained child pornography, O'Reilly turned the phone off and submitted it to evidence.

Twenty-three days later, the officer who was assigned to the child pornography task force, applied for a warrant to search the cell phone. In her supporting affidavit, the officer did not attach any images from the phone, but instead included Detective O'Reilly's descriptions of the images that he had viewed on the cell phone. The judge found probable cause and issued the warrant. Later that day, a forensic examination of the phone revealed over 1,000 images and 45 sexually explicit videos that constituted child pornography.

Based on the evidence recovered from the cell phone, officers obtained a warrant to search Johnson's home. During the execution of the warrant, Johnson confirmed that he had lost the cell phone at Wal-Mart. Johnson also told the officers that within three days of having lost the phone, he filed an insurance claim with the phone company and received a replacement phone, which he gave to Sparks. In addition, Johnson told the officers he had already purchased another phone for himself.

The government charged Johnson and Sparks with possession of child pornography and production of child pornography.

First, Johnson and Sparks argued Detective O'Reilly's warrantless search of the cell phone violated the *Fourth Amendment*. Specifically, they argued that the government failed to establish that the images and videos observed by O'Reilly, which formed the basis for and led to the issuance of the search warrants, were within the scope of the prior search conducted by Vo and Widner.

O'Reilly testified that he looked only at those photographs contained in a single photo album, and his descriptions of the photographs contained in that album matched the contents of the album that Widner had viewed. Because O'Reilly's search of the photographs on the phone did not exceed the scope of the search conducted by Vo and Widner, the court found there was no *Fourth Amendment* violation. However, the court held the second video that O'Reilly viewed, which had not been viewed by Vo or Widner, exceeded the scope of their private search. Nevertheless, the court concluded because the search warrant affidavit only described the photographs and the first video, which Vo and Widner had viewed, suppression of the evidence from the phone and Johnson's house was not warranted.

Second, Johnson and Sparks argued that the officer's 23-day delay in obtaining the warrant to search the cell phone unreasonably interfered with their possessory interest in the cell phone.

The court refused to decide this issue. Instead, the court held that Johnson and Sparks lost standing to contest the length of the 23-day delay because they abandoned their possessory interest in the phone three days after they lost it. In addition, the court found that the delay in obtaining the warrant to search the phone during this three-day period was reasonable.

While the court recognized that the loss of one's property, by itself, is not the same as abandonment, the court found that three days after losing their cell phone, Johnson and Sparks completely abandoned their efforts to recover it. First, when Vo failed to appear at the Wal-Mart to meet Sparks, the couple did nothing. For example, Johnson and Sparks did not ask anyone at Wal-Mart for assistance in locating it, nor did they complain to Wal-Mart management that one of its employees had found their phone and refused to return it. Finally, the couple did not file a report with the police complaining about Vo's failure to return the phone. In addition, Johnson and Sparks demonstrated their intent to abandon their phone by purchasing a replacement phone within a few days and filing an insurance claim for the phone they abandoned. Because Johnson and Sparks abandoned their possessory interest in the cell phone, the court held they lacked standing to claim that the officer's delay in obtaining the warrant to search the contents of the phone was unreasonable.

Finally, Johnson and Sparks argued that the evidence obtained from the cell phone and Johnson's house should have been suppressed because the officer did not attach actual images to the search warrant affidavit, but instead relied upon O'Reilly's descriptions of the photographs.

The court disagreed. A judge issuing a search warrant does not need to personally view photographs or images, which are alleged to be contraband, such as child pornography, if a reasonably specific affidavit describing the contents can provide an adequate basis to establish probable cause. In this case, the court held the descriptions provided in the officer's affidavit were not vague conclusions that the cell phone contained images of child pornography. Instead, the court found the affidavit objectively and specifically stated the contents of the photographs, and the officer swore to these descriptions under oath.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca11/14-12143/14-12143-2015-12-01.pdf?ts=1448998302>
