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Federal Law Enforcement Training Centers
Office of Chief Counsel
Legal Training Division

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The Federal Law Enforcement -Informer-

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

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

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FLETC Office of Chief Counsel Podcast Series

Fundamentals of the Fourth Amendment – A 15-part podcast series that covers the following Fourth Amendment topics:

A Flash History of the Fourth Amendment What is a Fourth Amendment Search? What is a Fourth Amendment Seizure? Fourth Amendment Levels of Suspicion Stops and Arrests Plain View Seizures Mobile Conveyance (Part 1 and Part 2)	Exigent Circumstances Frisks Searches Incident to Arrest (SIA) Consent (Part 1 and Part 2) Inventories Inspection Authorities

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FLETC Informer Webinar Schedule

1. Recording Me – Recording You (1-hour)

Presented by Henry W. McGowen, Attorney-Advisor/Senior Instructor, Federal Law Enforcement Training Centers, Artesia, New Mexico.

We all enjoy the First Amendment rights under our Constitution, which includes such issues as free speech and freedom of the media to report on events. Does this also include people recording law enforcement officers performing their sworn duties, including, for example, using force in order to effect an arrest? Almost everyone has a phone with a built-in camera, so it is very easy to do. Are there any restrictions for people recording and uploading these photos and videos online? And what about the law enforcement officers themselves, do they have that same right to record suspects? Body worn cameras are a hot topic in law enforcement now. Is this the answer to apparently incriminating, viral videos? Please join us as we look at these issues from a legal and practical perspective.

Wednesday, March 18, 2020: 3 p.m. EDT / 2 p.m. CDT / 1 p.m. MDT / 12 p.m. PDT

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Qualified Immunity

By Tim Miller[1]

The Federal Law Enforcement Training Centers teach the Fourth Amendment's objective reasonableness standard for using force and the defense of qualified immunity.[2] Qualified immunity is the officer's defense to standing trial for a constitutional tort. In the present context, it would be the officer's defense to a claim that he used excessive force to seize someone. Qualified immunity is raised well in advance of trial, and if granted, the civil case against the officer is dismissed.

We explain that there are two grounds for granting qualified immunity in an excessive force case. The judge may find that the force was objectively reasonable [constitutional]. Alternatively, the judge may find that the law was not clearly established at the time. The judge is not required to answer those questions in any particular order. She may simply find that the law was not clear, and save the harder *constitutional question* for another day.[3] To deny the officer qualified immunity, the judge must find that the officer violated a clearly established constitutional right based on the plaintiff's version of what happened.[4]

The objective reasonableness standard, as measured by reference to clearly established law, serves competing interests in our society.[5] The law allows plaintiffs to recover for objectively unreasonable conduct, while also minimizing excessive disruption of government services by taking officers away from their primary duties and subjecting them to lawsuits. Many claims can be answered without the need for trial. A judge, sitting alone, considers the totality of the facts and circumstances confronting the officer in light of clearly established law.

In this way, qualified immunity gives law enforcement officers breathing room to make difficult decisions. The Supreme Court reminded us that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."[6] Qualified immunity prevents second-guessing by judges. When things go wrong – and it can when making *split-second judgments* – the law must be clear. The unlawfulness of the officer's conduct must be apparent.[7]

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[1] Tim Miller is an attorney and instructor at the Legal Division for the Federal Law Enforcement Training Centers. The opinions in this article are his own. They should not be attributed to the Centers or be taken as legal advice. Any information should be shared with your agency or legal counsel.

[2] See generally *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989); and *Scott v. Harris, 550 U.S. 372 (2007).*

[3] *Pearson v. Callahan*, 554 U.S. 223 (2009); and *Saucier v. Katz*, 533 U.S. 194 (2001).

[4] There is a caveat to the qualified immunity defense. Obviously, dismissing the case denies the plaintiff his day in court, and there will be no trial. This means that the judge is generally required to consider the facts in a light most favorable to the plaintiff. See generally *Scott v. Harris*, 550 U.S. 372 at 378. To grant qualified immunity and dismiss the case, the judge must be willing to say, *"Mr. Plaintiff, I have considered your version of what happened. No reasonable jury could find for you."* Only then is it fair to deny the plaintiff his day in court and grant the officer qualified immunity. Therefore, if there is a material dispute about the case [something that could change the outcome of the case] the judge should deny the officer qualified immunity and send the case to trial to resolve the dispute.

[5] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[6] See *Graham*, 490 U.S. at 397.

[7] *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017).

CASE SUMMARIES

Circuit Courts of Appeal

First Circuit

United States v. Rodríguez-Pacheco, 948 F.3d 1 (1st Cir. 2020)

A woman reported to police that Gabriel Rodriguez-Pacheco, a man with whom she had once been in a relationship, had been sending her text messages in which he threatened to publish photos and videos of a sexual nature of the woman if she did not agree to rekindle their relationship. The woman added that Rodriguez was a police officer with the Puerto Rico Police Department. After an officer reviewed the text messages on the woman's phone, he reported the incident to the director of the domestic violence unit and was later directed by the district attorney to locate and arrest Rodriguez. As a result, officers planned to locate Rodriguez, disarm him, explain the complaint to him, and place him under arrest.

When the officers arrived at Rodriguez's house, he immediately came outside to the front of the house and spoke with the officers. After describing the nature of the complaint against Rodriguez, an officer told Rodriguez that he needed to seize Rodriguez's service weapon. Rodriguez, who was not handcuffed, went back into the house followed by the officers. Once inside Rodriguez's bedroom, one of the officers seized Rodriguez's service weapon as well as a Go-Pro camera, a white laptop computer, and a cell phone, all of which the officer believed could be related to the domestic violence allegation.

Officers obtained a warrant to search Rodriguez's electronics and discovered images and videos of Rodriguez engaging in sexual conduct with several female minors. The government charged Rodriguez with 16 counts of production of child pornography and one count of possession of child pornography.

Rodriguez filed a motion to suppress the electronics that officers seized from his house. Rodriguez argued that the officers' warrantless entry into his house violated the Fourth Amendment because he had not consented to the officers' entry nor did any other exception to the warrant requirement apply.

Without deciding whether Rodriguez consented to the officers' entry, the district court held that their entry was authorized under the exigent circumstances doctrine "to enter the home for the limited purpose of securing the weapon they knew was inside." Additionally, the district court held that the seizure of Rodriguez's electronics was justified under the plain view doctrine. Rodriguez appealed.

The First Circuit Court of Appeals held that there was no evidence in the record to support the district court's finding that exigent circumstances existed. Warrantless entries under the exigent circumstances exception are lawful when officers are faced with an "imminent threat to the life or safety of the public, police officers, or a person in a residence." Here, when the officers encountered Rodriguez he was unarmed, he had not threatened violence, he had no history of violence, and the presence of a firearm was not connected to the domestic violence complaint. In addition, the officers did not handcuff Rodriguez during the encounter because he "was very

cooperative and his family looked like really decent people." The court held that just because officers knew a gun was in the house, by itself, was not sufficient to demonstrate an exigency, warranting entry into Rodriguez's house.

Although the court determined that exigent circumstances did not justify the warrantless entry into Rodriguez's house, it remanded the case to the district court to determine whether Rodriguez granted the officers valid consent to enter his house.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/18-1391/18-1391-2020-01-15.pdf?ts=1579118405

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United States v. Carpentino, 948 F.3d 10 (1st Cir. 2020)

A Vermont state trooper arrested Kurt Carpentino for kidnapping and assaulting a 14 year-old girl and transported him to a nearby barracks. Two troopers assigned to the investigations unit brought Carpentino to an interview room and advised him of his Miranda rights. After waiving his rights, Carpentino began to answer questions. However, after the troopers challenged the truthfulness of Carpentino's story, he said that he wanted to end the interview and talk to his lawyer. The troopers immediately ceased their questioning and returned Carpentino to a holding cell. On the way to the cell, Carpentino asked to place a telephone call to his lawyer and the troopers said he could do so.

Approximately 45 minutes after being returned to his cell and before he was given access to a telephone, Carpentino told a guard that he wanted to talk to the troopers who had previously interviewed him. The troopers came to Carpentino's cell, confirmed that he wished to speak with them, and brought him back to the interview room.

Carpentino began by asking the troopers what the "maximum time" would be for the charges he faced. One of the troopers told Carpentino he was not sure but before the troopers could resume speaking to him, they needed to be sure that Carpentino wanted to talk to them again. Carpentino told the troopers he wanted to talk to them but then he commented that he had been previously told that he could make a phone call to his lawyer. At that point, the trooper asked Carpentino, "[w]ell is that what you're looking for, is a phone call to your lawyer or do you want to talk to us again?" Carpentino said, "I don't know," and then told the troopers, "I should probably start from the beginning." The trooper replied, "I have to make sure that we're clear on this. You want to talk to us." Carpentino stated, "[y]eah." At that point, the trooper told the defendant: "to do that I have to re-go through that whole Miranda thing again"… "[y]ou made mention about calling a lawyer"… "[if] that's what you want, then we can do that too but I can't do both"… " I can do one or the other." Carpentino responded, "I can talk with you with a lawyer, right?" The trooper replied, "[y]ou can, but usually that doesn't happen." After the trooper reiterated that Carpentino did not have to talk to them, Carpentino stated, "[y]eah, I'll talk." The trooper advised Carpentino of his Miranda rights again and Carpentino twice told the troopers that he was willing to talk to them. After Carpentino signed a second Miranda waiver, the troopers resumed questioning him. After approximately 30 minutes, Carpentino confessed to driving the 14 year-old girl from New Hampshire to Vermont and having sex with her in Vermont.

The government charged Carpentino with interstate transportation of a minor with intent to engage in criminal sexual activity. Carpentino filed a motion to suppress his confession, arguing that the

troopers violated his Miranda rights during the second phase of his interview. The district court denied Carpentino's motion and upon conviction he appealed.

First, Carpentino argued that he did not initiate communication with the troopers to discuss the investigation after he had terminated the first phase of the interview. While Carpentino conceded that he initiated the second phase of the interview by waving at the camera and requesting to speak to the troopers, he claimed that sought to speak with the troopers for the sole purpose of inquiring about the promised telephone call to his lawyer.

The First Circuit Court of Appeals disagreed. Once a suspect is advised of his Miranda rights, he may waive those rights and consent to an interrogation. If the suspect invokes his right to counsel at any point during the interrogation, all questioning must cease either until an attorney is present or until the suspect initiates further communication with the officers. However, not all subsequent communications initiated by a suspect will allow police officers to resume investigation-related questioning. For example, requests for a telephone, food or water, or access to a restroom are not considered communications that permit officers to resume questioning a suspect. On the other hand, a suspect opens the door to further questioning if his comments show "a willingness and a desire for a generalized discussion about the investigation."

In this case, the court held that a reasonable officer in the troopers' shoes could have understood that Carpentino sought to resume a generalized discussion of the investigation. After the troopers escorted Carpentino to the interview room, his first question focused on the crime that the troopers were investigating; e.g. when he asked them about the maximum time he was facing for his crimes. The court concluded that a reasonable officer could have interpreted this case-related question from Carpentino as a desire on his part to discuss the investigation. In addition, the court found that nothing in Carpentino's exchange with the troopers would have made it clear to a reasonable officer that he initiated communication for the sole purpose of securing access to a telephone to call his lawyer.

Next, Carpentino argued that he re-invoked his right to counsel during the second phase of the interview. Carpentino claimed that his two references to calling his lawyer at the beginning of the interview constituted unambiguous requests to speak to his lawyer.

The court disagreed. A valid invocation of the right to counsel requires the suspect to make a clear and unambiguous request for the assistance of an attorney. The court concluded that Carpentino's references to calling his lawyer were ambiguous and that the troopers prudently explained to Carpentino that they could not talk with him if he wished to speak to his lawyer. Yet, despite the troopers' explanation, at no subsequent point during the interview did Carpentino unambiguously request the assistance of counsel. The court held that because Carpentino did not clearly and unambiguously request the assistance of counsel during the second phase of the interview, the troopers were free to interview him.

Finally, Carpentino argued that he did not waive his Miranda rights knowingly and voluntarily before confessing. Carpentino claimed that he did not fully understand the rights he was giving up and that the troopers coerced him into signing the second waiver form.

Again, the court disagreed. The court recognized that after Carpentino initiated the second phase of the interview, the troopers twice told him that they would have to end their questioning if he told them that he wanted to talk with his lawyer. Second, the troopers told Carpentino several times that he did not have to speak with them. Third, despite these statements, Carpentino told the troopers three times that he wanted to talk. Fourth, the troopers read Carpentino his Miranda

rights twice after arresting him and both times Carpentino confirmed that he understood those rights, signed a waiver form, and agreed to speak with the troopers. Based on these facts, the court concluded that Carpentino made an uncoerced decision to waive his Miranda rights with a complete understanding of those rights.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca1/18-1969/18-1969-2020-01-17.pdf?ts=1579287604

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Seventh Circuit

Day v. Wooten, 947 F.3d 453 (7th Cir. 2020)

On September 26, 2015, police officers responded to a report of shoplifter at a store in a mall. A mall security officer reported that when he confronted Day, he noticed that Day had a gun in his pocket. When officers arrived, they encountered the suspect, Shanika Day, who had collapsed on a grassy slope outside the mall after being pursued by the mall security officer. At this point, the gun was lying in the grass a few feet away and out of Day's reach.

Officer Denny handcuffed Day behind his back with a single set of handcuffs. The officer noticed that Day, who was 18 years-old and weighed approximately 312 pounds, was overweight, sweating, and breathing heavily. After Day told officers that he was having trouble breathing, Officer Denny told him that he had exerted himself by running and told him to take deep breaths to slow his heart rate. Officer Denny told Day to remain in an upright seated position; however, Day would not maintain this position, but instead laid down and rolled down the slope. After two failed attempts to keep Day upright, Officer Denny positioned Day to lie on his side so as to prevent Day from asphyxiating by rolling onto his stomach.

A short time later, Sergeant Wooten arrived and monitored Day while Officer Denny completed his investigative duties as the arresting officer. Day complained to Sergeant Wooten that he was having difficulty breathing. Although he was skeptical of Day's claim, Sergeant Wooten called for paramedics to evaluate Day. Afterward, Sergeant Wooten observed that Day appeared to calm down and began to breathe normally.

When the paramedics arrived, Day told them that he had no preexisting medical conditions. The paramedics' examination involved multiple tests, including listening to Day's breathing and checking his heart rate, respiratory rate, and blood oxygen saturation. Day's hands remained handcuffed behind his back throughout the examination. The paramedics concluded Day was breathing regularly and normally. Based on their examination, the paramedics believed Day did not need to go to the hospital.

After the paramedics left, Officer Denny requested a "jail wagon" to transport Day to a detention facility. When the jail wagon arrived, the driver found Day unresponsive, lying on his back with his hands still cuffed behind his back. An ambulance was called and when paramedics arrived, Day's eyes were open and he was breathing but his pulse was weak. The paramedics began to perform CPR but they were not able to revive Day who was pronounced dead 30 minutes later. The coroner dispatched to the scene examined Day's body and found no visible signs of trauma. However, the autopsy report concluded that Day's cause of death was a lack of oxygen in his blood, caused in part by his obesity, an underlying heart condition, and restricted breathing due to having his hands cuffed behind his back.

Day's parents (plaintiffs) sued Sergeant Wooten and Officer Denny under 42 U.S.C. § 1983. The plaintiffs claimed the officers unreasonably seized their son by leaving his hands cuffed behind his back after he complained of difficulty breathing. The officers filed a motion for summary judgment based on qualified immunity. The district court denied the officers' motion, holding that "reasonable officers would know they were violating an established right by leaving Day's hands cuffed behind his back after he complained of difficulty breathing." The officers appealed.

The court held that at the time of the incident, it was clearly established in the Seventh Circuit that a person had the right "to be free from an officer's knowing use of handcuffs in a way that would inflict unnecessary pain or injury, if that person presents little or no risk of flight or threat of injury." It was also clearly established that unless "an officer is aware the handcuff tightness or positioning is causing unnecessary pain or injury, the officer acts reasonably in not modifying the handcuffs."

In this case, the Seventh Circuit Court of Appeals found that handcuffs used on Day were no tighter than they would have been to restrain an arrestee in similar circumstances and that there was no evidence the officers were aware the handcuffs were causing Day's breathing trouble. Day never complained that the tightness of the handcuffs was restricting his breathing nor was there any evidence to indicate the handcuffs contributed to Day's breathing difficulty until the autopsy report was released. In fact, the coroner noted no visible signs of trauma and the autopsy report indicated no lacerations or contusions on Day's wrists. Consequently, the court held that the officers were entitled to qualified immunity because the officers did not violate Day's right "to be free from an officer's knowing use of handcuffs in a way that would inflict knowing pain or injury."

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/19-1930/19-1930-2020-01-10.pdf?ts=1578686443

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Eighth Circuit

United States v. Bettis, 946 F.3d 1024 (8th Cir. 2020)

Informants told police officers that CJ Bettis was selling heroin in the Minneapolis area. Officers knew that Bettis had two prior convictions involving trafficking heroin from Chicago. In addition, officers knew that in a previous investigation, officers had searched Bettis' home and seized more than 80 grams of heroin and a fake identification. When officers learned that Bettis was in Chicago and likely driving a Toyota rented by his wife, Natasha Daniels, they set up surveillance of his return route.

Shortly before 5:00 p.m., a Minnesota state trooper stopped the Toyota for speeding. When asked for identification, the driver gave the trooper an Illinois photo identification with the name "Vernon Silas." However, the trooper recognized the driver as Bettis. The passenger was identified as Dalia Taha. Bettis did not have a valid license and the rental contract showed that Daniels, who was not in the vehicle, was the only authorized driver.

After the trooper smelled the strong odor of marijuana coming from the vehicle, he separated Bettis and Taha and questioned them. Bettis told the trooper that he had traveled to Chicago and attended a birthday party with Taha. Bettis also admitted to the trooper that he and Taha had

smoked marijuana in the car. Taha told the trooper that she had attended a funeral with Bettis but she could not remember any of the details, including the alleged decedent's name. Taha admitted that she had smoked marijuana but she told the trooper that she had not smoked in the rental car.

After a second trooper arrived, the first trooper walked his drug-detection canine around the Toyota. The dog alerted to the driver's side of the vehicle and then indicated that the center console contained drugs. The trooper found marijuana remnants in the console. The troopers continued to search the Toyota but did not find additional drugs. Shortly after 6:00 p.m., based on what they had learned throughout their search and knowing that drug dealers sometimes use marijuana to mask the odor of other drugs, the troopers towed the vehicle to a police garage for a more thorough search. The troopers dropped Bettis and Taha off at a nearby gas station.

The next day, the troopers performed another dog-sniff on the Toyota. After the dog alerted to the presence of drugs, the troopers obtained a state court warrant to search the vehicle. The troopers found approximately 200 grams of heroin in the driver's headrest.

The government charged Bettis with possession with intent to distribute heroin. Bettis filed a motion to suppress the heroin. Bettis argued that the troopers violated the Fourth Amendment by towing the vehicle to the police garage after the initial roadside search. The district court disagreed and denied Bettis' motion. Bettis appealed.

First, the Eighth Circuit Court of Appeals addressed the government's argument that as an unauthorized and unlicensed driver of a rental car, Bettis did not have standing to challenge the rental car's seizure after the roadside search. Standing is the legal concept that holds that a person must have a legitimate expectation of privacy in the area searched or the item seized by police officers before he or she can claim a Fourth Amendment violation. Eighth Circuit case law recognizes that an unauthorized driver of a rental car may establish the required expectation of privacy with "evidence of consent or permission from the lawful owner/renter."

In this case, the government argued that Bettis used the vehicle without prior authorization from the lawful renter and enlisted the use of a "strawman" to transport illegal substances. The court, however, held there was no evidence to suggest that Daniels acted as "strawman" in renting the vehicle for Bettis so he could use it to transport drugs. In contrast, Daniels testified that in the past when she rented cars, Bettis had driven them with her consent, even though she never listed him on the rental contract. Without more, the court held that a husband and wife sharing a rental car was not inherently suspicious and that it did not, by itself, suggest a strawman situation.

Next, the court held that it was reasonable for the troopers to seize the Toyota by transporting it to a police garage in order to later complete their search after the initial limited search only uncovered remnants of marijuana. A warrantless search of an automobile is reasonable when an officer establishes probable cause that it contains contraband or evidence of a crime. At that point, an officer is allowed to search every part of the automobile and its contents that could conceal the object of the search. In addition, in the Eighth Circuit, probable cause does not "dissipate simply because it took a long time to complete a reasonable and thorough search of the car."

Here, the court held that as the encounter with Bettis unfolded, the troopers developed additional evidence indicating deception and criminal conduct. First, Bettis gave the trooper a false name and photo identification. Next, although he admitted Daniels was the only authorized driver, he referred to his wife as "a friend of mine." Third, Bettis initially lied about smoking marijuana. Fourth, Bettis and his passenger gave inconsistent stories about where they smoked and what they had done in Chicago. Lastly, the court noted the canine alert, the modus operandi resembling

Bettis' past crimes, and the knowledge marijuana is used to mask other illegal drugs all indicated that Bettis was hiding more drugs. Finally, the court found that it was reasonable to perform a second dog-sniff after the marijuana odor subsided. The court also noted that Bettis and Taha were not delayed beyond the time necessary to complete the traffic stop, neither of the parties demanded the return of the vehicle, which the troopers later discovered was overdue by one day, and Bettis had no proof that the contract had been extended. Based on these facts, the court held that the troopers had probable cause to seize the vehicle and continue the search.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/18-2407/18-2407-2020-01-10.pdf?ts=1578672099

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Tenth Circuit

Donahue v. Wihongi, 2020 U.S. App. LEXIS 1600 (10th Cir. UT January 17, 2020)

Kevin Donahue was walking home at approximately 10:45 p.m., when he saw a woman hiding near his neighbor's house. Donahue questioned the woman and told her to leave. When the woman refused, Donahue called her "a piece of shit." The woman then punched Donahue in the jaw. When Donahue told the woman he was going to call the police, she told him that she was hiding from police officers who were investigating an unrelated incident a few houses away.

Donahue and the woman were approached by Officers Bennett and Wihongi at the nearby house. The officers separated the pair and interviewed them. While Officer Bennet spoke with Donahue, Officer Wihongi interviewed the woman. The woman told Officer Wihongi that her name was Amy LaRose. She told Officer Wihongi that Donahue, whom she claimed was drunk, approached her and called her a "piece of shit." Officer Wihongi then spoke to Donahue, who confirmed that he had insulted LaRose but denied starting the altercation. Donahue also admitted that he had been drinking that evening. Officer Wihongi suggested Donahue was intoxicated and disruptive in violation of Utah's public intoxication statute but Donahue denied both assertions. When Officer Wihongi requested Donahue's name, he refused to provide it. At this point, Officer Wihongi told Donahue that he was going to be detained, pulled Donahue's hands behind his back, and handcuffed him. Officer Wihongi told Donahue that he was being detained for public intoxication and failure to provide his name. Officer Wihongi again requested Donahue's name and he again refused. 19 minutes after Donahue was handcuffed, a sergeant arrived. Three minutes later, the officers removed the handcuffs and released Donahue.

Donahue sued Officer Wihongi under 42 U.S.C. § 1983. Donahue claimed that Officer Wihongi violated his Fourth Amendment rights by arresting him without probable cause, using excessive force during the arrest, and detaining him for an excessively long period.

The district court found that Officer Wihongi committed no constitutional violations, granted him qualified immunity, and dismissed the case. Donahue appealed.

The Tenth Circuit Court of Appeals agreed with the district court that Officer Wihongi was entitled to qualified immunity.

First, the court held that Officer Wihongi established reasonable suspicion that Donahue violated Utah's public intoxication statute, Utah Code Ann. § 76-9-701(1). Donahue acknowledged that he had been in an altercation in a public place with LaRose. Donahue twice admitted that he had

been drinking and that he had shouted an epithet at LaRose. Even though Donahue did not demonstrate overtly aggressive behavior in front of the officers, the officers observed that Donahue was "agitated, irritated, and argumentative," to the degree that he "may endanger" another person. Based on these facts, the court concluded that Officer Wihongi had reasonable suspicion that Donahue was in violation of the public intoxication statute.

Second, the court held that after Officer Wihongi had reasonable suspicion to believe that Donahue violated the public intoxication statute, he had the authority to demand Donahue's name under Utah's stop-and-question statute, Utah Code Ann. § 77-7-15.

Third, the court held that after Donahue refused to provide his name and identify himself, Officer Wihongi had probable cause to arrest him under Utah's arrest-with-probable-cause statute, Utah Code Ann. § 77-7-2(4) for violating Utah's failure-to-identify statute, Utah Code Ann. § 76-8-301.5.

Fourth, the court held that it was objectively reasonable for Officer Wihongi to pull Donahue's arms back and handcuff him after he established probable cause that Donahue violated the failure-to-identify statue.

Finally, the court held that Donahue was not detained for an unreasonable period at any point during his encounter with the officers. The court found that the officers had reasonable suspicion to detain Donahue under the public intoxication statute, which authorized Officer Wihongi to ask Donahue for his name. Donahue's refusal to give Officer Wihongi his name then gave Officer Wihongi probable cause to believe that Donahue had violated the failure-to-identify statue.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/19-4005/19-4005-2020-01-17.pdf?ts=1579287655

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United States v. Berg, 947 F.3d 1313 (10th Cir. 2020)

A Kansas state trooper was patrolling a section of Interstate-70 (I-70) when he saw three vehicles traveling east. The trooper noticed that all three were traveling approximately ten miles-per-hour below the speed limit and none had a Kansas license plate. Because it was uncommon to see three vehicles with out-of-state plates traveling in close proximity on I-70, the trooper believed the vehicles were traveling together. The trooper pulled onto the roadway and caught up with the trailing vehicle, a compact car with California license plates. The trooper checked the vehicle's registration with his in-car computer and discovered it was registered to a rental company in California.

As the trooper investigated the trailing vehicle, he noticed the two other vehicles, a red minivan and a pickup truck, sped up and began to travel at approximately the speed limit. The trooper passed the compact car and began following the minivan. The trooper determined the minivan was registered to a rental company in Arizona. While the trooper was investigating the minivan and running its registration, he saw it commit a traffic violation. Almost immediately after the minivan committed the infraction, the trooper saw the pickup truck accelerate to approximately ten-miles-per hour over the speed limit. The trooper ran the truck's license plates and discovered that it was registered to a private individual in California.

Based on his observations, the trooper believed the compact car and the pickup truck were escort vehicles which, based on his training and experience, he believed were used by drug traffickers

to divert attention from a vehicle transporting illegal drugs. In addition, the trooper believed the pickup truck had tried to divert his attention from the minivan by speeding up when it noticed he was following the minivan. The trooper decided to stop the minivan based on his belief it was more likely the "load" vehicle because of its larger capacity.

After the trooper stopped the minivan, he approached it and saw that it contained a large amount of cargo. The driver, Mark Berg, told the trooper that he was moving from Las Vegas to Minnesota. The trooper did not believe Berg's story because, in his experience, the way Berg's items were packed was not consistent with what he typically sees when interacting with motorists who are moving. Specifically, the trooper saw boxes, duffel bags, and suitcases stacked floor to ceiling, "crammed" into the minivan when he expected to see household items that cannot be packed into boxes, such as appliances, mixed in with the other items.

Based on his observations, the trooper believed Berg was transporting drugs. The trooper returned Berg's documents and then asked Berg if he would answer a few more questions. Berg did not expressly agree but he continued speaking to the trooper. When the trooper asked Berg for consent to search the minivan Berg refused. At this point, the trooper told Berg he was being detained while an officer with a drug-sniffing dog was called. When the dog arrived, it alerted to the presence of drugs in the minivan. Officers searched the minivan and found approximately 471 pounds of marijuana.

The government charged Berg with possession with intent to distribute marijuana. Berg filed a motion to suppress all evidence seized from his minivan. The district court denied Berg's motion and he appealed.

On appeal, Berg did not challenge the validity of the initial stop, which the trooper testified was based on two traffic violations committed by Berg: following too closely and failing to maintain a lane. Instead, Berg argued that the trooper unlawfully detained him from the time he refused consent to search the minivan until the drug dog alerted on the vehicle.

Generally, a police officer may detain a driver once the initial traffic stop ends if, during the stop, "the officer develops an objectively reasonable and articulable suspicion that the driver is engaged in some illegal activity." To determine whether an officer has a reasonable suspicion to continue the detention, a court will "look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis" for suspecting illegal activity.

Here, the Tenth Circuit Court of Appeals held that at the conclusion of the traffic stop, specific and articulable facts existed to provide the trooper with reasonable suspicion that Berg was engaged in criminal activity.

First, the trooper's suspicion that the three vehicles he followed were traveling in tanderm to support a drug trafficking operation was supported by the following facts: (1) in his experience it was uncommon to see three vehicles with out-of-state plates traveling in close proximity to each other on I-70; (2) the three vehicles were all traveling at approximately ten-miles-per-hour under the speed limit; (3) when the trooper got behind the compact car it continued to travel at approximately ten-miles-per hour under the speed limit while the minivan and pickup truck accelerated to the speed limit; and (4) the pickup truck accelerated to approximately ten-miles-per hour over the speed limit almost immediately after the minivan committed a traffic violation.

From these facts, the court concluded that it was reasonable for the trooper to infer that the pickup truck was intentionally diverting his attention from the minivan, which he believed to be the

"load" vehicle because of its cargo capacity and because the pickup truck was registered to a private individual. In the trooper's experience, he testified that he rarely saw large amounts of drugs transported in privately owned vehicles.

Second, the trooper's observations concerning Berg's cargo, in his experience, was not consistent with Berg's claim that he was moving from Las Vegas to Minnesota. Specifically, Berg's minivan was densely packed with at least five large moving boxes for flat panel televisions and twelve full duffel bags and suitcases, which the trooper testified was inconsistent with what he typically sees when people are moving. Consequently, the court held that the trooper had reasonable suspicion to prolong the stop while he waited for the officer to bring the drug-sniffing dog.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca10/18-3250/18-3250-2020-01-23.pdf?ts=1579802586

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Eleventh Circuit

United States v. Hill, 946 F.3d 1239 (11th Cir. 2020)

Jeffery Hill was arrested for possession of marijuana, possession of a firearm, and possession of drug paraphernalia while he was serving a term of federal supervised release. During his revocation proceedings, Hill filed a motion to suppress evidence seized during the traffic stop that led to his arrest. The district court held that the exclusionary rule did not apply to revocation proceedings concerning supervised release and, therefore, denied Hill's motion to suppress. Hill appealed.

The Eleventh Circuit Court of Appeals noted the Fourth Amendment contains no provision that expressly precludes the use of evidence obtained in violation of the Fourth Amendment. Nonetheless, the Supreme Court has held that the exclusionary rule "forbids the use of improperly obtained evidence during a criminal trial." The court added that the Supreme Court has not extended the exclusionary rule to judicial proceedings outside the criminal trial context. Specifically, the Supreme Court has held that the exclusionary rule does not apply to: state parole revocation proceedings, deportation proceedings, civil proceedings, or grand jury proceedings.

The Eleventh Circuit has not addressed in a published decision whether the exclusionary rule applies to revocation of supervised release proceedings. However, every circuit that has faced the issue, to include the 4th, 5th, 6th, 7th, 8th, and 9th circuits, has found that the exclusionary rule does not apply in supervised release proceedings. Because the Supreme Court has held in similar situations, including most notably, state parole revocation proceedings, that the exclusionary rule does not apply, the court affirmed the district court's denial of Hill's motion to suppress.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/19-10647/19-10647-2020-01-03.pdf?ts=1578081644

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