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

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The Informer – October 2015

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CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Hinkley, 2015 U.S. App. LEXIS 17215 (1st Cir. Me. Sept. 30, 2015)

On July 19, 2012, police officers received a report that Hinkley had inappropriate contact with two boys at his apartment. An officer spoke with Hinkley and asked him to come to the police station for an interview. Hinkley agreed and transported himself to the police station. At the beginning of the interview the officer told Hinkley that he was not in custody, asked him if he would mind if the door was closed and reminded Hinkley how to exit the police station in the event of an emergency. Twenty-nine minutes into the interview, the officer told Hinkley that he was still free to leave. Approximately thirty-nine minutes into the interview, the officer told Hinkley that he was no longer free to leave, and advised Hinkley of his *Miranda* warnings. Hinkley told the officer he understood his rights and continued to answer questions. In addition, Hinkley signed a consent-to-search form for his apartment. During the search, officers discovered images of child pornography on Hinkley's computer. The officers arrested Hinkley and transported him to jail.

On July 20, 2012, the officer interviewed Hinkley again. Before asking Hinkley any questions, the officer asked Hinkley if he remembered the *Miranda* warnings he had received the previous day. Hinkley told the officer he remembered the *Miranda* warnings, and when the officer asked Hinkley whether he wanted the warnings repeated, Hinkley said no. No new *Miranda* warnings were provided and Hinkley made incriminating statements.

First, Hinkley argued his statements from the July 19 interview should have been suppressed. Hinkley claimed he was in custody from the beginning of the interview, but did not receive *Miranda* warnings until thirty-eight minutes later.

The court disagreed. Hinkley arrived voluntarily at the police station and was told at the beginning of the interview, and again twenty-nine minutes into the interview, that he was free to leave. In addition, Hinkley was never restrained, and one officer only interviewed him. The court found the mere fact an interview occurs at a police station does not automatically create a custodial situation. Consequently, the court held Hinkley was not in custody for *Miranda* purposes at the beginning of the interview and *Miranda* warnings were not required until thirty-eight minutes into the interview when the officer told Hinkley that he was no longer free to leave. The court further held Hinkley made a valid waiver of his *Miranda* rights by making uncoerced statements to the officer after acknowledging that he understood his rights.

Second, Hinkley argued the physical evidence seized from his apartment should have been suppressed because Hinkley only consented to the search after the officer told him that his apartment would be searched eventually, with or without his consent.

Again, the court disagreed. The court held Hinkley's consent was not rendered involuntary by the officer's statement to Hinkley, as it was reasonable for the officer to believe that he would be able to obtain a warrant to search the apartment even if Hinkley refused consent to search.

Finally, Hinkley argued his statements from July 20 should have been suppressed because the officer was required to re-administer the full *Miranda* warnings rather than ask Hinkley if he recalled the warnings from the previous day.

The court stated that once effective *Miranda* warnings are administered, those warnings remain in effect until the passage of time or an intervening event makes the defendant unable to fully consider the consequences of waiving them. In this case, Hinkley acknowledged that he remembered the *Miranda* warnings, remained familiar with them, and did not need them repeated less than twenty-four hours after he received them the first time. As a result, the court found there was no indication the passage of time was long enough to make Hinkley's second waiver involuntary; therefore, his statements to the officer on July 20 were admissible.

Click [HERE](#) for the court's opinion.

Second Circuit

United States v. Diaz, 2015 U.S. App. LEXIS 15920 (2d Cir. N.Y. Sept. 8, 2015)

A police officer in Meridian, Mississippi stopped an 18-wheel tractor-trailer after he saw the right rear wheels of the trailer twice cross the solid white fog line on the right side of road. The officer believed crossing the fog line constituted careless driving in violation of Mississippi state law. A subsequent search of the truck revealed large quantities of heroin and cocaine. As a result, the government indicted the occupants of the truck, Diaz and Wellington, with conspiracy to possess with intent to distribute heroin and cocaine.

The district court granted the defendants' motion to suppress the drugs. The court held the government failed to establish that the momentary touching of the fog line by the trailer's rear wheels, without other evidence of careless driving, constituted a violation under Mississippi law.

The government appealed, arguing that the officer had reasonable suspicion to stop the defendants for careless driving after he saw the trailer's wheels cross the fog line.

The court agreed. First, the court recognized the trailer's touching or crossing the white fog line might be explained by circumstances other than carelessness. For example, the court noted a driver might swerve to avoid an object in the road. However, the court emphasized the question is not whether driver actually violated the careless driving statute, but whether an objectively reasonable officer could have formed a reasonable suspicion of carelessness under the circumstances. The court supported its position by citing several Mississippi Court of Appeals decisions, which held that an officer's observation of one or more lane-line incursions justified a traffic stop pursuant to the Mississippi careless driving statute. As a result, the court held when the officer saw the trailer's rear wheels cross the fog line, he had reasonable suspicion to justify the traffic stop.

Click [HERE](#) for the court's opinion.

United States v. Levy, 2015 U.S. App. LEXIS 17154 (2d Cir. Sept. 29, 2015)

Following a business trip to Panama, Levy returned to the Miami International Airport to face criminal charges he expected to be filed against him. At the time, Levy was aware he was the target of a criminal investigation into a series of stock manipulation schemes. At the airport, United States Customs and Border Protection (CBP) officers detained Levy and escorted him to a holding area after receiving information about the investigation into Levy from a Drug Enforcement Administration (DEA) task force. Outside of Levy's presence, the CBP officers inspected Levy's luggage, focusing on a spiral-bound notebook that contained eighteen pages of Levy's handwritten notes on a variety of subjects related to Levy's business dealings. After CBP officers examined and photocopied the notebook, they returned it to Levy, who was allowed to leave the airport.

At trial, the government entered the photocopy of Levy's notebook into evidence. After Levy was convicted, he argued the district court should have suppressed the photocopy of the notebook. Levy claimed the search of the notebook was a "non-routine" border search because it went beyond what a traveler expects at a point of entry into the United States.

The court disagreed. First, the court recognized the government has border search authority to conduct "routine" searches of people and items entering the United States without any degree of suspicion. Had the CBP officers merely reviewed Levy's notebook and returned it to him without copying it, the court had no doubt the search would have been "routine." However, the court added, whether searching and copying Levy's notebook constituted a "routine" border search that could be conducted without reasonable suspicion was debatable. Nevertheless, the court declined to decide the issue, instead holding the CBP officers' inspection and copying of the notebook was supported by reasonable suspicion that Levy was engaged in a financial crime. The court concluded that based on the information provided by the DEA task force, the CBP officers were aware of Levy's ongoing criminal participation in securities fraud schemes, which justified searching and copying Levy's notebook.

Second, the court concluded the CBP officers were entitled to rely on the information provided by the DEA task force to justify their search. Whether a Customs official's reasonable suspicion arises entirely from his or her own investigation, or is prompted by another federal agency is irrelevant to the validity of a border search. The court stated the *Fourth Amendment* does not prohibit Customs officials from conducting a border search just because the search supports another federal agency's criminal investigation.

Finally, Levy argued that border searches conducted by the CBP, even at the prompting of another federal agency, should be confined to crimes the CBP is specifically authorized to investigate.

The court disagreed. While the primary purpose of a border search is to seize contraband property unlawfully brought into the United States, CBP officers are not required to ignore tangible or documentary evidence of other federal crimes. CBP officers have the authority to search and review a traveler's documents and other items at the border when they have reasonable suspicion the traveler is engaged in criminal activity, even if the crime falls outside the primary scope of their official duties.

Click [HERE](#) for the court's opinion.

Sixth Circuit

United States v. Brown, 2015 U.S. App. LEXIS 16148 (6th Cir. Mich. September 11, 2015)

On March 8, 2011, federal and state police officers arrested Middleton, Brown and Woods for attempted delivery of heroin after conducting a traffic stop on Woods' vehicle. In response to standard booking questions, Brown provided a home address and possessed a driver's license that listed the same address as his residence.

The next day, officers obtained a warrant to search Middleton's house. When officers executed the warrant, they discovered a vehicle registered to Brown on the street in front of Middleton's house. The vehicle registration listed the same address Brown had given the officers as his home address the day before. In addition, a drug-detection dog alerted to the odor of narcotics inside Brown's vehicle. A few days later, an agent with the Drug Enforcement Administration (DEA) discovered Brown had a prior conviction for drug distribution, and had served time in federal prison.

On March 30, 2011, the DEA agent applied for a warrant to search Brown's house for evidence related to drug trafficking. A magistrate judge issued the warrant, which officers executed on March 31, 2011, twenty-two days after Brown's arrest. Pursuant to the warrant, the agents found drugs, firearms, and ammunition inside Brown's house.

The government charged Brown with a variety of drug and firearms offenses.

Brown moved to suppress the evidence seized from his house. First, Brown argued the information in the agent's search warrant affidavit failed to establish probable cause because it did not establish a connection between illegal drug activity and Brown's house. Second, Brown argued the information contained in the agent's affidavit was stale.

The court held the agent's affidavit established a sufficient connection or nexus between drug trafficking and Brown's house to support the issuance of the search warrant. While the affidavit contained no evidence indicating Brown distributed drugs from his house, that he stored drugs at his house, or that any suspicious activity had taken place there, the affidavit presented the magistrate judge with more than an uncorroborated suspicion Brown was a key drug dealer. First, the affidavit identified Brown as a previously convicted drug dealer and detailed the DEA's investigation of Brown's involvement in an ongoing drug trafficking ring. Second, the affidavit contained information concerning a drug-dog's detection of drug odor in a vehicle registered in Brown's name at the address where he lived. As a result, the court concluded the magistrate judge could reasonably infer from these facts that Brown had recently used the vehicle registered to his home address to transport drugs, and there would be a fair probability a search of his house would result in the seizure of contraband or evidence of a crime.

The court further held the information contained in the agent's search warrant affidavit was not stale. The court noted staleness is measured by the circumstances of the case, not by the passage of time alone. In this case, the court found the nature of the crime suggested a continuous and ongoing drug trafficking conspiracy of which Brown was a member. As a result, the court concluded the information known to the agent did not become stale in the 22 days between Brown's arrest on March 8 and the agent's application to search Brown's house on March 30.

Click [HERE](#) for the court's opinion.

Ninth Circuit

United States v. Fowlkes, 2015 U.S. App. LEXIS 17097 (9th Cir. Cal. Sept. 28, 2015)

On September 4, 2006, officers intercepted several phone calls that caused them to believe Fowlkes was planning to destroy or remove drugs and other evidence from his apartment. Within an hour of the last phone call, officers arrived at the apartment, entered without a warrant, handcuffed Fowlkes and conducted a protective sweep. During this time, the officers saw a handgun. The officers then obtained a warrant to search the apartment and seized crack cocaine, a digital scale and the handgun. At the conclusion of the search, the officers released Fowlkes.

On September 13, 2006, officers arrested Fowlkes for felony drug possession after witnessing what appeared to be a drug transaction, and transported him to the jail for processing. During intake, officers strip searched Fowlkes. After Fowlkes removed his clothing, officers saw him make a quick movement to his buttocks area with his hand in what appeared to be an attempt to push something into his rectum. One of the officers deployed his taser against Fowlkes while other officers handcuffed him. Once Fowlkes was secured, the officers saw a plastic bag partially protruding from Fowlkes' rectum. One of the officers forcibly removed the plastic bag in what was described as a "difficult, abrasive procedure." The officers discovered cocaine inside the plastic bag.

At trial, Fowlkes argued, among other things, the warrantless entry into his apartment on September 6 was unreasonable, and the subsequent search warrant was not supported by probable cause.

The court disagreed, holding exigent circumstances justified the warrantless entry into Fowlkes' apartment. Officers intercepted phone calls that suggested the presence of drugs and other evidence in Fowlkes' apartment, and that Fowlkes ordered its removal so the police could not seize it. As a result, the court concluded a reasonable police officer could have believed it was necessary to enter and secure Fowlkes' apartment to prevent Fowlkes from destroying evidence. In addition, the court found the one-hour lapse between the last intercepted call and the officers' entry into the apartment did not undermine the exigency of the situation, and that the warrant issued by the magistrate judge was supported by probable cause.

Fowlkes also argued the warrantless seizure of the plastic bag from within his body was unreasonable; therefore, the evidence the officers discovered inside the bag should have been suppressed.

The court agreed. First, the court held the warrantless visual strip search of Fowlkes during the jail intake process was reasonable. The court recognized the government's interest in preventing contraband from entering its prisons and jails, and that it would be impractical to require officers to obtain a warrant before conducting each individual visual search.

Second, the court did not determine whether the officers were required to obtain a warrant before retrieving the object from Fowlkes' rectum. However, assuming it would have been reasonable for the officers to seize the object without first obtaining a warrant, the court recognized the manner in which the officers removed the object still had to be reasonable.

Reviewing the totality of the circumstances, the court concluded the manner in which the officers removed the object from Fowlkes' rectum was unreasonable. First, the officers violated the jail's written policy for body cavity searches by failing to remove the evidence "under sanitary conditions," and by not using a "Physician, Nurse Practitioner, Registered Nurse, Licensed Vocational Nurse, or Emergency Medical Technician." Second, there was no evidence any of the officers had medical or any other relevant training on how to safely remove suspicious objects from an arrestee's rectum, or how to evaluate whether such removal could cause serious physical harm or death. Third, the officers did not offer Fowlkes options for removing the contraband or attempt to secure his compliance beforehand. The court noted the undisputed testimony by the officers established Fowlkes posed no threat to the officers, that was he was not flight risk, and there was no concern about the destruction of the evidence, as Fowlkes was handcuffed, tased and surrounded by five officers. In addition, there was no evidence a medical emergency existed that would have justified the immediate removal of the plastic bag from Fowlkes' rectum. Consequently, the court concluded the manner in which the officers seized the plastic bag from Fowlkes' rectum was unreasonable; therefore, the cocaine discovered inside it should have been suppressed.

Click [HERE](#) for the court's opinion.

District of Columbia Circuit

United States v. Weaver, 2015 U.S. App. LEXIS 15763 (D.C. Cir. Sept. 4, 2015)

Federal agents went to Weaver's apartment with a warrant for his arrest. After arriving at Weaver's building, the agents knocked on the apartment door twice. No one answered the door; however, the agents heard movement from inside the apartment. The agents were not concerned that Weaver would flee out a window, as the apartment was on a high floor. Less than a minute later, the agents announced "police" and immediately used a key they had obtained from the building manager to unlock the door and enter the apartment. The agents did not announce they had a warrant to arrest Weaver. Once inside the apartment, the agents subdued Weaver after a brief struggle and removed him from the apartment. While arresting Weaver, the agents smelled marijuana and saw what appeared to be bags of marijuana on the kitchen counter. Based on these observations, the agents obtained a warrant to search Weaver's apartment and found among other things, several kilograms of marijuana. As a result, the government indicted Weaver for three additional criminal offenses.

Weaver argued the agents were not legally in his apartment when they made the observations that supported their search warrant application because they had violated the knock-and-announce rule; therefore, the evidence seized from his apartment should have been suppressed.

While the government conceded the agents violated the knock-and-announce rule by failing to state their purpose before entering Weaver's apartment, the government claimed suppression of the evidence seized from the apartment was not the appropriate remedy. The government relied on *Hudson v. Michigan*, where the United States Supreme Court held when officers violate the knock-and-announce rule in executing a search warrant, the exclusionary rule does not apply to any evidence they discover. The government argued the decision in *Hudson* held the exclusionary rule did not apply to a violation of the knock-and-announce rule, whether the violation occurred during the execution of a search warrant or an arrest warrant.

The court disagreed, holding that suppression of evidence was the appropriate remedy where agents executing an arrest for Weaver violated the knock-and-announce rule, which then led to the discovery of evidence in Weaver's apartment.

The court noted search warrants and arrest warrants authorize law enforcement officers to take different actions. For example, officers with a search warrant may enter a home and search for the items described in the warrant anywhere in the home those items might be located. The court reasoned that a violation of the knock-and-announce rule in the execution of a search warrant would not expand or otherwise increase the search authority conferred on the officers by the warrant. As a result, suppression for a knock-and-announce rule violation was not an appropriate remedy.

In contrast, the officers' authority under an arrest warrant to enter and search a home is limited. First, officers with an arrest warrant may enter a person's home only when they have reason to believe the arrestee is there. Second, once inside the home, the officers may only look in places where a person might reasonably be found, and the officers must stop searching once they locate the arrestee. Third, the court concluded an arrestee's location inside the home at the time of arrest is likely to depend on whether officers comply with the knock-and-announce rule. Because the requirements for search warrants and arrest warrants protect distinct privacy interests, and the two types of warrants authorize officers to take different actions, the court concluded the protections afforded by the knock-and-announce rule are different as well. As a result, the court found in the context of an arrest warrant, the knock-and-announce rule protects an arrestee's privacy in his home in a way it does not with a search warrant. Therefore, the court held the exclusionary rule was the appropriate remedy for a violation of the knock-and-announce rule committed during the execution of an arrest warrant.

Click [HERE](#) for the court's opinion.
