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The Informer – June 2020

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FLETC Informer Webinar Schedule - July 2020

1. History of Indian Law (1-hour)

Presented by Robert Duncan, Attorney-Advisor and Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

There are three sovereign entities in the United States – federal, state, and tribal. Tribal governments are unique among the three, as they possess a separate sovereignty that has

never been formally incorporated into the American constitutional framework. This webinar will discuss "Indian" and "non-Indian" concepts as matters of political recognition, which are distinguishable from racial, genetic, cultural, or ethnic identity. This distinction is especially important in light of public interest as well as upcoming Supreme Court cases involving Indian Country Criminal Jurisdiction. Further, this webinar will discuss the history behind recognition through political status – especially in criminal jurisdiction – and why concepts unique to Indian law exist in a historical context.

Wednesday, July 22, 2020: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Rivera-Morales, 2020 U.S. App. LEXIS 17116 (1st Cir. P.R. May 29, 2020)

Beskis Sánchez-Martínez (Sánchez) was scrolling through her husband's (Morales) cell phone when she discovered a photograph of her husband's penis next to a pair of blurry hands. Sánchez continued to search her husband's phone and found a fourteen-second video of Morales engaging in a sexual act with their six-year old daughter. Sánchez contacted her uncle, a municipal police officer, who explained the process for reporting her discovery. Following his advice, Sánchez went to the local police station and showed the photograph and video to the desk officers. The officers arranged for Sánchez to meet Officer Pérez the next day. Sánchez held the cell phone throughout the entire conversation and the desk officers did not see anything besides the photograph and the video.

The next day, Sánchez met Officer Pérez. While holding the cell phone in her hand, Sánchez played the video for her. Afterward, Officer Pérez instructed Sánchez to turn off the cell phone. Officer Pérez took the cell phone from Sánchez and asked her to return the next day for an interview at the district attorney's office.

The following day Sánchez and Officer Pérez met with Immigration and Customs Enforcement (ICE) Agent Román at the district attorney's office. Sánchez explained what she had discovered on her husband's cell phone and asked the officers for the phone so she could play the video. Agent Román passed the cell phone to Sánchez, who pulled up the video. After viewing the video, Sánchez gave the phone back to Agent Román. Later that day, police officers interviewed Morales. After waiving his Miranda rights, Morales admitted to having recorded the video and consented to a search of his cell phone.

The government charged Morales with production of child pornography. Morales filed a motion to suppress the video and his ensuing confession, arguing that the officers violated the Fourth Amendment by accessing the video on his cell phone without a warrant and prior to obtaining his consent. The district court denied the motion. The court held that Sánchez searched the cell phone as a private party and the officers' subsequent viewings of the video did not exceed the scope of her search. Morales appealed.

Under the private search doctrine, the Fourth Amendment does not apply when a private party conducts a search or seizure, regardless of its reasonableness, unless the party is acting an agent for the government. In this case, the First Circuit Court of Appeals held that Sánchez was acting as a private party, not a government agent, when she accessed Morales' cell phone in their home and discovered the video. Sánchez's motives for handling the cell phone and accessing the photograph and video were purely personal and Sánchez had no communication with any government representative until after she discovered the video. Consequently, because Sánchez was acting in a private capacity when she accesses Morales' cell phone, the Fourth Amendment did not apply.

The court further held that the three instances in which Sánchez accessed Morales' cell phone to show the video to various law enforcement officers did not violate the Fourth Amendment.

First, the court held that Sánchez was still acting as a private party when she accessed the video to show it the desk officers at the police station. Even though Sánchez was advised to go to the police station by her uncle, a municipal police officer, the uncle was not acting in an official capacity and he did not accompany her to the police station. When Sánchez arrived at the police station, she maintained possession of the cell phone and showed the video to the desk officers. The court found that nothing about this series of events indicated that the government instigated, participated in, or controlled Sánchez's access or use of the cell phone.

Second, the court found that the phone examinations conducted by Officer Perez and the officers at the district attorney's during the re-interviews fell within the scope of Sánchez's private search. Under the private search doctrine, when a private party examines particular evidence and then invites the government to inspect what she had found, the private party has destroyed any reasonable expectation of privacy that a defendant might have in that evidence. As a result, as long as the government's later examination of the evidence does not exceed the scope of the private search, the government's actions will not be considered a search under the Fourth Amendment. Here, the court recognized that during both interviews Sánchez revealed the same video that she had discovered at home and accessed no other material on Morales' cell phone. The court concluded that the government intrusions into Morales' cell phone remained within the scope of Sánchez's private search.

The court concluded their opinion by holding that cell phones are not "categorically exempt" from the private search doctrine. The court noted that the only other two courts of appeals that have addressed this issue: the Eighth and Eleventh Circuits. In both circuits, the courts permitted the government to inspect information stored on similar devices and held that such searches did not exceed the scope of the private search.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/17-1258/17-1258-2020-05-29.pdf?ts=1590782403>

Seventh Circuit

United States v. Howell, 958 F.3d 589 (7th Cir. 2020)

Around noon on December 4, 2012, an anonymous 911 caller reported that a Hispanic man wearing a black sweater, black hat, and black bag was climbing under a fence at a warehouse. Two police officers arrived about five minutes later and saw a man who matched the caller's description, walking on the sidewalk outside the warehouse. The officers stopped the man and immediately patted him down but found nothing suspicious. The man identified himself as Eric Escobar and explained that he worked at the warehouse and had stepped outside to buy a drink and a snack for his manager. The manager emerged from the building and confirmed Escobar's story and identity.

While talking to the officers, Escobar noticed a white man wearing a black jacket and a dark hat across the street from the warehouse. Escobar commented that the man, later identified as Anthony Howell, seemed to match the officers' account of the 911 caller's description. One of the officers called out to Howell, asking: "What's going on?" According to the officer, Howell

refused to answer, did a “quick double take with a look of panic on his face,” and placed his hands in his pockets. Finding this reaction suspicious, the officer approached Howell and immediately frisked him for weapons. As soon as the officer began the frisk, he felt a hard object in Howell’s jacket pocket. When the officer asked what it was, Howell replied, “protection.” When the officer tried to retrieve what was later determined to be a firearm, Howell pulled away, attempted to flee, but slipped and fell to the ground. At some point during the scuffle with the officers, a handgun fell out of Howell’s pocket. The officers seized the handgun and arrested Howell.

The government charged Howell with being a felon in possession of a firearm. Howell filed a motion to suppress the handgun, arguing that the officer violated his Fourth Amendment rights by stopping and frisking him without reasonably suspecting him of being engaged in criminal activity. After the district court denied Howell’s motion, he appealed.

The Seventh Circuit Court of Appeals agreed that the officer’s decision to stop Howell did not violate the Fourth Amendment. First, the court found that Howell roughly matched the 911 caller’s description. Second, the court concluded that it was reasonable for the officer to find Howell’s response suspicious, specifically, by doing a double take, appearing panicked, and refusing to respond to the officer’s calls. Accordingly, the court held that these facts and circumstances combined formed the basis for reasonable suspicion, thereby allowing the officer to approach Howell and conduct an investigatory stop.

Although police officers may establish reasonable suspicion to stop a person and conduct a brief investigation, officers are not automatically entitled to frisk every person they stop. A frisk, which is a limited pat down of a person’s outer clothing for weapons or hard objects, is permissible under the Fourth Amendment only if a police officer can “point to articulable facts” indicating “that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.”

In this case, the Court of Appeals disagreed with the district court’s holding that the officer was justified in frisking Howell. The court considered several facts, including that the 911 caller was anonymous. The Supreme Court has long recognized that anonymous tips are generally unreliable without independent corroboration. Here, the anonymous caller mentioned that the suspect was a Hispanic male, who was carrying a bag. Whereas, Howell is a white male and was first seen without a bag. The court held that to justify a frisk of Howell, the officers needed some additional indicia of reliability or another source of corroboration beyond the limited information provided by the anonymous caller.

Next, the court considered the nature of the reported offense. The court noted that “a call to police is less likely to support reasonable suspicion [to support a frisk for weapons] when it does not describe an ongoing crime or emergency.” Here, the anonymous tip reported someone climbing a warehouse fence. The caller did not suggest that an emergency was underway or that anyone was in imminent danger. In addition, the alleged offense took place around noon, in broad daylight, and there was no evidence that it took place in a high-crime area.

Finally, what the court found “mattered the most” was that the 911 caller did not suggest that the suspect was armed or dangerous nor did such a threat arise after the officers responded to the call. When the officers arrived, they saw no crime in progress and encountered no victims or witnesses. It was only after Escobar, a bystander, saw Howell and suggested that he might be a suspect that the officers initiated contact. The court added that while Howell’s actions when confronted by the officers might have been suspicious, there was no indication that Howell was armed, as he did

not initially attempt to flee nor did he attempt to hide anything. The court found that Howell responded to seeing the officers as many might, by appearing to want to go about his business and avoid a discussion with the police. What concerned the court the most was how the officer reacted. Instead of asking Howell additional questions, such as where he lived or if he knew anything about a burglary at the warehouse, the officer immediately frisked Howell. The court concluded with the reminder that “frisks need to account for the totality of circumstances – they cannot be rote or reflexive.” Consequently, although the stop of Howell was lawful, the court held that the handgun recovered from Howell’s pocket should have been suppressed as the fruit of an unlawful search.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca7/18-3157/18-3157-2020-05-04.pdf?ts=1588608018>

Eighth Circuit

Cole v. Hutchins, 959 F.3d 1127 (8th Cir. 2020)

In the early morning hours of October 25, 2016, an intoxicated Roy Lee Richards went to the home of his uncle, Darrell Underwood, and got into an altercation. At one point Richards displayed a gun. After neighbors called 911 to report the commotion, Officer Dennis Hutchins and his partner were dispatched to the scene. Because Richard was reportedly armed, the officers decided to park a short distance away from the residence and approach the scene on foot. When the officers arrived, a neighbor told Richards and Underwood, who were fighting in the front yard, that police had arrived.

Exactly what happened next was disputed by the parties, but construing the facts in the light that is most favorable to the plaintiff (Cole) as required, the district court found the following facts:

Underwood and Richards fought for approximately ten or more seconds. Following the altercation, Underwood walked toward the front porch of his house. Meanwhile, Richards walked toward his vehicle, which was parked in the driveway and retrieved a long gun. By the time Richards reached his vehicle, Underwood had made it up the steps of his front porch. Richards then approached the front porch, holding the gun vertically, facing either the sky or the ground, but never pointed at Underwood. Officers Hutchins saw Richards armed with the gun, heading towards Underwood’s porch. As Richards started up the steps, Underwood entered his house and slammed the front door. Richards then backed down the steps of the porch and turned away from the door toward his vehicle. Approximately five seconds after Underwood entered his home and slammed the door, Officer Hutchins fired on Richards five times without warning, striking and killing him. From when he shut his door to the moment shots were fired, Underwood had time to lock his door, walk ten or eleven feet inside his home, and begin speaking to a friend who had been staying at his house.

Vanessa Cole (plaintiff) sued Officer Hutchins on behalf of Richard’s estate, alleging among other things that Officer Hutchins used excessive force against Richards in violation of the Fourth Amendment. After the district court denied Officer Hutchins qualified immunity, he appealed.

In determining whether a police officer is entitled to qualified immunity, the court is required to view the evidence in the light most favorable to the plaintiff or, in other words, assume that the facts alleged by the plaintiff are true. The court will then determine: 1) whether the facts as alleged by the plaintiff establish a violation of a constitutional or statutory right, and 2) whether the right was clearly established at the time of the violation, such that a reasonable official would have known that his actions were unlawful.

Applying these considerations, the court affirmed the district court and held that Officer Hutchins' use of deadly force was not objectively reasonable. According to the plaintiff, when Officer Hutchins shot Richards, Richards had turned away from Underwood's front door, retreated down the porch steps, and had his gun pointed either toward the ground or the sky. At that moment, the court concluded that Officer Hutchins did not have probable cause to believe Richards posed an immediate threat of serious physical harm to Underwood, as Richards was not pointing the weapon at Underwood or wielding it in an otherwise menacing fashion. Instead, Richards was visibly retreating from Underwood's home and any immediate threat that Richards may have previously posed to Underwood was no longer present. In addition, although not required, the court added that Officer Hutchins had enough time to warn Richards before he shot him.

Next, the court concluded that at the time of the incident, the law was clearly established and Officer Hutchins' use of deadly force against Richards was objectively unreasonable under the circumstances of this case. First, the court held that it was clearly established that a person does not pose an immediate threat of serious physical harm to another when he or she is in a possession of a firearm but does not point it at another or wield it in an otherwise menacing fashion. Second, it was clearly established that even a few seconds is sufficient time to determine whether an immediate threat has passed; and as applied to the facts of the present case, the passage of time eliminated the justification for the use of deadly force.

The court concluded by emphasizing the *limited* nature of its holding. The court noted that it did not decide whether Officer Hutchins, in fact, violated Richards' rights. This court's duty was only to decide whether the officer should be granted qualified immunity. The court added that if the factfinder (e.g. a jury) later determined that key facts differed from the one this court was bound to assume (e.g. the manner in which Richards held the gun, how much time elapsed between when Richards began to retreat toward his vehicle and when he was shot, whether Richards retreated at all, and whether Richards turned away from Underwood's door at all), then it could ultimately be determined that Officer Hutchins did not violate Richards' rights.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/19-1399/19-1399-2020-05-28.pdf?ts=1590679818>

Sok Kong v. City of Burnsville, 2020 U.S. App. LEXIS 17076 (8th Cir. May 29, 2020)

On March 17, 2016, at 6:16 a.m., two police officers were dispatched to a McDonald's restaurant parking lot after receiving a report that a man had been inside a parked car for over 30 minutes, waving a knife back and forth, while "jumping up and down inside his car." The restaurant faced a frontage road. Beyond the frontage road was a four-lane highway upon which the weekday traffic moved steadily that morning.

When the officers arrived, they saw a man, later identified as Map Kong, sitting in the driver's seat of the identified vehicle, windows rolled up, rocking back and forth, slashing a large knife

through the air in front of him. The officers pointed their firearms and flashlights at Kong, repeatedly ordering him to drop the knife and show them his hands. Kong did not comply with these commands but instead continued to rock in his seat and slash the knife through the air. At this point, the officers suspected that Kong was under the influence of methamphetamine.

In the meantime, other officers arrived on the scene and customers continued to drive through the parking lot behind Kong's car. After an officer parked his patrol car behind Kong's car to block it in, another officer broke Kong's front passenger window. The officers repeatedly ordered Kong to drop the knife but Kong did not respond. At this point, an officer fired his taser at Kong, striking him. Kong did not drop his knife or stop bouncing in his seat but instead swung his knife closer to the broken passenger side window where the officer stood. In response, the officer tased Kong again. After the second tasing, Kong stumbled out of the driver-side door and fell to the pavement. Kong quickly stood up, knife in hand, and began running across the parking lot toward the frontage road and highway, away from the officers and the restaurant. Within seconds, three officers shot Kong from the back and side, firing at least 23 bullets. Fifteen bullets hit Kong, killing him. When the officers shot Kong, he was running in the general direction of a customer's vehicle as it exited the parking lot, approximately 30 feet away. In addition, a few cars passed along the frontage road, 100 feet away, and steady traffic continued on the highway beyond.

Kong's estate (plaintiff) sued the officers and the City of Burnsville under 42 U.S.C. § 1983 for excessive use of force. After the district court denied the officers qualified immunity, they appealed.

A police officer is entitled to qualified immunity unless (1) the facts show a violation of a constitutional right, and (2) the right was clearly established at the time of the incident. On appeal, the Eighth Circuit Court held that the officers were entitled to qualified immunity. In reversing the district court, the court found that even if the facts showed that the officers violated Kong's Fourth Amendment right to be free from an unreasonable seizure, the law at the time of the incident was not clearly established.

The Supreme Court has held that to consider the law as "clearly established" existing case law must provide "fair warning" to officers regarding the legality of their conduct. At the time of Kong's shooting, Eighth Circuit case law had established that officers could use deadly force to stop a person armed with a bladed weapon if they reasonably believed the person could kill or seriously injure others. The case law also established that mental illness or intoxication does not reduce the immediate and significant threat posed by a suspect. The court noted that even if the officers caused Kong to get out of his car by confronting him, it was reasonable for the officers to believe that the law allowed them to shoot him if he posed an immediate and significant threat. Consequently, the court held that the officers were entitled to qualified immunity because existing Supreme Court and Eighth Circuit precedent did not provide fair warning to the officers that shooting Kong under these circumstances was unreasonable.

The plaintiff also sued the officers under Minnesota law for negligent failure to follow Burnsville police department policies. Specifically, the plaintiff claimed that the officers violated the department's policy on crisis intervention for persons "who may be experiencing a mental health or emotional crisis."

In addition to the provision cited by the plaintiff, the Eighth Circuit Court of Appeals noted that the department's policy stated, "nothing in this policy shall be construed to limit an officer's authority to use reasonable force when interacting with a person in crisis." As a result, the court

held that the officers acted reasonably when they attempted to disarm Kong in his car to prevent him from harming himself and others. Once Kong exited his car, the court held that “a reasonable officer would have believed deadly force was necessary to stop Kong from endangering bystanders when he ran through the parking lot with a large knife.” The court commented that officers’ acts showed they tried to follow their policy; however, when Kong started running through the parking lot with the knife, the officers reasonably believed that lethal force was necessary.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca8/19-1101/19-1101-2020-05-29.pdf?ts=1590766220>

Ninth Circuit

United States v. Yang, 958 F.3d 851 (9th Cir. 2020)

In April 2016, a man later identified as Jay Yang, was observed on surveillance camera driving a rented GMC Yukon and stealing mail out of collection boxes at a post office in Las Vegas, Nevada. A U.S. Postal Inspector contacted the rental company and discovered that the Yukon was approximately six days overdue and that the company had attempted to repossess the vehicle by activating its GPS unit and remotely disabling the vehicle. However, the company was not able to recover the vehicle because it was not at the location indicated and the GPS unit was no longer functioning, apparently having been disabled by a third-party.

Two days later, the inspector inputted the license plate number for the Yukon into LEARN, a license plate-location database operated by a private company with hopes of locating the Yukon and Yang. LEARN receives license plate images and GPS coordinates from digital cameras mounted on tow-trucks as well as repossession company and law enforcement vehicles. These camera-mounted vehicles photograph any license plate these vehicles encounter while driving around in the ordinary course of business. The Automatic License Plate Recognition (ALPR) technology loaded on a laptop inside the camera-mounted vehicles interprets the alphanumeric characters depicted on the license plate into readable text and records the latitude and longitude of a vehicle the moment it photographs the license plate. The software also generates a range of addresses estimated to be associated with these GPS coordinates. This information is uploaded to the LEARN database and is searchable by law enforcement agencies that pay a subscription fee.

The search for the Yukon in LEARN revealed that it had been photographed at a gated condominium complex after the deadline to return the vehicle had passed. The inspector went to the complex and located Yang at his residence as well as the Yukon. The inspector obtained a warrant to search Yang’s residence where he found devices for stealing mail out of mailboxes, called “fishing devices,” numerous pieces of stolen mail, and a handgun. After waiving his Miranda rights, Yang confessed to stealing mail from the collection boxes in the area and to owning the firearm.

The government charged Yang with receipt of stolen mail and being a felon in possession of a firearm. Yang filed a motion to suppress the evidence seized from his apartment and the statements he made to law enforcement on the basis that the search warrant obtained by the Postal Inspection Service relied on evidence that was obtained illegally. After the district court denied the motion, Yang appealed.

Yang argued that the ALPR technology used by the postal inspector without a warrant to track and locate the Yukon within Yang's gated condominium complex constituted an unlawful "search" under the Fourth Amendment.

The government countered by arguing that Yang did not have a reasonable expectation of privacy in the historical location information of the Yukon because when the postal inspector checked the LEARN database, the Yukon was approximately eight days overdue and the rental company had attempted to repossess the vehicle by activating the vehicle's GPS unit and remotely disabling it. Consequently, the government argued that Yang did not have standing to challenge the alleged search by the postal inspector.

The Ninth Circuit Court of Appeals agreed with the government. While the mere expiration of the rental period does not automatically end a lessee's expectation of privacy, the court concluded that Yang failed to establish that he had a reasonable expectation of privacy in the historical location information of the Yukon under the facts of this case. First, there was no evidence that the rental company had a policy or practice of allowing lessees to keep vehicles beyond the rental period. Second, the rental company made affirmative attempts to repossess the vehicle by activating the GPS unit to locate and disable the vehicle. It should be noted that in its opinion, the court did not address whether the search of the LEARN in this case or other database searches that use ALPR technology requires a warrant.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/18-10341/18-10341-2020-05-04.pdf?ts=1588611684>

United States v. Grey, 959 F.3d 1166 (9th Cir. 2020)

On April 4, 2018, the Los Angeles County Sheriff's Department (LASD) initiated a criminal investigation into Franz Grey. The LASD believed that Grey was a felon in possession of a firearm and ammunition, that he was in possession of a controlled substance, and that he had negligently discharged firearms at his residence multiple times. The LASD concluded that it did not have probable cause to arrest Grey or obtain a warrant to search his home. However, the LASD knew that the City of Lancaster was going to obtain an inspection warrant for Grey's home and request LASD assistance at the inspection. At that point, the LASD took no further action to investigate Grey or develop probable cause for a search or arrest until the inspection warrant was executed. In addition, the deputy who led the criminal investigation was put in charge of assisting the City with execution of the inspection warrant.

On May 3, 2018, shortly before 10:00 a.m., City inspectors and nine armed deputies went to Grey's home to serve the administrative warrant. When Grey opened the gate to allow the deputies into his yard, he was arrested, handcuffed, and placed in the back of a patrol car. A deputy later testified that when he stated that the deputies arrested Grey, he mistakenly meant that the deputies detained Grey. After securing Grey, the deputies decided to conduct a protective sweep of the residence before the execution of the administrative warrant. During their 15 to 20 minute sweep of Grey's house, the deputies saw firearms, ammunition, and drug paraphernalia in plain view. After determining that the house was safe, the deputies went outside to await a criminal search warrant to search Grey's residence. At this point, the City inspectors entered Grey's house and conducted their code enforcement inspection, noting several violations. At approximately

2:00 p.m., pursuant to the criminal search warrant, deputies seized firearms, ammunition, and a large amount of currency.

The government charged Grey with being a felon in possession of firearms and ammunition as well as possession of an unregistered firearm. Grey filed a motion to suppress the evidence seized from his house. Grey argued that the LASD's initial search of his home violated the Fourth Amendment because LASD's assistance in the execution of the inspection warrant was a pretext to conduct a criminal search, arrest, and investigation. Consequently, because the subsequent search warrant was obtained as a direct result of the initial unlawful search, Grey argued that all evidence seized from his house should be excluded at trial.

The district court agreed, concluding that LASD's execution of the administrative warrant was unreasonable under the Fourth Amendment because "LASD used the administrative warrant to enter the defendant's home without a criminal search warrant for the purpose of gathering evidence for its criminal case." In addition the court held that because the evidence gathered by the LASD when they initially entered Grey's home served as the basis for the criminal search warrant, the evidence seized pursuant to the search warrant was inadmissible. The government appealed.

Under the Fourth Amendment, a search of a house is generally unreasonable unless officers obtain a warrant based upon probable cause. However, in Camara v. Municipal Court of San Francisco, the Supreme Court recognized the administrative search exception. As applied to dwellings, the Court noted, "a judicial warrant and probable cause are not needed" in situations where the government officials obtain an administrative warrant to inspect a residence to ensure compliance with a housing code." Following Camara, the Supreme Court clarified that a criminal warrant supported by probable cause is required if the primary purpose of a search is to obtain evidence of criminal activity, while an administrative warrant will suffice if the primary purpose of a search is for non-criminal reasons.

The Ninth Circuit Court of Appeals agreed with the district court's conclusion that the LASD's primary purpose in executing the administrative warrant was to gather evidence in support of its criminal investigation rather than to assist the City inspectors. First, the LASD had an ongoing criminal investigation on Grey. Second, the LASD was unable to establish probable cause for a search or arrest warrant on its own. Third, the LASD failed to independently advance its own investigation pending the administrative inspection. Fourth, the deputies leading the criminal investigation against Grey were involved in the planning and executing the operation. Finally, nine deputies were involved in the search, Grey was arrested before the search began and the LASD's "protective sweep" of Grey's residence lasted approximately 20 minutes. The court concluded that the deputies' conduct in this case more closely resembled a criminal raid than an administrative inspection.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca9/18-50328/18-50328-2020-05-27.pdf?ts=1590598971>

Tenth Circuit

United States v. Neugin, 958 F.3d 924 (10th Cir. 2020)

Two Cherokee Nation deputies were dispatched to a restaurant parking lot to respond to a verbal altercation between Jack Neugin and his girlfriend, Julie Parrish. Upon arrival, one of the deputies found Neugin sitting on the curb and Parrish inside the restaurant. After discovering that the couple's pickup truck had broken down, one of the deputies offered to help Parrish arrange a ride. When Parrish told the deputy that she needed to retrieve her belongings, the deputy accompanied her to the truck. While Neugin and Parrish stood with one of the deputies at the back of the truck, the other deputy, without asking, opened the lid of the hard-shell "camper" attached to the back of the truck.

As he opened the camper, the deputy looked inside and saw a large bucket containing several rounds of ammunition. After Neugin claimed ownership of the ammunition, the deputy contacted dispatch and requested a background check on Neugin. Dispatch responded that Neugin had a felony conviction. The deputy asked Neugin if he had a firearm, and Neugin said no. Parrish then told the deputies that Neugin had a firearm and gave them consent to search the truck. The deputies found a shotgun under a suitcase in the back of the truck and arrested Neugin.

The government charged Neugin with being a felon in possession of a firearm and ammunition. Neugin filed a motion to seize the evidence seized from the truck. Neugin argued that the deputy violated the Fourth Amendment by opening the camper attached to the back of his truck, which led to the discovery of the ammunition.

The district court disagreed. The court held that the deputy was acting as a "community caretaker" when he opened the camper. The court held that the ammunition was in plain view once the camper was opened and was lawfully seized by the deputies when they learned that Neugin was a felon. Neugin appealed.

The Tenth Circuit Court of Appeals found that by covering the truck's bed with camper shell, Neugin manifested an expectation that the contents inside would remain hidden. The court added, "as with a closed trunk, society [would be] willing to recognize that expectation as reasonable. Consequently, the court held that the deputy intruded on Neugin's expectation of privacy when he opened the lid of the camper to examine the contents in the bed of the truck, thereby conducting search under the Fourth Amendment.

Next, the court disagreed with the district court's finding that the deputy was acting as a "community caretaker" when he opened the camper. The community-caretaking exception to the Fourth Amendment's warrant requirement allows the government to introduce evidence obtained through searches that are not related to the "detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Non-investigatory searches of automobiles under the community-caretaking exception do not violate the Fourth Amendment as long as they are "warranted [by] state law or sound police procedure, and are justified by concern for the safety of the general public . . ."

The court held that the community-caretaking exception did not apply because the government did not establish that "state law or sound police procedure" warranted opening the camper nor had it demonstrated how opening the camper was "justified by concern for the safety of the general public." The court noted that the government failed to explain how allowing Parrish to open the camper herself to retrieve her belongings would have posed any danger to the officers.

Specifically, the government identified “no specific and articulable facts” demonstrating that the deputy needed to stand behind the tail gate, lift the camper’s latch, or look into the bed of the truck, nor was opening the camper “necessary to protect” Parish, Neugin the officers, or others.

Finally, the court disagreed with the government’s contention that even if opening the camper violated the Fourth Amendment, the ammunition and shotgun should not have been suppressed because the truck inevitably would have been impounded and searched. The court held that if the deputy had not opened the camper, the deputy would not have inevitably: 1) seen the ammunition, 2) run a criminal history check, 3) found the gun, or 4) arrested Neugin. In addition, without probable cause to arrest Neugin, as was the case absent the search of the camper, Neugin would not have been arrested. Therefore, it was not inevitable that the truck would have been impounded or inventoried as the truck was in a restaurant parking lot and Neugin could have called his own towing company or a mechanic. Consequently, the court held that the inevitable discovery exception to the exclusionary rule did not apply.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca10/19-7043/19-7043-2020-05-01.pdf?ts=1588348846>
