
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 – August 2018

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FLETC Talks

A brief review of United States Supreme Court cases involving a variety of Constitutional issues relevant to law enforcement officers.

1. Arizona v. Gant (Search Incident to Arrest – Vehicles)

In Gant, the Supreme Court outlined two situations in which the passenger compartment of a vehicle can be searched incident to arrest. Do you remember what they are?

<https://www.youtube.com/watch?v=p-Ts09utgKQ>

For the court’s opinion: <https://www.supremecourt.gov/opinions/08pdf/07-542.pdf>



2. Government Employees and Free Speech Rights

The First Amendment permits, in certain circumstances, government employees, to include police officers, to speak as private citizens on matters of public concern. Click on the link below for a discussion on the limitations a government employer can place on its employees right to free speech under the First Amendment.

https://www.youtube.com/watch?v=W6EBfL9_oPY



3. Minnesota v. Dickerson (Plain-Touch Doctrine)

When a police officer detects contraband through his or her sense of touch during a lawful Terry frisk, does the Fourth Amendment permit the officer to seize it?

<https://www.youtube.com/watch?v=3s4bDZ83krww>

For the Court's opinion: <https://supreme.justia.com/cases/federal/us/508/366/case.pdf>



4. O'Connor v. Ortega (Government Workplace Searches)

A discussion of government employee Fourth Amendment rights regarding workplace administrative searches involving supervisors investigating suspected violations of agency policy, in comparison to law enforcement officers investigating criminal offenses.

<https://www.youtube.com/watch?v=WeTm3GrzR4Q>

For the Court's opinion: <https://supreme.justia.com/cases/federal/us/480/709/case.html>



FLETC Informer Webinar Schedule

1. Strategies for Engaging in the Art of the Difficult Conversation (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, and Ken Anderson, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Glynco, Georgia (John.Besselman@fletc.dhs.gov)

In this webinar, the presenters will reflect on their years of leading, managing and engaging in difficult conversations when necessary. The effective practice of law requires purposefully navigating communications in which the parties may disagree on desired outcomes. Though this challenge is not exclusively a legal problem, members of the profession will be encouraged to identify the risks and adopt strategies to solve these issues. Everyone that faces the challenges presented by the "difficult conversation" is invited to attend. A training certificate will be available at the conclusion of this presentation.

Thursday September 6, 2018 – 10:30 am. Eastern / 9:30 a.m. Central / 8:30 a.m. Mountain / 7:30 a.m. Pacific

To participate in this webinar: https://share.dhs.gov/difficult_conversations/



2. Use of Force in Medical Emergencies (1-hour)

Presented by Mary M. Mara, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico (mary.m.mara@fletc.dhs.gov)

This webinar presents legal aspects of use of force during medical emergencies following a recent decision by the Sixth Circuit Court of Appeals (Estate of Hill v. Miracle, 853 F.3d 306 (6th Cir. 2017)). Police officers frequently encounter medical conditions which cause otherwise law-abiding citizens subjects to act in an erratic, aggressive and sometimes combative manners: diabetes, epilepsy, mental illness and excited delirium. When confronted with such a scenario, an officer must quickly assess the situation and, when appropriate, employ force to protect themselves, the patient, and other emergency responders providing necessary medical care.

Wednesday September 12, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



3. Carpenter v. United States: New Rules on Tracking Suspects (1-hour)

Presented by Patrick Walsh, Attorney-Advisor / Branch Chief, Federal Law Enforcement Training Centers, Glynco, Georgia (patrick.walsh@fletc.dhs.gov)

In Carpenter v. United States, decided on June 22, 2018, the Supreme Court explained how the Fourth Amendment applies when the government tracks a suspect's location when it obtains cell site location information (CSLI) from a suspect's cell phone service provider. This webinar will discuss the short-term and long-term implications of the Carpenter decision, including how applications under Section 2703(d) of the Stored Communications Act must be changed immediately and the impact Carpenter might have on other methods law enforcement officers use to track the location of suspects.

Thursday September 13, 2018 10:30 am. Eastern / 9:30 a.m. Central / 8:30 a.m. Mountain / 7:30 a.m. Pacific

And

Wednesday September 19, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific

To participate in either webinar: <https://share.dhs.gov/walsh/>



4. Government Workplace Searches (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia
(John.Besselman@fletc.dhs.gov)

This webinar examines how public employees might create a Reasonable Expectation of Privacy in their workplaces (computers, cars, offices, etc.), and, if so, how the government can intrude on that REP. This course is recommended for government supervisors, the IG community, and those whose duties include internal investigations. A training certificate will be available at the conclusion of this presentation.

Tuesday September 18, 2018 – 10:30 am. Eastern / 9:30 a.m. Central / 8:30 a.m. Mountain / 7:30 a.m. Pacific

To participate in this webinar: <https://share.dhs.gov/govtworksearch/>



5. Officer Liability in 2018 (1-hour)

Presented by Henry W. McGowen, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico (henry.mcgowen@fletc.dhs.gov)

A reality today for law enforcement officers everywhere is the fact that they may be sued for doing their jobs, whether from a disputed use of force, claimed false arrest or damage to personal property resulting from police action. The Supreme Court has very recently addressed issues of officer liability and law enforcement officers' defenses to being sued. This webinar presents cases that have recently addressed critical issues of officer liability and the legal defenses to such lawsuits.

Wednesday September 26, 2018 – 3:00 p.m. Eastern / 2:00 p.m. Central / 1:00 p.m. Mountain / 12 p.m. Pacific

To participate in this webinar: <https://share.dhs.gov/artesia>



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CASE SUMMARIES

Circuit Courts of Appeal

Second Circuit

United States v. Iverson, 2018 U.S. App. LEXIS 21121 (2d Cir. N.Y. July 31, 2018)

Iverson called 911 and reported he had seen an unknown black male wearing a hoodie, holding a gun by his side, on the landing below the door to his second-floor apartment.

Two police officers were dispatched to Iverson's building but did not locate the prowler. While interviewing Iverson, the responding officers realized that Iverson's description of the prowler was similar to that of a man who had robbed a pizza shop earlier that evening approximately two-miles away. Consequently, a K-9 officer, who had attempted to track the pizza shop robber with his dog, Tank, was dispatched to Iverson's building to attempt to track the prowler.

The K-9 officer and Tank searched the perimeter of Iverson's building and the surrounding area for nearly one hour, but did not discover any traces of the prowler. Afterward, two other officers who had responded to the call, and the K-9 officer with Tank, decided to speak to Iverson to see if he could give them any additional information as to the direction in which the prowler had gone.

When the officers arrived outside Iverson's apartment the front door was open. One of the officers knocked on the open door, announced who he was, and asked Iverson whether they could come in to speak to him. Iverson came into view in the foyer and told the officers they could come in. The K-9 officer, with Tank tethered to his belt, entered the apartment and remained near the entryway, while the other two officers approached Iverson. There was nothing to obstruct Iverson's view of the K-9 officer or Tank in the entryway and Iverson did not state any objection to having Tank in the apartment.

After the two officers had been talking to Iverson about the prowler for approximately five-minutes, Tank, who in addition to tracking suspects, was trained to detect narcotics, alerted to the presence of drugs in Iverson's apartment. The K-9 officer informed the other officers as to Tank's alert. The officers then asked Iverson about the presence of drugs in the apartment. Iverson gave the officers three bags containing marijuana and one bag that contained cocaine. The officers arrested Iverson and obtained a warrant to search his apartment. During the search, officers found additional bags of marijuana, cocaine, an assault rifle, and ammunition.

The government charged Iverson with several drug and firearm-related offenses.

Iverson filed a motion to suppress the evidence seized from his apartment. Iverson argued that whatever consent he gave to the officers to enter his apartment did not extend to Tank.

The court held there was no evidence that Iverson did not see Tank or that Tank was not always in his line of sight. While the officers could not testify as to whether Iverson actually saw Tank, the court found that the officers gave credible testimony concerning their entry into Iverson's apartment. The court concluded this testimony allowed the district court to infer that Iverson saw Tank and that Iverson's invitation to enter the apartment implicitly extended to Tank.

Iverson further argued that the officers did not ask for consent to bring a drug-detection dog into his apartment.

The court held the fact that Tank was also a drug-detection dog had no bearing on the issue of whether Iverson gave the officers valid consent to enter his apartment. The officers went to the apartment solely to speak to Iverson about the prowler he had reported and had no suspicion that Iverson might have drugs in the apartment. The court noted that the K-9 officer and Tank had spent an hour trying to located traces of the prowler. When the officers went back to speak to Iverson in an attempt to obtain more information, they had no reason to mention that Tank also had the ability to recognize and react to the odor of narcotics. In addition, Tank and the K-9 officer remained in the entry hall and the K-9 officer never issued Tank a command to search for drugs.

Finally, Iverson argued that the officers' merely bringing Tank into his apartment constituted a Fourth Amendment search, because Tank did not need a command to alert to the presence of narcotics.

The court disagreed. The court found that as long as a K-9 is lawfully present at the location from which it alerts, no Fourth Amendment search occurs when the K-9's "senses are aroused by obviously incriminating evidence." Here, the court held that Iverson had no reasonable expectation of privacy in airborne particles bearing odors, while Tank was lawfully in his apartment.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca2/16-3829/16-3829-2018-07-31.pdf?ts=1533045610>

Third Circuit

United States v. Green, 2018 U.S. App. LEXIS 20655 (3d Cir. PA July 25, 2018)

On April 4, 2013, Trooper Volk stopped Green as he was traveling eastbound on the Pennsylvania Turnpike. Green told Trooper Volk that he was going to Philadelphia to visit family and that he was not sure how long he was going to remain there. A check of Green's license revealed that he had multiple prior arrests for drug and weapon offenses.

After Trooper Volk issued Green a warning ticket, he asked Green for consent to search his vehicle. Green agreed and signed a consent-to-search form. Trooper Volk searched Green's car and did not discover any contraband, although he had detected the smell of raw marijuana in the trunk compartment and noticed that the trunk liner was pulled back. Following the search, Trooper Volk allowed Green to leave.

On April 5, 2013, Trooper Volk saw Green's vehicle traveling westbound on the Pennsylvania Turnpike. Trooper Volk followed Green and ascertained Green's speed by "pacing" Green's vehicle. After Trooper Volk determined that Green was exceeding the speed limit, he stopped him. When Trooper Volk told Green that he had pulled him over for speeding, Green apologized and said that he had left the cruise control on while going down a hill. As Green was gathering his license and registration, he asked Trooper Volk, "How you doin' today?" Trooper Volk replied and then asked Green how he was doing, to which Green responded, "I can't complain. I got a dog, so." Trooper Volk then saw a dog in the backseat of Green's vehicle. After Trooper

Volk asked Green why he had returned from Philadelphia after only one day, Green told him that he was going home to care for his daughter who had just broken her leg.

Trooper Volk obtained Green's license and registration and returned to his cruiser where he called another trooper and discussed both traffic stops concerning Green. The phone call lasted two minutes. Eight minutes later, Trooper Volk went back to Green's vehicle and issued him a warning. After Trooper Volk issued Green the warning, he asked Green for consent to search his vehicle. Green declined, explaining that he was in a hurry to get home. At that point, Trooper Volk ordered Green to wait in his car until further notice.

Approximately fifteen minutes later, a K-9 officer arrived with his drug sniffing dog. After the dog alerted for the presence of drugs in the trunk, Trooper Volk obtained a warrant to search Green's car. A search of Green's trunk revealed a duffel bag containing approximately twenty pounds of heroin.

The government charged Green with possession with intent to distribute heroin.

Green filed a motion to suppress the heroin seized from his trunk. Green argued that the traffic stop violated the Fourth Amendment, because Trooper Volk did not have reasonable suspicion that Green was speeding.

The court disagreed. The court found that Trooper Volk paced Green's vehicle in compliance with the relevant Pennsylvania statute, when he determined that Green was driving 14 miles-per-hour above the posted speed limit. The court further held that the dashboard camera footage from Trooper Volk's cruiser supported this finding.

Next, Green argued that Trooper Volk violated the Fourth Amendment by unreasonably extending the duration of the traffic stop beyond the amount time necessary to issue a traffic citation.

The court assumed, without deciding the issue, that Trooper Volk extended the duration of the traffic stop after his initial conversation with Green, when he returned to his cruiser and made the telephone call to the other trooper in which they discussed Green's traffic stops on April 4 and April 5. The court concluded that at this point, Trooper Volk had reasonable suspicion to believe Green was involved in criminal activity.

First, when asked how he was doing, Green told Trooper Volk, "I can't complain," and mentioned that he had purchased a dog. At this point, Trooper Volk had already told Green he had been stopped for speeding. The court found it "highly" suspicious that Green would not offer his daughter's purported injury as an explanation for rushing home. Instead, Green's explanation for speeding was that he had left his cruise control on while going down a hill. The court held that Green's puzzling responses provided a reasonable basis to believe that he was lying about his travels and contributed to Trooper Volk's reasonable suspicion of criminal activity.

Second, during the consensual search of Green's car on April 4, Trooper Volk detected the smell of raw marijuana in the trunk. Although, Trooper Volk did not find any marijuana in Green's trunk, the court found that he was justified in relying on this odor as evidence of criminal activity on April 5.

Third, during the April 4 stop, Trooper Volk conducted a records check and discovered that Green had multiple prior arrests for drug and firearm violations. Even though an arrest record, by itself, is not enough to establish reasonable suspicion, the court recognized that it is a valid factor to consider in conjunction with other facts known to an officer. Consequently, the court held that

the totality of the circumstances established reasonable suspicion that Green was engaged in criminal activity when Trooper Volk extended the duration of the traffic stop of April 5.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca3/17-1576/17-1576-2018-07-25.pdf?ts=1532538010>

Fifth Circuit

Escobar v. Montee, 895 F.3d 387 (5th Cir. TX 2018)

Escobar assaulted his wife and then hid in the backyard of a house a few blocks away. Police officers located Escobar approximately twenty minutes later and while they decided on a course of action, they discovered that Escobar was armed with a knife. In addition, the officers learned that Escobar's mother had called 911 and said the police would have to kill Escobar to catch him and that Escobar would not go without a fight.

Based on those facts, Officer Montee decided that he would not give his usual warning to the suspect that he was about to deploy his canine, Bullet. Instead, Officer Montee put Bullet over the fence surrounding the backyard and then climbed over the fence himself. Montee followed Bullet who quickly found Escobar and bit him. According to Escobar, when Bullet initially bit him, he had already dropped the knife and surrendered by lying flat on the ground. However, Officer Montee believed Escobar still posed a threat, because the knife remained within Escobar's reach and because of the warnings from Escobar's mother. Consequently, Officer Montee allowed Bullet to continue biting Escobar until he was fully subdued and in handcuffs. Bullet bit Escobar for approximately one-minute.

Escobar sued Officer Montee under 42 U.S.C. § 1983 claiming that Officer Montee violated his Fourth Amendment right to be free from excessive force by (1) having Bullet initially bite him without warning and (2) permitting Bullet to continue biting after he surrendered and was not resisting.

The district court held that Officer Montee was entitled to qualified immunity as to Bullet's initial bite after Officer Montee released him without warning. The court concluded that an objectively reasonable officer in Officer Montee's position would not have known that Escobar was surrendering.

However, the district court held Officer Montee was not entitled to qualified immunity for Bullet's subsequent bites. The district court found that a reasonable officer would have known that Escobar was not resisting, but instead, was surrendering. The district court further held that using such force, when dealing with a surrendering suspect, was clearly established at the time of the incident. Officer Montee appealed to the Fifth Circuit Court of Appeals.

The court disagreed and reversed the district court, holding the Officer Montee was entitled to qualified immunity.

First, the court found that even if Escobar had dropped the knife and was lying flat on the ground it was undisputed that (1) Officer Montee saw the knife, which remained within Escobar's reach, (2) Officer Montee knew that Escobar's mother had called 911 and told the police her son would not go without a fight, (3) that Escobar had committed a felony assault and (4) that Escobar had fled before hiding in the backyard for approximately twenty minutes.

Next, the court applied these undisputed facts to the factors outlined by the Supreme Court in [Graham v. Connor](#) to determine if it was objectively reasonable for Officer Montee to allow Bullet to continue biting Escobar. The court found the first Graham factor, the severity of the crime, favored Officer Montee, as Escobar was suspected of having committed a felony assault, a serious offense.

The court then found the second Graham factor, the immediacy of the threat Escobar posed, favored Officer Montee. The court noted that the chase was at night and Escobar had hidden from the officers for twenty minutes before they located him. Along with the warnings from Escobar's mother, when Officer Montee encountered Escobar lying on the ground, the knife remained within Escobar's reach. Based on these facts, the court concluded that a reasonable officer in Officer Montee's position could believe that Escobar's "surrender" was a ploy and that he was ready to grab the knife once the dog was removed.

Finally, the court found the final Graham factor, whether the suspect was resisting or attempting to flee, were closely related to the second Graham factor and favored Officer Montee. The court held, that if Officer Montee had released Bullet after the first bite, Escobar might have attempted to flee. As a result, based on all of the circumstances, the court held that it was objectively reasonable for Officer Montee to allow Bullet to continue biting Escobar until he was fully handcuffed and subdued.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-10467/17-10467-2018-07-11.pdf?ts=1531351818>

United States v. Robles-Avalos, 895 F.3d 405 (5th Cir. TX 2018)

While on roving patrol west of Marfa, Texas around midnight, Border Patrol Agent McClain saw a Chrysler 300 driving west on U.S. Highway 90 well under the 75 mile-per-hour speed limit. McClain had been an agent for eight years, all at the Marfa Station, and he knew that this section of Highway 90 was heavily trafficked by smugglers. McClain did not recognize the vehicle as belonging to any of the local ranchers and he noticed the driver tapped the brakes several times as though lost or looking for a place to pull over. McClain's suspicions were further aroused when the Chrysler pulled into a roadside park directly across from the entrance to the aerostat balloon, a feature of the Tethered Aerostat Radar System, which is visible from Mexico and has historically been used as a guidepost for those walking illegally across the border. McClain had been involved in three arrests in previous two weeks in the area next to the balloon and he knew other agents in his office had recently arrested several additional loads of smugglers there. McClain drove past the Chrysler and saw the female driver standing outside the vehicle looking down the highway. McClain could see through the open driver's side door and did not observe anyone else inside the vehicle.

Approximately thirty minutes later, McClain saw the same Chrysler traveling on a road typically used only by local ranchers. As the Chrysler drove past him, McClain saw several passengers in the front and several passengers in the back of the vehicle. McClain suspected the driver had picked up illegal aliens that had hiked approximately twenty-five miles from the border. McClain followed the Chrysler and discovered that it was registered to a female in Odessa, Texas, a known destination for illegal aliens and narcotics. McClain also realized, that if the driver was traveling to Odessa, she was taking an inconvenient route.

McClain conducted a traffic stop and after he saw backpacks of marijuana on the passengers' laps, he arrested all of the vehicle's occupants. A search of the vehicle revealed 122.42 kilograms of marijuana between the backpacks and the trunk. A later immigration check showed that the occupants were illegally in the United States.

After being charged, Robles-Avalos and Guevara-Lopez, filed a joint motion to suppress the evidence seized from the vehicle, arguing that McClain did not have reasonable suspicion of criminal activity to justify the stop.

The court disagreed. First, McClain testified that, having patrolled the area for eight years, he knew the stretch of highway 90 near the aerostat balloon was a frequently used pick up spot for smugglers and that it was only a twenty-five-mile hike from the border. Second, McClain had made three other arrests there in the previous two weeks and knew of several more by other officers. Third, according to McClain, the usual traffic at that time of night consisted of local ranch vehicles and while he did not know every local vehicle, McClain did not recognize the Chrysler, which stood out from the typical truck or SUV used by ranchers. Fourth, the driver was going well below the posted speed limit, was tapping the brakes as though lost or searching for something along the road, and then pulled over at a known pick up point used by smugglers. Finally, when McClain saw the vehicle approximately thirty minutes later, numerous additional passengers appeared to be in the Chrysler. Based on the totality of the circumstance, the court held that McClain had reasonable suspicion to believe that the occupants of the Chrysler were engaged in criminal activity.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-50633/17-50633-2018-07-12.pdf?ts=1531438218>

United States v. Villafranco-Elizondo, 2018 U.S. App. LEXIS 20938 (5th Cir. LA July 27, 2018)

A police officer received an alert to be on the lookout (BOLO) alert for a white Chevrolet pickup truck with a green utility trailer. The officer saw the vehicle, followed it until he saw the driver commit two traffic infractions, and conducted a traffic stop. As the officer approached the pickup truck, he noticed several odd features concerning the trailer, including that the trailer's gate was misaligned to the degree that it would not be flush with the trailer floor when lowered. As a result, when lowered, the trailer's ramp was not functional. The officer had worked in his department's criminal interdiction unit for five years, performed hundreds of traffic stops, and received training in detecting hidden compartments and vehicle modifications. In addition, the officer had significant personal experience with this particular type of trailer.

When the officer asked the driver, Villafranco, about his travel plans, Villafranco told the officer he was traveling from Texas to Gonzales, Louisiana to pick up a concrete crawler he had purchased online. During the conversation, the officer saw a large suitcase in the back seat of the truck, which he found suspicious, as Villafranco had told the officer he planned to stay just long enough to pick up the concrete crawler. Villafranco showed the officer the paperwork indicating that he had purchased the concrete crawler for \$1,500, telling the officer that this type of equipment usually cost around \$12,000. The officer told Villafranco that the deal sounded "too good to be true" and became increasingly suspicious when Villafranco said he did not know the address where he would be picking up the crawler. A few minutes later, Villafranco consented to a search of his truck and trailer.

Before searching the truck and trailer, the officer and a backup officer placed Villafranco in handcuffs and told him they believed the trailer contained contraband. When the officers inspected the trailer, they saw fresh “bondo dust” and paint on the trailer along with “weak welds” on the tailgate, which indicated that the trailer had been modified. The officers then used a density meter to measure the density of various parts of the trailer. The density meter gave inconsistent readings, which indicated that the trailer contained a hidden compartment. Afterward, the officers directed a drug-sniffing dog to perform a “free air sniff” of the trailer; however, the dog’s behavior did not indicate a “final response” to the presence of drugs. The officers then moved the trailer to their department’s workshop to continue their search. At the workshop, the officers drilled into the trailer and found cocaine on the drill bit. The officers eventually discovered thirty-one kilograms of cocaine in hidden compartments in the trailer.

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

Villafranco filed a motion to suppress the evidence seized from his trailer. First, Villafranco claimed that his alleged traffic violations were a pretext for a drug interdiction stop. Villafranco argued that after receiving the BOLO alert, the officer followed his truck until he was able to “create or develop a reason to stop him and search his vehicle.”

The court noted that an officer’s subjective motivation is not relevant, as long as the officer conducts an otherwise lawful traffic stop. Here, the court credited the officer’s testimony that he stopped Villafranco only after he witnessed Villafranco commit two traffic infractions.

Second, Villafranco argued that the officer unreasonably extended the duration of the traffic stop; therefore, his consent to search the pickup truck and trailer was tainted by an unlawful detention.

The court disagreed. The court found, based on the officer’s training and experience, when he noticed the modifications to the trailer at the beginning of the stop, he had reasonable suspicion to prolong the detention. In addition, the court held that Villafranco’s answers to some of the officer’s questions concerning the duration of his trip, the purchase price of the concrete crawler, and its pickup location, added to the officer’s suspicions. As a result, the court concluded that Villafranco’s consent to search was not tainted by an unlawful detention.

Finally, Villafranco further argued that the drug dog’s failure to alert to the presence of drugs in the trailer dispelled any reasonable suspicion that might have previously existed.

Again, the court disagreed. The court found that by the time the dog sniff began, the officers had developed probable cause to search the trailer based upon the visible modification to the gate, weak welds, fresh bondo dust and paint, and inconsistent readings from the density meter. The court held the drug dog’s failure to alert did not diminish these factors or eliminate the officer’s existing probable cause.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca5/17-30530/17-30530-2018-07-27.pdf?ts=1532734216>

Eighth Circuit

United States v. Highbull, 894 F.3d 988 (8th Cir. S.D. 2018)

A police officer responded to a domestic-disturbance call from a young boy, who reported that a man was harassing his mother. When the officer arrived, the boy's mother, Michelle Janis, flagged down the officer. Janis told the officer that Highbull had naked pictures of her thirteen-year-old daughter on his phone. Janis informed the officer that the vehicle, which was left running in front of her building, belonged to Highbull. At that point, the officer asked Janis, "Do you have the phone?" Without explanation, Janis entered Highbull's vehicle, as a backup officer arrived. The two officers spoke to each other, while Janis was inside the vehicle for approximately thirty seconds. Neither officer directed Janis to enter Highbull's vehicle or to look for the phone.

When Janis exited the vehicle, she handed Highbull's cell phone to the responding officer. Janis told the officer there were nude photos of her daughter on the device, but that she could no longer locate them because they were "deeper in the phone." The officer seized the phone and a forensic analysis, conducted pursuant to a search warrant, revealed nude photos of the woman's daughter.

The government charged Highbull with sexual exploitation of a child.

Highbull filed a motion to suppress the evidence discovered on his phone, arguing that Janis's warrantless search of his vehicle to locate his phone violated the Fourth Amendment, because Janis was acting as an agent of the government.

The Fourth Amendment does not apply to searches or seizures by private individuals, unless the individual is acting as an instrument or agent of the government. Whether a private individual is acting as an agent or instrument of the government depends upon the degree of the government's participation in the private individual's activities.

First, the court held that when the officer asked Janis, "Do you have the phone?", he was not asking her to search Highbull's vehicle. Instead, the court found the officer was trying to determine if Janis had the phone in her possession.

Next, the court further held that while Janis assisted the officer by retrieving Highbull's phone, there was no evidence that she was primarily motivated by a desire to help the police. Rather, the court found that Janis was motivated at least as much by a desire to protect her daughter, as she was by any desire to aid the police. Consequently, even though the officer knew of and acquiesced in Janis's search of Highbull's vehicle, the court held that she was not acting as an agent or instrument of the government when she did so.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-2728/17-2728-2018-07-06.pdf?ts=1530891027>

United States v. Homedew, 895 F.3d 1083 (8th Cir. IA 2018)

Police officers arrested Patrick Carr after he received a controlled delivery of methamphetamine that officers had discovered in a package at a United States Postal Service facility. After his arrest, Carr agreed to cooperate with the officers. Carr told the officers that he and Jonathan Homedew were involved in distribution of methamphetamine and that Homedew was flying into town the next evening.

The next day ten officers went to the Des Moines, Iowa airport where Homedew was arrested upon his arrival. The officers handcuffed Homedew and seized a backpack he was carrying. The officers did not immediately search the backpack. Instead, the officers escorted Homedew to a police vehicle, and when asked, Homedew told the officers that he had checked one bag. When an officer asked Homedew if he could look into the backpack to retrieve the baggage claim receipt, Homedew replied, “go ahead,” and said the receipt would be in the top pouch. While looking for the receipt, the officer saw three postal receipts commingled with other papers in the pouch. The officer seized the postal receipts before Homedew withdrew his consent to search the backpack.

At the police station, Homedew again consented to a search of his backpack, as well as the checked bag. Officers found notes in Homedew’s checked bag that corroborated information Carr had given them about the drug operation. Later that day, an officer went online and tracked the packages based on information from the postal receipts seized from Homedew’s backpack. As a result, officers eventually seized eight packages containing methamphetamine.

The government charged Homedew, Carr, and two other individuals with conspiracy to distribute methamphetamine.

Homedew filed a motion to suppress the evidence seized from the search of his backpack and the seizure of the postal receipts, as well as the evidence seized from his checked bag. Homedew argued that he had not voluntarily consented to a search of those items.

The court disagreed, holding that the totality of the circumstances indicated that Homedew voluntarily consented to the search of his backpack and checked bag. First, even if there were ten officers on the scene and Homedew had already been arrested and handcuffed, the court found there was no evidence that the officers threatened or physically intimidated Homedew. The officers arrested Homedew in a public airport, and when the officer asked Homedew if he could search his backpack for the baggage claim receipt, Homedew gave an affirmative response. Second, when the officers arrested Homedew he appeared to be a sober, middle-aged man with no mental defects. Third, although the officers did not read Homedew his rights before obtaining his consent, Homedew had an extensive criminal record and prior experience with the legal system. Finally, Homedew was only under arrest for a few moments before the officers asked him for consent to search his backpack.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/17-2455/17-2455-2018-07-20.pdf?ts=1532100630>
