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The Federal Law Enforcement -Informer-

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

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The Informer – November 2015

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FLETC Informer Webinar Series

1. Law of Video Surveillance

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division
This course will review statutory and case law concerning video surveillance.

Date and Time: Thursday December 17, 2015 2:30 p.m. EST

To join this webinar: https://share.dhs.gov/lawofvideosurveillance/

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CASE SUMMARIES

United States Supreme Court

Mullenix v. Luna, 2015 U.S. LEXIS 7160 (U.S. Nov. 9, 2015)

At approximately 10:21 p.m., a police officer followed Leija to a fast food restaurant and attempted to arrest him on an outstanding misdemeanor arrest warrant. After some discussion with the officer, Leija fled in his vehicle with the officer in pursuit. A state trooper took the lead in the pursuit as Leija continued onto an interstate highway. Twice during the pursuit, Leija called the police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, along with a report that Leija might be intoxicated, to the officers.

Approximately eighteen minutes into the pursuit, Leija approached an overpass where an officer had deployed a spike strip in the roadway. In addition, Trooper Mullenix positioned himself on top of the overpass with an M-4 rifle. Mullenix fired six rounds at Leija's car, which then engaged the spike strip, hit the median and rolled over. Leija was pronounced dead at the scene. Leija's cause of death was later determined to be one of the shots fired by Mullenix.

Leija's estate sued Mullenix, claiming Mullenix violated the *Fourth Amendment* by using excessive force to stop Leija. Mullenix argued his use of force was objectively reasonable because he acted to protect the officers involved in the pursuit, the officer below the overpass, and other motorists who might have been in the path of the pursuit.

The Court of Appeals for the Fifth Circuit held Mullenix was not entitled to qualified immunity because he violated the clearly established rule that a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."

Mullenix appealed to the United States Supreme Court,

Qualified immunity protects officers from civil liability as long as long as their conduct does not violate a clearly established right. In the context of excessive force cases involving vehicle pursuits, the Supreme Court noted existing case law was not sufficiently clear to put Mullenix on notice that his actions violated Leija's *Fourth Amendment* right to be free from an unlawful seizure. Instead, the Court stated it has never found the use of deadly force in connection with a dangerous car chase to be a violation of the *Fourth Amendment*, let alone the basis for denying an officer qualified immunity. In *Scott v. Harris*, the Court held an officer did not violate the *Fourth Amendment* by ramming a fleeing suspect whose reckless driving "posed an actual and imminent threat to the lives" of other motorists and the officers involved in the chase. In *Plumhoff v. Rickard*, the Court reaffirmed *Scott* by holding that an officer acted reasonably when he fatally shot a fugitive who was "intent on resuming" a chase that "posed a deadly threat for others on the road." In this case, while Leija did not pass as many cars as the drivers in *Scott* or *Plumhoff* during the pursuit, Leija verbally threatened to kill any officers in his path, and he was about to come upon an officer as he approached the overpass. As a result, the Court reversed the Fifth Circuit's determination that Mullenix was not entitled to qualified immunity.

Click **HERE** for the court's opinion.

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Circuit Courts of Appeal

First Circuit

United States v. Peake, 2015 U.S. App. LEXIS 17868 (1st Cir. P.R. Oct. 14, 2015)

Federal agents presented a magistrate judge with a draft search warrant for his consideration. After reviewing the warrant, the judge crossed out a paragraph under Attachment A, which described the "premises" to be searched. The stricken paragraph would have allowed the government to search "briefcases, laptop computers, hand-held computers, cell phones, Blackberries and other moveable document containers" found on the premises described in the warrant. However, the judge left standing in the warrant other references to electronically stored documents and records. In addition, the judge added two handwritten provisions, which stated that any seized computer equipment or electronic storage devices would be returned to the defendant within 30 days.

The agents executed the warrant and seized Peake's laptop computer and Blackberry. The agents imaged both items and returned the laptop and Blackberry to Peake on-site the same day. A subsequent search of the images copies of Peake's laptop computer and Blackberry revealed information that was introduced at trial against Peake.

Peake argued the information collected from his laptop computer and Blackberry should have been suppressed because both items were outside the scope of the search warrant. Peake claimed when the judge struck the paragraph in Attachment A, the agents were specifically prohibited from searching and seizing any laptop computer or Blackberry devices they discovered.

The court disagreed. While the judge struck a paragraph from Attachment A, the court noted other intact passages in the warrant expressly demonstrated the judge approved searching for all documents and records stored in "an electronic or digital format." Given that Peake's personal electronic devices were on the premises to be searched, and the warrant specifically mentioned electronically-stored documents, the court concluded the agents acted within the scope of the warrant when they searched Peake's devices.

Click **HERE** for the court's opinion.

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United States v. White, 2015 U.S. App. LEXIS 18149 (1st Cir. Me. Oct. 20, 2015)

A confidential informant (CI) made two controlled purchases of cocaine from White. On both occasions, White drove to a pre-arranged location where he met the CI, who made the controlled purchases inside White's car. A few months later, the CI reported White was planning to restock his cocaine supply. Officers had the CI call White and order a "full" ounce of cocaine. White told the CI he would be leaving "pretty soon" and that he would bring the full amount of cocaine requested. Approximately ten minutes later, surveillance officers saw White exit his house, get into his car and drive away. After White drove a short distance, a police officer conducted a traffic stop. Another officer arrived a few minutes later and walked his drug-sniffing dog

around White's car. After the dog alerted, officers searched White's car and found one pound of cocaine in the trunk and a gun in the driver' side door pocket. Using information obtained from the traffic stop, officers obtained a warrant to search White's house where they found additional drugs and a handgun. The government indicted White on drug and firearm offenses.

White argued the officers did not have probable cause to stop and search his vehicle; therefore, the evidence obtained from his car, and later his house, should have been suppressed.

The court disagreed, holding the traffic stop and warrantless search of White's car was lawful under the automobile exception to the *Fourth Amendment's* warrant requirement. First, the officers corroborated information the CI had provided them concerning White, such as White's home address and vehicle information. Second, on two occasions the officers worked with the CI to execute two controlled purchases of drugs from White, with both purchases taking place in White's car. Finally, on the day of the traffic stop, White agreed to sell the CI drugs and told the CI he was going to be leaving his house "pretty soon." Within minutes, officers saw White come out of his house, get into his car and drive away. As a result, based on the totality of the circumstances, the court concluded, at the time of the traffic stop, officers had ample reason to believe White was en route to conduct a sale of cocaine, and that a search of his vehicle would yield evidence of drug dealing activity.

Click **HERE** for the court's opinion.

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Fourth Circuit

United States v. Slocumb, 2015 U.S. App. LEXIS 18343 (4th Cir. Va. Oct. 22, 2015)

Around midnight, an officer saw Slocumb, his girlfriend, Lewis, and an infant standing near two cars in the parking lot of a salvage business that had closed hours earlier. Slocumb told the officer Lewis' car had broken down, and they were in the process of transferring a child car seat from one car to another car Slocumb had borrowed. The officer noticed Slocumb appeared to by hurrying Lewis, and he believed Slocumb was acting evasively, as Slocumb did not make eye contact and gave mumbled responses to the officer' s questions. The officer told Slocumb and Lewis they were not allowed to leave, and eventually asked Slocumb for identification. Slocumb told the officer he did not have any identification; however, he told the officer his name was "Anthony Francis." When Lewis told another officer that Slocumb's name was "Hakeem," the officer arrested Slocumb for providing a false name. Officers searched the car Slocumb had been driving and found methamphetamine and cocaine under the seat. The government indicted Slocumb for several drug offenses.

Slocumb argued the officer did not have reasonable suspicion of criminal activity when he detained him; therefore, the evidence discovered in the car should have been suppressed.

The court agreed. The court found the factors considered by the district court did not support a finding of reasonable suspicion to believe Slocum was involved in criminal activity. The court recognized the lateness of the hour and the fact the business had been closed for many hours were relevant; however; when considered along with Slocumb's behavior, concluded these facts did not establish reasonable suspicion. Here, Slocumb's actions, such as hurrying Lewis to finish the transfer of the car seat, keeping his head turned and avoiding eye contact, and giving low, mumbled responses, did not establish reasonable suspicion. In addition,

Slocumb did not attempt to evade the officers; instead, Slocumb acknowledged them and was not noticeably nervous. Any suspicion the officer might have had when he first approached Slocumb was dispelled when Slocumb gave answers consistent with his actions. The court noted, at that point, there was no more reason to suspect that Slocumb was engaged in criminal activity than there was to believe his story as to what he and Lewis were doing.

In conclusion, the court cautioned the government "must do more than simply label behavior as 'suspicious' to make it so." Instead, the government must be able to "articulate why a particular behavior is suspicious" or logically demonstrate why the behavior is likely to be indicative of criminal activity that it might initially appear.

Click **HERE** for the court's opinion.

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United States v. Patiutka, 2015 U.S. App. LEXIS 18464 (4th Cir. Va. Oct. 23, 2015)

A state trooper stopped Patiutka for failing to maintain his lane and suspected tint violations. The trooper approached the car and asked the driver, Patiutka, for his license. After Patiutka gave the trooper his license, the trooper asked Patiutka for his name and date of birth. Patiutka gave the trooper a date that differed by eight years from the date on driver's license. Although the trooper believed Patiutka was lying to him about his identity, which the trooper understood to be an arrestable offense, he did not ask any follow-up questions concerning Patiutka's suspected lie. Instead, the trooper ran the information provided by Patiutka through police databases and, after receiving no results, returned Patiutka's license, gave him a verbal warning, and told Patiutka that he was "free to go." As Patiutka began to walk back to his car, the trooper asked him if he would answer some questions. The trooper then asked for and received consent to search Patiutka's car. Several other officers who had arrived on scene began to search Patiutka's car. During their search, the officers found a credit card reader, and four new, unopened iPads inside a suitcase. At this point, Patiutka revoked his consent, and the officers stopped searching for a moment. The trooper then handcuffed Patiutka and took him back to his patrol car. The other officers resumed their search of Patiutka's car and found a credit card embosser, a credit card re-encoder and numerous blank credit cards. At the conclusion of the search, Patiutka was transported to the police station. Several months later, the government charged Patiutka with access device fraud and aggravated identity theft.

After the district court suppressed the evidence seized from Patiutka's car, the government appealed.

First, the government argued the evidence was seized incident to a lawful arrest. Specifically, the government claimed the trooper had probable cause to arrest Patiutka for the state offense of providing false identity.

The court disagreed. A search incident to arrest may occur prior to an arrest, and still be incident to that arrest. However, officers must have probable cause to arrest before beginning their search. Here, the court agreed with the district court, which concluded the trooper did not have probable cause to arrest Patiutka for providing a false identity when Patiutka revoked his consent to search. First, the video of the traffic stop showed the trooper did not ask Patiutka any follow-up questions regarding Patiutka's suspected lie as to his birthdate. Instead, the trooper handed the license back to Patiutka and told him he was "free to go." Second, the video showed that after the trooper obtained Patiutka's consent to search, he immediately stopped the

search after Patiutka revoked his consent. The court found this suggested the only basis for the search of Patiutka's car was consent, and that it was not incident to arrest.

Second, the government argued the warrantless search of Patiutka's car was valid under the automobile exception to the warrant requirement.

Again, the court disagreed. Officers do not need a warrant to search an automobile if they have probable cause to believe it contains evidence of criminal activity. When the officers continued to search Patiutka's car after Patiutka revoked consent, the officers had already found a credit card reader and four new iPads. While the officers found the combination of these items and their locations in the car suspicious, they were items that Patiutka could legally possess. The court acknowledged the facts known to the officers would likely have established reasonable suspicion to detain Patiutka and investigate further. If the officers had questioned Patiutka further about these items, they might have been able to establish probable cause to support a further search of Patiutka's car. However, the trooper did not speak with Patiutka before placing him in handcuffs, nor did any of the other officers before resuming their search. Because the automobile exception requires probable cause, not just reasonable suspicion, the court held the exception did not apply here.

Click **HERE** for the court's opinion.

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Eighth Circuit

United States v. Ball, 2015 U.S. App. LEXIS 18817 (8th Cir. Iowa Oct. 29, 2015)

A state police officer impounded the car in which Ball had been a passenger, and conducted an inventory search.[1] Department policy restricted inventory searches to those areas where an owner or operator would ordinarily place or store property or equipment, including the trunk and engine compartments. When the officer opened the hood of the car, he saw fresh fingerprints on the air filter box. The officer opened the cover of the box and found two packages of cocaine. The government indicted Ball, who was already the target of an unrelated investigation, on a variety of drug charges.

Ball filed a motion to suppress the drugs, arguing that opening the air filter box went beyond the scope of an inventory search, as the air filter box was not an area where an owner or operator would ordinarily place or store property or equipment."

The court disagreed. First, the state police inventory policy explicitly states that one area in the vehicle that should be searched is the engine compartment. Second, the court noted it has previously held that as part of an inventory search, it is reasonable to search the engine compartment. Third, the officer testified that he had conducted over one-thousand inventory searches of vehicles, that he always searches the engine compartment and that at least 90% of the time he also checks the air filter box for property where he has previously found narcotics and currency. Finally, opening the cover of the air filter box in Ball's car only required him to unsnap two small tabs, not to remove any screws or panels.

[1] The court assumed with deciding that Ball had a sufficient expectation of privacy in the car to assert a *Fourth Amendment* claim regarding the inventory search.

Click **HERE** for the court's opinion.

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Eleventh Circuit

Moore v. Pederson, 2015 U.S. App. LEXIS 17894 (11th Cir. Fla. Oct. 15, 2015)

Deputy Pederson was dispatched to an apartment complex after a resident reported that a man and two women had been arguing in the parking lot. When Pederson arrived, the resident told him the man and one of the women had gone into Moore's apartment. As Pederson approached the apartment he heard what sounded like an argument and loud music coming from inside. Pederson knocked on the door, and when Moore opened the door, he was wearing a towel wrapped at the waist. Pederson saw two women inside the apartment, and while neither asked for assistance, one of the women appeared visibly upset. Not knowing if a domestic violence situation existed, Pederson began to interview Moore to determine Moore's involvement in the parking lot dispute. Moore stated he knew nothing about the earlier dispute and when Pederson requested Moore's name and identification, Moore refused to provide them. After Moore's multiple refusals to provide identification, Pederson took out his handcuffs and directed Moore, who was standing inside the doorway of the apartment, to turn around and put his hands behind his back. Moore complied. Pederson then reached into the apartment, handcuffed Moore and arrested him for resisting a police officer without violence. The charges against Moore were eventually dismissed.

Moore sued, claiming Pederson violated the *Fourth Amendment* by entering his apartment without a warrant and arresting him without probable cause based solely on his refusal to provide Pederson his name and identification.

Pederson argued he established probable cause to arrest Moore for resisting an officer after Moore refused to identify himself during a lawful *Terry* stop. Pederson further argued exigent circumstances allowed him to enter Moore's apartment without a warrant to effect the arrest. Alternatively, Pederson argued Moore impliedly consented to his entry into the apartment when Moore turned around and put his hands behind his back so Pederson could arrest him.

The court held that unless exigent circumstances exist, the government may not conduct the equivalent of a *Terry* stop inside a person's home. Here, the court concluded that exigent circumstances did not exist. The court found even if Pederson had reasonable suspicion to investigate the parking lot dispute when he approached Moore's door, that reasonable suspicion never developed into probable cause during his encounter with Moore. First, before knocking on Moore's door, all Pederson knew was that a neighbor had complained of a non-violent argument in the parking lot and Pederson heard what he believed was arguing and music coming from inside the apartment. Second, when Moore opened the door, nothing Pederson saw established that anyone's life or health was at risk, as no one appeared to be injured. Third, Pederson did not see any furniture or other items strewn around. Finally, Pederson did not identify any behavior or conduct that suggested any of the apartment's occupants contemplated violence in any way. Because Pederson was not conducting a lawful *Terry* stop while Moore remained inside his apartment, Moore was free to refuse Pederson's requests to identify himself. As a result, Pederson could not have probable cause to arrest Moore for resisting or obstructing an officer.

The court further held that a person does not consent to entry into his home by an officer standing outside by following an officer's instructions to turn around and be handcuffed, while the person remains inside his home. Consequently, the court concluded Pederson violated Moore's *Fourth Amendment* right to be from unreasonable seizures.

Although Pederson violated Moore's *Fourth Amendment* rights, the court determined Pederson was entitled to qualified immunity because at the time of the incident the law was not clearly established that a *Terry*-like stop could not be conducted in a home without exigent circumstances.

The court further held at the time of the incident the law was not clearly established that an officer could not conduct a warrantless arrest without both probable cause and either exigent circumstances or consent. Consequently, Pederson the court concluded Pederson was entitled to qualified immunity regarding Moore's arrest.

Click **HERE** for the court's opinion.

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