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Legal Training Division

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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

Circuit Courts of Appeal

Second Circuit

United States v. Faux, 2016 U.S. App. LEXIS 12577 (2d Cir. Conn. July 8, 2016)

Federal agents went to Faux's home to execute a search warrant in connection with a health care fraud investigation. As the agents arrived, Faux and her husband were in the process of leaving for vacation. Two agents, dressed in business attire, questioned Faux in the dining room. During the two-hour interview, Faux made incriminating statements to the agents. The agents did not arrest Faux at the conclusion of the interview. The government later indicted Faux for a variety of criminal offenses.

Faux filed a motion to suppress the statements she made during the execution of the search warrant. Faux claimed the agents subjected her to a custodial interrogation without first advising her of her *Miranda* rights.

The court disagreed. Statements made during a custodial interrogation are generally inadmissible unless a person has first been advised of his or her *Miranda* rights. It was undisputed the questions posed by the agents constituted interrogation, and that Faux was never advised of her *Miranda* rights. The only issue was whether Faux was "in custody" when the agents questioned her. A person is in custody for *Miranda* purposes if his or her "freedom of action" is curtailed to a degree associated with a formal arrest.

In this case, twenty-minutes into the interview, the agents told Faux that she was not under arrest. Second, the tone of the conversation was conversational, and there was no indication the agents raised their voices while questioning Faux. Third, while Faux's movements were monitored by an agent when she used the bathroom and retrieved a sweater from a closet, the agent did not restrict Faux's movements to the degree of a person under formal arrest. Fourth, the agents questioned Faux in the familiar surroundings of her home. Fifth, although the agents never told Faux that she was not free to leave, Faux did not attempt to end the encounter, leave the house, or join her husband, who was being questioned in another room. Sixth, the agents did not display their weapons, or otherwise threaten or use any physical force against Faux. Finally, the agents did not handcuff Faux during the interview and she was not arrested at its conclusion. Consequently, the court concluded the agents did not curtail Faux's freedom to the level associated with a formal arrest; therefore, Faux was not in custody for *Miranda* purposes.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-1282/15-1282-2016-07-08.pdf?ts=1467988209

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Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 2016 U.S. App. LEXIS 12926 (2d Cir. N.Y. July 14, 2016)

The government obtained a warrant issued under *§ 2703* of the Stored Communications Act (SCA) that directed Microsoft to seize and produce the contents of an email account that it maintained for a customer who used the company's electronic communications services. The government then served the warrant on Microsoft at its headquarters in Redmond, Washington.

Microsoft provided the government the customer's non-content related information that was located on a server in the United States. However, Microsoft determined that to comply fully with the warrant, it would need to access customer content stored and maintained on a server located in Ireland. Microsoft refused to provide the government this data and filed a motion to quash the warrant. Microsoft argued that a warrant issued under the SCA could not require it to produce data that was stored on servers located outside the United States.

The government argued Microsoft was required to produce the data, pursuant to the warrant, no matter where the data was located, as long as Microsoft had custody and control of the data.

The court held *§ 2703* of the SCA does not authorize a United States court to issue and enforce an SCA warrant, even against a United States-based service provider, for the contents of a customer's electronic communications stored on severs located outside the United States. Consequently, the court held the SCA warrant in this case could not lawfully compel Microsoft to produce the contents of a customer's email account stored on servers located in Ireland.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/14-2985/14-2985-2016-07-14.pdf?ts=1468508412

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United States v. Compton, 2016 U.S. App. LEXIS 13153 (2d Cir. N.Y. July 19, 2016)

United States Border Patrol agents set up an immigration checkpoint on a public road near the Canadian border. Approximately one-half mile before the checkpoint, there was a vegetable stand. A Border Patrol agent parked his marked police vehicle between the checkpoint and the vegetable stand. From this location, the agent saw an SUV come over the crest of a hill and abruptly turn into the driveway of the vegetable stand, as the driver apparently saw the sign indicating the presence of the checkpoint. The agent then received a phone call from an agent at the checkpoint who reported that a motorist entering the checkpoint told him that the SUV had passed her vehicle, and then immediately slowed down upon reaching the crest of the hill. The agent drove up to the vegetable stand and parked behind the SUV. The SUV was unoccupied, but the agent saw Compton and his brother walking away from the vegetable stand, approximately fifteen to twenty feet from one another. The agent saw each man was holding a container of peppers. The agent ordered Compton and his brother back to the SUV. As the agent passed the rear of the SUV, he saw a blanket in the back that appeared to be concealing something. Suspecting the blanket was concealing humans or narcotics, the agent requested canine unit to his location. Approximately one-minute later, another agent arrived with his canine, Tiko. Within five minutes, Tiko alerted to the presence of narcotics. The agents searched the SUV and found 145 pound of marijuana in four duffel bags. The government charged Compton and his brother with two drug offenses.

Compton filed a motion to suppress the evidence seized from the SUV. Compton argued the agent did not have reasonable suspicion to detain him, and that the agent had unreasonably prolonged the duration of the detention to conduct the canine sniff.

The court disagreed. The court held the agent established reasonable suspicion to detain Compton due to the combination of the brothers' avoidance of the checkpoint, the proximity of the checkpoint to the border, and the brothers' peculiar attempt to conceal their avoidance of the checkpoint by purchasing containers of peppers at the vegetable stand.

In addition, after detaining the brothers, the court held the agent conducted his investigation with reasonable promptness. After ordering the brothers back to the SUV, the agent saw a blanket that appeared to be concealing objects in the back of the vehicle. The agent immediately requested a canine unit, and the canine sniff that confirmed the presence of narcotics took no more than five minutes. The court added that the fact the agents placed the brothers in separate police vehicles and handcuffed them during the brief canine sniff was irrelevant, as the agents would have found the marijuana even if Compton and his brother had not been handcuffed and placed in separate vehicles.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca2/15-942/15-942-2016-07-19.pdf?ts=1468936807

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Eighth Circuit

United States v. Montgomery, 2016 U.S. App. LEXIS 12682 (8th Cir. Mo. July 11, 2016)

Officers patrolling a high-crime neighborhood saw a van parked in the unfenced backyard of a house. The officers approached the van and saw Montgomery and another person asleep inside. Two weeks earlier, the officers had arrested a man dismantling a stolen car in the same backyard. Concerned that the van was stolen and soon to be processed for salvage, the officers investigated. After determining that the van was not stolen, the officers looked into the van through the windows and saw a large quantity of copper pipes. The officers detained Montgomery and obtained his identification. The officers contacted their dispatch who informed them that Montgomery had two outstanding arrest warrants. The officers arrested Montgomery and during the search incident to arrest discovered a firearm in his pants pocket. The government charged Montgomery with being a felon in possession of a firearm.

Montgomery filed a motion to suppress the firearm, arguing that the officers did not have reasonable suspicion to detain him while their dispatcher conducted the warrant check.

The court disagreed, finding the officers had reasonable suspicion to believe the copper pipes in the back of Montgomery's van were stolen property. First, the area was known for scrap-metal theft, and the officers had recently arrested a man in the same backyard for dismantling a stolen car in order to sell the parts and scrap metal. Second, the van bore no markings of a plumbing or construction business. The court noted the absence of such markings suggested the copper pipes were potential scrap and not part of a legitimate business. Finally, the fact that Montgomery was using the van and the backyard for sleeping also raised suspicion of unlawful activity.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2206/15-2206-2016-07-11.pdf?ts=1468251047

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United States v. Woods, 2016 U.S. App. LEXIS 12991 (8th Cir. Mo. July 15, 2016)

An officer saw Woods and a passenger driving in a Cadillac with heavily tinted windows. The officer knew Woods to be a drug trafficker and that Woods' vehicle contained hidden compartments that Woods used to hide narcotics. After he saw Woods throw a piece of paper out the window onto the street, the officer conducted a traffic stop. The officer told Woods that he stopped him because the windows on the Cadillac appeared to be tinted too darkly and that Woods had thrown litter on a public roadway. Inside Wood's vehicle, the officer saw a fake iPhone that appeared to be a set of digital scales, and he smelled the odor of marijuana. At some point, the officer spoke to the passenger, who gave the officer a conflicting account as to where he and Woods were traveling.

After issuing Woods traffic citations, the officer requested a canine unit. Approximately twenty-minutes later, the canine officer arrived, and the drug-sniffing dog alerted to the presence of narcotics inside Woods' vehicle. The officers impounded the Cadillac and transported Woods to the police station for questioning. An officer searched the Cadillac and found a hidden compartment that contained marijuana, methamphetamine, cocaine, and a firearm.

Other officers interviewed Woods. Before the interview, an officer read Woods his *Miranda* rights from a form. Woods refused to sign the form to acknowledge that he was waiving his *Miranda* rights. However, Woods told the officers he was willing to speak with them, and he admitted the drugs and firearm found in the Cadillac belonged to him, not his passenger. During the interview, Woods never refused to answer questions, invoked his right to counsel, or told the officers that he did not want to speak with them any longer.

Two days later, a federal agent interviewed Woods, and after waiving his *Miranda* rights, Woods admitted the evidence found in the Cadillac belonged to him.

The government charged Woods with drug and firearm offenses.

Woods filed a motion to suppress the evidence seized from his Cadillac. After the officer issued Woods the citations, Woods argued the officer violated the *Fourth Amendment* by unreasonably extending the duration of the traffic stop to allow the canine officer to arrive.

The court disagreed. The court held the officer established reasonable suspicion that Woods was involved in drug trafficking; therefore, the officer was justified in extending the duration of the stop for twenty-minutes until the canine officer arrived. First, the officer smelled the odor of marijuana in Woods' car. Second, the officer saw digital scales disguised as an iPhone in Woods' car. Third, the officer had received information that Woods was a drug trafficker and that his car contained hidden compartments used to store narcotics. Finally, Woods and his passenger gave the officer conflicting stories concerning their travel plans.

Woods also claimed his incriminating statements should have been suppressed. Woods argued his refusal to sign the *Miranda*-rights waiver form constituted an invocation of his *Miranda* rights.

Again, the court disagreed. First, to establish a valid *Miranda* waiver, the government must establish the wavier was voluntary, intelligent, and knowing. Second, a person can validly waive *Miranda* rights orally or in writing. Third, the court commented that a person's refusal to sign a written waiver form does not automatically require suppression of his subsequent statements.

In this case, officers read Woods his *Miranda* rights before questioning him. In both instances, Woods acknowledged that he understood his rights, agreed to speak with the officers, and stated that the drugs and firearm in his vehicle belonged to him. Finally, Woods did not refuse to answer questions or tell the officers that he no longer wished to speak with them at any point during either interview.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2837/15-2837-2016-07-15.pdf?ts=1468596677

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United States v. Conerd, 2016 U.S. App. LEXIS 13088 (8th Cir. Iowa July 18, 2016)

Police dispatch received a report that Conerd had just assaulted Travis Norton and that he was in the process of assaulting Megan Owens in the basement of his residence. The responding officer had arrested Norton in the past for drug-related offenses. The officer also knew that Owens, who was once romantically involved with Conerd, had reported multiple domestic-assault incidents over the prior year involving Conerd that occurred at his residence. In addition, the officer had received information from multiple informants and from another officer that Conerd might be in possession of a firearm. Finally, the officer believed Conerd had a closed-circuit camera system installed at his residence and that one of the cameras was aimed at the front door.

The officer arrived at Conerd's residence at 11:30 p.m., and the only light the officer could see in was coming from a basement window, where Conerd was reportedly assaulting Owens. As the officer approached, he did not see or hear anything to indicate an assault taking place inside. However, the officer remained concerned for the safety of Norton and Owens, as well as for his own safety, because of Conerd's history of domestic assaults and the possibility that Conerd possessed a firearm. In addition, the officer was concerned about the presence of a closed-circuit camera trained on the front door. Consequently, instead of knocking on the front door, the officer approached the basement window, and from a distance of approximately five or six feet, the officer saw into Conerd's residence. The officer saw Conerd and Norton standing together in the basement and Norton raising a glass pipe to his mouth to ingest what the officer believed to be illegal drugs. The officer went back to the police station and obtained a warrant to search Conerd's residence.

Officers searched Conerd's residence and seized a box of assorted ammunition. The government charged Conerd with being a felon and unlawful drug user in possession of ammunition.

Conerd filed a motion to suppress the evidence seize from his residence. Conerd argued the officer's warrantless entry onto the curtilage of his residence to look through the basement window violated the *Fourth Amendment.*

The court disagreed. The emergency-aid exception to the *Fourth Amendment's* warrant requirement allows an officer to enter a residence, to include the curtilage, without a warrant when the officer has a reasonable belief that an occupant is imminently threatened with serious injury.

Here, before he arrived, the officer was told that Conerd had assaulted Norton and was in the process of assaulting Owens in the basement of his residence. In addition, the officer was aware of Conerd's history of committing domestic violence assaults at his residence, and that Conerd might be in possession of a firearm. The officer was also aware that Conerd likely had a closed-circuit camera trained on the front door. Finally, when the officer arrived at Conerd's residence,

the only light was coming from the basement, where Owens was supposedly being assaulted. Based on these facts, the court concluded it was objectively reasonable for the officer to believe that someone inside Conerd's residence was threatened with serious injury. Consequently, the court held the emergency-aid exception justified the officer's warrantless entry onto the curtilage of Conerd's residence and looking through the basement window.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-3566/15-3566-2016-07-18.pdf?ts=1468855864

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United States v. Shackleford, 2016 U.S. App. LEXIS 13634 (8th Cir. Mo. July 27, 2016)

Two patrol officers received information that a man named "Javon," driving a red Chevrolet Monte Carlo, might be coming to "shoot up" a nearby residence. This information came from another officer who had interviewed Kimberly Farley. Farley reported that Javon Shackleford had assaulted her the day before, that she had seen Shackleford with a gun a few weeks earlier, and that Shackleford and his friend Quentin Fantroy were looking for her. In addition, another officer had spoken with Farley's sister, who confirmed that Shackleford had assaulted Farley the day before, and that Shackleford was going to Farley's house to cause another disturbance.

When the patrol officers saw a red Monte Carlo, they checked the license plate number and discovered Shackleford owned the vehicle. The officers conducted a traffic stop, ordered Shackleford out of the vehicle, and frisked him without finding a firearm. After the officers learned that Farley wished to prosecute the assault from the day before, they arrested Shackleford.

During this time, Fantroy and a woman approached the officers. Shackleford asked the officers to release his vehicle to the woman, so it would not be towed. The officers refused, searched Shackleford's vehicle and found a loaded handgun in the glove compartment.

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

Shackleford claimed the firearm should have been suppressed, arguing the warrantless search of his vehicle violated the *Fourth Amendment*.

The court disagreed, holding the warrantless search of Shackleford's vehicle was valid under the automobile exception to *Fourth Amendment's* warrant requirement. The automobile exception allows officers to conduct warrantless searches when the officers have probable cause to believe an automobile contains contraband or evidence of criminal activity. Here, the patrol officers based their decision to stop Shackleford and search his vehicle on information they received from other officers. The other officers received their information concerning Shackleford directly from Farley, the assault victim, and from Farley's sister, both of whom were deemed reliable. In addition, during the stop, the officers frisked Shackleford, without finding a firearm. Almost immediately afterward, Shackleford asked the officers to release his vehicle to the woman who appeared on the scene within minutes of the stop. The court concluded these facts provided the officers with probable cause to believe Shackleford's car contained a firearm, and justified the warrantless search of the vehicle.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca8/15-2603/15-2603-2016-07-27.pdf?ts=1469633456

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Ninth Circuit

United States v. Torres, 2016 U.S. App. LEXIS 12941 (9th Cir. Nev. July 14, 2016)

An officer arrested Torres for driving under the influence. The officer decided to impound Torres' car because it was located in the parking lot of a private apartment complex, and neither Torres nor his passenger lived in the complex. During the inventory search, another officer unlatched the lid of the engine's air filter compartment where he found a handgun. The government charged Torres with being a felon in possession of a firearm.

Torres filed a motion to suppress the handgun. Torres argued the officer's decision to impound his car was unreasonable under the *Fourth Amendment*.

The court disagreed, holding the officer's decision to impound Torres' car was reasonable under the *Fourth Amendment*, as it was consistent with Las Vegas Metropolitan Police Department (LVMPD) policy. In addition, the court held impounding Torres' car served the agency's legitimate community-caretaking function to promote other vehicles' convenient ingress and egress to the parking lot, and to safeguard Torres' car from vandalism or theft.

Torres also claimed the officer exceeded the scope of an inventory search by unlatching the lid of the air filter compartment.

Again, the court disagreed. First, once a vehicle has been legally impounded, officers may conduct an inventory search without a warrant. Officers conducting inventory searches must follow the standard procedures outlined by their agency. Although an inventory policy may give the searching officer significant discretion as to what areas should be searched, the policy cannot authorize officers to search for evidence of criminal activity under the pretext of conducting an inventory search.

Second, the court noted that the Supreme Court has repeatedly approved police policies that permit inventory searches of closed compartments within automobiles. Here, the LVMPD inventory policy clearly extends to the engine cabin of a vehicle, as the policy requires impounding officers to itemize personal property found during an inventory search on a standardized Vehicle Impound Report that lists the engine, battery, and radiator among the 51 area on a vehicle to be searched. In addition, the air filter compartment was large enough to hold a firearm, and could be opened by lifting the hood and releasing the latches on the box. Finally, the officer who conducted the inventory search testified that he commonly checks the air filter compartment because, based on his training and experience, individuals hide contraband there such as narcotics and weapons.

Based on these facts, the court held the LVMPD inventory policy is reasonably designed to produce uniformity in inventory searches that protects owners of impounded vehicles from officers conducting inventory searches as a pretext to search for evidence of criminal activity. Consequently, the court held the officer acted within the guidelines of the LVMPD inventory policy when he unlatched the air filter compartment and discovered the firearm.

For the court's opinion: http://cases.justia.com/federal/appellate-courts/ca9/14-10210/14-10210-2016-07-14.pdf?ts=1468515901

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