Department of Homeland Security
Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

April 2019

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.

This edition of *The Informer* may be cited as 4 INFORMER 19.

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Case Summaries

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FLETC Informer Webinar Schedule

1. Understanding the Inventory Search (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia. (John.Besselman@fletc.dhs.gov)

The inventory search is an effective means for government agencies to protect themselves from dangers, real or imagined. This little corner of the Fourth Amendment search warrant exception arena includes some straightforward and simple rules. This webcast is designed to make sure agencies that seize personal items know what those rules are and why they exist. A training certificate will be available at the conclusion of the presentation.

Thursday May 9, 2019: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

To participate in this webinar: https://share.dhs.gov/occ_inventories/

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2. Warrantless Searches - No PC Required! (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, Federal Law Enforcement Training Centers, Glynco, Georgia. (John.Besselman@fletc.dhs.gov)

There are several well recognized (and some not so well recognized) exceptions to the Fourth Amendment's Search Warrant requirement. This webcast will examine those exceptions in which probable cause is not even required. We will discuss the frisk, SIA, consent, inventory, and inspection exceptions and how they fit into the flow of the Fourth Amendment's limitation on governmental actions. A training certificate will be available upon completion of the training.

Tuesday May 14, 2019: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

To participate in this webinar: https://share.dhs.gov/warrantlesssearch_nopc/

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3. Can't Touch This! Update on Vehicle Searches Under Jones (1-hour)

Presented by Paul Sullivan and Patrick Walsh, Attorney-Advisors / Branch Chiefs, Federal Law Enforcement Training Centers, Glynco, Georgia. (patrick.walsh@fletc.dhs.gov)

In United States v. Jones (2012), the Supreme Court adopted the MC Hammer approach to searches under the Fourth Amendment. Physically touching a vehicle to gather information triggers Fourth Amendment protections. In the last few months, two federal appellate courts have ruled that officers conducted a search by touching a car. This webinar will explain the Jones case and demonstrate how courts are applying it to traffic stops and minor physical contact with vehicles.

Thursday May 16, 2019: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

and

Tuesday May 28, 2019: 2:30 pm Eastern / 1:30 pm Central / 12:30 pm Mountain / 11:30 am Pacific

To participate in either webinar: https://share.dhs.gov/walsh/

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4. Dark Web: What Goes On Behind the Scenes? (1-hour)

Presented by Robert Duncan and Henry McGowen, Attorney-Advisors / Senior Instructors, Federal Law Enforcement Training Centers, Artesia, New Mexico. (robert.duncan@fletc.dhs.gov; henry.mcgowen@fletc.dhs.gov)

We have all heard of the so called "dark web," but what is it really? We may have heard that it is where nefarious criminal activity occurs, but what are the criminals doing? How does it work? How does someone even find the dark web? This webinar presentation will shed some light on the dark web, discussing what it is and how it works. Our focus will be to demystify this shady part of the internet for law enforcement investigators and prosecutors seeking evidence of criminal wrongdoing hidden behind the scenes. We hope you will join us!

Wednesday May 22, 2019: 3pm Eastern / 2pm Central / 1pm Mountain / 12 pm Pacific

To participate in this webinar: https://share.dhs.gov/artesia

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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.
6. Even though meeting rooms may be accessed before an event, there may be times when a meeting room is closed while an instructor is setting up the room.
7. **If you experience any technical issues / difficulties during the login process, please call our audio bridge line at (877) 446-3914 and enter participant passcode 232080 when prompted.**

CASE SUMMARIES

United States Supreme Court

City of Escondido v. Emmons, 586 U.S. ___ (2019), 139 S. Ct. 500

Several police officers were dispatched to an apartment on a domestic violence call. The dispatcher told the officers two children might be in the apartment and that calls to the apartment had gone unanswered. When the officers arrived, no one answered the door, but they spoke to a woman through an open window. As the officers attempted to convince the woman to open the apartment door so they could conduct a welfare check, a man opened the door and came outside. Officer Craig told the man, later identified as Emmons, not to close the door but Emmons closed the door and tried to brush past him. Officer Craig stopped Emmons, quickly took him to the ground and handcuffed him. Officer Craig did not strike Emmons or display any weapon. Police body-camera video showed that Emmons was not in any visible or audible pain from the takedown or afterward while on the ground. The officers arrested Emmons for the misdemeanor offense of resisting and delaying a police officer.

Emmons sued Officer Craig and one of the other officers, Sergeant Toth for, among other things, using excessive force in arresting him.

The district court held that Officer Craig and Sergeant Toth were entitled to qualified immunity. The court stated that the "video shows that the officers acted professionally and respectfully in their encounter" with Emmons. In addition, because only Officer Craig used any force at all, the district court dismissed Emmons's claim against Sergeant Toth.

Emmons appealed and the Ninth Circuit Court of Appeals reversed the district court. In denying the officers qualified immunity, the Ninth Circuit held, "The right to be free of excessive force was clearly established at the time of the events in question." The officers appealed to the United States Supreme Court.

First, with respect to Sergeant Toth, the Supreme Court reversed the Ninth Circuit Court of Appeals. The Court noted that the Ninth Circuit offered no explanation for its decision to deny him qualified immunity. The Court added, the Ninth Circuit's "unexplained reinstatement of the excessive force claim against Sergeant Toth was erroneous – and quite puzzling in light of the District Court's conclusion that "only Defendant Craig was involved in the excessive force claim"" and that Emmons presented no contrary evidence.

Next, the Court held that the Ninth Circuit erroneously determined that Officer Craig was not entitled to qualified immunity. A police officer is entitled to qualified immunity when his conduct does not violate a suspect's clearly established constitutional or statutory right. The Supreme Court has repeatedly reminded the appellate courts not to define clearly established rights at a "high level of generality." In this case, the Ninth Circuit should have asked whether clearly established law prohibited Officer Craig from stopping and taking down a man under the circumstances he faced when he arrested Emmons. Instead, the Ninth Circuit defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established" at the time of the incident. Consequently, the Supreme Court remanded the case and directed the Ninth Circuit to conduct the proper analysis to determine

whether Officer Craig was entitled to qualified immunity for stopping and arresting Emmons in the manner in which he did as Emmons exited the apartment.

For the court's opinion: https://www.supremecourt.gov/opinions/18pdf/17-1660_5ifl.pdf

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Circuit Courts of Appeal

First Circuit

Págan-González v. Moreno, 2019 U.S. App. Lexis 8716 (1st Cir. P.R. March 22, 2019)

Ten federal agents went to González's home that he shared with his parents in Puerto Rico. Special Agent Moreno identified herself as an agent with the Federal Bureau of Investigation (FBI) and stated that law enforcement officers were there because a modem in a computer at the house was "sending a signal and/or viruses to computers in Washington." This was not true. In reality, FBI agents had reason to believe that a computer on the premises contained child pornography, and the agents had come to the home to investigate.

The agents asked the family for consent to inspect their computers and said they would try to fix the problem that was sending transmissions to Washington. The agents said that if they could not make the repair they would take the faulty computer and provide a replacement at the FBI's expense. González, age 21, and his parents signed consent forms authorizing the computer searches. After inspecting two computers, the agents told the family that they needed to take González's laptop.

A forensic examination of the laptop revealed numerous images and videos of child pornography. Federal agents arrested González' on December 12, 2013 and he remained in custody until his parents posted bond a week later. A grand jury indicted González on January 9, 2014 on child pornography-related offenses.

González filed a motion to suppress the evidence obtained from the search of his computer. González argued that the agents' deception about the reason for being at his house invalidated the consent given by the family for examination of their computers. Instead of responding to the suppression motion, the government filed a motion to dismiss the case, "in the interests of justice."

González and his parents subsequently filed a Bivens action against the federal agents, arguing that they consented to the agents' entry and search only after agents deceived them about the true nature of their investigation. As a result, they claimed that any consent was tainted by the agents' lies, which led to an unreasonable search and seizure of the computers in violation of the Fourth Amendment.

Law enforcement officers may conduct warrantless searches when they obtain valid consent. For consent to valid, it must be obtained voluntarily. While courts have found that some degree of deceit will not automatically render a person's consent involuntary, there is consensus that two types of deception have an impermissibly coercive effect. First, the Supreme Court has rejected the consent to search obtained by officers who falsely claim they have a warrant. Second, courts have regularly held that coercion is implicit where officers falsely present a need for urgent action. Specifically, when an officer lies about the existence of exigent circumstances, the officer implies that the person has no right to resist and may face immediate danger if he tries.

The court held that the agents were not entitled to qualified immunity. The court found that the appearance of ten federal agents at the González home with alarming news that computers in Washington, D.C. were receiving signals or viruses from their computers was sufficient to render their consent involuntary. The court rejected the government's argument that a finding of coercion based on fabricated exigent circumstances is limited to lies about imminent physical danger or a time sensitive investigation involving the safety of a vulnerable person. The court found that by late 2013 cyber security was a major concern and that the national security threats posed by cyberattacks was public knowledge.

The court further held that case-law concerning fabricated exigent circumstances put the agents on notice that their type of ruse violated the Fourth Amendment at the time of this incident. Specifically, the court found that a reasonable officer would have understood that the ruse used here carried out in a manner that signified an emergency would leave an individual with effectively no choice but to allow the agents inside his home so they could attempt to alleviate the threat. Consequently, a reasonable officer would have known that denying González any real chance to deny consent violated the Fourth Amendment.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/16-2214/16-2214-2019-03-22.pdf?ts=1553288403

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Fourth Circuit

Williams v. Strickland, 917 F.3d 763 (4th Cir. S.C. 2019)

On June 29, 2012, Williams drove from Georgia to South Carolina to visit a relative. Officer Heroux, who was on patrol, ran Williams's license plate through dispatch and learned that the plate had been stolen. Officer Heroux followed Williams into the parking lot of an apartment complex and activated his blue lights. In response, Williams pulled into a parking space. As Officer Heroux got out of his patrol car, Officers Strickland and Criddle arrived on the scene. When Officer Heroux was about ten feet from Williams's car, Williams shifted the car into reverse and cut the wheel, causing the front end to swivel in Officer Heroux's direction. Officer Heroux, believing himself to be in danger, stepped back and drew his gun. At the same time, Officer Strickland started walking toward Williams's car. Williams then put the car in gear in drive, straightened out, and drove toward Officer Strickland.

Officers Heroux and Strickland discharged their firearms at Williams's car. It was not clear at this stage how far Williams got before Officers Heroux and Strickland started shooting. Williams may have been headed toward Officer Strickland. Williams may have been passing by Officer Strickland, such that Strickland was alongside the car and out of the car's trajectory; or, Williams may have already driven past Officer Strickland, such that Strickland, like Officer Heroux, was behind the car. After one of Officer Heroux's shots hit Williams in the back, he lost control of the car and crashed into a tree.

Williams sued Officers Heroux and Strickland under 42 U.S.C. § 1983. Williams claimed that by firing on him during the course of his arrest, the officers had subjected him to excessive force in violation of the Fourth Amendment.

Officers Heroux and Strickland filed a motion for summary judgment based on qualified immunity. The district court held that a reasonable jury, viewing the facts as alleged by Williams, could conclude that when the officers discharged their firearms, Williams's car was either (a) in the process of passing Officer Strickland or (b) already past Officer Strickland. According to the district court, if either (a) or (b) were true, then the officers' use of deadly force would have been a violation of clearly established law, referencing a 2005 case. The officers appealed.

The court of appeals agreed with the district court and affirmed the denial of qualified immunity to the officers.

In 2005, the Fourth Circuit Court of Appeals in 2005 clearly established that (1) law enforcement officers may, under certain conditions, be justified in using deadly force against the driver of a car when the officers are in the car's trajectory and have reason to believe that the driver will imminently and intentionally run over them, but (2) the same officers violate the Fourth Amendment if they employ deadly force against the driver once they are no longer in the car's trajectory. This is true even if only a few seconds separate the point at which deadly force is reasonable from the point where deadly force is unreasonable. The court noted that, "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."

Consequently, the court concluded that if Officers Heroux and Strickland started or continued to fire on Williams after they were no longer in the trajectory of Williams's car, they violated Williams's Fourth Amendment right to be free from excessive force. Therefore, because a reasonable jury could conclude that the officers violated this clearly established right, they were not entitled to qualified immunity.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/18-6219/18-6219-2019-03-05.pdf?ts=1551814226

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Fifth Circuit

United States v. Richmond, 915 F.3d 352 (5th Cir. TX 2019)

A Texas State Trooper was on patrol when he saw a pickup truck driven by Jennifer Richmond. When the trooper drove alongside the truck, he saw that the tires were shaking, wobbly, and unbalanced. After the truck drove across the fog line between the right lane and the shoulder of the road, the trooper stopped the truck, concerned that the tires were a potential danger to the public. During the stop, the trooper looked at the passenger-side rear tire and saw that the bolts had been stripped as if they had been removed numerous times. The trooper tapped on the tire with his hand and heard a "solid thumping noise" that indicated that something besides air was inside the tire. After discovering inconsistencies with Richmond's travel history, the trooper obtained Richmond's consent to search the truck and had it taken to a local car dealership to have the tires examined. Technicians at the dealership discovered secret compartments that contained methamphetamine.

The government charged Richmond with trafficking methamphetamine. Richmond filed a motion to suppress the evidence found in her truck's tires, arguing that the trooper's tapping on the tire constituted an unreasonable warrantless search.

The court held that tapping Richmond's tire was not a Fourth Amendment search under the reasonable expectation of privacy test outlined by the Supreme Court in Katz v. United States. The court concluded that Richmond did not have a reasonable basis to believe that the trooper would not touch the tire during the stop.

However, the court held that tapping the tire was a Fourth Amendment search under the property-based approach outlined by the Supreme Court in U.S. v. Jones. In Jones, the Court held that a search occurs when the government trespasses upon a constitutionally protected area (persons, houses, papers or effects) to obtain information. In this case, the court concluded that the trooper's tapping of the tire was a search, regardless of how insignificant it might seem.

Lastly, the court held that tapping the tire was reasonable. The court noted that the wobbly tires, the truck veering outside its lane, and the stripped bolts would have given a reasonable officer probable cause to believe that the tire posed a safety risk. The court commented that the government's interest in making sure that a loose tire does not pose a safety threat strongly outweighed the intrusiveness of an officer's tapping the tire for a second or two. It did not matter that the trooper might have suspected the tire contained drugs.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca5/17-40299/17-40299-2019-02-08.pdf?ts=1549650668

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Sixth Circuit

Taylor v. City of Saginaw, 2019 U.S. App. LEXIS 11586 (6th Cir. MI Apr. 22, 2019)

The City of Saginaw uses a parking enforcement practice known as "chalking," whereby City parking enforcement officers use chalk to mark the tires of parked vehicles to track how long they have been parked. Parking enforcement officers return to the car after the posted time for parking has passed, and if the chalk marks are still there, the officer issues a citation.

Alison Taylor sued the City and its parking enforcement officer, claiming that chalking violated her Fourth Amendment right to be free from unreasonable warrantless searches. The district court held that while chalking may have constituted a Fourth Amendment search it was reasonable.

The Sixth Circuit Court of Appeals disagreed. First, the court held that the practice of chalking was a search for Fourth Amendment purposes. In U.S. v. Jones, the Supreme Court held that a Fourth Amendment search occurs when the government trespasses upon a constitutionally protected area (persons, houses, papers or effects) to obtain information. Here, it was undisputed that the parking enforcement officer made intentional physical contact with Taylor's vehicle. The court found that this physical intrusion, constituted a trespass against Taylor's effect. The court further found that the parking enforcement officer used the chalk marks to identify vehicles that have been parked in the same location for a certain period of time. The parking enforcement officer then used this information to issue citations. Although the court recognized that chalking was a low-tech investigative technique, this practice still amounted to an attempt to obtain information under a Jones analysis.

Second, the court held that the warrantless search of Taylor's vehicle was unreasonable because the City failed to establish an exception to the Fourth Amendment's warrant requirement. The City argued that the warrantless search of Taylor's vehicle was reasonable under the community

caretaker exception. Under the community caretaker exception, as it relates to vehicles, officers are allowed to search and seize vehicles if they pose a risk to public safety. For example, if a vehicle is left disabled at the side of the road, impedes traffic, or otherwise creates and inconvenience, courts have held that it is reasonable for officers to impound the vehicle and inventory its contents.

However, the court held that the City failed to demonstrate how this search was related to public safety. The City did not show that the location or length of time that Taylor's vehicle was parked created the type of hazard or traffic impediment amounted to a public safety concern. Instead, at the time of the search, Taylor's vehicle was lawfully parked in a proper parking space, imposing no safety risk whatsoever. The court added that because the purpose of chalking is to raise revenue and not to reduce a public hazard the City was not acting in its role as a "community caretaker."

Finally, the court found that the warrantless search of Taylor's vehicle was not valid under the automobile exception. The automobile exception allows officers to search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime. However, the court found that City parking enforcement officers conduct searches of legally parked vehicles by chalking them without probable cause or any other suspicion of wrongdoing.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca6/17-2126/17-2126-2019-04-22.pdf?ts=1555947016

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Cruise-Gulyas v. Minard, 918 F.3d 494 (6th Cir. MI 2019)

In June 2017, Officer Minard pulled over Debra Cruise-Gulyas for speeding. However, Officer Minard wrote her a ticket for a lesser, non-moving violation instead. As Cruise-Gulyas drove away, she raised her middle finger at him. Officer Minard pulled Cruise-Gulyas over a second time, less than 100 yards from where the initial stop occurred and amended the ticket to a speeding violation.

Cruise-Gulyas sued Officer Minard under 42 U.S.C.§ 1983 alleging that he violated the Fourth Amendment by pulling her over a second time and changing the original ticket to a more serious violation. Officer Minard filed a motion for summary judgment based on qualified immunity.

The district court denied the motion holding that Cruise-Gulyas could not be stopped a second time in the absence of a new violation of the law, that she had a free speech right to make the gesture with her middle finger, and that the gesture did not violate any identified law. Officer Minard appealed.

Officer Minard did not dispute that he clearly lacked authority to stop Cruise-Gulyas a second time. Officer Minard argued that he should have been granted qualified immunity because at the time of the incident it was not clearly established that a second stop, after a first stop supported by probable cause, violated Cruise-Gulyas's Fourth Amendment rights.

The court disagreed. In making his argument, Officer Minard failed to acknowledge that the second stop was distinct from the first stop, not a continuation of it. As such, the court noted that case law from 2015 clearly required independent justification for the second stop. The court added that Cruise-Gulyas's crude gesture could not provide that new justification.

Cruise-Gulyas also alleged that Officer Minard violated her First Amendment right to free speech by stopping her the second time in retaliation for her expressive, if vulgar, gesture. To succeed, Cruise-Gulyas must show that (1) she engaged in protected conduct, (2) Minard took an adverse action against her that would deter an ordinary person from continuing to engage in that conduct, and (3) her protected conduct motivated Officer Minard at least in part.

The court held that at the time of the incident it was clearly established that (a) any reasonable officer would know that a person who raises her middle finger engages in speech protected by the First Amendment; (b) that an officer who seizes a person for Fourth Amendment purposes without proper justification an issues her a more severe ticket clearly commits an adverse action that would deter her from repeating that conduct in the future; and (c) that Minard stopped her because she made a crude gesture. As a result, the court affirmed the district court's denial of qualified immunity.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca6/18-2196/18-2196-2019-03-13.pdf?ts=1552498272

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Tenth Circuit

United States v. Knapp, 917 F.3d 1161 (10th Cir. WY 2019)

Stacy Knapp called the police to report a theft at a grocery store. Officers responded to the call, arrested the theft-suspect, and took a statement from Knapp. During their investigation, the officers discovered that Knapp had an outstanding warrant for her arrest. By that time, Knapp had left the grocery store so an officer went outside to locate her.

The officer found Knapp in the driver's seat of a parked pickup truck outside the store. After the officer told Knapp that she was under arrest, she grabbed her purse, exited the truck and followed the officer back into the store. Because the officers were still concluding their theft investigation, Knapp was asked to sit on a chair outside a bank office located within the store.

Once Knapp sat down, the officer moved her closed purse a few chairs away from her. Knapp asked her friend who was present to take her purse so she would not have to take it to jail. Knapp's friend declined to take the purse and the officer refused to let her leave the purse in her truck. The officer asked Knapp for consent to search the purse but she refused. The officer then placed Knapp in handcuffs behind her back and led her outside while another officer carried the purse.

The officers and Knapp walked to a patrol car. An officer put Knapp's purse on the hood of the car while Knapp stood near the front bumper of the car facing the officers. At that time, Knapp was handcuffed facing the officers while her purse was three to four feet behind her. Suspecting that Knapp had drugs in her purse, an officer told her it was a felony to bring drugs into the detention center. Knapp then told the officers that she was carrying a pistol in her purse. The officers searched the purse and discovered a pistol. The government charged Knapp with being a felon in possession of a firearm.

Knapp filed a motion to suppress the pistol, which the district court denied. Knapp appealed.

In Chimel v. California, the Supreme Court held that it was reasonable for an officer to conduct a warrantless search an arrestee's person to locate any weapons, means of escape, and to prevent the concealment or destruction of evidence. In addition, the Court held that it was reasonable to

search the area within the arrestee's immediate control or to prevent the person from gaining possession of a weapon, a means of escape, or destructible evidence.

In United States v. Robinson, the Court held that a search of an arrestee's person incident to arrest does not have to be separately justified for each arrest, but instead is justified by the arrest itself. Although the Court did not address whether areas within the arrestee's immediate control were also automatically subject to warrantless searches incident to arrest, it noted that searches of an arrestee's person and searches of the area within the arrestee's immediate control were two distinct categories of searches. In cases concerning searches incident to arrest, it is noteworthy that the Court has never clearly delineated where the "person" ends and where the area within the arrestee's immediate control, often referred to by lower courts as the "grab area" begins.

In this case, the issue before the Tenth Circuit Court of Appeals was (1) whether the search of Knapp's purse was one of her person under Robinson and therefore justified solely by virtue of her arrest, and (2) if Knapp's purse was not part of her person, whether the search was nevertheless justified because it was within the area from which she might have gained possession of a weapon, a means of escape, or destructible evidence under Chimel.

First, the court held that an automatic search of a person incident to arrest under Robinson is limited to searches of an arrestee's clothing, including containers concealed under or within the clothing. As a result, the court found that visible containers in an arrestee's hands such as Knapp's purse are best considered to be within the area of arrestee's immediate control; therefore, governed by Chimel, the search of which must be justified in each case. Because Knapp's purse, which was not concealed under or within her clothing was easily capable of separation from her person, the court held that the officers did not have authority to automatically search its contents under Robinson.

Second, joining the Third Circuit Court of Appeals, the court found that to determine an arrestee's immediate area of control or grab area it is necessary to focus on an arrestee's ability to access weapons or destroy evidence at the time of the search rather than the time of arrest.

Finally, the court concluded it was unreasonable for the officers to believe that at the time of the search the purse was located in an area within Knapp's immediate control. First, Knapp's hands were cuffed behind her back, while one officer stood next to her and two other officers were nearby. Second, the purse was closed and three to four feet behind her on the hood of a patrol car. Third, the officers had maintained exclusive possession of the purse after placing Knapp in handcuffs. Fourth, Knapp tried repeatedly to leave her purse behind during the whole encounter, suggesting that she was not trying to access a weapon, destroy evidence, or otherwise escape.

Consequently, because the search of Knapp's purse was not one of her "person" under Robinson nor was the search supported by the justifications outlined in Chimel, the court held that it was unlawful for the officers to search Knapp's purse incident to her arrest.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/18-8031/18-8031-2019-03-05.pdf?ts=1551805238

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Eleventh Circuit

Sebastian v Ortiz, 2019 U.S. App. LEXIS 7477 (11th Cir. FL 2019)

A police officer stopped Ruben Sebastian for speeding and requested to check the tint on the front windows Sebastian's vehicle to determine whether it was compliant under Florida law. Sebastian consented to the check of his interior window but did not consent to a search of the interior of the vehicle. The officer claimed that the tint on the rear windows prevented him from seeing into the back of the car. After Sebastian denied consent to search, the officer contacted Lt. Javier Oritz for backup.

When Lt. Oritz arrived, he asked for permission to search the interior of the vehicle and again Sebastian refused. At this point, according to Sebastian, Lt Ortiz "became enraged," opened the car door, and removed Sebastian from the vehicle. By this time an unknown third officer, "Officer Doe," arrived at the scene and either Lt. Ortiz or Officer Doe placed Sebastian in metal handcuffs. Sebastian claimed that the handcuffs were engaged "in a manner purposely intended to cause pain and injury, cutting off the circulation in his hands, and cutting into the skin on his wrists." Sebastian complained and either Officer Doe or Lt. Ortiz told him that "he knew of a way to make them tighter."

While Sebastian was restrained, the officers searched his vehicle and found a firearm which Sebastian had a permit to carry. Afterward, Lt. Ortiz directed a fourth officer who had arrived at the scene to transport Sebastian to jail in the officer's patrol car. Before transporting Sebastian, either Officer Doe or Lt. Oritz replaced the metal handcuffs with plastic flex cuffs, again, according to Sebastian, "intentionally tightening the cuffs in a manner purposely and wantonly intended to cause pain and further injury." Sebastian alleged that the officers refused to loosen the flex cuffs after he complained that he was beginning to lose feeling in his hands.

Sebastian was transported to the police station where he was detained for more than five hours with his hands still cuffed behind his back. Sebastian was charged with two counts of resisting or obstructing an officer without violence and one count of reckless display of a firearm. Those charges were later dismissed by the State Attorney, although Sebastian pleaded guilty to a non-criminal speeding violation.

Sebastian filed a lawsuit under 42 U.S.C. § 1983 against Lt. Oritz claiming an excessive use of force in violation of the Fourth Amendment. Sebastian claimed that he suffered permanent nerve damage to his hands and wrists as the result of being left in handcuffs for more than five hours.

Lt. Ortiz filed a motion for summary judgment based on qualified immunity. The district court denied Lt. Ortiz qualified immunity and he appealed.

The Eleventh Circuit Court of Appeals agreed with the district court and affirmed the denial of qualified immunity.

To determine whether the force used by a police officer is excessive, a court must consider the factors outlined in Graham v. Connor, including, but not limited to the following: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arresting or attempting to evade arrest by flight. Applying this test, the court noted that "we have repeatedly ruled that a police officer violates the Fourth Amendment and is denied qualified immunity if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.

In this case, the court held that all of the Graham factors weighed in Sebastian's favor. First, speeding is a minor, non-criminal offense. Second, there was no evidence to support that Sebastian posed a threat to officer safety or to anyone else. Third, there was no evidence that Sebastian was a flight risk at any time during the stop. The court stated that Sebastian's refusal to consent to a search of his vehicle resulted in his being subjected to force that left him with permanent injuries.

The court was not persuaded by Lt. Ortiz's argument that he did not violate the Fourth Amendment because the amount of force used against Sebastian was "de minimis". The court recognized that the right to make an arrest necessarily carries with it the right to use some degree of force and that "painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal." However, the court added that the nature and extent of physical injuries sustained by a person are key factors in determining whether an officer's use of force was reasonable, and in this case, Sebastian alleged serious, permanent injuries.

Next, while the court has never addressed a claim factually identical to Sebastian's, at the time of the incident the law was clearly established that if an arrestee demonstrates compliance, and the officer nonetheless inflicts gratuitous and substantial injury using ordinary arrest tactics, the officer may have used excessive force. In this case, the facts as alleged by Sebastian, establish that substantial injuries were inflicted on him in a gratuitous manner, not as an incidental effect of legitimate law enforcement actions.

Finally, although Sebastian was unsure which officer, Lt. Ortiz or Officer Doe applied the handcuffs, Sebastian alleged that if it was Officer Doe, Lt. Oritz is liable for failing to intervene in Officer Doe's excessive use of force. The court noted that the failure to intervene claim is dependent on the underlying excessive force claim. Because Sebastian adequately alleged a clearly established constitutional right to be free from excessive force, Lt. Ortiz was not entitled to qualified immunity on the failure to intervene claim at this stage of the proceedings.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/17-14751/17-14751-2019-03-14.pdf?ts=1552568424

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