
THE FEDERAL LAW ENFORCEMENT - INFORMER -

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

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The Informer – May 2017

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1. Wednesday June 7, 2017

Live Webinar: Law Enforcement Legal Update (3 hours) – 1:00 p.m. EDT
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Contact Bruce-Alan Barnard – Attorney-Advisor, Glynco, GA with questions concerning the Live Webinars, Rewind Replays and Bruce's Brownbag webinar listed above at: bruce.barnard@dhs.gov

6. Wednesday June 21, 2017

Live Webinar: Major Crimes Act (1 hour) – 1:30 p.m. MDT

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7. Wednesday July 26, 2017

Live Webinar: Assimilative Crimes Act (ACA) and Violence Against Women Reauthorization Act of 2013 (VAWA) (1 hour) - 1:30 p.m. MDT

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Contact Robert Duncan - Attorney-Advisor, FLETC – Artesia, NM with questions concerning the Major Crimes Act or the ACA/VAWA webinars listed above at: robert.duncan@fletc.dhs.gov.



Virtual Symposium – July 24 and 25, 2017

The Federal Law Enforcement Training Centers and partner organizations are sponsoring an interactive virtual continuing legal education (CLE) training conference to develop and enhance knowledge of agency/component missions, emerging areas of law, and new developments in training. The virtual conference will be held on July 24 and 25, 2017 from 10:30 a.m. EDT to 4:00 p.m. EDT and can be accessed by visiting <http://share.dhs.gov/symposium>. Registration is not required. Attendees with a HSIN login may use existing credentials. Attendees without a HSIN login may log in as a guest. Please contact Tammy Fields at tammy.fields@fletc.dhs.gov or Robert Duncan at robertduncan@fletc.dhs.gov for more information.



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CASE SUMMARIES

Circuit Courts of Appeal

Second Circuit

United States v. Babilonia, 2017 U.S. App. LEXIS 6515 (2d Cir. N.Y. Apr. 17, 2017)

The government was investigating several individuals for being part of a drug trafficking operation and for their involvement in a murder-for-hire plot that targeted a rival drug dealer. Based on information provided by a confidential informant, officers conducted surveillance on Roger Key. The officers saw Key park a minivan, which had no front license plate, across the street from an apartment building. The officers saw Key get out of the minivan and look up and down the street repeatedly, even though there was no traffic on the street. Based on his experience, one of the officers believed that Key was checking for police or other observers in the area. Key then entered the apartment building, and reappeared a few minutes later holding a green plastic bag with a weighted, brick-shaped object inside. Key got into his minivan and drove away. Based on their observations and experience, the officers suspected that the bag contained either drugs or drug proceeds.

The officers followed Key for a short distance in their vehicles and then conducted a traffic stop. After the officers activated their lights and sirens, Key refused to pull over. Instead, Key led the officers on a high-speed pursuit that lasted five to eight minutes. During this time, the officers saw Key using a cell phone while he was driving. Key eventually stopped and the officers arrested him. Inside Key's minivan, the officers saw the green plastic bag, which contained a rectangular shaped object, wedged between the two front seats. The officers searched the bag and discovered \$10,000 in cash bundled with rubber bands. The officers searched the rest of the minivan and found several cell phones, receipts for other cell phones, and a New York license plate in the rear storage area. In an effort not to raise Key's suspicions about the larger ongoing investigation, the officers decided not to prosecute Key for the driving offense. In addition, the officers decided not to seize any evidence from Key's minivan other than the green plastic bag and the \$10,000 cash.

Approximately one month later, officers went to Key's apartment to arrest him for his involvement in the drug trafficking operation and the murder-for-hire plot. When Key answered the door, he was wearing boxer shorts and an undershirt, holding a cell phone. The officers pulled Key into the hallway, and handcuffed him. After the officers cleared the apartment, they brought Key back inside to get dressed. When the officers brought Key into the living room, one of the officers saw several cell phones on a table. At the time, the officer knew that Key was being investigated for narcotics trafficking and a murder-for-hire conspiracy that involved cell phones. In addition, the officer was aware of a wiretap investigation into Key's drug trafficking activities in which cell phones were involved. The officer asked Key if there were any firearms or drugs in the apartment. Key said there were not, and then gave the officer verbal consent to search the apartment for firearms and drugs. The officers searched the apartment and seized several cell phones, an iPad, and an address book. The officers later obtained a warrant to search the cell phones and iPad.

First, Key argued that the warrantless search of his vehicle violated the Fourth Amendment.

The court disagreed, holding that the search of Key's minivan was justified under the automobile exception to the Fourth Amendment's warrant requirement. The automobile exception allows law enforcement officers to conduct warrantless searches of "readily mobile vehicles" when the officers have probable cause to believe that the vehicle contains contraband. Here, the court concluded there was ample evidence for the officers to believe that Key was transporting drugs in his vehicle. First, the officers were conducting surveillance as part of a larger drug trafficking investigation when they saw Key emerge from a minivan without a front license plate and look up and down the block a number of times over a period of minutes, even though there was no street traffic at the time. Second, the officers saw Key enter an apartment building and return minutes later with a green plastic bag weighted down by a brick-shaped object, hurrying back to the minivan. Third, after the officers attempted to conduct a traffic stop, Key failed to pull over and continued driving at high speeds with the officers in pursuit for five to eight minutes. The court noted that Key's efforts to escape caused the officers to believe that Key had something to hide, and in the Second Circuit, flight is an appropriate factor supporting a finding of probable cause to search a vehicle after it is stopped.

Key also argued that the officers' testimony concerning the items they saw in the rear storage area of his minivan during the traffic stop should have been suppressed because the officers only saw those items after the unlawful search of the front part of the vehicle.

Again, the court disagreed. Even though the officers did not seize the items observed in the rear of Key's vehicle, the court concluded that evidence would have been inevitably discovered in an inventory search of the vehicle, which would have been conducted if Key's vehicle had been impounded.

Finally, Key argued that the officers' warrantless seizure of the cell phones, iPad and address book from his apartment violated the Fourth Amendment. However, the district court held that the officers lawfully seized these items under the plain view doctrine. Under the plain view doctrine, an officer may seize evidence without a warrant if: (1) the officer is lawfully in a position from which the officer views an object, (2) the incriminating nature of the object is immediately apparent and, (3) the officer has a lawful right of access to the object.

Key's sole challenge on appeal was that the plain view doctrine did not apply because the incriminating nature of the phones, iPad and address book were not immediately apparent to the officers.

The court disagreed. When the officers arrested him, Key had been the target of an investigation for several months. The investigation had revealed the murder-for-hire conspiracy involved the use of multiple cell phones, and a separate wiretap investigation established that Key and his coconspirators used cell phones to conduct drug-related activity. The investigation also revealed that officers had analyzed Key's use of numerous cell phones in connection with his suspected criminal activity. Finally, in their experience, officers testified that address books usually contained contact information for associates. Based on these facts, the court concluded that the incriminating nature of the items was immediately apparent to the officers when they seized them, particularly as the officers did not search the electronic devices until after they had obtained a warrant.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/14-3739/14-3739-2017-04-17.pdf?ts=1492439406>

United States v. Diaz, 854 F.3d 197 (2d Cir. Apr. 18, 2017)

New York City Police Department Officers Aybar and Espinal entered a private apartment building to conduct a floor-by-floor patrol. The officers had received consent from the owners of the building to patrol the common areas to deter drug dealing and trespassing offenses. When the officers entered the building they immediately smelled marijuana. The officers went up the stairs where they encountered Diaz and two other men on the third-floor landing. Diaz was sitting next to a bottle of vodka and holding a red plastic cup. As Officer Aybar approached Diaz, she saw clear liquid in the cup and smelled what seemed to be alcohol. Officer Aybar initially planned to issue Diaz a summons for violating New York's open-container law, which prohibited among other things, possession with the intent to consume an alcoholic beverage from an open container in a public place. Officer Aybar had received training on the open-container law and had issued approximately fifty summonses for open-container violations, often in apartment buildings.

Because Officer Aybar did not feel safe confronting Diaz while he was seated, she ordered him to stand against the wall and produce his identification. Diaz stood, fumbled with his hands in his jacket pocket, and rearranged his waistband. Believing that Diaz might be armed, Officer Aybar frisked Diaz and felt a bulge in his jacket. Officer Aybar removed a loaded handgun from Diaz's jacket pocket and handcuffed him. Diaz was transported to the police station where Officer Aybar issued him a summons for the open-container violation.

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

Diaz filed a motion to suppress the firearm, arguing that the apartment-building stairwell where he was found with an open container of alcohol did not constitute a "public place" under the open-container law.

The court disagreed. The court noted the issue was not whether the common-area stairwell in an apartment building constituted a public place under the open-container law, but whether Officer Aybar reasonably believed that it did. The court held that Officer Aybar's belief that the apartment building stairwell qualified as a public place within the meaning of the open-container law was reasonable. The court found that the New York Court of Appeals has not yet addressed whether a common area inside an apartment building is "public place" under the open-container law, and the other New York courts that have done so have reached conflicting conclusions. As a result, the court concluded that at the time of the search, Officer Aybar had probable cause to arrest Diaz for a violation of New York's open-container law based on a reasonable belief that an apartment-building stairwell is a public place under that law.

Diaz also argued that Officer Aybar's search was not a lawful search incident to arrest because when Officer Aybar searched Diaz, she did not intend to arrest him. Diaz claimed that Officer Aybar decided to arrest him only after she discovered the handgun.

Again, the court disagreed. The court concluded that when an officer has probable cause to believe that a person has committed a crime, the officer may search that person pursuant to the search-incident-to-arrest doctrine, provided that a "formal arrest follows quickly on the heels of the frisk." The court found that it was irrelevant whether, at the time of the search, Officer Aybar intended to arrest Diaz or just issue him a citation for the open container violation.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca2/15-3776/15-3776-2017-04-18.pdf?ts=1492527606>

Fifth Circuit

Hanks v. Rogers, 853 F.3d 738 (5th Cir. Tex. Apr. 5, 2017)

Officer Rogers saw Hanks driving a vehicle with its hazard lights engaged, approximately 20 miles-per-hour under the speed limit on an interstate highway. Officer Rogers stopped Hanks. Hanks told Officer Rogers that he was trying to locate his cell phone, which he had inadvertently left on top of his car at the outset of his trip. Officer Rogers asked Hanks to produce his driver's license and proof of insurance. Hanks gave Officer Rogers his driver's license, but he could not locate an insurance card for the vehicle, which he had borrowed with permission from a relative. Officer Rogers ordered Hanks to exit his vehicle, but instead of getting out of his vehicle, Hanks questioned the basis for Officer Rogers' order. Officer Rogers repeated his command six times before Hanks exited his vehicle.

Once outside the vehicle, Officer Rogers ordered Hanks to place his hands on the rear of Hanks' vehicle. Hanks initially leaned back against the rear of his vehicle, but eventually complied after Officer Rogers repeated his command and drew his taser. Officer Rogers then ordered Hanks to "go to [Hanks'] knees." Hanks replied by asking Officer Rogers if he was under arrest. A few seconds later, Officer Rogers repeated his command, and Hanks asked again if he was under arrest. Officer Rogers ordered Hanks to his knees again. When Hanks made a small lateral step with his left foot, Officer Rogers rushed up behind Hanks and administered a blow, referred to as a "half spear," to Hanks' upper back. The blow forced Hanks' upper body onto the trunk of his vehicle. Officer Rogers eventually got Hanks onto the ground and handcuffed him. When Hanks took the small step to his left, his empty hands remained "surrendered" behind his back, and Hanks offered no resistance while Officer Rogers handcuffed him. After Officer Rogers issued Hanks a traffic citation, medics transported Hanks to the hospital.

Hanks sued Officers Rogers under *42 U.S.C. § 1983*, claiming that Officer Rogers used excessive force against him in violation of the Fourth Amendment. The district court granted Officer Rogers qualified immunity and dismissed the case. The district court concluded that Hanks did not establish that Officer Rogers' use of force was objectively unreasonable. Hanks appealed to the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals reversed the district court. The court concluded that under the circumstances documented in the recording¹ in this case, a reasonable officer on the scene would have known that suddenly resorting to physical force as Officer Rogers did would be clearly excessive and unreasonable.

In [Graham v. Connor](#), the Supreme Court outlined several factors that a court should consider to determine if an officer's use of force was reasonable. Factors to consider include: 1) the severity of the crime at issue, 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

¹ The record on appeal contained an audiovisual recording of the encounter captured by a camera in Officer Rogers' police vehicle and may be accessed via the following link: <http://www.ca5.uscourts.gov/opinions/pub/15/15-11295.mp4>.

First, the court found the fact that Hanks was driving 20 miles-per-hour below the speed limit and he was unable to produce proof of insurance constituted minor traffic violations.

Second, the court perceived “little basis in the recording from which Officer Rogers could have reasonably viewed Hanks as an immediate threat” to his safety or others when Officer Rogers applied the “half spear.” The recording showed that for approximately the last thirty seconds before the blow, more than half of the total time between when Hanks exited his vehicle and when Officer Rogers took him to the ground, Hanks stood facing away from Officer Rogers. Throughout that time, Hanks displayed his empty hands on the trunk of his car, on the back of his head, and then behind his back. During those last thirty seconds, Officer Rogers kept his taser at the ready, trained on Hanks' back. Hanks' resistance "was, at most, passive," and consisted primarily of remaining on his feet for about twenty seconds after Officer Rogers first order to kneel, during which time Hanks twice asked whether he was under arrest. Consequently, the court concluded that a reasonable officer under these circumstances would not have believed that Hanks posed an "immediate threat" warranting a physical takedown.

Finally, as previously mentioned, the court found that Hanks displayed, at most, passive resistance and made no attempt to flee. Although Hanks took a small lateral step with his left foot, it was clear that Hanks' step was not accompanied by any obvious signs of violence or flight. Under the circumstances captured in the recording, the court concluded that a reasonable officer would not have perceived this movement as active resistance or an attempt to flee.

The court further held that at the time of the incident it was clearly established that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation.

It should be noted that after the incident, the Grand Prairie Police Department conducted an investigation that led to Officer Rogers' indefinite suspension. The department's investigation concluded that Officer Rogers' “half spear . . . was not objectively reasonable to bring the incident under control . . . based on Mr. Hanks' lack of resistance.” While the court mentioned the department's disciplinary action in its opinion, the court did not take this disciplinary action into consideration when determining reasonableness of Officer Rogers' actions.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/15-11295/15-11295-2017-04-05.pdf?ts=1491435032>

United States v. Henry, 853 F.3d 754 (5th Cir. La. Apr. 10, 2017)

While on patrol, two Baton Rouge police officers noticed that Henry's license-plate frame obstructed the view of the expiration date on the plate's registration sticker. Believing that Henry's obstructed registration sticker violated *Louisiana Statutes Annotated* § 32:53(A)(3), which provides that "[e]very permanent registration license plate . . . shall be maintained free from foreign materials and in a condition to be clearly legible," they conducted a traffic stop. During the stop, Henry consented to a search of his car. The officers searched Henry's car and found marijuana, a digital scale, and a loaded handgun.

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

Henry filed a motion to suppress the evidence seized from his car, claiming that the officers did not have reasonable suspicion to conduct the stop. Henry argued that *Section 32:53* does not apply to obstructed registration stickers, and the officers' interpretation of the statute was unreasonable. Instead, Henry claimed that *Section 32:53* only requires the letters and numbers on the plate itself be clearly legible.

The court declined to render an opinion on the proper interpretation of *Section 32:53* because it determined that Louisiana case law establishes that the officers' interpretation, even if mistaken, was objectively reasonable. In [State v. Pena](#), the court held that a license-plate frame that obscured part of the plate violated the statute, even though the lettering and numbering on the plate was "clearly visible." Although [Pena](#) did not specifically address obscured registration stickers, the court concluded that its broad construction of the statute can reasonably be construed to apply to them. As a result, the court concluded that given [Pena](#), the officers' belief that Henry's obstructed registration sticker violated *Section 32:53*, even if mistaken, was objectively reasonable; therefore, they had reasonable suspicion to stop Henry.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/16-30731/16-30731-2017-04-10.pdf?ts=1491845446>

Texas v. Kleinert, 855 F.3d 305 (5th Cir. Tex. Apr. 20, 2017)

Officer Kleinert, an Austin, Texas police officer, was specially deputized by the Federal Bureau of Investigation (FBI) under Titles 21 and 28 of the United States Code. After his deputations, Kleinert worked as a full-time FBI bank robbery task force officer. As such, Kleinert reported to work each day at an FBI office, received a security clearance from the federal government, was supervised by an FBI agent, and used FBI issued equipment.

In July 2013, Officer Kleinert went to a bank that had been robbed earlier in the day to obtain surveillance footage and interview bank employees. Although it was normal business hours, a sign on the front door indicated the bank was temporarily closed. While Kleinert was discussing the robbery with two employees, a man, later identified as Larry Jackson, pulled on the bank's locked front door. When one of the bank employees went out to tell Jackson the bank was closed, Jackson identified himself as "William Majors," and told the bank employee that he needed to withdraw funds from his account. The bank employee knew that Jackson was not William Majors because she personally knew Majors. Uncomfortable with Jackson's representations, the bank employee asked Officer Kleinert to talk to Jackson.

Jackson told Officer Kleinert that he was not William Majors, but rather Mr. Majors' brother. Jackson told Kleinert that he needed to get money out of the bank to cover the costs of a tow truck and rental car because he had been involved in a traffic accident. Jackson held up his phone to his face and pretended to be engaged in a conversation with someone about the accident. After this exchange Jackson fled, and Officer Kleinert chased him.

Officer Kleinert caught up to Jackson on a rocky incline that led to a traffic bridge. Kleinert drew his firearm and ordered Jackson to the ground. Jackson stopped briefly, ignored Kleinert's command, and continued to run. Kleinert caught up to Jackson and grabbed Jackson with his left hand while holding his firearm in his right hand. Jackson continued to run with Kleinert holding on to the back of his shirt. As Jackson tried to go up the rock incline, Kleinert struck Jackson twice in the lower back with the "meaty part" of his right hand, while still holding his firearm.

When Kleinert tried to strike Jackson a third time, Jackson fell back towards Kleinert and knocked him down. As they fell, Kleinert accidentally pulled the trigger of his firearm, firing one bullet into Jackson's neck, killing him.

In 2014, a Travis County, Texas state grand jury indicted Kleinert for manslaughter. The indictment charged that Kleinert "recklessly caused" Jackson's death by striking and attempting to strike Jackson while holding a loaded firearm and for attempting to seize Jackson without maintaining a distance between himself and Jackson that was sufficient to holster his firearm.

Officer Kleinert filed a motion in federal district court to remove the state prosecution to federal court under 28 U.S.C. § 1442, the "federal-officer-removal" statute. After the federal district court determined that removal was proper, Kleinert asked the district court to dismiss the indictment. Kleinert argued that under the *Supremacy Clause* of the *United States Constitution* he was immune from prosecution by the local district attorney for conduct that he undertook as a federal officer. The district court agreed and dismissed the indictment. The State appealed to the Fifth Circuit Court of Appeals arguing that the district court improperly removed the case to federal court.

The court disagreed. To remove a case to federal court under the federal-officer-removal statute¹, the defendant / officer must:

- 1) Be "an officer . . . of the United States" or of a federal agency;
- 2) Show that the state prosecution arose out of an act done by the officer under the color of federal authority and in enforcement of federal law;
- 3) Raise a "colorable" or plausible federal defense" to the prosecution by the state.

The court noted that the State did not dispute that Officer Kleinert was a "federal officer" for the purposes of the removal statute; therefore, the first element was satisfied.

Next, Officer Kleinert was a specially deputized federal agent who investigated bank robberies for the FBI's local task force. When Officer Kleinert encountered Jackson, he was investigating a bank robbery, and during their interaction Kleinert developed probable cause to believe that Jackson was trying to rob or defraud the same bank, also federal offenses. According to Kleinert, federal law authorized him to arrest Jackson based on probable cause and the State's prosecution was based on Kleinert's striking Jackson during the arrest. As a result, the court found that Officer Kleinert satisfied the second element of the federal-officer-removal statute.

Finally, the court held that Officer Kleinert satisfied the third element because he plausibly claimed that he was acting as a federal officer at the time of the shooting. As a result, the court concluded that Kleinert, asserted a "colorable" defense of *Supremacy Clause* immunity from state prosecution.

Even if the district court properly removed the case to federal court, the State argued that the district court improperly granted Officer Kleinert immunity under the *Supremacy Clause*.

¹ Title 28 U.S.C. § 1442(a)(1), the federal-officer-removal statute, provides that: "any officer . . . of the United States or of any agency thereof" prosecuted "for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals" may remove the action to federal court. Although not explicit in the text of the statute, the officer must also allege "a colorable federal defense" to satisfy Article III's "arising under" requirement for subject matter jurisdiction.

Again, the court disagreed. The *Supremacy Clause* of the *United States Constitution* protects federal officers, acting within their federal authority from liability under state law. The *Supremacy Clause* prohibits a state from punishing, whether by local prosecution or private lawsuit under state law,

- 1) A federal officer;
- 2) Authorized by federal law to perform an act;
- 3) Who, in performing the authorized act, did no more than what the officer subjectively believed was necessary and proper (this subjective element depends on an officer's "honest belief that his actions are reasonable and necessary to the exercise of his authority");
- 4) And that belief was objectively reasonable under the circumstances.

As before, the State conceded that Officer Kleinert was a federal officer in this case. Second, the court ruled that when Officer Kleinert attempted to arrest Jackson, he had probable cause to arrest Jackson for bank robbery and bank fraud.

Third, the court found Officer Kleinert's testimony credible that once he drew his firearm he could not safely re-holster it before going "hands-on" with Jackson because, to do so, he would have to take his eyes off Jackson. According to Officer Kleinert, taking eyes off a suspect before apprehending him is dangerous and re-holstering his firearm would have been difficult because of his plain clothes, including a baggy, untucked shirt. In addition, Officer Kleinert explained that he used "hammer fist" strikes, a technique he learned from police training, to gain compliance. The court noted that Jackson had run away from Officer Kleinert twice already and continued to resist even after Kleinert physically held on to Jackson's shirt. After the shooting, Kleinert immediately called dispatch to report the incident and seemed concerned that EMS and other officers were not arriving quickly enough.

Fourth, a Lieutenant with the Austin Police Department testified that he and other officers "have gone hands on" with suspects while holding their firearms. In addition, a training instructor testified that the department teaches its officers to perform hammer-fist strikes while holding a weapon, although not necessarily a firearm. The State presented little evidence to the contrary. Consequently, the court concluded that Officer Kleinert's actions were objectively reasonable under the circumstances because he reacted on a "split-second basis" and accidentally discharged his firearm, in what the State's own expert called a "sympathetic" or involuntary discharge.

In conclusion, the court reminded officers that "even if a federal officer satisfies every element of the immunity standard, the *Supremacy Clause* cannot shield the officer from *federal* consequences, such as prosecution by federal authorities or civil liability under federal law."

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/15-51077/15-51077-2017-04-20.pdf?ts=1492731034>

United States v. Broca-Martinez, 2017 U.S. App. LEXIS 7612 (5th Cir. Tex. Apr. 28, 2017)

While conducting surveillance, Homeland Security Investigations (HSI) agents saw a vehicle leave a residence suspected of harboring undocumented immigrants. The agents notified local

police officers to be-on-the-lookout (BOLO) for the vehicle. While on patrol, an officer began to follow the defendant's vehicle because it matched the vehicle from the HSI agents' BOLO. While following the vehicle, the officer entered its license plate number into a computer database designed to return vehicle information such as insurance status. The computer indicated the insurance status was "unconfirmed." Based on his experience using this system, the officer concluded that the vehicle was likely uninsured, a violation of Texas law. The officer conducted a traffic stop and learned that the defendant was in the United States illegally. The officer issued the defendant citations for violating the insurance requirement and driving without a license while he waited for the HSI agents to arrive.

The government charged the defendant with conspiracy to harbor illegal aliens. The defendant argued that the "unconfirmed" insurance status obtained from the state computer database did not provide the officer reasonable suspicion to stop the defendant.

The court recognized that the Fifth Circuit had not yet addressed whether a state computer database indication of insurance status establishes reasonable suspicion. However, the court commented that the Sixth, Seventh, Eighth, and Tenth Circuits have found that such information may give rise to reasonable suspicion as long as there is either some evidence suggesting the database is reliable or at least an absence of evidence that it is unreliable. In this case, the court followed the other circuits that have decided this issue and held that a state computer database indication of insurance status may establish reasonable suspicion when the officer is familiar with the database and the system itself is reliable.

Here, the court found that the officer's testimony established the reliability of the database. First, the officer explained the process for inputting license plate information. Second, the officer described how records in the database are kept and stated that he was familiar with these records. Finally, the officer testified that based on his knowledge and experience as a police officer, he knows a suspect vehicle is uninsured when an "unconfirmed" status appears because the computer system will either return an "insurance confirmed," or "unconfirmed" response. As a result, the court held that the officer had reasonable suspicion to stop the defendant.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca5/16-40817/16-40817-2017-04-28.pdf?ts=1493400712>

Sixth Circuit

Estate of Hill v. Miracle, 853 F.3d 306 (6th Cir. Mich. Apr. 4, 2017)

In June 2013, Corey Hill suffered a diabetic emergency in his home due to his low blood-sugar level. When paramedics arrived, Hill was agitated and combative; however, the paramedics managed to measure Hill's blood-sugar level, and discovered that it was dangerously low. Deputy Miracle arrived at Hill's home at some point after the paramedics had measured Hill's blood-sugar level. Deputy Miracle's duties included responding to calls for emergency medical services, and he had encountered over a dozen diabetic emergencies. In addition, Deputy Miracle was aware that persons suffering from low blood-sugar levels are often disoriented and unaware of their surroundings.

Because the paramedics considered Hill's low blood-sugar level a "medical emergency," they inserted a catheter into his arm to intravenously administer dextrose in order to raise his blood-

sugar level. In response, Hill became increasingly combative, swinging his fists, kicking, and swearing at the paramedics. At some point, a completely disoriented Hill ripped the catheter from his arm. Hill continued to kick, swing, and swear at the paramedics as they tried to hold him down and re-insert the catheter into his arm. Deputy Miracle, who at that point had not joined in the attempt to physically restrain Hill, ordered Hill to “relax.” After Hill continued to kick and swing, Deputy Miracle told Hill that he was going to use his taser. Deputy Miracle then deployed his taser in drive-stun mode directly to Hill’s right thigh. After Deputy Miracle held the taser against Hill’s thigh for a few seconds, Hill calmed down long enough for a paramedic to re-establish the intravenous catheter. Eventually Hill’s blood-sugar level reached a normal level and Hill was transported to the hospital without incident. Medical records from the hospital noted a taser puncture wound on Hill’s right thigh and that the wound did not require treatment.

Hill sued Deputy Miracle under *42 U.S.C. § 1983*, claiming that Miracle used excessive force in violation of the Fourth Amendment when he deployed his taser against Hill. Hill alleged that he suffered burns on his right thigh and that his diabetes worsened because of the incident. The district court found that Deputy Miracle violated Hill’s clearly established rights in deploying his taser and denied Miracle qualified immunity. Deputy Miracle appealed to the Sixth Circuit Court of Appeals.

To determine whether an officer used excessive force in violation of the Fourth Amendment the court considers whether the officer’s actions were objectively reasonable in light of the facts and circumstances confronting him. In [Graham v. Connor](#), the Supreme Court established a three-factor test to assist lower courts in assessing objective reasonableness in the typical situation of a law enforcement officer accused in a civil suit of using excessive force. The factors set out in [Graham](#) are: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The court of appeals appreciated the fact that the district court had to apply the [Graham](#) factors to a medical emergency where there was no crime, no resisting of an arrest, and no direct threat to the officer. In addition, the court recognized that because Hill had not committed a crime and was not resisting arrest, two of the three [Graham](#) factors automatically weighted against Deputy Miracle from the beginning. Finally, the court noted that no appellate courts have provided any guidance on how to assess objective reasonableness when a law enforcement officer is presented with a medical emergency. The court found that most of the cases dealing with excessive force and taser use have ruled that an officer does not use excessive force by tasing a person who is actively resisting arrest, but does use excessive force if that person is not resisting. Rather than continuing to struggle with this dilemma, the court suggested that a “more tailored” set of factors be considered in the medical-emergency context to determine if an officer’s actions were objectively reasonable. Where a situation does not fit within the [Graham](#) test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

- 1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
- 2) Was some degree of force reasonably necessary to ameliorate the immediate threat?

- 3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

The court added, “if the answers to the first two questions are “yes,” and the answer to the third question is “no,” then the officer is entitled to qualified immunity.”

Applying the factors outlined above to this case, the court concluded that Deputy Miracle did not use excessive force against Hill when Deputy Miracle deployed his taser in drive-stun mode. First, Hill was experiencing a medical emergency because of his hypoglycemic episode when Deputy Miracle encountered him, and Hill’s combative actions placed the paramedics in immediate physical danger.

Second, the court found that some degree of force was necessary to ameliorate the immediate threat to the paramedics and to Hill. Hill was violently resisting the paramedics’ attempts to render him lifesaving assistance, and the paramedics were unable to gain control over Hill.

Third, the court held that Deputy Miracle’s use of his taser in drive stun mode was objectively reasonable to gain control over Hill. Four paramedics were not able to physically restrain Hill, whose health was rapidly deteriorating and who was unresponsive to Deputy Miracle’s command to “relax.” As a result, the court concluded that a reasonable officer on the scene without the benefit of 20/20 hindsight would be justified in taking the same actions as Deputy Miracle.

The court further held that at the time of the incident Hill’s Fourth Amendment right was not clearly established. Specifically, “at the time of the alleged violation, no reasonable officer would have known that using a taser on an individual who was undergoing a medical emergency, posed a risk to the responders' safety, and needed to be subdued in order for medical personnel to render life-saving assistance violated that person's constitutional rights.”

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca6/16-1818/16-1818-2017-04-04.pdf?ts=1491832850>

Eighth Circuit

United States v. Murillo-Salgado, 854 F.3d 407 (8th Cir. Mo. Apr. 13, 2017)

A state trooper saw a pickup truck traveling on an interstate highway in the left lane, but not passing other vehicles, and driving three miles-per-hour over the speed limit. The trooper conducted a traffic stop. As the trooper approached the stopped truck, which bore California license plates, he saw a driver and passenger in the front seats, as well as three packages of electrical wiring, a small ladder, a hard hat, and a toolbox in the open truck bed. The driver identified himself as Ramon Arredondo and gave the trooper a California driver’s license. Arredondo told the trooper that he and his passenger, Salgado, were driving from California to North Carolina to complete a wiring job for a 15,000-square-foot residence. When asked why they were driving such a long distance instead of flying, Arredondo told the trooper they were transporting tools and all of the electrical wiring for the job. The trooper was suspicious of Arredondo’s response because he did not believe that the quantity of wiring that he had seen in the truck bed was sufficient to complete the wiring job described by Arredondo. During the stop, the trooper discovered the name on the vehicle rental agreement did not match the name on Arredondo’s license. In addition, the trooper noticed that the truck had only been rented for five

days. At some point the trooper spoke with Salgado who confirmed Arredondo's claim that the men were traveling to North Carolina to wire a 15,000-square-foot house; however, the men gave the trooper conflicting answers about who was paying for the truck rental.

Approximately twenty-three minutes into the stop the trooper asked Arredondo for consent to search the truck. The trooper had not yet completed the tasks related with the traffic stop or issued Arredondo a ticket. After Arredondo gave the trooper consent to search, the trooper asked Arredondo if he owned everything in the truck. Arredondo told the trooper that he owned two bags in the back seat that contained his clothes, but he denied owning any of the tools or toolboxes.

When the trooper opened the rear passenger door to the truck, he saw an air compressor on the back seat. The trooper immediately identified the smell of fresh paint and saw some rough, jagged non-factory welding on the air tank. The trooper looked at the compressor more closely and noticed a square cut underneath the motor that looked like it had been recently painted. The trooper eventually opened the air tank and discovered several packages of cocaine. Arredondo and Salgado were charged with possession with intent to distribute cocaine.

Salgado filed a motion to suppress the evidence seized from the truck. Salgado argued that the trooper prolonged the traffic stop beyond the time reasonably required to investigate the traffic violations; therefore, the evidence seized from the truck should have been suppressed.

The court disagreed. The trooper, who had received specific training in the trafficking of illegal drugs and had participated in "hundreds" of drug investigations, developed reasonable suspicion of drug-related activity while he was completing the routine tasks associated with the traffic stop. First, the trooper noticed a discrepancy between the name on Arredondo's driver's license and the name on the rental agreement. Second, the trooper noticed that the rental agreement was for a period of time that appeared insufficient to accomplish the stated purposes of the trip. Third, based on his admittedly limited electrical-wiring experience, the trooper believed that the quantity of electrical wiring in the bed of the truck was insufficient to complete work on a 15,000-square-foot house.

Next, Salgado argued that even if Arredondo had given valid consent to search the truck, Arredondo's consent to search did not extend to a search of the air compressor because Arredondo had specifically denied ownership of it.

Again, the court disagreed. Observations made by an officer during a consensual search of a vehicle may provide the officer with probable cause to expand the scope of the search under the automobile exception to the Fourth Amendment's warrant requirement. In this case, the trooper began his search after he obtained Arredondo's voluntary consent. Arredondo's consent allowed the trooper to search all areas of the truck, including the passenger compartment where the air compressor was located. When the trooper smelled the odor of fresh paint, then saw fresh paint on the compressor's tank along with the rough, jagged, non-factory welds, he had probable cause to believe that the tank contained contraband or evidence of a crime. As a result, the court concluded that the warrantless search of the air compressor was valid under the automobile exception.

For the court's opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-1959/16-1959-2017-04-13.pdf?ts=1492097446>

United States v. Peoples, 2017 U.S. App. LEXIS 7098 (8th Cir. Mo. Apr. 24, 2017)

A police officer located a stolen car in the parking lot of a motel. While conducting surveillance on the car, the officer saw a man and a woman exit Room 114 and approach the stolen car. The couple had a brief conversation and then the woman got into the car and drove away. The officer followed the woman and eventually arrested her for possession of a stolen automobile. The woman told the officer that she had spent the night in Room 114 with a man named “Dusty.”

In the meantime, another officer was dispatched to the motel to advise management of the criminal activity on the premises and to determine the identity of the man from Room 114. After arriving at the motel, the officer told the clerk on duty that a stolen car had been observed leaving the parking lot and that, while one person had been arrested, there was still a man associated with the vehicle inside Room 114. In response, the clerk handed the officer a key to Room 114 so the officer could evict the occupants.

The officer went to Room 114 accompanied by back-up officers and knocked on the door several times, announcing that he was with the police. After receiving no response, the officer used the key to enter the room and found Peoples lying on the bed. The officer also saw a loaded handgun magazine on the floor and narcotics on the nightstand. After the officers arrested Peoples, they obtained a warrant to search the room based on the evidence they had observed when they first entered the room. The officers subsequently found a loaded handgun and stolen electronics.

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

Peoples filed a motion to suppress all evidence obtained as a result of the initial police entry into the motel room. Peoples claimed that the officer’s unlawful warrantless entry into Room 114 tainted the subsequent search with the warrant, which led to the seizure of the firearm.

The Fourth Amendment’s protection against unreasonable searches and seizures extends to a person’s privacy in temporary dwelling places such as hotel or motel rooms. However, once a guest has been “justifiably” expelled, the guest does not have standing to contest an officer’s entry into his hotel room under the Fourth Amendment. In addition, Missouri law (*Mo. Rev. Stat. § 315.075(3)*) allows a hotel to eject a person when the hotel operator reasonably believes that the person is using the premises for an unlawful purpose.

In this case, the court held that the motel clerk gave the officer the key to Room 114 to evict the occupants under § 315.075(3). The court further held the eviction was lawful under Missouri law because the clerk had a reasonable belief that the occupants of Room 114 were using motel premises for an unlawful purpose. Specifically, the officer told the clerk that the occupants of Room 114 had kept a stolen car in the motel parking lot, and that the woman who had exited Room 114 had been arrested for this offense. Consequently, the court concluded that the officers’ entry into Room 114 was for the lawful purpose of effecting People’s eviction; therefore, the evidence observed during this initial entry provided a valid basis for the subsequent search warrant.

For the court’s opinion: <http://cases.justia.com/federal/appellate-courts/ca8/16-2044/16-2044-2017-04-24.pdf?ts=1493047848>
