
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 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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FLETC Informer Webinar Schedule - August 2020

1. United States Supreme Court Update (1-hour)

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

As we come to the close of the U.S. Supreme Court's 2019-2020 session, it is a good time to see how the Court ruled on key criminal justice issues. This 1-hour webinar will review the Court's opinions on cases which address key constitutional issues related to the work of law enforcement officers, prosecutors, and judges.

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

To participate in this webinar, join us at: <https://share.dhs.gov/aug/>

2. History of Indian Law (1-hour) (Previously Recorded Webinar)

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. And, the discussion of "Indian" and "non-Indian" concepts as matters of political recognition distinguishable from racial, genetic, cultural, or ethnic identity are especially important in light of public interest as well as upcoming Supreme Court cases involving Indian Country Criminal Jurisdiction. 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.

To access this recorded webinar: <https://share.dhs.gov/pontxold4gup/>



To Participate in a FLETC Informer Webinar

1. Click on the link to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account, click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.
5. You will now be in the meeting room and will be able to participate in the event.



Cybercrime & Technical Investigations Training Conference Virtual

The FLETC Cybercrime & Technical Investigations Training Conference, CYCON-2020, will now be conducted as a virtual event between September 9-11, 2020. Hosted by the FLETC Cyber Division with support from the FLETC's Legal Division and the eLearning Branch, this event will offer multiple presentations in a variety of current cyber-related topics. There is **no cost** for attendees to participate.

The following presentations will be provided during Virtual CYCON-2020:

- Data Acquisition: Drone Artifact Extraction – 1 hour
- Internet-Based Investigations: How to Minimize Your Risk Online – 1 hour
- Electronic Law and Evidence: Legal Issues and Digital Forensics – 1 hour
- First Responders to Digital Evidence: Novel Devices Investigators May be Missing – 1 hour
- Introduction to Mobile Device Investigations: Cellphone Seizures – 2 hours
- 802.11 Tools for Analysis and Geo-Location: Home Networking – 2 hours
- Internet-Based Investigations: TOR and the Dark Web – 2 hours

Registration: Please follow the registration instructions posted [HERE](#). Attendees must be sworn law enforcement personnel or non-sworn employees who directly support the law enforcement mission. Non-sworn personnel attending must provide a written letter of sponsorship by their law enforcement organization via email to fletc-cybercrimeconference@fletc.dhs.gov.

Schedule: The CYCON-2020 schedule and links to register for each training session will be posted [HERE](#) at a later date.

Questions: Questions concerning this conference training event should be directed to the Cyber Division at fletc-cybercrimeconference@fletc.dhs.gov.



FLETC Office of Chief Counsel Podcast Series

Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:

A Flash History of the Fourth Amendment What is a Fourth Amendment Search? What is a Fourth Amendment Seizure? Fourth Amendment Levels of Suspicion Stops and Arrests Plain View Seizures Mobile Conveyance (Part 1 and Part 2)

Exigent Circumstances Frisks Searches Incident to Arrest (SIA) Consent (Part 1 and Part 2) Inventories Inspection Authorities
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Click Here: <https://leolaw.podbean.com/>



CASE SUMMARIES

United State Supreme Court

McGirt v. Oklahoma, 2020 U.S. LEXIS 3554 (July 9, 2020)

In 1996 Jimcy McGirt, a Native American, was convicted of sexual assault on a minor and sentenced to life by an Oklahoma state court. On appeal, McGirt argued that the State of Oklahoma lacked jurisdiction to prosecute him. Specifically, McGirt argued that he should have been tried in federal court because The Major Crimes Act, Title 18 U.S.C. §1153, grants federal courts exclusive jurisdiction over certain enumerated crimes committed by Native Americans in “Indian Country” and his alleged crimes took place on lands were formerly part of the Creek Nation’s Reservation.

In a 5-4 decision written by Justice Neil Gorsuch, the Supreme Court agreed with McGirt. The Court held that because Congress failed to disestablish the Creek Reservation, those lands were “Indian Country” for purposes of the Major Crimes Act. As a result, the Court held that the Oklahoma state court lacked jurisdiction over the crime and McGirt should be tried in federal court.

Prior to Oklahoma obtaining statehood in 1907, nearly half of the land in eastern Oklahoma belonged to the Five Civilized Tribes – the Cherokee, Chickasaw, Choctaw, Creek and Seminole – the original Indian tribes who gave up their lands in the East during the Indian Removal Acts and were promised lands by treaty in the Indian Territory. In 1906, Congress passed the Oklahoma Enabling Act¹, which paved the way for statehood by presumed disestablishing reservations while reserving the rights of tribes to handle internal matters for Native Americans within their former boundaries. The state retained jurisdiction for non-Native Americans and for all other purposes such as law enforcement and prosecution.

Significantly, on the same day the Supreme Court released the McGirt opinion, the Court issued an opinion in Sharp v. Murphy². In Sharp v. Murphy, the Court affirmed a 2017 ruling from the Tenth Circuit Court of Appeals which held that the Oklahoma Enabling Act failed to disestablish Oklahoma’s Indian Reservations.

The Supreme Court’s decision in McGirt is seen as a significant win for Native American rights. The decision directly affects Native Americans convicted under Oklahoma state law for crimes committed on former reservation lands, as their prosecution is a matter for federal and tribal courts, not state courts. The case has implications beyond criminal jurisdiction and potentially impacts civil and regulatory jurisdiction in the state on former reservation lands.

For the court’s opinion: https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf

¹ Pub.L. 59–234, 34 Stat. 267, enacted June 16, 1906.

² 866 F.3d 1164 (10th Cir. 2017).

Circuit Courts of Appeal

First Circuit

United States v. Moore-Bush, 963 F.3d 29 (1st Cir. 2020)

After getting a tip from a cooperating witness (CW), agents with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began investigating Nia Moore-Bush in early 2017 for the unlicensed sale of firearms. In May 2017, the CW purchased four guns illegally from Moore-Bush, through her boyfriend Dinelson Dinzey at their residence at 120 Hadley Street.

Approximately two weeks later, ATF agents installed a camera near the top of the public utility pole across the public street from Moore-Bush's residence at 120 Hadley Street (the pole camera). The pole camera operated 24/7 for eight months and captured only a portion of the front of the house. Agents could access the video feed live or via recordings but to use the zoom features to see faces, license plates, and other details clearly, they had to monitor it live. The pole camera did not capture audio and everything it recorded was visible to a passerby on the street.

The government eventually charged Moore-Bush, Dinzey, and several other individuals (defendants) with a variety of drug-related offenses. The defendants filed a motion to suppress the pole camera evidence. The defendants argued that the government's warrantless use of the pole camera was an unlawful search under the Fourth Amendment. The defendants claimed that [United States v. Bucci](#), decided by the First Circuit in 2009, which held that the use of a pole camera for eight months did not constitute a search, was no longer valid law after the United States Supreme Court decided [Carpenter v. United States](#) in 2018. Specifically, the defendants argued that [Carpenter's](#) holding that a person has a reasonable expectation of privacy "in the whole of their movements," even if exposed to the public applied to this situation. As such, the defendants argued that the government's warrantless use of a pole camera to record the movements into and around their home for an eight month period violated the Fourth Amendment because they had a reasonable expectation that such movements would not be monitored and recorded for that length of time.

The district court agreed and granted the defendants' motion to suppress. The government appealed.

The First Circuit Court of Appeals disagreed and reversed with the district court's holding that [Bucci](#) was no longer binding precedent concerning the use of pole cameras in light of the Supreme Court's decision in [Carpenter](#). In [Carpenter](#), the Supreme Court held that the Government's acquisition of records containing Carpenter's cell site location information (CSLI) was a search within the meaning of the Fourth Amendment, as it intruded upon Carpenter's reasonable expectation of privacy "in the whole of his physical movements." The Court recognized that tracking a person's past movements by using CSLI was similar to many of the qualities of GPS monitoring; therefore, the government must generally obtain a warrant supported by probable cause before acquiring such records. Significantly, the Court added that its ruling was "narrow" and that it did not call into question conventional surveillance techniques and tools utilized by the government, such as security cameras.

Here, the First Circuit found that pole cameras are, in essence, security cameras that the Supreme Court did not call into question in [Carpenter](#). In addition, nowhere in the [Carpenter](#) decision did

the Court suggest that it was overruling prior case law which has held that a person does not have a reasonable expectation of privacy in the actions he or she knowingly exposes to public view. Consequently, because Bucci was based on Supreme Court case law that was not affected by Court's decision in Carpenter, the district court was bound to follow it.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca1/19-1582/19-1582-2020-06-16.pdf?ts=1592337606>

Fourth Circuit

Estate of Jones v. City of Martinsburg, 961 F.3d 661 (4th Cir. 2020)

Around 11:30 p.m. on March 13, 2013, Officer Paul Lehman was on patrol when he saw Wayne Jones walking in the road, instead of on the sidewalk, near downtown Martinsburg, West Virginia. West Virginia Code § 17C-10-6(a) and City of Martinsburg, W. Va., Ordinance 371.06(a) require pedestrians to use a sidewalk where available.

Officer Lehman parked his police car near Jones, exited the vehicle, and asked Jones why he was walking in the street. Lehman then asked Jones for identification. Jones replied that he did not have any identification. The officer then asked to search him for weapons. Jones first asked, "What's a weapon?" When Officer Lehman explained that this meant "anything--guns, knives, clubs," Jones acknowledged that he did have "something." At this point, Officer Lehman called for backup and ordered Jones to put his hands on the police car. Jones did not comply but instead tried to move away from him. Officer Lehman began to repeatedly shout, "Put your hands on the car." Jones responded, "What are you trying to do?"; "What do you want?"; and "What did I do to you?" Officer Lehman then pulled out his taser and discharged it on Jones. Officer Daniel North reached the scene at approximately the same time that Officer Lehman was discharging his taser. Officer North tased Jones as well. The officers reported that the tasers appeared to have no effect on Jones.

Jones broke away and ran down the street. Officer North pursued him on foot and was the first officer to catch up with him. Officer William Staub arrived at the scene and ran toward Jones and Officer North. Jones had "cornered himself" in "a stoop entranceway to a bookstore, up a couple steps." Officer North stated that he told Jones to "just get on the ground, just listen to what we're saying," to which Jones replied "I didn't do anything wrong," while he moved his hands up. Officers Staub and North grabbed Jones' hands and the three men tumbled down the stairs. At the bottom of the stairs, Officer Staub wrestled Jones to the ground and put him in "a choke hold, to stop him from resisting." A loud choking or gurgling sound, which seems to be coming from Jones, is audible on Officer Staub's audio recorder at this time.

Officer Lehman rejoined the group, and officers Eric Neely and Erik Herb arrived on the scene. One of the officers tased Jones for a third time, then Officer North applied his taser against Jones in "drive stun [mode] without any probes." The officers reported that these efforts to stun Jones had no visible effect.

Officer Staub was on his knees on the ground and still had Jones in a choke hold when he felt "like a scratch on my hand," which he initially "didn't think much of" because "we were rolling around on the concrete." Then, "a second or two later," at approximately the same time that the other officer tased Jones, Officer Staub felt "a sharp poke in my side" which "alarmed" him, so

he partially released Jones and raised up to look at what was poking him. Officer Staub reported that he then “saw the subject's right hand with a fixed blade knife in his hand” and he shouted, “He's got a knife! He's got a knife!” Officer Neely also claimed that he saw “a weapon in [Jones's] right hand.”

Having learned of the knife, the officers simultaneously drew back approximately five feet. As they moved back, Jones' left arm dropped lifelessly and his body was motionless on the ground, laying “with his right side on the ground.” All five officers drew their firearms and formed a semicircle around the recumbent Jones. The officers ordered Jones to drop the weapon but Jones remained motionless on the ground and did not verbally respond. Afterward, Officer Lehman reported that Jones “did not make any overt acts with the knife towards the officers” and Officer Staub reported that as the officers stepped back, Jones “still had the fucking knife in his hand and he wasn't fucking doing nothing.” Seconds later, the officers fired a total of twenty-two rounds at Jones, killing him where he lay on the sidewalk.

Immediately afterward, the officers searched Jones and found a small fixed blade knife tucked into his right sleeve. After being told that the state police were coming to investigate, officers can be heard saying that “the incident would be a “cluster” and that they were going to “have to gather some fucking story.”

One month later, Jones' Estate sued the City of Martinsburg and the officers, alleging, among other things, that the officers used excessive force in violation of the Fourth Amendment by shooting and killing Jones.

In 2018, the Fourth Circuit Court of Appeals (the court) reversed the district court's dismissal of the Estate's excessive use of force claim. The court held that the district court had improperly considered the facts in the light most favorable to the officers, rather than the Estate, as required. In addition, the district court ignored discrepancies among the officers' accounts of the incident and assumed that Jones presented an ongoing threat to the officers as he lay on the ground because he still had the knife. As a result, the court concluded that a reasonable jury could find excessive force, because “it is not clear that Jones continued to pose an immediate threat of physical harm to the officers at the time they shot and killed him.”

Upon remand to the district court, the officers claimed they were entitled to qualified immunity because at the time of the shooting, Jones was not “secured” under clearly established law. The district court agreed and dismissed the case. The Estate appealed to the Fourth Circuit Court of Appeals.

The court disagreed with the officers and remanded the case to the district court. First, the court noted that in 2013 it was clearly established that suspects can be secured without handcuffs when they are pinned to the ground, and that such suspects cannot be subjected to further force. In this case, the court concluded that a reasonable jury viewing the available videos of the incident could find that Jones was secured when the five police officers pinned him to the ground. In addition, although Jones was armed with a knife that was tucked into his sleeve, the court found that it was also clearly established that armed suspects can be considered “secured” before an officer disarms them.

Second, the court concluded that: 1) given the relatively inaccessible location of the knife, 2) Jones physical inability to wield it given his position on the ground, 3) the number of officers on top of Jones, 4) and Jones' physical state by this time, a reasonable jury could find that Jones was secured even though he was still armed. The court added that even if Jones had stabbed Officer

Staub, once the officers secured Jones, they could not constitutionally release, back away, and then shoot him.

Finally, the court added that even if a jury were to find that Jones was not secured, it could still reasonably find that Jones was incapacitated when the officers shot him. The court concluded by noting that it was clearly established in 2013 that officers may not use force against an incapacitated suspect.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca4/18-2142/18-2142-2020-06-09.pdf?ts=1591727433>

Sixth Circuit

Wright v. City of Euclid, 962 F.3d 852 (6th Cir. 2020)

On November 4, 2016, at approximately 6:00 p.m., Lamar Wright pulled his SUV into a driveway off 207th Street in Euclid, Ohio, and began speaking with a friend. The friend, who stood outside the residence, never approached the SUV and Wright never exited his vehicle. The visit lasted for about one minute. During this time, two plainclothes police officers, Kyle Flagg and Vashon Williams, were surveilling the friend's home in an unmarked vehicle after having received reports of illegal drug activity at the residence. Based on the amount of time Wright spent at the house, the officers suspected that he might have been involved in a drug transaction.

After Wright pulled out of the driveway, the officers followed him until he pulled into another driveway to answer a text message. The officers claimed that while following Wright he failed to use his turn signal on two occasions. While Wright texted in his SUV, the officers drew their guns and approached his vehicle. Not recognizing Flagg and Williams as police officers, Wright believed that he was about to be robbed. As Wright put his vehicle in reverse, he heard one of the men identify himself as a police officer. In response, Wright put his vehicle in park and raised his hands. After the officers holstered their guns, Officer Flagg opened the driver's side door and ordered Wright to shut off the vehicle. Wright complied and began to raise his hands again when Officer Flagg grabbed Wright's left wrist, twisting his arm behind his back. Officer Flagg then attempted to gain control of Wright's right arm in order to handcuff him behind his back while he remained seated in the vehicle. During this time, Wright repeatedly stated that the officer was hurting him, as Wright had recently undergone abdominal surgery which required staples in his stomach and a colostomy bag attached to his abdomen.

By this time, Officer Williams had moved over to stand behind Officer Flagg on the driver's side. When Wright placed his right hand on the center console to better situate his torso to exit the car, Officer Williams reached around Officer Flagg and deployed his pepper spray against Wright. At the same time, Officer Flagg deployed his taser into Wright's abdomen. Wright managed to exit his vehicle with his hands up where he was forced to the ground by the officers. The officers eventually had Wright sit on the trunk of his vehicle while they called an ambulance. During this time, Officer Flagg made various self-serving statements that were captured on his body camera including, that "[Wright] was reaching like he had a gun," and that Officer Flagg had been afraid that Wright was going to shoot him.

At some point, the officers searched Wright and his vehicle but they did not find any guns, drugs, or other contraband. The officers eventually arrested Wright for the misdemeanors of obstructing

official business and resisting arrest along with criminal trespass and failure to use a turn signal. Although the officers found no drugs on Wright, they designated his arrest as arising from a drug investigation. This designation resulted in Wright's being detained for an additional four hours and subjected to an intrusive body scan for drugs after the officers knew of Wright's medical condition. The scan revealed no drugs and no drug-related charges were ever brought against Wright.

All charges against Wright were eventually dismissed. Thereafter Wright sued Officers Flagg and Williams under 42 U.S.C. § 1983 for: excessive use of force, failure to intervene, false arrest, extended detention, malicious prosecution, and several state-law torts. Wright also sued the City of Euclid (the City) claiming the City had a policy or custom of indifference to the use of force utilized by its officers. The district court granted the officers qualified immunity and dismissed Wright's claim against the City. Wright appealed.

The Sixth Circuit Court of Appeals (the court) reversed the district court and held that Officers Flagg and Williams were not entitled to qualified immunity on Wright's excessive use of force, false arrest, extended detention, malicious prosecution, and state-law tort claims.

First, concerning Wright's excessive use of force claim, the court found that the officers had, at most, a suspicion that Wright had briefly visited with a suspected drug dealer. However, given that the officers had not identified Wright himself as a drug dealer or sought any corroboration of their suspicions that Wright was involved in criminal activity, the court determined there was a genuine dispute as to whether the officers were justified in brandishing their firearms as they approached Wright. Consequently, the court held that a jury must determine whether their decision to do so violated the Fourth Amendment. In addition, the court held that it was clearly established at the time of the incident that drawing a weapon on a suspect who was not fleeing or posing a safety risk constituted excessive force.

Next, the court analyzed the officers' use of the taser and pepper spray against the factors outlined by the Supreme Court in [Graham v. Connor](#) to determine the reasonableness of these actions. First, the court found that the first Graham factor, the severity of the suspected crime, weighed against a finding of a justified use of force because the officers did not have probable cause to believe that Wright had committed any crime before deploying the taser and pepper spray against him. Next, the court found that the second Graham factor, the immediacy of the threat posed by the suspect to the officers or others, also weighed in Wright's favor. Although the officers claimed they thought Wright was reaching for a weapon in the center console, Wright claimed that any movement he made was done in an attempt to exit the vehicle. Because there were conflicting versions of this part of the incident, the court held that it was up to a jury to decide if a reasonable officer could believe that Wright posed an immediate threat to their safety. Finally, the court held that the third Graham factor, whether the suspect was resisting arrest weighed in Wright's favor as a reasonable juror could accept Wright's account that he was not resisting, but rather was having difficulty maneuvering while seated in the vehicle and in Officer Flagg's forced hold. As a result, the court held that a reasonable jury could find, based on the totality of the circumstances, that the officers' actions constituted unreasonable and excessive force. The court added that, at the time of the incident, it was clearly established that deploying a taser and pepper spray against a suspect who was not actively resisting arrest constituted excessive force.

Second, the court held that the officers were entitled to qualified immunity on Wright's failure to intervene claim. The court concluded that because the officers' use of force against Wright

occurred simultaneously and for no more than approximately ten seconds, neither officer could have perceived what the other officer was doing and intercede to stop it.

Third, the court held that the officers were not entitled to qualified immunity on Wright's false arrest claim. In a deposition, Officer Flagg conceded that he did not have probable cause to arrest Wright until Wright began to resist the officers' efforts to get him out of the vehicle. The court recognized that Ohio law does not prohibit resisting an unlawful arrest. Consequently, the court concluded that a reasonable jury could find that the officers did not have probable cause to arrest Wright prior to his alleged resistance. The court added that at the time of the incident, it was clearly established that arresting a person without probable cause violated the Fourth Amendment.

Fourth, the court held that the officers were not entitled to qualified immunity on Wright's extended detention and malicious prosecution claims. The court noted there was a four-hour delay in Wright's release, which was caused by the officers' designation of his arrest as being drug-related. However, at the time the drug designation occurred, the officers knew that: 1) both Wright and his vehicle had been searched, and no drugs or other contraband had been found; 2) no drugs or contraband were found on Wright when he was searched again at the jail and he was not charged with any drug-related offense; 3) Wright had a serious medical condition; and 4) the drug designation would result in Wright's being subjected to additional, more thorough searches. The court concluded that these facts were sufficient for a reasonable juror to find the officers made a false statement that Wright's arrest was drug related, thereby establishing their involvement in his wrongful detention and prosecution without probable cause.

Fifth, for most of the reasons previously stated, the court held that the officers were not entitled to qualified immunity for Wright's state-law tort claims of malicious prosecution and intentional infliction of emotional distress.

Sixth, the court held that the district court improperly dismissed Wright's claim against the City. Wright claimed that the injuries he suffered at the hands of Officers Flagg and Williams were directly attributable to the City's policy or custom of indifference to use of force. Specifically, Wright pointed to defensive tactics training that the City provided to its officers that included a link to a YouTube video of a Chris Rock comedy skit entitled, "How not to get your ass kicked by the police!" and a use of force training class that included: 1) a PowerPoint presentation, the first page of which displayed a stick figure cartoon portraying a police officer in riot gear beating a prone and unarmed civilian with a club with the caption "protecting and serving the poop out of you," and 2) a meme that depicts two officers with their guns drawn and aimed at something, with the caption, "Bed bug! Bed Bug on my shoe!"

The court held that Wright produced enough evidence such that a reasonable jury could find that the City's use of force training regimen and practices gave rise to a culture that encouraged, permitted, or acquiesced to the use of unconstitutional excessive force, and that, as a result, such force was used on Wright.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca6/19-3452/19-3452-2020-06-18.pdf?ts=1592503216>

Eighth Circuit

United States v. Nevatt, 960 F.3d 1015 (8th Cir. 2020)

In mid-July 2015, Detective Jason Copley of the Springfield, Missouri Police Department (SPD) learned through his chain of command that Ryan Nevatt (Nevatt) was trafficking methamphetamine from Texas and Oklahoma to Branson and Springfield, Missouri. Consequently, upon learning on July 29, 2015, that Nevatt was at the Mercy Hospital in Springfield, Missouri, Det. Copley drove to there, located Nevatt's motorcycle, and waited for Nevatt to return to it.

Eventually, Det. Copley saw Nevatt leave the hospital carrying a drawstring bag, get on his motorcycle, and drive away. Following Nevatt, Det. Copley noticed that Nevatt appeared very rigid, accelerated so slowly that he impeded traffic, and appeared to have difficulty maintaining his balance. After seeing Nevatt impede traffic and fail to maintain his lane, Det. Copley, a former patrol officer, suspected that Nevatt was impaired. Consequently, Det. Copley asked his partner to call and ask patrol Officer Jim Cooney to conduct a traffic stop on Nevatt.

At the partner's request, Officer Cooney stopped Nevatt. During the encounter, Officer Cooney explained that he stopped Nevatt because another officer saw Nevatt and thought that Nevatt might be impaired. In response, Nevatt admitted to driving imperfectly, said that he bought the motorcycle recently, and that, as a novice rider, he had not yet mastered riding it.

After administering a field sobriety test and concluding that that Nevatt was not impaired, Officer Cooney's record check showed that although Nevatt had a valid driver's license, his motorcycle was uninsured and Nevatt did not have a motorcycle endorsement, both of which were required by law. Officer Cooney addressed the violations by citing Nevatt for driving without a motorcycle endorsement and giving him a verbal warning for not having insurance.

Next, Officer Cooney decided to tow and impound Nevatt's motorcycle for several reasons. First, the motorcycle posed a safety hazard, as no one could lawfully drive it on the public roadway until it was insured. Second, leaving the motorcycle on the roadside would allow Nevatt, who was not under arrest and who acknowledged that he could not operate it safely, the ability to operate the motorcycle and endanger the public once Officer Cooney left the area. Consequently, Officer Cooney decided to impound the motorcycle.

The Springfield Police Department's Standard Operating Guidelines (the Guidelines) in effect at that time had two pertinent provisions. First, the Guidelines authorized an officer to decide on the spot to tow and impound a vehicle located on "the public right-of-way" if the vehicle posed a "safety hazard" or was otherwise involved in "a violation of law." Second, whenever an officer ordered a tow and impound, the Guidelines required impounding officers to conduct an inventory search and list all items with values of \$25 or more found on a specially-designated tow report.

Officer Cooney's inventory search of Nevatt's motorcycle revealed two cell phones, a drawstring bag containing a GoPro camera, a tablet, and a plastic bag containing a large amount of cash inside the saddlebags. Officer Cooney seized all of the items and communicated his findings to the detectives. Ultimately, the officers advised Nevatt that they were seizing the items from his saddlebags as evidence in an ongoing investigation, towed the motorcycle, and terminated the encounter with Nevatt.

Because the officers ultimately seized the items from Nevatt's saddlebags as evidence, Officer Cooney did not list them in his tow report's inventory section. Instead, as Officer Cooney later explained, he logged the items as evidence with his police report because "[t]hey weren't going to be left with the motorcycle."

Thereafter, Det. Copely prepared a search warrant application relying, at least in part, on evidence that Officer Cooney found when inventorying the saddlebags, and a court issued search warrants authorizing the officers to search the seized electronics and a hotel room where Nevatt was staying. After the hotel room search yielded an additional, large sum of U.S. currency, controlled substances, cell phones, tablets, and a firearm, a federal grand jury indicted Nevatt for several counts, including methamphetamine trafficking, possessing firearms in furtherance of drug trafficking, and money laundering offenses.

Nevatt filed a motion to suppress the evidence that Officer Cooney found during his inventory search and all evidence traceable to it, including the evidence found in his hotel room when officers executed the search warrant. Nevatt claimed that he had parked his motorcycle lawfully beside a public road in a way that was not hazardous to other drivers or a threat to public safety; therefore, Officer Cooney's decision to impound and inventory violated the Fourth Amendment.

First, the court noted that the Fourth Amendment requires that all searches be reasonable under the totality of circumstances. It pointed out that a warrantless search conducted pursuant to the inventory exception to the Fourth Amendment is reasonable when officers lawfully impound property and follow their agency's standardized policy to inventory the property's contents. An inventory search becomes unreasonable and unconstitutional, however, when police exploit the exception to justify rummaging for evidence of a crime.

Next, the court credited Officer Cooney's testimony that Nevatt's motorcycle was parked partially in the roadway when he decided to impound and inventory it. As a result, the court found that Officer Cooney's decision to impound Nevatt's motorcycle was lawful. In addition, the court held that the SPD's Guidelines authorized Officer Cooney to impound and inventory Nevatt's uninsured motorcycle, as no one could lawfully operate it on a public roadway, and to ensure that Nevatt could not endanger the public by trying to operate it in violation of the law once Officer Cooney left the scene.

The court also rejected Nevatt's argument that Officer Cooney violated the SPD Guidelines by conducting an inventory as a pretext to search for criminal evidence. Again, the court credited Officer Cooney's testimony that he did not give Det. Copely or his partner a chance to weigh in on the impound decision "[b]ecause at that point it was my traffic stop and, you know, that was—they had their side of it and then I had my obligations and the side of my stop." The court further implied that even if agency policy required Officer Cooney to list the items that he seized from the motorcycle as inventory on the tow report, instead of logging them into the inventory of evidence with his incident report, that failure fell well short of a policy violation sufficient to render the inventory search unreasonable, pretextual, and unconstitutional. Consequently, the Eighth Circuit affirmed the district court's denial of Nevatt's motion to suppress.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca8/18-3555/18-3555-2020-06-01.pdf?ts=1591025419>

Tenth Circuit

United States v. Young, 962 F.3d 1196 (10th Cir. 2020)

In the early morning hours of March 16, 2018, a Woodward County, Oklahoma, Sheriff's deputy saw Young's car swerving on the roadway and activated his blue lights. Young continued to drive, ultimately stopping at a residential property and fleeing on foot. Pursuing Young, the deputy tased and ultimately arrested him. After the arrest, the deputy retraced Young's steps to Young's car and found a small headphone case containing approximately 4 grams of methamphetamine.

Although authorities released Young later that day, law enforcement officers also revisited the area where Young fled. During that visit, officers found a black bag containing approximately 93 grams of methamphetamine near where Young stopped his car. After a witness who lived on the property said that he did not recognize the bag and had not seen anyone in the area earlier that day, the deputy rearrested Young.

During an ensuing custodial interview, Young admitted to possessing the smaller quantity of methamphetamine but denied that the larger quantity was his. Thereafter Young invoked his right to silence and terminated the interview.

Four days later, Young was still in the county jail when a Federal Bureau of Investigation (FBI) Special Agent and a state narcotics agent arrived to interview him. After advising Young of his Miranda rights, Young waived them and agreed to speak with the agents.

At the beginning of the interview, Young said that he was concerned about who would pick up his pregnant fiancée when she was released from rehab the next day and worried about how criminal charges would affect his ability to raise his new baby. Young also said that he was sick to his stomach and wanted to “roll over and die.”

The FBI agent responded, saying that he tried to help people in trouble if they were trying to “do what's right and get on the right path.” The agent further assured Young that after their conversation the agent would do his best to try and help.

Next, the FBI agent said that he had gone to Oklahoma City the prior afternoon to meet with the Assistant United States Attorney and brief the prosecutor about Young's arrest. After explaining that the prosecutor had met with the judge, the agent presented Young with a federal warrant for Young's arrest. Young was visibly shocked.

Next, the agent said that he wanted to proceed from the “bad news” that Young was facing federal charges “to the good news.” He urged Young to trust him and told Young, “[F]rom this moment on, I'm on your side.” Young then asked, “Is any of this going to help me?” The agent responded, “Yes, absolutely,” and pivoted again to the “good news” that the agent was on Young's side and that Young had to trust the agent.

The agent continued to describe his trip to Oklahoma City, saying that he had spoken with the judge who reviewed the case. According to the agent, the judge had looked at Young's criminal record. After emphasized that he was “not bullshitting” and repeatedly telling Young to trust him, the agent claimed that the judge was willing to charge “anywhere from five to ten years” for the 4 grams of methamphetamine. Next, the agent said that Young had two options and that Young could “physically buy down the amount of time you see in a federal prison.” The difference, the agent said, depended on Young's “willingness to own to the information.” The agent continued,

“every time you answer a question truthfully, it ticks time off that record, it ticks time off how much you're going to actually see.” Repeatedly, the agent also promised to go back to the judge and report what Young said at the interview, invoking the agent’s supposed relationship with the judge numerous times.

After reiterating that Young needed to trust him, the agent asked Young about the bag containing the 93 grams of methamphetamine. The agent also suggested that Young could explain that he threw the bags in different directions when he ran from his car.

Young responded by wondering aloud whether he should have a lawyer present, commenting, “I want to help myself out, man, but at the same time I feel like I'm buying the farm.” Thereafter, Young admitted to losing his grip on the 2 containers of methamphetamine as he left his car and said that they flew in different directions as he was running away. He also provided information about the source of the methamphetamine and about his drug-dealing activities.

Ultimately, a grand jury indicted Young for possessing approximately 97 grams of methamphetamine with intent to distribute it. Young responded by filing a motion to suppress his statements. In it, he claimed that his statements were involuntary.

The district set a pretrial evidentiary hearing during which the FBI agent testified. At the hearing, the agent explained that his references to speaking with the “judge” were “error[s] in specificity of speech” because the agent meant to say “prosecutor.” Additionally, the agent said that although he had spoken about the case to the federal magistrate judge who signed Young's warrant, they had not discussed potential charges. Additionally, the agent said that he did not know the actual sentencing range was for the offenses for which Young was charged and explained that he quoted the “five-to ten-year figure” because he was trying to provide a tangible number to explain that cooperation could “pay dividends.”

After Young was convicted, he appealed to the Tenth Circuit, again arguing that the totality of the circumstances coerced his confession. The Tenth Circuit agreed.

The court first declared three of the FBI agent’s statements – (a) that Young could be sentenced to five to ten years, (b) that Young’s cooperation was the primary factor that would determine Young’s sentence, and (c) that Young could “physically buy down the amount of time” in federal prison that Young saw “in a federal prison” – outright “misrepresentations” that weighed in favor of coercion. Second, it distinguished a mere promise to tell the prosecutor about cooperation from what he agent did - create a false impression that “the way” the federal system “work[ed]” was through agents like him with direct lines of communication judges to ensure that “time” got “ticked . . . off” of a defendant’s sentence “every time” that defendant “answer[ed] a question truthfully.” Moreover, the agent’s claim that he misspoke when he promised to described Young’s cooperation to the “judge” instead of the “prosecutor” did not persuade the court, which pointed out that the agent’s intent was irrelevant because it was obligated to examine coercion from Young’s perspective.

The court was not persuaded by the government’s arguments that the following evidence weighed in favor of voluntariness: (a) that the FBI agent advised Young of his Miranda rights, (b) that Young waived them, (c) that Young, who was experienced with the criminal justice system, knew that he could invoke his right to remain silent at any time because he successfully terminated his first interview, and (d) the short interview occurred in a “friendly” tone. Instead, after noting the agent’s promises of leniency, the court accurately criticized the agent’s behavior as “misconduct” that included “misrepresentations,” “inaccurate representations,” “improper representations about

his purported access to a federal judge.” Viewing the totality of the circumstances, the court found the agent’s misconduct so serious that the favorable evidence could not overcome it. Consequently, it found Young’s statement’s involuntary and vacated his conviction.

For the court’s opinion: <https://cases.justia.com/federal/appellate-courts/ca10/18-6221/18-6221-2020-06-16.pdf?ts=1592323253>

Eleventh Circuit

United States v. Yarbrough, 961 F.3d 1157 (11th Cir. 2020)

After receiving numerous, unverified telephone calls and emails claiming that “a lot of traffic in and out” of Mr. and Mrs. Yarbrough’s house suggested that “drug activity” was taking place there, Thomas Monroy, an investigator with the Cherokee County, Alabama, Sheriff’s Office, conducted criminal history check for the couple. That check showed valid, outstanding arrest warrants for both husband and wife. Consequently, Officer Munroy tried to arrest Mr. Yarbrough, who was a convicted felon, several times without success.

On the evening of August 31, 2016, an anonymous tipster claiming to be the Yarbroughs’ neighbor sent a text message to Officer Munroy. In it, the tipster reported that Mr. Yarbrough was home, that “everybody was there,” and that the tipster saw Mr. Yarbrough in the yard.

Officer Munroy and a second officer responded by driving to the Yarbroughs’ home. Upon arriving, they saw two vehicles and three men, one of whom was Mr. Yarbrough, in the driveway. After calling for backup, handcuffing the three men without incident, and Terry frisking them with negative results, the officers determined that one of the vehicles belonged to Mr. Yarbrough and the second belonged to one of the two other men.

At this point, Officer Munroy asked where Mrs. Yarbrough was, and Mr. Yarbrough responded that she was inside the house. Consequently, Officer Munroy approached the house, identified himself as a law enforcement officer, and called out Mrs. Yarbrough’s name. Through the house’s screen door, Officer Munroy saw Mrs. Yarbrough run from the living room into a bathroom and shut the door. Entering the house, Officer Munroy followed Mrs. Yarbrough into the bathroom and handcuffed her there. Officer Munroy escorted Mrs. Yarbrough out of the house and left her with the second officer and the three handcuffed men.

Fearing that someone "could possibly" remain inside the house, Officer Munroy “immediately” re-entered the home and performed an extended protective sweep. During the sweep, which lasted approximately one minute, Officer Munroy saw and seized two shotguns in plain view before exiting the home a second time. Shortly thereafter, Mr. and Mrs. Yarbrough consented to a search of their home, and the officers found and seized additional items.

Ultimately, a federal grand jury indicted Mr. Yarbrough for possession of a firearm by a convicted felon. Mr. Yarbrough filed a motion to suppress the shotguns, arguing that Officer Munroy’s extended protective sweep was invalid because the totality of circumstances did not support a reasonable belief that other dangerous persons could be present in the house. Moreover, Mr. Yarbrough argued, because the unconstitutional protective sweep tainted his consent, all of the evidence that officers seized from the home was inadmissible fruit of the poisonous tree.

The district court agreed with Mr. Yarbrough, finding that the totality of the circumstances did not support a reasonable belief that others might be present inside the home. Consequently, the court suppressed both the shotguns and all of the evidence seized during the consent search. The government appealed to the Eleventh Circuit, and the circuit court reversed.

The Eleventh Circuit first explained that the valid warrant that Officer Munroy had for Mrs. Yarbrough, coupled with the totality of circumstances that he and the other officers faced at the Yarbroughs' home, did support a reasonable belief that other people capable of endangering the officers could be inside the home. While acknowledging that anonymous tips, standing alone, could not support a reasonable suspicion justifying an extended protective sweep, the court pointed out that the presence of the two additional men that officers found standing outside with Mr. Yarbrough and the two vehicles, which were capable of transporting more people than the officers encountered initially, not only corroborated the tipster's text that "everyone" was there but also supported a reasonable inference that other people could be inside the house. Additionally, Mrs. Yarbrough's flight into the bathroom when Officer Munroy called out to her was not only "evasive" and "furtive," but also consistent with intent to destroy evidence such as drugs. When viewed in this light, the court said, Mrs. Yarbrough's conduct also corroborated the tipsters' allegations of drug activity and supported a reasonable inference that weapons could be in the house, too. Consequently, the court found that Officer Munroy had case-specific facts sufficient to support a reasonable belief that other potentially dangerous people could be present on the premises.

Finally, the court assessed the scope, duration, and timing of Officer Munroy's extended protective sweep. Focusing on the sweep's approximately one minute duration, the court explained that the such a short period weighed heavily in favor of concluding that the scope was "proportional" to the potential threat and "reasonable" in nature. Moreover, the court commented, Officer Munroy did not delay the protective sweep, but instead, returned inside the home "immediately" after delivering Mrs. Yarbrough into the second officer's custody. While emphasizing that Fourth Amendment reasonableness is an objective standard, the court nonetheless pointed out that Officer Munroy's quick return into the home to perform the sweep was also objective evidence that the potential for danger to emerge from the house was both real and pressing.

For the court's opinion: <https://cases.justia.com/federal/appellate-courts/ca11/18-10624/18-10624-2020-06-11.pdf?ts=1591907443>
