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The Federal Law Enforcement -Informer-

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

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CASE SUMMARIES

United States Supreme Court

Voisine v. United States, 2016 U.S. LEXIS 4061 (U.S. June 27, 2016)

Voisine pled guilty to assaulting his girlfriend in violation of *§ 207* of the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly, or recklessly cause bodily injury or offensive physical contact to another person." Several years later, law enforcement officers investigated Voisine for killing a bald eagle and discovered that he owned a rifle. The government subsequently charged Voisine with possession of a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of *18 U.S.C. § 922(g)(9)*.

Armstrong pled guilty to assaulting his wife in violation of *§ 207* of the Maine Criminal Code. A few years later, law enforcement officers found six guns and a large quantity of ammunition when they searched Armstrong's home as part of a narcotics investigation. Like Voisine, the government charged Armstrong under *§ 922(g)(9)* for unlawfully possessing firearms.

Voisine and Armstrong argued they were not prohibited from possessing firearms under *§ 922(g)(9)* because their prior convictions under *§ 207* of the Maine Criminal Code could have been based on reckless, rather than knowing or intentional conduct, and therefore did not qualify as misdemeanor crimes of domestic violence.

Title 18 U.S.C. § 922 (g)(9) prohibits persons convicted of a "misdemeanor crime of domestic violence" from possessing firearms. A "misdemeanor crime of domestic violence" is defined to include any misdemeanor committed against a domestic relation that necessarily involves the "use . . . of physical force." In *United States v. Castleman*, the United States Supreme Court held a knowing or intentional assault against a domestic relation qualified as a "misdemeanor crime of domestic violence." Here, the issue before the Court was whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies a person from possessing a firearm under 18 U.S.C. § 922 *(g)(9)*.

In resolving a split between the circuits, the Court held a conviction for a "reckless" domestic assault qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922 *(g)(9)*. Congress' definition of a "misdemeanor crime of domestic violence" contains no exclusion for convictions based on reckless behavior. In addition, the court noted a person who assaults another recklessly, *i.e.*, with conscious disregard of a substantial risk of harm, uses force no less than one who carries out that same assault knowingly or intentionally.

For the court's opinion: http://www.supremecourt.gov/opinions/15pdf/14-10154_19m1.pdf

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Circuit Courts of Appeal

First Circuit

United States v. Casey, 2016 U.S. App. LEXIS 10109 (1st Cir. P.R. June 3, 2016)

Officers arrested Casey in connection with the death of an undercover police officer during a drug buy. While Casey was in custody, officers went to Casey's grandparents' house with whom he lived. Casey's grandfather, Rivera, told the officers Casey lived in the residence because Casey could not afford to live on his own. Rivera told the officers that he and his wife provided Casey's lodging and food for free, and that both had free access to Casey's unlocked room at all times. Casey's grandparents fully cooperated with the officers and readily gave both oral and written consent to search their home, to include Casey's bedroom. Inside Casey's bedroom, officers found evidence that connected Casey to the death of the undercover officer.

Casey filed a motion to suppress the evidence seized from his bedroom arguing that his grandparents lacked the authority to consent to the search.

The court disagreed. Without deciding whether Casey's grandparents had actual common authority to consent to a search of the bedroom, the court concluded the grandparents had apparent authority to consent to a search of Casey's bedroom. Apparent authority exists when the person giving consent does not have actual authority, but the officer reasonably believes that the person has actual authority to consent to the search.

Here, when the officers arrived, the door to Casey's bedroom was open and unlocked. In addition, Rivera told the officers Casey did not contribute to rent or food, and that he and his wife both had free access to Casey's bedroom. The court concluded it was reasonable for the officers to rely on Rivera's representation that he and his wife had actual common authority over Casey's bedroom, and therefore could consent to its search.

Casey also claimed a photo-array identification made by a witness was unduly suggestive; therefore, it should have been suppressed. Specifically, Casey argued that he was the darkest-skinned, black, non-Latino man in the array and the only individual pictured with a distinct, long, thin, facial structure.

Again, the court disagreed, holding the circumstances surrounding the photo array identification were not unduly suggestive. First, the array contained six black and white photographs. Second, while Casey had the darkest complexion among them, each individual could have been described as black, and they shared relatively similar facial features, a near-identical haircut, and groomed eyebrows. In addition, the array displayed no names and bore a disclaimer in Spanish and English stating that the person the witness saw may or may not appear among the presented photographs.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/13-1839/13-1839-2016-06-03.pdf?ts=1464976805

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United States v. Rivera, 2016 U.S. App. LEXIS 10465 (1st Cir. Mass. June 9, 2016)

A confidential informant (CI) called Rivera to arrange the purchase of crack cocaine. Approximately three minutes later, officers conducting surveillance of Rivera's residence saw Rivera's car drive away. A few minutes later, officers saw Rivera's car parked outside a location they suspected Rivera used as a drug stash-house. The officers followed Rivera's car from the stash-house to a Walgreens parking lot. The officers saw the CI get out of his car and into Rivera's car. The CI purchased crack cocaine from Rivera, got out of Rivera's car and left the area. The officers followed Rivera, who drove back to the stash house.

Based on information from the monitored phone call between Rivera and the CI, the purchase of crack cocaine from Rivera, and observations from their surveillance, the officers obtained warrants to search Rivera's stash-house as well as his residence. At Rivera's residence, officers seized among other things, a loaded 9mm handgun.

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

Rivera filed a motion to suppress the firearm seized from his residence. Rivera argued the search warrant affidavit provided no nexus, or connection, between his residence and his alleged drug dealing; therefore, the officers failed to establish probable cause to search his residence.

The court disagreed. A search warrant application must establish probable cause to believe that a crime has occurred and that evidence of the crime will be at the location to be searched, also known as the nexus element. To establish probable cause the government has to establish there is a "fair probability" that contraband or evidence of a crime will be found at the place to be searched. In this case, while the search warrant affidavit provided no information showing that Rivera sold drugs out of his residence, the government established he was likely at home when he participated in the drug-related phone call with the CI. In addition, the judge that issued the search warrant was entitled to rely on the officer's affidavit statement, that in his training and experience drug dealers often kept evidence related to their crime, such as cash, firearms, and records, in their homes. Consequently, the court held that the government established probable cause to believe evidence connected to Rivera's illegal sale of drugs would be found in his residence.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca1/15-1349/15-1349-2016-06-09.pdf?ts=1465504207

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Sixth Circuit

United States v. Crumpton, 2016 U.S. App. LEXIS 9993 (6th Cir. Mich. June 2, 2016)

Police executed a search warrant at Crumpton's residence for evidence related to drug and firearm violations. At this time, a federal agent read Crumpton his *Miranda* rights. The agent recited and Crumpton confirmed his understanding of the following:

> (1) "the right to remain silent"; (2) that "anything you say can be used against you **in court**"; (3) "the right to consult with an attorney and have them present during questioning" and (4) that "if you cannot afford an attorney, one will be appointed to represent you prior to questioning."

Crumpton then told the agent "there may be some old bullets laying around." (First Statement)

The agent conducted a second interview with Crumpton sometime later during the execution of the search warrant. The agent advised Crumpton of his *Miranda* rights again; however, the agent added a fifth warning, and told Crumpton "if you decide to answer any questions now without a lawyer present, you have the right to stop answering questions at any time."

Crumpton asked the agent, "Will we be going to court?" The agent told Crumpton, "No, I'm just saying, in general. Anything you say can be used against you in court. That's, these are your rights."

Crumpton eventually made an additional incriminating statement concerning his knowledge of ammunition in his residence. (Second Statement)

Crumpton filed a motion to suppress both statements he made to the agent. Crumpton argued his first statement should be suppressed because the agent violated *Miranda* by failing to advise him he had the right to stop answering questions, as the agent had done when he advised Crumpton of his *Miranda* rights the second time.

The district court agreed and suppressed Crompton's first statement on its belief that *Miranda* requires that a suspect be advised of his right to stop answering questions at any time during a custodial interview. The government appealed.

The Court of Appeals reversed the district court. The Court held the district court misread *Miranda* to require that a suspect be advised of his right to stop answering questions at any time during a custodial interrogation. The court added *Miranda* requires that a suspect undergoing custodial interrogation be informed of four particular rights:

> (1) "that he has a right to remain silent"; (2) "that any statement he does make may be used as evidence against him"; (3) "that he has a right to the presence of an attorney"; and (4) that the attorney may be "either retained or appointed."

The court noted that subsequent Supreme Court decisions have reiterated these four, and only four required warnings.[1] In addition, the Sixth Circuit and other circuits have made clear that "a defendant need not be informed of a right to stop questioning after it has begun."

The district court suppressed Crumpton's second statement. When Crumpton asked the agent, "Will we be going to court?" and the agent replied, "No," and the court held that the agent misled Crumpton into believing he would never go to court in connection with statements he might give to law enforcement; therefore, nullifying the *Miranda* warning that anything Crumpton said could be used against him "in court."

The government appealed, and again, the Court of Appeals reversed the district court. In *Miranda*, the Supreme Court mandated that four warnings be given to inform a suspect in police custody of certain rights in order to protect the privilege against self-incrimination. One such warning was phrased in the opening section of the Court's opinion as notice "that any statement he does make may be used as evidence against him." At two later points in the opinion, the Court suggested that the warning would use the phrase "in court" after the suspect was told that anything he said could be used against him. However, the Court has never dictated the words in which the essential

[1]*Florida v. Powell*, 559 U.S. 50, 59-60 (2010), *Colorado v. Spring*, 479 U.S. 564, 567 (1987), *United States v. Lares-Valdez*, 939 F.2d 688, 689 (9th Cir.), *United States v. Davis*, 459 F.2d 167, 168-169 (6th Cir. 1972), *United States v. Ellis*, 125 F. App'x 691, 699 (6th Cir. 2005).

information from *Miranda* must be conveyed to the suspect. The *Miranda* court stated the warnings seeks to convey "the consequences of forgoing [the privilege of self-incrimination]" and "to make the individual more acutely aware that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest." In keeping with this purpose, the Sixth Circuit along with two other Circuits have specifically held that a warning that omits the "in-court" language does not violate *Miranda*.[2] Consequently, a suspect who is informed of his right to remain silent and the fact that failing to do so will result in his statements being used "against him" is sufficiently informed of the key information the warning seeks to provide. In this case, the agent was not required to add the words "in court" to his warning to Crumpton.

In addition, the court found the agent did not undermine or contradict the point of the warning by answering, "No" when Crumpton asked, "Will we be going to court?" Instead, the court found when taking the agent's entire answer in context, the agent was informing Crumpton of his rights and the consequences of waiving them, not telling Crumpton specifically what would happen the next day.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/15-1299/15-1299-2016-06-02.pdf?ts=1464879644

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United States v. Brown, 2016 U.S. App. LEXIS 11739 (6th Cir. Mich. June 27, 2016)

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

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

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

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

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

[2] *United States v. Castro-Higuero*, 473 F.3d 880, 886 (8th Cir. 2007), *Evans v Swenson*, 455 F.2d 291, 295-96 (8th Cir. 1972), *United States v. Franklin*, 83 F.3d 79, 82 (4th Cir. 1996)

The court agreed.[3] An affidavit supporting a search warrant application must demonstrate a nexus, or connection between the evidence sought and the place to be searched. In this case, the court found the search warrant affidavit contained no evidence that Brown distributed narcotics from his home, stored narcotics in his home, or that any suspicious activity occurred in Brown's home.

In addition, even though a drug-dog alerted to the presence of narcotics in Brown's car while it was parked in front of Middleton's house, this fact only supported a search of Brown's car. The alert by the drug-dog did not support a fair probability that evidence of drug trafficking would be found at Brown's house. The court noted a more direct connection was required, such as surveillance indicating Brown had used the car to transport drugs from his house to Middleton's house on the day in question.

Finally, although the affidavit characterized Brown as a known "drug dealer," based on his prior criminal history, the court held a suspect's "status as a drug dealer, standing alone," cannot give rise to a "fair probability that drugs will be found in his home." Instead, the government is required to provide some reliable evidence connecting the known drug dealer's ongoing criminal activity to his home, such as an informant who observed drug deals or drug paraphernalia in or around the suspect's home.

The court further held the good-faith exception to the exclusionary rule did not apply to the evidence seized from Brown's house. For the good-faith exception to apply, the court noted the affidavit was required to contain a minimal nexus between the illegal activity and the place to be searched. Except for a passing reference to Brown's car registration, the affidavit failed to provide any facts establishing a nexus between Brown's alleged drug dealing activity and his house.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca6/13-1761/13-1761-2016-06-27.pdf?ts=1467066637

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Seventh Circuit

United States v. Patterson, 2016 U.S. App. LEXIS 10767 (7th Cir. Ind. June 14, 2016)

Federal agents suspected that Patterson committed a bank robbery. Two agents drove separately to a residence connected to Patterson where they saw him standing outside in the driveway. The agents approached Patterson, identified themselves, and told Patterson two or three times to show his hands. After Patterson complied, the agents told Patterson they wanted to talk to him about a bank robbery. When Patterson asked the agents some questions about the case, the agents told Patterson they did not want to discuss the details in the driveway. The agents asked Patterson if he would be willing to go to their office to discuss the case and "clear his name." Patterson agreed to accompany the agents to their office. Before Patterson got into the agent's vehicle, he allowed one of the agents to frisk him for weapons. After completing the frisk, the agent asked Patterson, "I just want to make sure you're voluntarily coming with us, correct?" Patterson responded affirmatively.

The agent drove Patterson to the public garage for his building, parked, and took the public elevator to the agents' office. Once inside, the agents took Patterson to a conference room,

[3] The court issued an opinion in the case on September 11, 2015, in which it denied Brown's motion to suppress the evidence seized from his residence before issuing this amended opinion. (See 801 F.3d 679 (6th Cir. 2015) and 10 Informer 15).

allowing Patterson to sit closest to the door. When asked about the bank robbery, Patterson denied any involvement. The agents accused Patterson of being involved, and told Patterson that he could speak freely, as he was not going to be arrested that day. Patterson then confessed to his involvement in the robbery. At the end of the interview, the agents told Patterson an arrest warrant would likely be issued in a week or two and gave him a ride back to his house.

Patterson filed a motion to suppress his incriminating statements, arguing that he was "in custody" at the time of the interview; therefore, the agents should have advised him of his *Miranda* rights before questioning him.

A person is "in custody" for *Miranda* purposes if there is a formal arrest or a restraint on the person's freedom of movement of the degree associated with a formal arrest. Because the agents did not formally arrest Patterson, the court had to determine whether a reasonable person in Patterson's position would have believed he was free to leave.

The court concluded that Patterson was not "in custody" for *Miranda* purposes because the agents did not restrain Patterson's movement to the degree associated with a formal arrest. First, Patterson went to the agents' office voluntarily. The agents told Patterson they wanted to talk to him about their investigation, while truthfully implying that his name might not be "clear." In addition, the agents double-checked by asking Patterson if he was voluntarily going with them before he got into the agents' car.

Second, Patterson was not "in custody" for *Miranda* purposes during the initial encounter with the agents in the driveway. At most, the initial contact, from the driveway to getting into the agents' car was a *Terry* stop. The court noted that the temporary and relatively non-threatening detention involved in a *Terry* stop does not constitute *Miranda* custody. In addition, in the Seventh Circuit, it has been repeatedly held that a *Terry* frisk does not establish custody for *Miranda* purposes.

Third, during the drive to the agents' office, Patterson never requested that the agents stop the car so he could get out or do anything to indicate that he did not want to speak with the agents.

Fourth, while the agents were armed, they never used their weapons or restrained Patterson in any way.

Finally, at the end of the interview, the agents told Patterson he was not going to be arrested that day, and was allowed to leave so he could get his affairs in order.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/15-3022/15-3022-2016-06-14.pdf?ts=1465932663

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United States v. Miranda-Sotolongo, 2016 U.S. App. LEXIS 11816 (7th Cir. Ill. June 28, 2016)

A police officer saw Miranda driving on an interstate highway and noticed the Indiana temporary vehicle tag on Miranda's car looked "odd." The officer checked the registration number from the tag in a database, but found no record of the registration. The officer then had a police dispatcher run a check on the tag in the same database. Like the officer, the dispatcher could not find a record of the car's registration in the database. After receiving this information from the dispatcher, the

officer conducted a traffic stop to investigate whether the tag on Miranda's car might be a forgery designed to hide a stolen or otherwise unregistered vehicle.

When the officer asked Miranda for his driver's license, Miranda told the officer he was driving on a suspended license. The officer arrested Miranda. During an inventory search of Miranda's car, the officer found two firearms. The government charged Miranda with being a felon in possession of a firearm.

Miranda argued the firearms seized from his car should have been suppressed because the officer did not have reasonable suspicion to conduct the traffic stop.

The court disagreed. The officer stopped Miranda after two computer checks failed to verify Miranda's car was temporarily registered as the tag indicated. First, the court concluded the officer's observing and recording the registration number from the tag on Miranda's car was not a *Fourth Amendment* search. Second, it was not a search when the officer used the registration tag number, in which Miranda had no reasonable expectation of privacy, to retrieve the registration information from the law enforcement database. As a result, after the officer and the dispatcher both checked the relevant database and found no record of the car's registration in Indiana, the court held the officer had reasonable suspicion to justify the stop.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca7/14-2753/14-2753-2016-06-28.pdf?ts=1467140586

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United States v. Walton, 2016 U.S. App. LEXIS 12084 (7th Cir. Ill. June 30, 2016)

A police officer pulled over a Chevrolet Suburban for several minor traffic violations. The Suburban contained two people; Smoot, the driver, and Walton, the passenger. After the officer told Smoot that he planned to issue a written warning, Walton told the officer that they had been stopped in Kansas the previous evening and had received a written warning for using an improper signal. Walton gave the officer a copy of the written warning issued in Kansas, which indicated Walton was driving at the time, and that he had a suspended driver's license. Walton then stated the officers in Kansas had detained them for two hours and had searched the Suburban, which was a rental vehicle. When the officer asked Walton why he had rented such a large vehicle, Walton told him that it was the only vehicle available, which the officer found implausible. Walton gave the officer a copy of the rental agreement, which indicated the Suburban had been rented at the Denver International Airport, that the rental fee was almost $1,000, and that Smoot was not an authorized driver.

The officer asked Smoot to accompany him to his squad car while he prepared the written warning. When the officer asked Smoot why Walton had rented such a large expensive vehicle, she told him, "guys like trucks." When the officer asked Smoot about the encounter with the police in Kansas the previous evening, Smoot told him the stop did not last two hours, and the officers did not search the Suburban. The officer also learned that Smoot and Walton were driving back to their home in Ohio. Finally, during the stop, the officer learned from his dispatcher that Walton had a criminal history that included a drug trafficking arrest.

After issuing Smoot the written warning, the officer asked Walton some follow-up questions concerning the trip, as well as the rental car. The officer then asked Walton for consent to search the Suburban. Walton denied the officer's request to search inside the Suburban; however, Smoot

consented to a search of her bag. After Walton refused, the officer told him that he was calling a canine unit to conduct a sniff around the exterior of the Suburban, as the officer believed he had established reasonable suspicion that Smoot and Walton were involved in criminal activity. After searching Smoot's bag, finding only a change of clothing, the officer contacted dispatch and requested a canine unit. Approximately 14 minutes elapsed from when the officer issued Smoot the written warning until he requested the canine unit.

When the canine unit arrived, the officer walked his dog around the Suburban, and the dog alerted to the presence of drugs in the vehicle. The officers searched the Suburban, found cocaine concealed in bags hidden in a void within the rear driver's side quarter panel, and arrested Smoot and Walton.

Walton filed a motion to suppress the cocaine, arguing the officer did not have reasonable suspicion to detain him after issuing the written warning to Smoot.

The court disagreed. First, within three to four minutes of pulling over Walton and Smoot, the officer saw there were only two individuals with one bag of luggage in a large Suburban, which seated seven to eight passengers. The officer testified that in his experience criminals often rent large luxury vehicles for the larger areas available to conceal contraband. Second, the officer learned the Suburban was rented solely for the purpose of driving two people from Colorado to Ohio at a rental cost of almost $1,000. The officer knew the pair could have rented a smaller vehicle that accomplished the same goal for around $100 or $200. Third, by the time the officer issued the written warning, he had heard conflicting stories from Walton and Smoot regarding how long the Kansas police officers had detained them the previous evening, and whether the car was searched during that time. Fourth, Smoot and Walton gave the officer different stories as to why Walton rented the Suburban. Fifth, prior to issuing the written warning, the officer discovered that neither Smoot nor Walton was legally entitled to drive the Suburban, as Smoot was not authorized under the rental agreement, and Walton had a suspended driver's license. Consequently, the court found the officer could have towed the Suburban and conducted an inventory search. Finally, before he completed the written warning, the dispatcher told the officer of Walton's lengthy criminal history, which included a drug trafficking offense. Based on the totality of the circumstances, the court held the officer had reasonable suspicion to detain Walton after he issued Smoot the written warning.

Walton further argued that the officer unreasonably prolonged the duration of the stop by failing to diligently request a canine unit to search the Suburban after issuing Smoot the written warning.

Again, the court disagreed. The court noted that after issuing the written warning to Smoot, the officer asked Walton some brief follow-up questions, requested consent to search the Suburban, which was denied, and searched Smoot's bag, with her consent. The court concluded that nothing in this 14-minute timeline suggested that the officer did not act diligently in requesting the canine unit.

For the court's opinion: http://law.justia.com/cases/federal/appellate-courts/ca7/15-3626/15-3626-2016-06-30.html

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Eighth Circuit

United States v. Briere de L'Isle, 2016 U.S. App. LEXIS 10345 (8th Cir. Neb. June 8, 2016)

During a traffic stop, an officer lawfully seized a large stack of credit, debit, and gift cards located in a duffle bag in the trunk of the defendant's car. Afterward, a federal agent scanned the seized cards and discovered the magnetic strips on the backs of the cards either contained no account information or contained stolen American Express credit card information.

The government charged the defendant with possession of fifteen or more counterfeit and unauthorized access devices.

The defendant filed a motion to suppress any evidence discovered when the agent scanned the magnetic strips on the seized cards. The defendant argued that scanning the magnetic strips on the backs of the cards, without a warrant, constituted an unlawful *Fourth Amendment* search.

The court disagreed. First, the court noted a physical intrusion or trespass by a government official constitutes a search under the *Fourth Amendment*. However, the court concluded that scanning the magnetic strips on the cards was not a physical intrusion into a protected area prohibited by the *Fourth Amendment*. The magnetic strips on the back of a debit or credit card is a type of external electronic storage device that is designed to record the same information that is embossed on the front of the card. Consequently, the information embossed on the front of the card and recorded in the magnetic strip will only be different if someone has tampered with the card. Credit card readers simply reveal whether the information in the magnetic strip on the back of the card matches the information on the front of the card. The court found the process of using a credit card reader "analogous to using an ultraviolet light to detect whether a treasury bill is authentic", which is not considered a *Fourth Amendment* search. Therefore, the court held that because sliding a card through a scanner to read virtual data does not physically invade a person's space or property, the agent did not conduct a search under the original trespass theory of the *Fourth Amendment*.

The court further held that scanning the magnetic strips on the cards did not violate any reasonable expectation of privacy the defendant might have had in the cards. First, the defendant could not subjectively expect privacy in the cards in which his name was embossed on the front. Second, the defendant could not have had a subjective expectation of privacy in any of the other cards, in which his name was not embossed on the front, because the purpose of a credit, debit, or gift card is to enable the holder of the card to make purchases. When the holder uses the card, he knowingly discloses the information on the magnetic strip of the card to a third party. Consequently, the holder of the card cannot claim a reasonable expectation of privacy in this information.

Even if the defendant had an actual, subjective expectation of privacy in the information found in the magnetic strips on the backs of the cards, the court held this privacy interest is not one society if prepared to accept as reasonable. All of the information found in the magnetic strips on legitimate American Express cards is identical to the information in plain view on the front of the cards. If it is not reasonable to expect privacy in the information that is visible on the front of these cards, the court concluded the defendant could not reasonably expect privacy in information contained in the magnetic strip that is either non-existent or different from the information on the front of the card.

The court added that American Express cards with no information in the magnetic strips, and debit and gift cards that have been re-coded with new information in the magnetic strips are counterfeit

cards, and therefore, considered contraband. Governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." The court concluded that because scanning the magnetic strips on the cards was the government's way of revealing the defendant's possession of contraband, the counterfeit cards, there was no violation of a legitimate privacy interest, and no search within the meaning of the *Fourth Amendment*.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-1316/15-1316-2016-06-08.pdf?ts=1465398085

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United States v. Roberts, 2016 U.S. App. LEXIS 10347 (8th Cir. Mo. June 8, 2016)

Police officers went to an apartment to locate a suspect involved in a deadly shooting the day before. When an officer knocked on the door and announced "police officers," the door unexpectedly swung open. Rather than stand in the open doorway, providing easy targets, the officers entered the apartment. Inside the apartment, the officers found Roberts, sitting on a couch. The officers smelled the odor of burning marijuana and saw something green and leafy smoldering in an ashtray. The officers also saw a handgun on the couch.

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

Roberts argued the evidence seized from the apartment should have been suppressed because the officers' warrantless entry into his apartment violated the *Fourth Amendment.*

The court disagreed. When the door opened unexpectedly after a hard "police knock," the officers found themselves caught off-guard, isolated, and framed in an open doorway to an apartment they thought might contain an armed gunman. While the court commented that it had not previously considered an exigent circumstances case with facts similar to these, it concluded the officers' concern for their safety when the apartment door opened was reasonable. Facing a split-second decision between entry and retreat, the court refused to hold the officers only reasonable response was to retreat.

Click for the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2642/15-2642-2016-06-08.pdf?ts=1465398087

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United States v. Dillard, 2016 U.S. App. LEXIS 10417 (8th Cir. Mo. June 9, 2016)

Two officers patrolling in a marked squad car in an area known for, among other things, auto thefts, saw three individuals standing near a parked car. As a different squad car passed by the parked car, all three individuals moved away from the vehicle. After the squad car passed, one of the men, Dillard, walked back to the driver's side door of the parked car. When the two original officers drove past the parked car to obtain its license plate number, Dillard again walked away from the car. Believing Dillard's activities to be suspicious, the officers decided to conduct a "pedestrian check" or a "car check." The officers suspected Dillard was attempting to break into the parked car, had previously stolen the car, or possibly was hiding something in the car. By the time the officers turned around however, the car was gone from its parking spot and no longer visible to the officers. The officers knew the car must have been travelling in excess of the 25 miles-per-hour speed limit, as it would not have been possible to travel out of their view in the time it took them to turn around. The officers radioed for assistance locating the car. Another

officer located and stopped Dillard. During the stop, officers found a loaded firearm in Dillard's car.

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

Dillard filed a motion to suppress the firearm, arguing the officers did not have reasonable suspicion to justify the traffic stop.

The court disagreed. While patrolling a high-crime area, two officers saw Dillard acting suspiciously by moving away then returning to the parked car as another squad car drove past. Then, when the officers drove past the parked car, Dillard repeated the same behavior. Finally, when the officers decided to conduct a "pedestrian check," or "car check" because they suspected Dillard might be involved in criminal activity, they discovered the car was gone, and likely had fled at a high rate of speed. At this point, the court concluded the officers were justified in stopping the fleeing car to investigate whether Dillard was involved in criminal activity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-1668/15-1668-2016-06-09.pdf?ts=1465486278

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United States v. Nowak, 2016 U.S. App. LEXIS 10956 (8th Cir. S.D. June 17, 2016)

Nowak asked his friend, Madsen, for a ride. When Nowak got into Madsen's car, he placed his backpack on the floor in front of him. A few minutes later, an officer stopped Madsen for a traffic violation. When Nowak got out of the car, the officer told Nowak to get back into Madsen's car, and Nowak complied. When the officer returned to his patrol car to contact dispatch, Nowak exited Madsen's car and ran from the scene. The officer did not pursue Nowak. Madsen gave the officer consent to search his car, and when the officer asked Madsen about the backpack, Madsen told the officer it belonged to Nowak. The officer searched the backpack and found a handgun. Other officers searched the area but did not locate Nowak who did not return to the scene during the 24-minute traffic stop.

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

Nowak filed a motion to suppress the firearm, arguing the warrantless search of his backpack violated the *Fourth Amendment*.

The court disagreed, holding Nowak had abandoned the backpack; therefore, he gave up any privacy interest he had in its contents. The test to determine whether property has been abandoned is based on the objective facts available to the investigating officers, not based on the owner's subjective intent. For example, it does not matter if an owner has a desire to reclaim his property later. In addition, the court considers whether the owner physically relinquished his property and whether he denied ownership of it. The court added that verbal denial of ownership is not necessary for a finding of abandonment.

In this case, Nowak did not deny ownership of the backpack but he physically relinquished it when he fled the scene of the traffic stop, leaving the backpack in Madsen's car. Even though Nowak left the backpack in Madsen's car, he did not ask Madsen to store or safeguard the backpack for him to ensure its contents would remain private. Instead, when expressly directed by the officer to remain in the car, Nowak got out of the car, ran from the scene, and left his

backpack behind. Consequently, it was objectively reasonable for the officer to believe that Nowak abandoned the backpack, and it was lawful for the officer to search it without a warrant.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2576/15-2576-2016-06-17.pdf?ts=1466177474

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United States v. Roelandt, 2016 U.S. App. LEXIS 12030 (8th Cir. Iowa June 30, 2016)

A plainclothes officer saw Roelandt walking quickly through a high-crime area at night. The officer noticed Roelandt was continually looking around, and he appeared to be extremely nervous. The officer knew Roelandt was a convicted felon and a "hard core" member of a local street gang. In addition, a confidential informant (CI) told the officer three month earlier that Roelandt was known to carrying a gun. Finally, the officer knew that an hour or two before he saw Roelandt that evening, another member of Roelandt's gang sustained a gunshot wound and was admitted to the hospital. The plainclothes officer directed a uniformed officer to stop Roelandt. The officer stopped Roelandt and frisked him. The officer felt a hard object in Roelandt's pocket and removed a loaded 9mm pistol.

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

Roelandt filed a motion to suppress the pistol, arguing the officer did not have reasonable suspicion to stop him.

The court disagreed, holding the totality of the circumstances supported the officer's reasonable suspicion that Roelandt was engaged in the criminal activity of possessing a firearm. Roelandt was a known felon and gang member who was walking quickly through a high-crime area and suspiciously looking around as he walked. The officer had received a past report from a CI that Roelandt had possessed a gun, and the officer knew a fellow gang-member, and friend of Roelandt's had been admitted to the hospital hours earlier with a gunshot wound. Although the officer did not know the details of the shooting, he knew from his experience that gang members often engaged in retaliatory shootings. Each aspect of Roelandt's behavior was largely consistent with innocent behavior when considered by itself; however, when considered together, the court concluded the officer had reasonable suspicion to stop Roelandt.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2590/15-2590-2016-06-30.pdf?ts=1467300658

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Tenth Circuit

Davis v. Clifford, 2016 U.S. App. LEXIS 10648 (10th Cir. Colo. June 13, 2016)

Officer Clifford decided to conduct a traffic stop after he discovered Davis had an active warrant for driving with a suspended license due to a failure to provide proof of insurance. After he activated his emergency lights, Clifford called for back-up assistance, and three other officers responded that they were en route. Davis pulled into a parking lot and turned off her car, and the other officers soon arrived, blocking Davis' car from all directions.

According to Davis, after being surrounded by police cars, she heard batons banging on her car. Fearing for her safety, Davis locked her doors and rolled up her window. Officer Clifford and Officer Fahlsing approached the driver's side door, and Clifford told Davis to step out of the car. Through a gap in the window, Davis asked why she had been pulled over and offered to show Clifford her license, insurance, and registration information. Davis then alleged Clifford told her, "You know why," and commanded her to "step the fuck out of the car." After the officers told Davis she was under arrest, and again ordered her to exit her car, Davis responded that she would get out of the car if the officers promised not to hurt her. When she did not immediately exit her car, Davis claimed Fahlsing shattered the driver's side window with his baton. Davis claimed that Clifford and Fahlsing then grabbed her by her hair and arms, pulled her through the shattered window, pinned her face-down on the broken glass outside the car, and handcuffed her.

Davis sued Officers Clifford and Fahlsing, claiming they used excessive force when they arrested her.

While recognizing that many of the material facts alleged by Davis were disputed by the officers, the court commented that it was required to view the facts in the light most favorable to Davis. Consequently, the court concluded the facts as alleged by Davis demonstrated that Clifford and Fahlsing used excessive force; therefore, they were not entitled to qualified immunity.

The court took the facts alleged by Davis and applied them to the factors outlined by the United States Supreme Court in *Graham v. Connor* to determine whether the officers' use of force was objectively reasonable. In *Graham*, to determine the objective reasonableness of an officer's use of force, the court found the following factors must be considered: 1) the severity of the crime, 2) whether the suspect poses an immediate threat to the safety of the officer or others, and 3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The court concluded the severity of Davis' crime weighed against the use of anything more than minimal force because the charge underlying her arrest for a minor driving offense was a misdemeanor. Davis claimed that the officers shattered her car window and dragged her through the broken glass by her arms and hair. The court found that this degree of substantial force was not proportional to the misdemeanor offense suspected.

The court found the second factor, whether Davis posed and immediate threat to the safety of the officers or others, weighed against Clifford and Fahlsing. The court noted there was no evidence that Davis had access to a weapon or that she threatened to harm herself or others.

The court held the third factor, whether Davis actively resisted or attempted to evade arrest, weighted slightly against Clifford and Fahlsing. Even though Davis did not immediately obey the officers' commands to exit her car, police cars surrounded Davis' car on all sides, so she could not have driven away. In addition, there was no evidence presented that Davis actually attempted to flee.

The court further held at the time of the incident it was clearly established that the use of disproportionate force to arrest an individual who had not committed a serious crime and who poses no threat to herself or others, constitutes excessive force.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca10/15-1329/15-1329-2016-06-13.pdf?ts=1465833689

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District of Columbia Circuit

United States v. Castle, 2016 U.S. App. LEXIS 10713 (D.C. Cir. June 14, 2016)

On a very cold night in February, officers on patrol in an un-marked pick-up truck saw a man walking quickly away from the direction of an apartment complex outside of which PCP was known to be sold. The man crossed the street and entered an alley where the officers saw him lean over near a parked U-Haul truck. The officers then saw the man walk back across the street with his hands in his pockets. The officers approached the man and recognized him as Harold Castle. The officers knew Castle had been arrested previously for PCP-related offenses and conducted a *Terry* stop. After ordering Castle to sit down on the curb, the officers saw Castle place a small vial on the ground and try to conceal it. Based on the vial's appearance and smell, the officers believed it contained PCP. The officers arrested Castle.

Castle argued the vial should have been suppressed because the officers did not have reasonable suspicion to conduct a *Terry* stop.

The government claimed the officers patrolled the area so regularly that "people in the neighborhood" had come to recognize the un-marked pick-up truck as a police vehicle. As a result, the government argued when Castle saw the truck he recognized it as a police vehicle, and his subsequent behavior allowed the officers to believe he was involved in criminal activity.

The court disagreed. First, the court noted the government failed to put any evidence into the record that would support a reasonable officer's belief that Castle saw the officer's truck before he crossed the street and entered the alley. When the truck turned onto the street, Castle and the truck were at opposite ends of a long city block, and the truck's headlights were on and pointed in Castle's direction. Second, even if Castle saw the truck, the court found that no matter how widely and readily recognizable the truck may have been known in the neighborhood as a police vehicle, there was no evidence to show that Castle knew it was a police vehicle. Finally, the court held that walking quickly on a very cold evening into an alley is common. The fact that Castle was doing these things in a neighborhood known for drug use did not establish reasonable suspicion that he was involved in criminal activity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/cadc/14-3073/14-3073-2016-06-14.pdf?ts=1465916542

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