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Office of Chief Counsel
Legal Training Division

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The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Centers. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting https://www.fletc.gov/legal-resources.

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The Informer – December 2015

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FLETC Informer Webinar Series

1. Cops, Canine, Curtilage

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This course will review and analyze current cases concerning searches (sniffs) by police canines in various constitutionally protected areas.

Date and Time: Tuesday January 5, 2016 2:30 p.m. EST

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

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2. Search and Seizure Update

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This course will review and analyze current federal cases involving *Fourth Amendment* searches and seizures.

Date and Time: Tuesday January 12, 2016 2:30 p.m. EST

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3. Law of Video Surveillance

1-hour webinar presented by Bruce-Alan Barnard, FLETC Legal Division. This course will present the current law governing the use of video-only surveillance, provide an explanation of Mosiac Theory, and discuss the potential future application of Mosiac theory to video-only surveillance.

Date and Time: Monday January 25, 2016 3:30 p.m. EST

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

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Body Cameras in Excessive Force Cases

By
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So far, the debates about body cameras in cases of alleged excessive force have been about whether they get to the truth about what really happened. One argument is that the recording can refresh an officer's memory. Another is that the officer will simply shape his or her testimony around the recording. Enter the *Fourth Amendment's* reasonable officer standard. It considers the totality of the facts and circumstances from the perspective of a reasonable officer (which is obviously the reviewing court, reviewing everything through a hypothetical eye).[1] But since the focus is on *what a reasonable officer could believe*, what really happened is not determinative. Here is how this came up:

> Dispatch told me there was an officer down.[2] When I arrived on scene, a crowd of people ran by pointing wildly to where they had been. I walked on, looking for the injured officer and saw someone in a blue uniform lying on the ground. The officer appeared to be unconscious or worse. A man with a pistol in his hand was standing over the officer. He shouted and waived the gun around. I yelled, "Drop the gun!" but he continued to shout and point the gun - - first at the officer on the ground and then at me. I shot him.

That was only a scenario on a use of force simulator; but the instructor's feedback raised questions about how a court would consider the events, had they been real.

- **Instructor:** What did you hear when the crowd ran by?
- **Miller:** Nothing, really.

- **Instructor:** You didn't hear the woman yell, "He's got a gun"?
- **Miller:** No; I certainly didn't hear that.

- **Instructor:** Ok; let's review. *(Like a body camera, the instructor re-played the crowd running past me. Sure enough, a woman in the crowd shouted, "He's got a gun!")*
- **Miller:** I still don't remember; but no matter. I saw a gun and I shot to stop the threat posed by the man holding it. *(I quoted the U.S. Court of Appeals for the Eleventh Circuit. An officer is not required to wait for an armed and dangerous felon to draw a bead on him, especially after orders to drop the gun have gone unheeded.*[3])

- **Instructor:** That wasn't a gun. *(And sure enough, the re-play showed the man holding a hammer.)*
- ***Miller:*** Oh…

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[1] *Graham v. Connor*, 490 U.S. 386, 396 (1989) citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1968).
[2] "Officer down" is an alert that a police officer has been killed or wounded.
[3] *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997).

The Police Executive Research Forum (PERF) reported that reviewing body camera footage may help get to the truth of what really happened.[4] The review may jog the officer's memory. *(But not in my case. I reviewed the tape and I still cannot recall a warning about a gun. And I still picture the man holding a pistol instead of a hammer.)* Other executives believe that the truth - - and the officer's credibility - - are better served if an officer is *not* permitted to review footage of an incident prior to making a statement. One said, "In terms of the officer's statement, what matters is the officer's perspective at the time of the event, not what is in the video." *(Personally, I would love to be judged from my own perspective, but the plaintiff's attorney might object.)*

Then comes the Supreme Court's analysis in *Graham v. Connor*, the seminal case for judging police officers accused of using excessive force to seize someone under the Fourth Amendment. The Court's instructions were to consider "… the totality of the facts and circumstances …" (not what I can remember) and to consider everything "from the perspective of a reasonable officer on the scene ..." (obviously not my own).[5] Whether I can recall the statement about a gun should be no more determinative than … well, my personal motive for shooting the man. If motive was determinative, the fate of two officers - - using the same force, and under the same circumstances - - would depend on who had the better *motive.* If memory was determinative, their fate would depend who had the better *memory*. The *Graham* analysis does not look into the subjective hearts and minds of the officers.[6] It is an objective test that looks at everything through the lens of a reasonable officer.

The saying goes that hindsight is always 20/20, but after-the-fact assessments like "You should have …" or "I would have … " are forbidden. (Incidentally, they are also generally made *after getting to the truth about what really happened.*) There are no perfect answers under an objective test and looking for one goes against the grain of the *Graham* analysis. The camera stopped, so to speak, after I pulled the trigger. Now the reasonable officer looks backwards.

Hindsight is a rule of relevance, and while the Court does not give specific instructions about what is relevant, and what is hindsight, in an analysis where the operative word has always been reasonableness, a fact should be relevant if it was *reasonably known* at the time. Stated differently: Looking backwards, could a reasonable officer in the shoes of the real one have seen or heard *that fact,* or at least believed it to be true? If a fact was reasonably known (or reasonably believed to be true based on other facts) it should be considered. Obviously, if the woman came up to me *after* the shooting and said "I thought he had a gun" her statement would be after-the-fact - - gained in hindsight - - and not relevant. But her warning was as clear as a bell on the replay. I did not hear her; but a reasonable officer could have. Her statement was *reasonably known*. The question now: Based on everything else that was reasonably known,

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[4] See Miller Lindsay, and Jessica Toliver. Police Executive Research Forum (PERF). 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, Washington, D.C.: Office of Community Oriented Policing Services.

[5] See *Graham*, 490 U.S. at 396 citing *Tennessee v. Garner*, 471 U.S. 1, 8-9.

[6] An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an unreasonable use of force constitutional. *Graham*, 490 U.S. at 397. The Court has repeatedly rejected attempts to bring the officer's subjective beliefs into a Fourth Amendment analysis. See also *Brendlin v. California*, 551 U.S. 249, 260 (2007). The Court has stated that probable cause to arrest depends on the *facts known to the officer*. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). But there is a world of difference between the test for an arrest and objectively reasonable force to effect one. The officer has time to make a calculated decision before taking someone into custody. *Graham* at 397 (officers often have to make split second decisions about force).

could a reasonable officer believe that the man was holding a gun? If so, the fact that it turned out to be a hammer should be hindsight.

Not hearing the woman's warning about a gun was probably due to a natural human reaction to stress that causes the sense of hearing to diminish. Stress, fatigue, and exertion - - conditions well known to law enforcement officers - - can greatly effect memory. In a survey of officers involved in shootings, 84 percent reported not hearing even the loudest of sounds.[7] "If it hadn't been for the recoil, I wouldn't have known my gun was working" an officer reported. The same study reported that 79 percent of the officers experienced tunnel vision and almost half could not recall significant details about what they did.

Another study found inconsistencies between written use of force reports and body camera recordings.[8] Eleven officers were asked to react to certain use of force scenarios, report what they saw, and then compare their written report to the footage on their body cameras. Every officer failed to report other potential weapons in the scenario, including a gun plainly visible on a table. Eight of the eleven officers failed to report a third person in the room. Two did not report uses of force.

There is probably nothing more *subjective* than memory, and memory is probably most vulnerable during tense, uncertain and rapidly evolving situation where an officer is trying to defend himself, or others, from a significant threat. Body cameras are just another piece of technology that gets *some* of the facts before the court. They are no different than the hundreds of millions of smart phones and I-phones that make every citizen a reporter - - and neither friend nor foe to anyone. They simply record facts. Officers can certainly add to the facts. Force science experts may add more by explaining why an officer did not hear something, or saw something that was not there. But in the end, the court through the reasonable officer decides if the plaintiff established that the force was constitutionally excessive.

Officers are more likely to be truthful if they are told the truth about how they are judged. And the truth is that the recording in an officer's brain will most likely be different than the electronic copy. Me? I thought the man was holding a gun. I would also like my attorney to argue that the woman's statement about a gun makes my belief more objectively reasonable, whether I heard it or not. Still, the reasonable officer may find both of us incredible (*in a bad way)*. Then forget the gun. Could a reasonable officer believe that the man posed a significant threat while swinging the hammer? Sometimes what actually happened *is* reasonable.

[7] Artwoh, A. *Perceptual and Memory Distortion during Officer-Involved Shootings*. FBI Law Enforcement Bulletin, 71, 2002.

[8] Dawes, Heegard, Brave, Paetow, Weston, and Ho. *Body-Worn Cameras Improve Law Enforcement Officer Report Writing Accuracy*. Journal of Law Enforcement. 2015.

CASE SUMMARIES

Circuit Courts of Appeal

Sixth Circuit

Mullins v. Cyranek, 2015 U.S. App. LEXIS 19485 (6th Cir. Ohio Nov. 9, 2015)

Officer Cyranek saw Mullins walking in downtown Cincinnati with two other individuals who were suspected of possessing firearms. Cyranek observed Mullins holding his right side, which led him to believe that Mullins possessed a gun. Cyranek followed Mullins who positioned the right side of his body away from Cyranek, making Cyranek more suspicious that Mullins had a gun. Cyranek approached Mullins, ordered him to stop and Mullins complied. When Cyranek grabbed Mullins' wrist to prevent him from pulling out a gun, Mullins resisted. Cyranek pushed Mullins to the ground, ending up on Mullins' back. During the struggle, Cyranek saw that Mullins had a pistol in his right hand, with a finger on the trigger. While drawing his firearm, Cyranek ordered Mullins to drop the pistol. Mullins threw his gun over Cyranek's shoulder as Cyranek rose from his crouched position and fired two shots at Mullins. One of Cyranek's shots struck Mullins in the torso killing him. Surveillance video of the incident showed that no more than five seconds elapsed between the time Mullins threw his gun and when Cyranek fired his second shot.

Mullins' mother sued Cyranek for several causes of action, claiming that Cyranek used excessive force in violation of the *Fourth Amendment* by firing two shots at her son, even though her son had already discarded his firearm.

The court held Cyranek was entitled to qualified immunity.

To determine whether Cyranek's use of deadly force was reasonable under the *Fourth Amendment*, the court considered: (1) The severity of the crime at issue; (2) Whether the suspect posed an immediate threat to the safety of the officer or others; and (3) Whether the suspect was actively resisting arrest or attempting to evade arrest by flight. In addition, the court recognized the reasonableness of the use of force must be judged from the perspective of a reasonable officer on the scene and not on 20/20 hindsight, as officers are often required to make split-second judgments under circumstances that are tense, uncertain and rapidly evolving.

First, the court held the severity of the crime and resistance factors weighed in Officer Cyranek's favor. At the outset, Cyranek only had probable cause to believe Mullins possessed a weapon, a misdemeanor under Ohio law. However, Mullins' removal of the pistol in Cyranek's presence without Cyranek's permission constituted a felony under Ohio law. In addition, prior to the shooting, Mullins physically struggled with Cyranek for well over a minute.

Second, the court recognized the question of whether it was reasonable for Cyranek to believe that Mullins posed a significant threat at the time Cyranek shot him, was the main issue in the case.

Cyranek conceded that he shot Mullins after Mullins threw his pistol; however, Cyranek claimed the confrontation unfolded so rapidly that he did not have a chance to realize a potentially dangerous situation had evolved into a safe one.

The Sixth Circuit has previously held that "within a few seconds of reasonably perceiving a sufficient danger, officers may use deadly force even if in hindsight the facts show that the person threatened could have escaped unharmed." In this case, it was undisputed that within a five-second span, Mullins removed a previously concealed firearm without being ordered to do so, threw the weapon over Cyranek's shoulder after being ordered to drop it, and was then shot at twice and struck once by Cyranek. In addition, Mullins had his finger on the trigger of the firearm and the incident occurred in a populated city square. While Cyranek's decision to shoot Mullins after he threw his firearm might appear to be unreasonable in the "sanitized world of our imagination," the court concluded Cyranek was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable. In addition, the fact that Mullins was actually unarmed when he was shot was not relevant to the reasonableness inquiry. Instead, the court stated what mattered was the reasonableness of Officer's Cyranek's belief when he shot Mullins. Because only a few seconds elapsed between when Mullins drew his firearm and when Cyranek shot him, the court concluded a reasonable officer in the same situation could have fired with the belief that Mullins still had the gun in his hand.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/14-3817/14-3817-2015-11-09.pdf?ts=1447084848

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Seventh Circuit

Gustafson v. Adkins, 803 F.3d 883 (7th Cir. Ill. 2015)

Adkins, a detective at a Department of Veterans Affairs Medical Center, installed a hidden surveillance camera in the ceiling of an office used by female police officers as a changing area. Gustafson, a police supervisor, learned the camera had captured images of her changing from early 2007 through April 2009, and sued Adkins. Gustafson claimed Adkins violated the *Fourth Amendment* by subjecting her to an unreasonable search.

Adkins argued he was entitled to qualified immunity, claiming his actions did not violate a clearly established constitutional right of which a reasonable law enforcement officer in his position would have known.

The court disagreed. In 1987, the United States Supreme Court decided *O'Connor v. Ortega*, holding that an employer's workplace search must be reasonable. The Court found the reasonableness of a search depends upon the circumstances presented in a given situation, and upon balancing the public, governmental, and private interests at stake.

In a case that presented a "flagrant *Fourth Amendment* violation," the court concluded the Supreme Court had clearly established the right of employees to be free from unreasonable employer searches by the time Adkins installed the hidden surveillance equipment in 2007.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/15-1055/15-1055-2015-10-16.pdf?ts=1445023844

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United States v. Sands, 2015 U.S. App. LEXIS 19240 (7th Cir. Ill. Nov. 4, 2015)

A confidential informant told Officer Williams that Sands was selling narcotics out of a car at a specific location in Chicago. Officer Williams drove to the location and conducted surveillance. During this time, Officer Williams saw Sands engage in a hand-to-hand transaction through the driver's side window with another individual. Based on his training and experience, Officer Williams believed he had just observed a narcotics transaction. Officer Williams relayed this information to Officer Kilroy who was in a police cruiser, which was parked out of sight of Sands' car, and ordered Officer Kilroy to arrest Sands. Officer Kilroy drove his police cruiser to where Sands was located, and parked two or three feet from the front bumper of Sands' car. When Officer Kilroy got out of his cruiser, he saw Sands holding a firearm in his right hand. Officer Kilroy then saw Sands place the firearm in the center console. Officer Kilroy drew his firearm and ordered Sands out of his car. When Sands did not comply, Officer Kilroy opened the driver's side door and physically removed Sands from the vehicle. After securing Sands, Officer Kilroy searched Sands' car and found a firearm and marijuana under a false floor in the center console.

The government charged Sands with being a felon in possession of a firearm.

Sands moved to suppress the evidence seized from his car. First, Sands argued he was arrested when Officer Kilroy parked his police cruiser in front of his car, and that Officer Kilroy did not have probable cause to arrest him at that time. As a result, Sands claimed Officer Kilroy's observations and the evidence seized from his car should have been suppressed.

The court disagreed.

First, the court held Officer Kilroy's parking his police cruiser in front of Sands' car, without lights, sirens or guns drawn did not constitute an arrest. The court explained an arrest occurs once the suspect has submitted to an officer's show of authority. In this case, Sands did not initially comply with Officer Kilroy's order to get out of his car. Consequently, the court found Sands was not arrested until Officer Kilroy physically removed Sands from his car.

Second, the court held there was probable cause to arrest Sands when Officer Kilroy removed Sands from his car. Officer Williams received information from an informant who had provided reliable information for over six years. After receiving this information, Officer Williams corroborated the information through surveillance, and then he saw Sands engage in a hand-to-hand transaction, that based on his training and experience, was a narcotics transaction. As a result, the court concluded Officer Williams established probable cause to arrest Sands.

Third, the court held the information known by Officer Williams, which established probable cause to arrest Sands, was imputed to Officer Kilroy under the collective knowledge doctrine. The collective knowledge doctrine allows an officer to conduct a stop or effect an arrest at the direction of another officer, even if the officer conducting the stop or arrest does not have firsthand knowledge of the facts that established the reasonable suspicion or probable cause.

Finally, the court held the warrantless search of Sands' car was lawful. After Officer Kilroy parked his police cruiser in front of Sands' car, he saw Sands place a firearm in the center console. Based on this observation and the information provided by Officer Williams that

Sands had just engaged in a narcotics transaction in his car, Officer Kilroy had probable cause to believe Sands' car contained contraband or evidence of a crime. As a result, the search of Sands' car was lawful under the automobile exception to the warrant requirement.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-3409/14-3409-2015-11-04.pdf?ts=1446669054

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United States v. Rahman, 805 F.3d 822 (7th Cir. Wis. 2015)

In the early morning hours of January 19, 2010, firefighters responded to a fire in a building that housed a business belonging to Rahman. The building was comprised of a first and second floors and a basement. Later that morning, fire investigators obtained Rahman's written consent to search the building to look for the "origin and cause" of the fire. On January 20, an investigator viewed surveillance video from another building that indicated the fire originated above the basement. On January 21, investigators believed the fire started somewhere between the first and second floors and not in the basement. On January 22, investigators searched the basement looking for the remains of valuable items in the ashes. According to investigators, the lack of the remains of valuable items can be evidence of criminality, as thieves sometimes commit arson to hide evidence of burglary. After searching through the rubble in the basement, investigators found neither a safe nor a laptop computer that Rahman previously told the investigators were in the basement. However, during their search, the investigators seized two doors from the basement, which they sent a laboratory to determine if any ignitable liquid was present. At the conclusion of the investigation, the government charged Rahman with arson and several other federal offenses.

Rahman argued the investigators' observations concerning the absence of the computer and safe, as well as the two doors seized from the basement should have been suppressed. Rahman claimed his written consent to search the building for the fire's "origin and cause" did not include consent to search for evidence of arson.

The court agreed. First, the court held an objectively reasonable person would conclude that when investigators asked Rahman for consent to search the building to determine the "origin and cause" of the fire, that person would understand the request to be for consent to determine where the fire started and what started it, not a search for evidence of arson. Second, by January 21, the investigators had ruled out the basement as the origin of the fire. Finally, an investigator testified the primary reason he searched the basement on January 22 was to find evidence of criminal activity. As a result, the court held the investigators search on January 22 exceeded the scope of Rahman's consent to search because the investigators had already ruled out the basement as the origin of the fire when they conducted their search, and that Rahman's consent did not include a search for evidence of arson.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/13-1586/13-1586-2015-11-09.pdf?ts=1447086650

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United States v. Sanford, 806 F.3d 954 (7th Cir. Ill. Nov. 25, 2015)

A state trooper stopped a car for speeding on I-55. During the stop, the trooper learned the car had been rented earlier that day, but neither the driver nor either of the two passengers had rented it nor was authorized by the rental contract to drive the car. The trooper asked the occupants for identification and ran a criminal history check. The check revealed Sanford and the other passenger were affiliated with a notorious street gang, that Sanford had a record of 19 arrests for a variety of offenses including drug offenses, and that the other passenger had a recent drug arrest. The trooper requested a drug-detection dog, which arrived and alerted to the presence of drugs approximately 26 or 27 minutes into the stop. The troopers searched the car and found 1.5 kilograms of cocaine in the trunk.

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

Sanford argued the cocaine should have been suppressed. Sanford claimed it was unlawful for the trooper to prolong a traffic stop for speeding by looking up his criminal history as well as the criminal history of the other passenger.

The court disagreed. First, the court recognized that officers are allowed to check the criminal histories of a vehicle's occupants during traffic stops without any additional suspicion of criminal activity.

Second, the court did not determine whether Sanford had standing to object to the search of the car by virtue of being a mere passenger in the car. Instead, the court held Sanford had standing to object to the seizure of his person that occurred when the trooper stopped the car for speeding, and then the right to challenge any search that occurred because of that seizure.

Third, while Sanford had standing to object to the traffic stop, the court held the trooper did not unreasonably prolong the duration of the stop to wait for the drug-dog to arrive. The trooper testified his suspicions were aroused by a combination of facts he knew or quickly learned when he stopped the car. For example, the trooper knew I-55 is a drug corridor, and that drug couriers often use cars rented by third parties. In addition, during the stop the trooper testified the occupants were nervous and evasive, reluctant to speak, and made poor eye contact with him. Finally, the criminal histories the trooper discovered made it reasonable to wait for a few more minutes for the drug dog to arrive.

The court added that while the trooper did not do so, he could have extended the duration of the stop by calling the car rental agency to see if it wanted him to impound the car. The rental contract prohibited anyone from driving the car whom the contract did not authorize to drive it, and none of the three persons in the car was authorized.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-2860/14-2860-2015-11-25.pdf?ts=1448474713

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Eighth Circuit

United States v. Vinson, 2015 U.S. App. LEXIS 19966 (8th Cir. Minn. November 18, 2015)

An officer received a report of a shooting near her location by a suspect driving a white Buick. While the officer drove toward the scene of the shooting, the dispatcher reported the suspect's vehicle was a white SUV. A few minutes later, the officer saw a white SUV driving towards her. The officer made a U-turn and stopped the white SUV. After the three occupants of the SUV were placed in handcuffs, another officer crouched down and looked into the SUV through the rear passenger door that had been left open by the occupants. While remaining outside the SUV, the officer saw a handgun underneath the front passenger seat. The officers arrested the three occupants, searched the SUV, and seized the handgun from under the seat as well as a second handgun that was tucked into the back seat cushions.

The government charged Vinson with being a felon in possession of a firearm.

Vinson argued the officer did not have reasonable suspicion to support the stop because the dispatcher initially reported the suspect vehicle was a white Buick.

The court disagreed. Although the original description of the suspect vehicle was a white Buick, the vehicle in which Vinson was travelling matched the second police radio description of the suspect's vehicle, a white SUV, which the officer saw driving away from the shooting scene three minutes after the initial report. Consequently, the court concluded the officer's personal observation of the white SUV provided her with reasonable suspicion to support the stop.

Additionally, the court agreed with the district court, which held the officer did not violate the *Fourth Amendment* by bending down from outside the SUV's rear door to look inside after all of the occupants had exited. Once the officer saw the firearm from that vantage point, the court held the officer lawfully seized it under the plain view exception to the warrant requirement.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-1363/15-1363-2015-11-18.pdf?ts=1447864287

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United States v. Burston, 2015 U.S. App. LEXIS 20266 (8th Cir. Iowa Nov. 23, 2015)

Two officers received information regarding potential illegal drug use in the apartment building where Burston lived. The officers went to the apartment building and one of the officers released his drug dog, Marco, off-leash, to sniff the air alongside the front exterior wall of the west wing of the building. The building's west wing contained four exterior apartment doors, including Apartment 4 where Burston lived. Burston's apartment had a private entrance and a window. A walkway led to Burston's door from the sidewalk, but the walkway did not go directly to or by his window. Instead, Burston's window was approximately six-feet from the walkway. A bush covered part of his window, and there was a space between the bush and the walkway where Burston kept a cooking grill. Marco went past the bush and alerted to presence of drugs by sitting down six to ten inches from the window of Burton's apartment. Later that day, the officers obtained a warrant to search Burston's apartment based on Marco's alert and Burston's criminal record. Pursuant to the warrant, officers seized rifles, ammunition and

marijuana residue from the apartment and arrestee Burston. During a post-arrest interview, Burston made incriminating statements to the officers.

Burston argued the dog-sniff violated the *Fourth Amendment* because the officer allowed Marco to intrude upon the curtilage of his apartment without a warrant. As a result, Burston claimed the evidence seized from his apartment and his post-arrest statements should have been suppressed.

The court agreed.

In *Florida v. Jardines*, the United States Supreme Court held an officer's use of a drug-sniffing dog to investigate a home and its immediate surroundings constituted a "search" under the *Fourth Amendment*. In *Oliver v. United States*, the Court held the area "immediately surrounding and associated with the home," or curtilage, is considered part of the home for *Fourth Amendment* purposes. Finally, in *United States v. Dunn*, the Court outlined four factors a court should consider to determine whether a particular area around a home should be considered the curtilage. The factors the Court articulated in *Dunn* are (1) the proximity of the area claimed to be the curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by.

Here, the court concluded the factors articulated in *Dunn* supported a finding that Marco's sniff occurred within the curtilage of Burston's apartment; therefore, it constituted a *Fourth Amendment* search under *Jardines*. First, the area Marco sniffed was in close proximity to Burston's apartment, as it occurred six to ten inches from the window. Second, the evidence established Burston made personal use of the area by setting up a cooking grill between the door and his window. Third, there was a bush planted in the area in front of the window, which partially covered the window, and one function of the bush was likely to prevent close inspection of Burston's window by passersby. Finally, while the area was not surrounded by an enclosure, the court found the bush served as a barrier to the area where Marco sniffed.

The court also recognized that not all warrantless governmental intrusions onto curtilage violate the *Fourth Amendment*. For example, when officers walk up to the front door of a house to make contact with the homeowner, courts have held the homeowner grants implicit license or permission for the officers to do so, just like any other member of the public. However, in this case, the court held the officers did not have implicit license or permission to allow Marco to sniff six to ten inches from the window in front of Burston's apartment. Consequently, because the officers had no license to intrude upon the curtilage of Burston's apartment, and the area where Marco sniffed was within the curtilage, the court held Marco's sniff was an unlawful search and violated Burston's *Fourth Amendment* rights.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/14-3213/14-3213-2015-11-23.pdf?ts=1448294506

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Tenth Circuit

United States v. Hill, 805 F.3d 935 (10th Cir. N.M. 2015)

Hill boarded an Amtrak train in Los Angeles. When the train stopped in Albuquerque, New Mexico, an agent with the Drug Enforcement Administration (DEA) boarded to conduct drug interdiction activities. The agent went to a common area where passengers stored large pieces of unchecked luggage where he saw a suitcase with no nametag. The agent removed the suitcase from the luggage area, carried it to the passenger area, and rolled it down the center aisle, asking each passenger if the suitcase belonged to him. All of the passengers, including Hill, denied ownership of the suitcase. The agent determined the suitcase was abandoned and searched it. Inside the suitcase, the agent found a large quantity of cocaine as well as items of clothing linking the suitcase to Hill.

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

Hill argued the agent's taking the suitcase from the common storage area and rolling it down the aisle of the passenger area constituted an illegal seizure which rendered Hill's subsequent abandonment of the bag invalid.

A traveler's luggage is one of the many "effects" the *Fourth Amendment* protects against unreasonable seizures. A *Fourth Amendment* seizure occurs when there is some meaningful interference with an individual's possessory interest in his property. However, the court recognized there is very little Supreme Court precedent addressing the parameters of the *Fourth Amendment's* "meaningful interference" test as applied to seizures of property, let alone, seizures of luggage. Courts have routinely held that taking luggage from the direct possession of a traveler amounts to a seizure. Alternatively, courts have consistently held that a brief detention of checked luggage that does not delay the luggage from reaching its intended destination does not amount to a seizure. With this in mind, the court noted Hill's possessory interest in the suitcase fell in the area between luggage in his direct possession and luggage checked with Amtrak. As such, the court concluded that Hill could reasonably expect that other passengers or Amtrak officials might briefly move or reposition his suitcase within the common storage area. However, the court also found that because Hill retained responsibility for the suitcase instead of checking it with Amtrak officials, he could reasonably expect that he could access the suitcase in the common storage area at any time.

Applying the facts of the case within this legal framework, the court held the agent's actions in taking the suitcase into his own dominion and control for the purpose of finding its owner and conducting narcotics interdiction, deviated significantly from a reasonable traveler's expectations as to how his bag would be treated in the common storage area. In addition, the court held the agent's actions deprived Hill of is possessory interest in being able to access his luggage on his own schedule. Consequently, the court concluded the agent's actions amounted to a seizure of Hills's luggage. Because the government conceded the agent seized Hill's luggage without reasonable suspicion, the existence of an exigency or a warrant, the court held it was a violation of the *Fourth Amendment*.

The court added the fact that Hill's suitcase was not marked with a baggage tag did not diminish his possessory interest in it. Although Hill might have deviated from Amtrak's baggage policy, it was undisputed that Amtrak allowed Hill to board the train with untagged luggage and place

it in the common storage area without any indication that his bag could possibly be removed under this policy.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/14-2206/14-2206-2015-11-09.pdf?ts=1447088469

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