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

May 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 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 5 INFORMER 19.

The Informer – May 2019

Case Summaries

Circuit Courts of Appeals

First Circuit

Second Circuit

Seventh Circuit

Eighth Circuit

Eleventh Circuit

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FLETC Informer Webinar Schedule

1. Qualified Immunity (1-hour)

Presented by Paul Sullivan and Patrick Walsh, Attorney-Advisors / Branch Chiefs, Federal Law Enforcement Training Centers, Glynco, Georgia.

Qualified immunity is a legal protection for officers who are sued civilly for Constitutional Torts. In many cases, plaintiffs allege that the officer violated the Fourth Amendment by using excessive force or in some other way unlawfully searched or seized them. This webinar will discuss how qualified immunity works and how officers use it to defend against a civil lawsuit. This webinar will also discuss recent challenges and efforts to get courts to restrict or perhaps replace the doctrine.

Thursday June 6, 2019: 2:30 pm Eastern / 1:30 pm Central / 12:30 pm Mountain / 11:30 am Pacific

and

Tuesday June 25, 2019: 10:30 am Eastern / 9:30am Central / 8:30 am Mountain / 7:30 am Pacific

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

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2. Kalkines and Garrity Overview (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, and Ken Anderson, Attorney-Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Glynco, Georgia.

In this webinar we will look at these two important cases and how they affect the government's ability to obtain statements from its employees that may be suspected of criminal activity and / or workplace misconduct.

Tuesday June 11, 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/fletclgd0124

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3. Consent Searches (1-hour)

Presented by John Besselman, Senior Advisor for Training, Office of Chief Counsel, and Ken Anderson, Attorney / Advisor – Senior Instructor, Federal Law Enforcement Training Centers, Glynco, Georgia.

When a law enforcement officer obtains valid consent to search a given area or object, neither a search warrant, probable cause, nor reasonable suspicion of criminal activity is required. In situations where officers have some evidence of illegal activity, but lack

probable cause to arrest or search, a search authorized by valid consent may be the only way to obtain evidence of a crime. This webinar will discuss the requirements for conducting valid consent searches.

Tuesday June 18, 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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4. Policing and the Americans with Disabilities Act (1-hour)

Presented by Mary M. Mara, Attorney Advisor / Senior Instructor, Federal Law Enforcement Training Centers, Artesia, NM

The Americans with Disabilities Act (ADA) prohibits discrimination against persons who suffer from a disability. Questions sometimes arise whether the ADA requires law enforcement officers to make special accommodations when interacting with disabled persons. Both line officers and their supervisors need to be aware of this concern. This webinar will examine this critical issue and assess the impact of the ADA on everyday police activities.

Wednesday June 19, 2019 – 3pm Eastern / 2pm Central / 1pm Mountain /12 pm Pacific

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

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CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Hood, 2019 U.S. App. LEXIS 9817 (1st Cir. ME April 3, 2019)

Federal agents opened an investigation into the transmission of child pornography via the smartphone messaging application "Kik". According to information received by the agents, a person bearing the Kik username "rustyhood" had communicated with another person regarding the exchange of child pornography and the sexual abuse of young children. The conversation log between the two individuals showed that "rustyhood" either sent or received 13 pornographic images of young children and bragged explicitly about his past sexual abuse of a neighbor's young daughter. The investigation also revealed that "rustyhood" had posted six pornographic images of children to a larger group chat as well as two links to files containing 58 photographs and 18 videos of child pornography.

In response to this information, a federal agent issued an Emergency Disclosure Request (EDR) pursuant to 18 U.S.C. § 2702 (the Stored Communications Act) to Kik requesting subscriber information and recent internet protocol (IP) addresses associated with the "rustyhood" account. Kik provided the agent with the date that the account was registered, the email address used to register the account, and the make and model of the device most recently used to access the account. Kik also provided the most recent IP logs associated with the account.

Based on the information provided by Kik, the agent determined the IP addresses belonged to two different internet service providers. The agent obtained information from the internet service providers which established the defendant, Rusty Hood, was associated with the username "rustyhood."

The government subsequently charged Hood with child pornography-related offenses.

Hood filed a motion to suppress the evidence obtained from Kik pursuant to the EDR. Hood argued that the government violated the Fourth Amendment by obtaining the aforementioned information without a search warrant.

The district court disagreed. Applying the third-party doctrine, the court held that Hood had no reasonable expectation of privacy in the information acquired from Kik. The third-party doctrine provides that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Because Hood voluntarily provided Kik the information that eventually allowed the government to identify him, the court found that he had no reasonable expectation of privacy in that information. Hood appealed.

Hood did not dispute that he voluntarily disclosed the information to Kik. Instead, Hood claimed the Supreme Court's recent decision in Carpenter v. United States established that the third-party doctrine did not apply to the information he provided Kik.

In the Carpenter case, the Court held that the government's acquisition of cell-site-location information (CSLI) from the defendant's wireless carrier constituted a search under the Fourth

Amendment for which the government needed a warrant. The Court explained that given the location information that CSLI conveyed and the fact that a cell phone user transmits CSLI by simply possessing the cell phone, if the government could access the CSLI without a warrant the result would be that "only the few without cell phones could escape" what would amount to "tireless and absolute surveillance." Consequently, the Court declined to extend the third-party doctrine to CSLI. Instead, the court found that Carpenter retained a reasonable expectation of privacy in his CSLI even though he had shared it with his wireless carrier.

In this case, Hood argued that the IP address data that the government acquired from Kik without a warrant was not materially different from the CSLI that was at issue in Carpenter.

The court disagreed. First, the court noted that an internet user generates the IP address data that the government acquired from Kik in this case only by making the affirmative decision to access a website or application. By contrast, the CSLI acquired by the government in Carpenter in many instances was generated even when the cell phone remained untouched in the suspect's pocket, as it still continued to monitor that person's movements throughout the day. Second, the court recognized that the IP address data that the government acquired from Kik did not convey any location information, a key distinction from the CSLI at issue in Carpenter. Consequently, the court concluded that Hood did not have a reasonable expectation of privacy in the information the government acquired from Kik without a warrant. The court added that this conclusion was in agreement with the rulings of the circuits (3rd, 4th, 7th, 8th, 9th, and 10th) that had addressed this issue before Carpenter had been decided and with the ruling of the one circuit (5th) that had addressed this issue since Carpenter.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/18-1407/18-1407-2019-04-03.pdf?ts=1554323406

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United States v. Morel, 2019 U.S. App. LEXIS 11457 (1st Cir. N.H. 2019)

The National Center for Missing and Exploited Children (NCMEC) received an anonymous report that included a list of Uniform Resource Locators (URLs) said to depict child pornography. NCMEC analysts discovered one of the URLs listed in the report led to an album of images hosted by Imgur, a social networking platform where users share images online. The album appeared to contain three images of child pornography.

NCMEC contacted Imgur who provided the internet protocol (IP) address from which the images were uploaded to Imgur's servers. Using a publicly-available website, NCMEC looked up the IP address included in Imgur's report and learned that it was associated with a Comcast subscriber in Derry, New Hampshire. A week later, Imgur submitted to NCMEC three additional reports of alleged child pornography associated with the same IP address.

NCMEC notified law enforcement in New Hampshire of its findings and a detective with experience in child pornography and child exploitation investigations reviewed the six images included in the reports. The detective entered the IP address from the reports into a publicly-available website and learned that the IP address was associated with a Comcast account. The detective then obtained a subpoena requesting information from Comcast about the owner of the IP address.

The detective discovered the IP address belonged to a David Morel Sr., who told the detective that his son, David Morel, Jr., (Morel) used the email address associated with the Comcast account. The detective obtained a warrant issued by a state court to search Morel's computer. In the affidavit supporting the warrant application, the detective did not attach the six suspected child pornography images, which depicted different girls. Instead, the detective described the nudity and the sexual or sexually suggestive positioning of the girls depicted each of the six suspected child pornography images. In addition, the detective outlined his experience and specialized training concerning sexual assault investigations, including this specialized experience regarding child abuse and exploitation cases.

A forensic examination of a copy of the hard drive of Morel's computer revealed approximately 200 videos and images of child pornography. The government charged Morel with possession of child pornography.

Morel filed a motion to suppress the evidence obtained from his computer.

First, Morel argued that he had a reasonable expectation of privacy in his IP address information. Morel claimed that after the Supreme Court's 2018 decision in Carpenter v. United States the third-party doctrine should not apply to IP address information; therefore, the government should have been required to obtain a search warrant to get this information.

The court disagreed. Citing its decision in United States v. Hood, the court held that Morel did not have a reasonable expectation of privacy in the IP address information obtained by the government. As in the Hood case, IP address information on its own does not provide information concerning location, unlike the cell site location (CSLI) that was at issue in the Carpenter case.

Second, Morel argued that he had a reasonable expectation of privacy in the images he uploaded to Imgur. Again, the court disagreed. The record established that Morel chose to upload the images to Imgur. In addition, testimony from an Imgur employee established that it was "impossible" to prevent third-parties from accessing the images, whether the images were uploaded to "public" or "private" albums. Consequently, the court held that under the third-party doctrine, Morel had no reasonable expectation of privacy in the images he voluntarily uploaded to Imgur.

Finally, Morel argued that the warrant to search his computer was not supported by probable cause to believe that the girls depicted in the images were under the age of eighteen. Specifically, Morel claimed that the detective failed to follow the "best practice" outlined by previous First Circuit case law of attaching suspected child pornography images to the warrant application or providing a sufficiently detailed description of the images.

The court disagreed. The court found that the "best practice" language in two prior First Circuit cases was not applicable in this case because the warrant was issued by a state court. Even if the "best practice" language was applicable, the court's job is to determine whether an affidavit was supported by probable cause as required by the Fourth Amendment. In this case, the court held that the detective's affidavit established probable cause because his experience and specialized training in the area of child abuse and exploitation as well as his descriptions of the girls depicted in the images supported his belief that the girls were under the age of 18.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/17-1696/17-1696-2019-04-19.pdf?ts=1555702206

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Second Circuit

United States v. Lyle, 2019 U.S. App. LEXIS 9457 (2d Cir. N.Y. April 1, 2019)

On December 11, 2013, New York City Police Department officers saw James Lyle park and exit a car in midtown Manhattan. The officers saw a knife clipped to Lyle's pants, which they suspected was an illegal gravity knife. The officers approached Lyle who told the officers that he was legally permitted to carry a gravity knife to perform his job. Lyle also told the officers he had not driven the car. However, when the officers told him that they had seen him driving it, Lyle admitted to being the driver. After a brief investigation, the officers discovered that Lyle's driver's license was suspended. The officers also learned that the vehicle Lyle was driving was a rental car and that Lyle was not an authorized driver under the rental agreement. Lyle claimed that his girlfriend had rented the car and had given him permission to drive it. The officers arrested Lyle for driving with a suspended license and for possessing an illegal knife.

Before being transported to the police station, Lyle asked the officers if the car could be left at the location and stated that his girlfriend would pick it up. The officers denied the request and impounded the vehicle. The officers conducted an inventory search at the police station and found over one pound of methamphetamine and approximately $39,000 cash in the trunk of the car.

The government charged Lyle and several other individuals with a variety of drug-related offenses.

Lyle filed a motion to suppress, among other things, the evidence seized from the trunk of the rental car. The district court denied Lyle's motion. First, the court held that Lyle did not have a reasonable expectation of privacy in the rental car because he was not an authorized driver under the rental agreement; therefore, he did not have standing to object to the search. Second, the court found that the officers lawfully impounded the rental car and conducted a valid inventory search. Lyle appealed and in May 2017, the Second Circuit Court of Appeals affirmed the district court's rulings.

On May 21, 2018, the Supreme Court vacated the judgment against Lyle and remanded the case for further consideration in light of its ruling in Byrd v. United States, decided earlier that month. The Supreme Court's decision in Byrd resolved a circuit split, holding that the "mere fact that a driver is in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." In so ruling, the Court rejected the government's suggestion of a per se rule that unauthorized drivers "always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone."

In this case, the Second Circuit Court of Appeals reaffirmed its prior holding that Lyle did not have standing to object to the officers' search of the rental car because his use of the car was both unauthorized and unlawful. Lyle should not have been driving any car because his license was suspended and a rental car company with knowledge of this fact would not have given him permission to drive its car nor allowed a renter to let him do so. The court added that just as a car thief would not have a reasonable expectation of privacy in a stolen car, an unauthorized, unlicensed driver in sole possession of a rental car does not have a reasonable expectation of privacy the vehicle. Consequently, because Lyle's operation of the car rendered his possession and control of the vehicle unlawful, he did not have a reasonable expectation of privacy in it.

The court further held that even if Lyle had a reasonable expectation of privacy in the rental car, the officers' decision to impound the vehicle was reasonable under the Fourth Amendment. First, Lyle was the car's driver and sole occupant. As there was no third-party immediately available to lawfully drive the vehicle, the officers did not know how long the car would be unattended. Instead, by impounding the vehicle, the officers ensured that the car was not left on a public street in a busy midtown Manhattan location where it could have become a nuisance, been stolen, been damaged, and it could have become illegally parked the next day if it had not been removed. Second, even if Lyle did not expect to be in custody long, he would not have been able to operate the car himself upon release due to his suspended license. Third, although Lyle asked for the opportunity to arrange for his girlfriend, the authorized driver under the rental agreement, to remove the car, the officers were not required to grant this request. Because Lyle only challenged the officer's decision to impound the rental car, not the subsequent inventory search of the vehicle at the police station, the court did not address that issue.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca2/15-958/15-958-2019-04-01.pdf?ts=1554129008

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Seventh Circuit

United States v. Lewis, 2019 U.S. App. LEXIS 9843 (7th Cir. IL April 3, 2019)

A police officer pulled over Arriba Lewis for following another vehicle too closely. While the officer processed a warning on his computer, Lewis, who seemed unusually nervous, sat in the patrol car. Approximately two minutes into the stop, Lewis gave the officer inconsistent stories concerning his travel plans. After learning that Lewis was on federal supervised release for a cocaine conviction, approximately five minutes into the stop, the officer requested a drug-sniffing dog. The total time from Lewis pulling over to the officer handing him the warning was approximately 10 minutes, 50 seconds. Approximately 10 seconds after the officer gave Lewis the written warning, the dog sniff began. Approximately one minute, eight seconds later, the drug-sniffing dog alerted on Lewis's car. The officer searched Lewis's car and found over 200 grams of heroin.

The government charged Lewis with possession with intent to distribute heroin.

Lewis filed a motion to suppress the drugs found in his car.

First, Lewis argued that the officer lacked probable cause to conduct the initial traffic stop. The Supreme Court has held that, generally, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."

Here, the court held that the officer had ample grounds to stop Lewis. The officer testified that he saw Lewis following another vehicle too closely, a violation of Illinois law. After making this observation, the officer then pursued Lewis and conducted a time-distance calculation to confirm his suspicion. The court concluded that the officer's initial observation combined with the subsequent time-distance calculation established probable cause that Lewis was following too closely, which justified the stop.

Second, Lewis argued that even if the officer lawfully stopped him, the officer unreasonably prolonged the stop without reasonable suspicion of criminal activity to allow the dog sniff.

After an officer conducts a lawful stop, it is possible for the officer to violate the Fourth Amendment if he exceeds the scope or unreasonably prolongs the stop. The court found that the officer's dash camera video and the officer's testimony both established there was no unreasonable delay between finishing the warning and handing it to Lewis. The court added that during the stop the officer permissibly asked Lewis questions concerning his travel plans and that the officer continued to work on the warning while talking with Lewis.

Finally, the court held that even if the one-minute period between handing Lewis the warning and the dog alert constituted a delay, it was justified by reasonable suspicion that Lewis was engaged in criminal activity. During the stop, the officer testified that: (1) Lewis seemed unusually nervous, as his hands were trembling and his breathing was heavy and labored even after being told that he was getting a warning, (2) Lewis was on supervised release for a drug offense, and (3) Lewis gave the officer inconsistent stories concerning his travel plans. The court concluded that these facts gave the officer reasonable suspicion to extend the duration of the stop.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/17-3592/17-3592-2019-04-03.pdf?ts=1554328815

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Eighth Circuit

United States v. Sallis, 2019 U.S. App. LEXIS 10408 (8th Cir. IA April 9, 2019)

A confidential informant (CI) told officers that Sallis, a suspect in a recent shooting, was staying at a particular apartment complex with a named female and provided the apartment number to the officers. At the time, there were outstanding warrants for Sallis' arrest on unrelated offenses.

Officers conducted surveillance at the complex where on two occasions they saw Sallis come down the steps of the complex, enter vehicles, and engage in behavior that, based on their experience, indicated drug trafficking. When Sallis got into the second vehicle, officers approached the car and arrested Sallis on his outstanding warrants. On the backseat of the car, near where Sallis sat, officers recovered: a cell phone, a silver bag which officers had previously observed Sallis carrying into the apartment, containing 1/4 pound of marijuana, and more than $1,500 cash.

Sallis would not identify the apartment number in which he had been staying. Officers placed Sallis in a police car and advised him of his Miranda rights. A short time later, the woman who resided in the apartment arrived. Officers told the woman that Sallis was in custody and they had begun the process to apply for a search warrant. When officers asked the woman for consent to search her apartment she asked to speak to Sallis to discuss the matter. When the woman walked out and talked to Sallis he told her there was marijuana and more cash in the apartment and told her to "get his bag" and give it to the officers. Sallis told the officers that "I'll give it to you," referring to the marijuana, and said the woman would get the bag, explaining "I'll have her go get it."

The woman went into the apartment and retrieved a plastic tote and a bag that she identified as belonging to Sallis. Officers smelled marijuana and observed packaged marijuana in plain view in the bag. This information regarding the packaged marijuana was included the search warrant affidavit that was being prepared. When the officers searched the apartment they found marijuana, scales, 9mm ammunition, and a 9mm handgun.

The government charged Sallis with, among other things, being a felon in possession of a firearm and ammunition.

Sallis claimed the search of the apartment pursuant to the warrant was not lawful because he did not voluntarily consent to the search and seizure of the tote and bag. At issue was whether Sallis' statement to the woman instructing her to "get his bag" and give it to the officers, constituted valid consent to permit the officers to search the bag.

One established exception to the Fourth Amendment's warrant requirement is a search that is conducted pursuant to consent. For a person's consent to be valid, it must be given voluntarily and not the product of duress or coercion. To determine the voluntariness of a person's consent, courts consider the totality of the circumstances, including but not limited to, the person's age, intelligence, education, familiarity with arrests and the legal system, whether officers threatened, intimidated, punished or falsely promised something to the person, and whether the defendant was in custody or under arrest when consent was given and if so, how long he had been detained.

The Eighth Circuit Court of Appeals agreed with the district court which held that under the totality of the circumstances Sallis's instructions to the woman to "go get my bag," and his repeated assurance to the officers that "I'll give it to you," referring to the marijuana, demonstrated his implied consent to search the bag.

The court also agreed with the district court which concluded that Sallis's consent to the seizure and subsequent search of the bag was voluntary. Although Sallis was in custody at the time, a person in custody can still voluntarily consent to a search.

In this case, when Sallis told the woman to get his bag, he had been in custody less than 30 minutes and had been advised of his Miranda rights within the previous 15 minutes. The court added that Sallis's statements to the woman were not result of police questioning. Instead, Sallis was responding to the woman who had asked to speak to him.

The court further held that even if Sallis had not voluntarily consented to the search of his bag, the evidence seized from the apartment would have been inevitably discovered as a result of the execution of the search warrant. The court concluded that even if the officers had not included the information concerning the packaged marijuana discovered in Sallis's bag in their warrant application, evidence from the CI and from the officers' surveillance of Sallis established probable cause that evidence related to drug trafficking would be found in the apartment.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/18-1662/18-1662-2019-04-09.pdf?ts=1554823822

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United States v. Houston, 2019 U.S. App. LEXIS 10551 (8th Cir. IA April 10, 2019)

Just after 1:00 a.m., three officers responded to a neighborhood disturbance call. The police had recently responded to other neighborhood disturbance call and shots-fired calls in the area. The neighborhood to which the officers were called was within a 20-block by six block area that accounted for nearly one third of confirmed shots-fired calls for the department within the past nine months.

When the officers arrived, they saw Alvin Houston, who looked at them and ran. One officer ordered Houston to "wait," but Houston kept running. Another officer saw a black pistol in Houston's hand. The officers chased Houston into the backyard of his home, drew their weapons, and again ordered him to stop. After Houston stopped, an officer frisked Houston and felt something "metallic" in Houston's pants pocket. Unsure what the item was, the officer reached into the pocket and removed a set of brass knuckles. The officers then removed a small knife, a bottle of alcohol, and a cell phone from Houston's pockets. At that point, the officers planned to arrest Houston for possession of the brass knuckles, a violation of Iowa law.

After Houston was searched, one of the officers found a black pistol in a ravine past the property line of Houston's residence. The pistol resembled the pistol the officer had previously observed Houston holding. After the officers placed Houston in a patrol car, they checked his criminal history and discovered that he was a convicted felon. The government subsequently indicted Houston for being a felon in possession of a firearm.

Houston filed a motion to suppress the firearm, brass knuckles, and other items removed from his pocket.

First, Houston claimed that he was seized under the Fourth Amendment when the officer ordered him to "wait." Houston claimed this seizure violated the Fourth Amendment because the officer did not have reasonable suspicion that he was involved in criminal activity.

The court disagreed, explaining that "it is well established that police pursuit in attempting to seize a person" does not amount to a seizure under the Fourth Amendment. A Fourth Amendment seizure occurs when a person submits to an officer's show of authority to restrain the person's freedom of movement. Consequently, because Houston did not submit when the officer ordered him to "wait," there was no seizure; therefore, the Fourth Amendment did not apply.

Next, Houston argued that the seizure of the items from his pockets after he was detained was unlawful.

Under Terry v. Ohio, the Supreme Court held that an officer may stop an individual if the officer has reasonable suspicion that criminal activity may be afoot. After conducting the stop, an officer may conduct a frisk for weapons if the officer has a reasonable suspicion that the suspect is armed and dangerous.

The court held that the officers had reasonable suspicion to stop Houston because: (1) the encounter occurred in the middle of the night in an area known for gun-related crime, (2) one of the officers saw a pistol in Houston's hand, and (3) Houston fled from the officers when he saw them.

The court further held that because one of the officers told the others that he saw Houston holding a pistol, the officers had a reasonable, articulable suspicion that Houston was armed and dangerous; therefore, they were entitled to frisk Houston for weapons. While conducting the frisk, one of the officers felt a hard, metallic object in Houston's front pocket and he could not rule out the possibility that it was a weapon. Consequently, the court found that the removal of the brass knuckles from Houston's pocket was lawful. The court added that the removal of the other items from Houston's pockets were lawful as a search incident to arrest.

Finally, Houston claimed the pistol found in the ravine should have been suppressed. Houston argued the ravine constituted curtilage to his home and the officer's warrantless search of that area violated the Fourth Amendment.

The court agreed with the district court's finding of facts that the officer had to walk into a wooded area, past a section of a fence bordering Houston's yard, beyond the property line of Houston's residence to retrieve the pistol. Based on these facts, the ravine did not constitute curtilage to Houston's home; therefore, the officer's warrantless search for and subsequent seizure of the pistol did not violate the Fourth Amendment.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/18-1516/18-1516-2019-04-10.pdf?ts=1554910220

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Eleventh Circuit

United States v. Johnson, 2019 U.S. App. LEXIS 11118 (11th Cir. FL April 16, 2019)

Officer Williams, with the Opa-Locka, Florida police department, received a call at 4:00 a.m. reporting a burglary in progress at a nearby multi-family duplex. The suspect was described as a black male wearing a white shirt. Officer Williams knew the duplex was in a high-crime area from which the police department received a high volume of calls concerning the use of firearms in crimes ranging from burglaries, to robberies and home invasions.

When Officer Williams arrived at the duplex he saw the defendant, Paul Johnson, a black male, wearing a white shirt, standing near a fence in a dark alley at the back of the duplex. As other officers arrived, they ordered Johnson to lie on the ground and handcuffed him.

Officer Williams then began to frisk Johnson. While patting down Johnson's pocket, Officer Williams felt something nylon covering "a small, round, hard object" that he immediately recognized as ammunition. Officer Williams reached into Johnson's pocket and removed a round of live .380 ammunition and an empty nylon holster. Officer Williams was concerned that the ammunition and empty holster meant there was a firearm nearby. In addition, in his experience, Officer Williams knew that burglaries often involved more than one perpetrator. Officer Williams searched the area and found two pistols, one .380 caliber and the other a .40 caliber, less than a foot from where the officers had first seen Johnson.

Johnson confessed to the officers that he had been holding the pistols for his brother and cousin, even though he had previously been convicted of a felony. The government charged Johnson with being a felon in possession of a firearm and ammunition.

Johnson filed a motion to suppress, among other things, the ammunition and the holster. Johnson argued that Officer Williams violated the Fourth Amendment by frisking him and by seizing the ammunition and holster. The district court denied Johnson's motion. Johnson appealed.

A three-judge panel of the Eleventh Circuit Court of Appeals reversed the district court, holding that the frisk was lawful, but that the removal of the ammunition and holster from Johnson's pocket violated the Fourth Amendment. The panel held that "the presence of a single round of ammunition – without facts supporting the presence or reasonable expectation of the presence of a firearm – was insufficient to justify the seizure of the bullet and the holster." (See 4 Informer

18 and https://cases.justia.com/federal/appellate-courts/ca11/16-15690/16-15690-2018-03-22.pdf?ts=1521736240).

Subsequently, a majority of the judges of the Eleventh Circuit Court of Appeals voted to grant a rehearing in front of the entire Eleventh Circuit Court of Appeals sitting en banc and vacated the panel's opinion. (See https://law.justia.com/cases/federal/appellate-courts/ca11/16-15690/16-15690-2018-06-19.html). The court directed the parties to address one issue: whether Officer Williams was entitled to seize the ammunition and holster when he felt a round of ammunition in Johnson's pocket during a Terry frisk.

In Terry v. Ohio, the Supreme Court held that when an officer reasonably believes that a suspect threatens his safety or the safety of others, he may search the suspect and seize concealed objects that he reasonably believes may be weapons or other "instruments of assault." Under Terry, the search consists of a frisk of the suspect's outer clothing. If the officer feels a concealed object that he reasonably believes may be a weapon, the officer may continue the search beyond the outer clothing by searching the suspect's pockets and removing the concealed object.

To determine whether a Terry frisk is reasonable under the Fourth Amendment, a court will consider the totality of the circumstances to include the time of day, the location of the encounter, the lighting at the scene, the number of officers, and the nature of the alleged crime.

In this case, the court found that when Officer Williams received the call about a burglary in-progress at 4:00 a.m., he was patrolling a "high-crime" area that generated a "high volume of calls" concerning crimes involving guns. At the scene, Officer Williams saw Johnson, who matched the burglar's description, standing in a dark alley. In addition, when he arrived the scene was not yet secure and Officer Williams knew that burglars in Opa-Locka were often armed and that they often worked with other perpetrators. Finally, when Officer Williams seized the ammunition and empty holster, it was reasonable for him to believe that a firearm was nearby. Based on these facts, the court held that Officer Williams's removal of the ammunition and holster during the frisk was reasonably related to the protection of the officers and others as outlined by the Supreme Court in Terry and did not violate the Fourth Amendment.

The court emphasized that while the totality of the circumstances in this case justified the removal of the ammunition from Williams's pocket, the court was not creating a categorical rule that ammunition may always be seized during a Terry frisk.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/16-15690/16-15690-2019-04-16.pdf?ts=1555443080

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United States v. Cooks, 2019 U.S. App. LEXIS 9775 (11th Cir. FL April 3, 2019)

Officers from the U.S. Marshals Service went to arrest Cooks at his home. After no one answered the door, the officers entered the house by force and left after they discovered no one inside the house.

The officers returned the next day and approached a woman, identified as Precious Clemens, outside the house. Clemens ignored the officers' commands to stop and instead ran inside the house and locked the door. Although attempts to communicate with Clemens through the door were unsuccessful, two of the home's other occupants, Pamela Price and Everstein Johnson spoke

to the officers. The women told the officers they could not open the door because it had been barricaded and locked from the inside using a deadbolt for which they did not have a key.

During this time, officers heard the sound similar to that of a power drill being used from inside the house near the front door. At some point, Price told the officers that Cooks was armed and that she and another occupant of the house wanted to leave but could not.

After negotiations with Cooks to open the barricaded door failed, a SWAT team broke a window and extracted Price and Johnson from the house. Price told the officers that Cooks had put multiple guns in a hole in the floor. After the officers secured Price and Johnson, they arrested Cooks and Clemens.

After arresting Cooks, the officers conducted an initial 30-second sweep, followed by a three-to five-minute sweep of the house. During this time, the officers found a four-by-four-foot hole covered with plywood that appeared to have been hastily secured with screws that had not been present the day before. The officers removed the plywood and discovered that it led to the home's crawlspace. As one of the officers put his hand down to brace himself so he could enter the crawlspace, he felt a plastic tarp move. Under the tarp, the officer saw the butt of a gun in plain view. After the officer shined his flashlight into the crawlspace, he saw more guns sticking out from underneath the tarp. Officers searched the crawlspace and seized nine pistols and 22 long guns.

The government charged Cooks with unlawful possession of a firearm by a convicted felon.

Cooks filed a motion to suppress the firearms seized from the crawlspace. Cooks claimed that pulling up plywood and entering the crawlspace exceeded the scope of a protective sweep. The government argued that the search of the crawlspace was justified under the exigent circumstances doctrine because the officers did not know if anyone else was inside the residence or inside the hole in the floor.

The exigent circumstances doctrine covers several common situations where it might not be feasible or advisable for officers to obtain a warrant before conducting a search. Examples of these situations are: (1) when officers are concerned with destruction of evidence, (2) when there is a risk of harm to the public or police, and (3) when officers are in hot pursuit of a suspect. In this case, the officers were concerned with risk of harm to the public, sometimes called the "emergency-aid" aspect of the exigent circumstances doctrine.

To justify a warrantless search under the emergency-aid context, the officers must establish probable cause and the existence of an exigency. The probable cause element may be satisfied when officers reasonably believe a person is in danger. In addition, the officers must ensure that their warrantless search is limited to the nature of the exigency that authorized it and limited to the areas where a person reasonably could be located.

The court found it was clear that a hostage situation existed at Cooks' residence that created an exigency of the type that would justify a warrantless search. The issue before the court was whether the exigency was ongoing during the officers' search of the crawlspace after Cooks and the other three occupants were removed from the home.

The court concluded that the officers' search of the crawlspace was justified under the emergency-aid aspect of the exigent circumstances doctrine. The court began by emphasizing it was not the court's role to "armchair quarterback" the officers' decision or "indulge in the 20/20 vision of

hindsight." Instead, the court noted that it had to adopt the "perspective of a reasonable officer on the scene," which in this case involved an armed stand-off with a fugitive that had evolved into a hostage situation.

With this in mind, the court held that even after Cooks and the three women were removed from the house, it was reasonable for the officers to believe Cooks' crawlspace, which was covered by a makeshift plywood "door" that was not there the day before, might have contained hostages. First, several officers testified they believed there were four people in the house but were not sure if there were others. Second, the drilling sounds that the officers heard shortly after they arrived made it reasonable for the officers to believe Cooks was trying to hide either something or someone that he did not want the officers to find. The officers could not be sure which it was until they searched the crawlspace. Consequently, the court found that the officers were justified in removing the plywood cover and briefly searching the crawlspace without a warrant.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/18-10080/18-10080-2019-04-03.pdf?ts=1554310968

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