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

August 2020

The Federal Law Enforcement -Informer-

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

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

This edition of *The Informer* may be cited as 8 INFORMER 20.

The Informer – August 2020

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FLETC Informer Webinar Schedule - September 2020

1. Guardians' Pathway Webcast Series – Episode 1: The "Want" to be an Officer (1-hour)

The first in a series of webcasts that examine the heartset and mindset requirements for successful engagement as a law enforcement officer in a free and open democratic society. Join the Federal Law Enforcement Training Centers' David Lau of the Leadership Training Division and John Besselman of the Office of Chief Counsel as they discuss the call of being a law enforcement officer in our society.

Tuesday September 8, 2020: 2:30 p.m. Eastern / 1:30 p.m. Central / 12:30 p.m. Mountain / 11:30 a.m Pacific

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

2. Warrantless Vehicle Searches and the Fourth Amendment (1-hour)

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

When may law enforcement officers search a vehicle in accordance with the Fourth Amendment? Where can they look and what are they authorized to look for? This webinar will examine each of these critical questions with respect to Terry frisks, searches incident to arrest, warrantless vehicle searches under Carroll v. United States, 267 U.S. 132 (1925), consent searches, and inventory searches of vehicles.

Wednesday September 9, 2020: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

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

3. Guardians' Pathway Webcast Series - Episode 2: How Difficult Is It? (1-hour)

Join Dominic McClinton and John Besselman of the Federal Law Enforcement Training Centers as they examine critical issues confronting the law enforcement community in their efforts to effectively serve in a free, open, and democratic society.

Thursday September 24, 2020: 3 p.m. Eastern / 2 p.m. Central / 1 p.m. Mountain / 12 p.m. Pacific

To participate in this webinar: https://share.dhs.gov/guardianspathwayepisode2/

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To Participate in a FLETC Informer Webinar

1. Click on the link to access the Homeland Security Information Network (HSIN).
2. If you have a HSIN account, enter with your login and password information.
3. If you do not have a HSIN account, click on the button next to "Enter as a Guest."
4. Enter your name and click the "Enter" button.

5. You will now be in the meeting room and will be able to participate in the event.

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Cybercrime & Technical Investigations Training Conference Virtual

The FLETC Cybercrime & Technical Investigations Training Conference, CYCON-2020, will now be conducted as a virtual event between September 9-11, 2020. Hosted by the FLETC Cyber Division with support from the FLETC's Legal Division and the eLearning Branch, this event will offer multiple presentations in a variety of current cyber-related topics. There is **no cost** for attendees to participate.

The following presentations will be provided during Virtual CYCON-2020:

- Data Acquisition: Drone Artifact Extraction – 1 hour
- Internet-Based Investigations: How to Minimize Your Risk Online – 1 hour
- Electronic Law and Evidence: Legal Issues and Digital Forensics – 1 hour
- First Responders to Digital Evidence: Novel Devices Investigators May be Missing – 1 hour
- Introduction to Mobile Device Investigations: Cellphone Seizures – 2 hours
- 802.11 Tools for Analysis and Geo-Location: Home Networking – 2 hours
- Internet-Based Investigations: TOR and the Dark Web – 2 hours

Registration: Please follow the registration instructions posted **HERE**. Attendees must be sworn law enforcement personnel or non-sworn employees who directly support the law enforcement mission. Non-sworn personnel attending must provide a written letter of sponsorship by their law enforcement organization via email to fletc-cybercrimeconference@fletc.dhs.gov.

Schedule: The CYCON-2020 schedule and links to register for each training session will be posted **HERE** at a later date.

Questions: Questions concerning this conference training event should be directed to the Cyber Division at fletc-cybercrimeconference@fletc.dhs.gov.

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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

Click Here: https://leolaw.podbean.com/

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CASE SUMMARIES

Circuit Courts of Appeal

Fourth Circuit

United States v. Curry, 965 F.3d 313 (4th Cir. 2020)

Four uniformed police officers were on patrol in a neighborhood that had been the site of frequent gun violence, with six shootings and two homicides having occurred there in the previous three months. The most recent homicide in the neighborhood had occurred ten days earlier. At around 9:00 p.m., the officers heard approximately six gunshots a few blocks away. The officers drove two to three blocks, arriving at an apartment complex from which they believed the shots originated, approximately thirty-five seconds later.

Upon arrival, the officers saw five to eight men walking in and around a field adjacent to the apartment complex. None of the men were walking alongside each other or talking to one another as they moved away from the complex. The officers also saw several people standing near the apartment buildings. As the officers exited the patrol car, they received corroboration from dispatch that "random gunfire" had been reported at the complex but no suspect description was provided.

At this point, two officers approached Bill Curry and another man, both of whom were separately walking in the field away from the complex. The officers illuminated the men with their flashlights and ordered them to stop and raise their hands. Both men complied. Curry pointed toward where the gunshots had come from and told the officers that he was looking for his nephew. When the officers told Curry to pull his shirt up so they could see his waistband, Curry turned away from the officers. Unable to visually check for a bulge because Curry's non-compliance, the officers restrained Curry's arms and began to frisk him for weapons. After one of the officers felt what he believed was the butt of a handgun, Curry began to struggle with the officers. The officers took Curry to the ground and then recovered a handgun laying on the ground approximately one-and-a-half feet from Curry.

After the government charged Curry with being a felon in possession of a firearm, he filed a motion to suppress the firearm. Curry argued that the officers violated the Fourth Amendment by stopping and searching him without first establishing reasonable suspicion that he was engaged in criminal activity.

The district court agreed and suppressed the firearm. The court held that the officers lacked reasonable suspicion to justify the brief investigatory stop. The court reasoned that because the officers "had no particularized suspicion as to Curry" and were "not attempting to detain only Curry" but the other men as well, the stop could not be justified under Terry v. Ohio. Although the court recognized that the officers had legitimate concerns for their safety, the court stated, "the Constitution requires a particularized and objective basis for suspecting the particular person stopped of criminal activity."

In its appeal to the Fourth Circuit Court of Appeals, the government conceded that the officers lacked reasonable suspicion to stop Curry under Terry. Instead, the government argued that

exigent circumstances justified the officers' seizure of Curry. A three judge panel of the Fourth Circuit agreed, and in 2-1 opinion, reversed the district court. The panel held that the government's interest in responding to the shooting and preventing violence was an exigent circumstance that constituted a "special need." Consequently, the panel found that the officers acted reasonably in stopping Curry and the other men without individualized suspicion that any of them were involved in criminal activity. (See 10 Informer 19). Thereafter, Curry appealed for, and was granted, a rehearing before all of the judges on the Fourth Circuit Court of Appeals.

The Fourth Circuit Court of Appeals, sitting en banc, reversed the panel and affirmed the district court's order granting Curry's motion to suppress the firearm. The court noted that the exigent circumstances doctrine typically involves emergencies justifying a warrantless search of a home, not the seizure of a person during a Terry stop. However, the court added that in the few cases that have applied the exigent circumstances doctrine to justify the suspicionless, investigatory seizure of a person, the officers: 1) have searched for a suspect implicated in a known crime, and in their search for that suspect, 2) have isolated a geographic area with clear boundaries or a discrete group of people to engage in minimally intrusive searches. For example, one line of cases has found it reasonable for officers to establish vehicular checkpoints and stop all motorists along routes that they reasonably expected to be used by suspects leaving the scene of a known crime. Beyond the context of vehicular checkpoints, courts have similarly required that officers have specific information about the crime and suspect before conducting suspicionless stops of individuals.

In this case, the court found that the officers did not have specific information about the suspect and the alleged crime which would have allowed them to narrowly confine their suspicionless stops to the individuals they encountered. Instead, the officers approached Curry in an open field, at one of several possible escape routes, in an area that they only suspected to be near the scene of an unknown crime. In addition, the officers did not have a description of the suspect and had no reason to believe that any of the men walking in the field had anything to do with the gunshots they heard. The court added, "the fact that the officers stopped those walking in the field but not those standing closer to the apartment complex - who were closest to the reported location of the shooting - illustrates the relatively unrestricted nature of the search." The court concluded that the exigent circumstances doctrine may permit suspicionless seizures when officers can narrowly target the seizures based on specific information of a known crime and a controlled geographic area.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca4/18-4233/18-4233-2020-07-15.pdf?ts=1594837818

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Sixth Circuit

United States v. Trice, 966 F.3d 506 (6th Cir. 2020)

As part of a drug investigation, police officers executed two controlled buys using a confidential informant to purchase heroin from Raheim Trice. After the second controlled buy, officers believed that Trice was associated with Apartment B5 in a nearby apartment building. Before the officers executed a scheduled, third controlled buy, an officer installed a motion-sensor camera disguised as a smoke detector on the hallway wall outside Apartment B5. The officer entered through the building's front door, which was ajar and had no lock, intercom, or doorbell. Once

inside, the officer installed the camera, which was set to record for a period of two or three minutes when anyone entered or exited Apartment B5.

After the camera was installed, officers executed the third controlled buy in the parking lot of a nearby business. The officers watched Trice exit the apartment building, walk to the parking lot, complete the purchase, and return to the apartment building. Trice entered and exited the building using the rear door, which provided access to Apartment B5.

After the buy was completed, the officer returned to the apartment building and retrieved the camera. The camera had been in place for approximately four to six hours and had video recorded Trice's entering and exiting Apartment B5 on three or four occasions. One video showed Trice using his cell phone for several minutes, but the display on the cell phone screen was not visible. In addition, although the video recorded a view through the threshold of the apartment doorway when the apartment's door was open, nothing inside the apartment was visible.

The video supported the affidavit that officers submitted in support of an application for a search warrant for Apartment B5. After the warrant issued, officers searched Apartment B5 and seized methamphetamine, crack cocaine, powder cocaine, heroin, digital scales and packing material. The government charged Trice was several drug-related offenses.

Trice filed a motion to suppress the evidence seized from Apartment B5. Trice argued that the warrantless installation and use of the disguised camera outside Apartment B5 violated the Fourth Amendment. After the district court denied Trice's motion, he appealed.

First, the Sixth Circuit Court of Appeals held that Trice did not have a reasonable expectation of privacy in the common areas of the apartment building, to include the hallway outside Apartment B5. The court found that the building's exterior door was not only unlocked, but ajar when the officer entered to install the camera. The court reasoned that Trice could not reasonably expect privacy in common hallway, which was effectively open to all, in which Trice had taken no steps to maintain his privacy.

Next, the court concluded that the camera was not placed within the curtilage of Trice's apartment, which was consistent with its previous cases holding that readily visible common areas do not constitute curtilage of an apartment. Although the officer placed the camera near the door to Trice's apartment, the hallway was a common area open to the public, Trice did not take any measures to protect the area from observation, and Trice had no authority over the area opposite the door to Apartment B5, where the camera was installed.

Finally, the court held that the officers' use of the camera did not violate the Fourth Amendment. The court concluded that the video recordings did not provide the officers any information that they could not have discovered through ordinary visual surveillance. Specifically, the court found that the only information the officers obtained was Trice's entry and exit of his apartment and that "there is no reasonable expectation of privacy in the activity of leaving from a constitutionally protected area (the home) to an area without constitutional protection," such as the common area hallway.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca6/19-1500/19-1500-2020-07-21.pdf?ts=1595358013

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Seventh Circuit

United States v. Kizart, 967 F.3d 693 (7th Cir. 2020)

Kevin Kizart was driving alone on a highway in Gulfport, Illinois when a police officer stopped him for speeding. While the officer was talking to Kizart, he smelled burnt marijuana coming from Kizart's car. When the officer asked Kizart about the smell, Kizart said that his brother had smoked marijuana in the car a few hours earlier.

The officer asked Kizart to step out of the car, patted him down, and found no drugs or weapons. Turning to the vehicle, the officer searched the passenger compartment, which took approximately five to seven minutes. Kizart then approached the officer looking "relieved" and with a "smile on his face" and asked the officer if he was finished. The officer replied by asking Kizart how to open the trunk. Kizart did not immediately respond, instead he "stood still" and "looked sort of shocked." Kizart's change in demeanor made the officer "suspicious about what might be in the trunk." The officer removed the keys from the car's ignition and used them to open the trunk. Near the back of the trunk, the officer found a backpack with a garbage bag inside, which contained three pounds of marijuana and three pounds of methamphetamine.

The government charged Kizart with possession of marijuana and methamphetamine with intent to distribute. Kizart filed a motion to suppress the drugs, arguing that the smell of burnt marijuana near the passenger compartment of his car did not give the officer probable cause to search its trunk. The district court disagreed, finding that the smell of burnt marijuana from the car, in addition to the change of Kizart's demeanor from relief to shock or concern, gave the officer probable cause to search the trunk. Kizart appealed.

The automobile exception to the Fourth Amendment's warrant requirement allows a police officers to search cars without a warrant if they establish probable cause. Probable cause to search exists when, based on the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Accordingly, the scope of a search under the automobile exception is determined by object of the search and the places in the car in which there is probable cause to believe that it may be found.

In this case, it was undisputed that probable cause existed to believe that the car contained contraband or evidence of a crime when the officer smelled the burnt marijuana emanating from the car, and Kizart admitted that marijuana had been smoked there. However, the Seventh Circuit Court of Appeals disagreed with Kizart's contention that the smell of burnt marijuana suggested personal use; therefore, the scope of the officer's search was limited to the passenger compartment. Examining the totality of the circumstances, the court concluded there was a fair probability that contraband or evidence of a crime would be found in the trunk of Kizart's car. Specifically, the court found that in addition to the smell, and Kizart's admission that marijuana had been smoked in the car, Kizart's behavior when the officer asked about the trunk gave the officer probable cause to search the trunk under the automobile exception. The court added that its decision was supported by Eighth Circuit case law in which the smell of burnt marijuana plus other suspicious activity may provide probable cause for the search of an entire vehicle including its trunk.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca7/19-2641/19-2641-2020-07-28.pdf?ts=1595953815

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Eighth Circuit

United States v. Freeman, 964 F.3d 774 (8th Cir. 2020)

After Derrick Ashley and an unidentified accomplice shot a victim while robbing a bank, the ensuing investigation identified a house in St. Joseph, Missouri, as a place where Ashley might be. Consequently, police dispatched a detective to the house to determine whether Ashley was there.

As the detective drove past the home, he saw a tan car parked directly in front of the house and a silver Pontiac with two occupants parked behind the tan car. The detective parked a short distance from the home to watch for Ashley. At some point thereafter, the detective recognized Ashley as he walked out of the house and spoke with the Pontiac's passengers. A short time later, the detective saw the Pontiac drive away with both occupants inside. Next, the detective saw a Cadillac arrive and park behind the tan car, and less than an hour after the Pontiac's departure, it returned and parked behind the Cadillac. As the detective watched, he saw Ashley come out of the home a second time, walk to the Pontiac, and take a bag of dog food out of the car and into the home.

Using the detective's observations, police applied for and received a warrant authorizing them to search the house for Ashley. In anticipation of entering the house, police dispatched a special response team in an armored car to the location. Seeing the Pontiac and its occupants still parked approximately three car lengths away and within sight of the home where Ashley was, officers used the armored car to block the Pontiac so that it could not drive away.

Thereafter, the surveilling detective and multiple officers walked up the street to help secure the Pontiac's occupants. On approach, the officers could smell marijuana through the open sunroof, and one officer who looked into the Pontiac saw Maurice Freeman, who was in the driver's seat, lean forward. Believing Freeman was attempting to conceal something in or retrieve something from the floorboard, the officer ordered the car's occupants to turn the engine off and raise their hands. After officers ordered Freeman and his passenger out of the car, they handcuffed them, and sat the men inside the armored car. Based on the smell of marijuana, officers searched the Pontiac and found a handgun and a pill bottle that appeared to contain marijuana. After admitting the gun was his, the officers arrested Freeman.

Ultimately, a federal grand jury indicted Freeman for possession of a firearm by a convicted felon. In his subsequent motion to suppress, Freeman argued that police detained him in violation of the Fourth Amendment when they blocked his Pontiac in, approached and detained him, and ultimately searched his car. Freeman claimed that because the car was not located on the curtilage and because he was too far away from the premises, the offices were not authorized to detain him under the Summers doctrine.

The Eighth Circuit Court of Appeals disagreed, finding that the Summers doctrine authorized officers to block the Pontiac, approach it, and then briefly detain its occupants. In Michigan v. Summers, the Supreme Court held that a search warrant for contraband implicitly carried with it the limited authority to detain the occupants of the premises while the search is conducted. In Summers, the Court held that such a detention was justified to ensure officer safety, facilitate the completion of the search, and prevent flight.

In this case, the court reasoned that executing a premises search warrant for an armed, bank robbery suspect known to have shot a victim was equally likely to "give rise to sudden violence[,]

frantic efforts to conceal or destroy evidence", or escape as a search warrant for drugs. The court added that the potential for unexpected violence was even greater here because: Ashley's accomplice in the armed robbery and assault remained unidentified; police saw Ashley interact with the Pontiac's passengers twice before obtaining the search warrant; and Freeman and his passenger were sitting within sight of the premises. Finally, given that one of the Pontiac's occupants could have been Ashley's armed accomplice, who might have decided to threaten the officers or otherwise interfere with their search and apprehension of Ashley, the court concluded Freeman and his passenger posed a very "real threat" to officers and their ability to safely and efficiently execute the warrant. Consequently, the court held that Freeman and his passenger were not only "sufficiently connected" to the premises but also sufficiently "within the vicinity" of the house to justify detaining them briefly by blocking and approaching their car.

The court further held that during their approach the officers developed probable cause to search the Pontiac when the smelled marijuana and saw Freeman's furtive movements. As the brief seizure of Freeman and subsequent search of the Pontiac were lawful, the court concluded that the district court properly denied Freeman's motion to suppress.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/19-2055/19-2055-2020-07-10.pdf?ts=1594395018

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United States v. Ringland, 966 F.3d 731 (8th Cir. 2020)

Google is an electronic communication service provider (ESP) that offers a variety of services, including the email service gmail. To create a gmail account, users must agree to Google's terms of service, which includes. Google's right to review content to ensure it complies with the law. Google monitors gmail accounts using automated systems employing a hash-comparison technology to detect unlawful content, such as child pornography. Federal law requires Google to report known child pornography violation to the National Center for Missing and Exploited Children (NCMEC) through the CyberTipline Report system.

Between March 20, 2017 and April 19, 2017, Google sent CyberTipline reports to NCMEC indicating that a gmail account connected to Mark Ringland contained 1,216 files of suspected child pornography. Of these files, Google viewed 502 and gave no indication as to whether it viewed the rest. NCMEC forwarded Google's reports to the Nebraska State Police (NSP). In June 2017, an NSP officer obtained a warrant to search Ringland's gmail account. In her application, the officer stated that Google had reviewed only 502 of the 1,216 files found on Ringland's gmail account and that she had reviewed only the same 502 files.

Near the conclusion of the investigation, the officer obtained a federal arrest warrant for Ringland as well as search warrants for his electronic devices based on the information provided by Google and NCMEC. At trial, the government introduced the child pornography evidence found on Ringland's electronic devices. After Ringland was convicted of receipt of child pornography, he appealed. Ringland argued that the Google's warrantless search of his gmail account should have been suppressed because it violated the Fourth Amendment. Ringland claimed that Google was acting as an agent of the government when it searched his gmail account because it was coerced into reporting child pornography by federal law that imposed penalties for failing to report such content.

The Supreme Court has held that Fourth Amendment protection against unreasonable searches and seizures extends only to actions undertaken by government officials or those acting at the direction of a government official. As a result, the Fourth Amendment does not apply to searches or seizures, reasonable or otherwise, conducted by private parties on their own initiative.

In this case, the Eighth Circuit Court of Appeals recognized that Title 18 U.S.C. § 2258A(a) requires an ESP to report to NCMEC any apparent violation of child pornography law it discovers. However, the court added that despite this reporting requirement, Section 2258A does not require ESP's to seek out and discover violations. Accordingly, the court held that Google did not act as an agent of the government simply because it chose to scan its users' emails voluntarily, out of its own private business interest of eradicating child pornography from its platform. In addition, the court found that the government did not know of Google's initial searches of Ringland's gmail accounts and the government did not request the searches. Consequently, the court held that Google was not acting as an agent of the government; therefore, its search of Ringland's gmail account did not implicate the Fourth Amendment.

After an individual conducts a valid private search, law enforcement officers may, in turn, perform the same search as the private party without violating the Fourth Amendment as long as the search does not exceed the scope of the private search. The court held that because the officer searched only the same files that Google searched, she did not expand the search beyond Google's private party search; therefore, she did not violate the Fourth Amendment.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/19-2331/19-2331-2020-07-16.pdf?ts=1594913418

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United States v. Sherrod, 966 F.3d 748 (8th Cir. 2020)

Gabriel Sherrod's mother-in-law called Kansas City, Missouri police department and requested a welfare check on her grandchildren, who lived with Sherrod. After Officer Trost discovered that Sherrod had an active felony arrest warrant, Sherrod's mother-in-law confirmed that Sherrod matched the warrant's description.

When police officers arrived at Sherrod's house, a child, later identified as Sherrod's son, was taking out the trash. Officer Trost asked him if Sherrod was home. Without answering, the child immediately turned and walked toward the house. Officer Trost and two other officers followed the child to the front door and watched him enter the house, leaving the front door open. Officer Trost stepped into the house, saw a man, and said, "Gabriel?" Sherrod stood up and fled. As Officer Trost chased Sherrod, he saw several guns near the entryway. After officers covering the back of the house arrested Sherrod outside, Officer Trost went back to the front door and seized the guns. During a protective sweep of the home, the officers found an additional firearm above the door frame.

The government charged Sherrod with being a felon in possession of a firearm. Sherrod filed a motion to suppress the firearms seized from his home, claiming that Officer Trost violated the knock-and-announce rule before entering his house through the open door. The district court denied Sherrod's motion, concluding that Officer Trost was not required to knock and announce his presence before entering the open door of the residence. Sherrod appealed.

The Eighth Circuit Court of Appeals noted it had been long recognized at common law that before an officer could lawfully "break open" a door and enter a person's dwelling, the officer was required to announce his presence, authority, and make a request to open the door. In incorporating this common law requirement, the Supreme Court has recognized that the knock-and-announce rule protects individuals from harm that may occur from an unannounced forced entry by police officers, protects property by allowing individuals to comply with officers' commands, and protects an individual's "privacy and dignity that can be destroyed by a sudden entrance." However, the Court has also recognized that when a door is open, an officer and occupant of a home have increased visibility into and out of the home. The Court added that this increased visibility eliminates a potential forced entry and may also provide notice to the occupant of an officer's presence.

In this case, the Eighth Circuit Court of Appeals held that the knock-and-announce rule does not apply when officers enter a home through an open door. The court reasoned that its holding made sense in light of the rule's underlying purpose and that requiring officers to follow the knock-and-announce rule when facing an open door would "force [officers] to comply with formalistic rules when the circumstances direct otherwise." As a result, the court held that Officer Trost was not required to comply with the knock-and-announce rule before entering Sherrod's house.

Next, the court had to determine if Officer Trost's entry into Sherrod's house was reasonable. First, Officer Trot had a felony arrest warrant for Sherrod. Second, when Officer Trot and the other officers encountered the child outside the house, it was reasonable for them to believe that he was Sherrod's son and that he was leading the officers to Sherrod. Based on these facts, the court held that it was reasonable for Officer Trot to follow Sherrod's son through the open door into the house where he encountered Sherrod.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/18-2976/18-2976-2020-07-17.pdf?ts=1594999839

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United States v. Ferguson, 2020 U.S. App. LEXIS 23539 (8th Cir. S.D. July 27, 2020)

Federal agents suspected that Danny Ferguson was involved in the attempted burning of a trailer home. During an interview at his home, Ferguson told the agents that he would be willing to take a polygraph examination. On the morning of the examination, Ferguson and his wife arrived at the Justice Center in Pine Ridge, South Dakota, where the examination was to be administered. At the beginning of the examination, an agent read Ferguson a polygraph authorization form, which advised him: 1) he had the right to refuse the examination; 2) he could leave or terminate the examination at any point; 3) he could refuse to answer any questions; 3) he had the right to remain silent; 4) he had the right to stop questioning at any time; 5) anything he said could be used against him; 6) he had the right to consult with, and have the presence of, an attorney; and, 7) an attorney would be provided to him if he could not afford one. Ferguson signed the form.

When questioned specifically about the fire, Ferguson denied knowledge of it but acknowledged that he was being accused of attempting to start it. After several minutes of questioning about the fire, Ferguson denied the allegations, told the agents he was going to leave, walked out of the room and went to the parking lot. When one of the agents found Ferguson, she asked him why he had left the room and he replied that he had needed to use the restroom. After a few minutes, Ferguson agreed to resume the polygraph examination.

Upon resuming the examination, an agent reminded Ferguson that he could leave and did not have to answer questions. Ferguson chose to resume the polygraph examination. Before the conclusion of the examination, Ferguson took one additional break of approximately five minutes after asking to use the restroom. Approximately ten minutes after the examination ended, the agents brought Ferguson back to the examination room for a post-polygraph interview. At this point, an agent told Ferguson that he failed the polygraph examination, meaning that his answers had been "deceptive." When questioned about his "deceptive" answers, Ferguson made incriminating statements concerning the attempted burning of the trailer. After Ferguson made statements about not wanting to talk anymore or not wanting to talk about specific topics, the agents reminded him that it was his right not to answer questions and that he could end the interview. When Ferguson finally asked whether the interview was being recorded and stated that he "just want[ed] to plead the Fifth," the agents ended the interview.

The government subsequently charged Ferguson with arson. Ferguson filed a motion to suppress the statements made to agents following the polygraph examination. Ferguson argued that he was in custody when the agents questioned him; therefore, the agents should have provided him Miranda warnings.

Miranda warnings are required only where there has been a restriction on a person's freedom as to render him "in custody." To determine whether a person is in custody for Miranda purposes, a court will consider the circumstances surrounding the questioning and whether, given those circumstances, a reasonable person would have felt free to terminate the questioning and leave.

The Eighth Circuit Court of Appeals affirmed the district court's finding that Ferguson was not in custody during the polygraph examination or subsequent interview; therefore, he was not entitled to Miranda warnings. First, Ferguson came voluntarily to the Justice Center. Second, the agents told Ferguson that his participation in the polygraph examination was voluntary and that he could end it at any time. Third, Ferguson was read the polygraph examination form, which he signed, and the form reiterated that he could refuse to take the test, decline to answer questions, end the test at any time, and have an attorney present. Fourth, the agents did not restrain Ferguson's movement, as he was allowed two breaks during the examination. Fifth, Ferguson returned to the examination after both breaks. Finally, the agents ended the interview after Ferguson stated his desire to "plead the Fifth."

In addition, the court agreed with the district court's finding that Ferguson's incriminating statements to the agents were voluntarily made. A suspect's statement is considered involuntary and therefore inadmissible, in situations where police officers obtain it through some type of "coercive activity." The court found that under the circumstances, a reasonable person in Ferguson's position would have understood that his participation in the interview was voluntary, that he did not have to answer any questions if he did not wish to do so, that he was free to leave at any point, and that he could terminate the questioning at any point. The court pointed to the fact that Ferguson exercised each of these options in stressing the voluntary nature of Ferguson's statements to the agents.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca8/19-1723/19-1723-2020-07-27.pdf?ts=1595863820

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Ninth Circuit

United States v. Malik, 963 F.3d 1014 (9th Cir. 2020)

Nevada State Highway Patrol Trooper Chris Garcia pulled over a tractor-trailer for speeding outside of Ely, Nevada. When he approached the tractor-trailer, Trooper Garcia smelled marijuana in the cab. Haseeb Malik, the driver, admitted he smoked a marijuana cigarette six to seven hours earlier and claimed to have discarded its remnants afterward. Nevada state law permits marijuana possession but forbids consuming it in public. Consequently, after conferring with a second trooper, Trooper Garcia decided that he had probable cause to search the cab and containers in it for evidence that Malik and his co-driver consumed marijuana in public in violation of Nevada law.

After radioing for backup, Trooper Garcia decided to search the truck, re-approached it, and ordered Malik and his co-driver out of the cab. During the ensuing Terry frisks of both men, which were not contested on appeal, Malik admitted to smoking the marijuana four – rather than six to seven – hours earlier. During Trooper Garcia's ensuing search of the cab, he discovered 135 pounds of cocaine and 114 pounds of methamphetamine.

A federal grand jury indicted Malik and his co-driver for drug trafficking charges. Malik responded with a motion arguing that Trooper Garcia lacked probable cause to believe that evidence of a violation of Nevada's law against publicly consuming marijuana could be found in the truck.

The district court agreed with Malik, concluding that Trooper Garcia lacked sufficient facts to support a reasonable belief that evidence of public marijuana consumption was in the truck when he re-approached it and ordered Malik and the co-driver out of the cab for the Terry frisks. Criticizing Trooper Garcia's subjective motives for conducting the search, the district court suppressed the drugs.

The government appealed, and the Ninth Circuit Court of Appeals reversed. Citing the district court's "failure to analyze the totality of the circumstances" and its improper "focus on [Trooper] Garcia's subjective motivations" for searching, the Ninth Circuit reiterated that the Fourth Amendment's reasonableness standard is an objective one.

Applying the correct, objective standard, the court noted that Trooper Garcia properly stopped the tractor-trailer because he reasonably suspected Malik was speeding. While investigating the speeding offense, Trooper Garcia's objectively reasonable suspicion that the state crime of public marijuana consumption was afoot, meant that any subjective motive that the trooper had to search was simply "not relevant." Consequently, the court stated that even if the trooper lacked probable cause to search the truck when he ordered Malik and the co-driver out of the cab, Malik's shifting story about when he smoked the marijuana was part of the totality of the circumstances that the district court should have considered, as it supported a reasonable inference that Malik, who had a "guilty mind", was lying and that the marijuana remnants were still in the truck. In short, the court concluded, because the totality of the relevant circumstances supported a reasonable belief that evidence of public marijuana consumption in violation of Nevada law was present in the truck at the time of the search, the district court erred when it granted Malik's motion to suppress the drugs.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca9/19-10166/19-10166-2020-07-06.pdf?ts=1594054859

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Eleventh Circuit

United States v. Deason, 965 F.3d 1252 (11th Cir. 2020)

From January 6 to February 4, 2016, Steven Deason chatted online with Amber, who told Deason that she was a fourteen-year-old girl living with her parents on Robins Air Force Base. During this time, Deason introduced sexual topics into their conversations and emailed Amber pornographic images and links to sexually explicit videos. On February 4, Deason and Amber agreed to meet at Amber's house to engage in sexual acts; however, Deason never went to Amber's house as planned.

The next day, Air Force Special Investigations Special Agent Adam Ring, an adult male, who had been pretending to be the underage female named Amber arrived at Deason's house with a warrant to search Deason's cell phone. Deason agreed to talk with S.A. Ring and another agent inside his house.

The agents did not read Deason his Miranda rights, preferring to keep the interview non-custodial. At the beginning of the interview, which was videotaped, S.A. Ring told Deason that he was not under arrest, that he was not in custody, and that the agents would leave at any time Deason told them to go. During their interview, Deason confessed that he had believed the mythical Amber was an actual fourteen-year-old girl.

Approximately one hour into the interview, Deason's wife came home and asked the agents to step outside so she could talk to her husband alone. When Deason tried to follow the agents outside, his wife would not let him. After Deason and his wife had talked alone in the house for about 15 minutes, Deason asked the agents to come back inside. Once inside, the agents again told Deason that he was not under arrest or in custody and that he could tell the agents to leave at any time. Deason continued the interview with the agents.

One month later, the government charged Deason with attempted online enticement of a minor and six counts of attempted transfer of obscene matter to a minor. Deason filed a motion to suppress his statements to the agents. Deason argued that his statements should have been suppressed because he had been in custody during the interview and the agents had not read him his Miranda rights. The district court denied Deason's motion and he appealed.

A person is in custody for Miranda purposes when there has been a formal arrest or when officers restrain a person's freedom of movement to the degree associated with a formal arrest. In this case, the Eleventh Circuit Court of Appeals found that: 1) at the beginning of the interview, Agent Ring told Deason several times that he was not under arrest, nor in custody, and that he could end the conversation at any time; 2) Deason told the agents that he understood that he was not under arrest and was free to leave; 3) the interview occurred in Deason's home; 4) the agents stepped outside when Deason's wife asked them to leave the house; 5) Deason attempted to follow the agents outside and would have if his wife had not stopped him; and, 6) after Deason spoke with his wife, he asked the agents to come back inside the house, where they reminded him that he was not under arrest, nor in custody.

Based on these facts the court held that the district court correctly concluded that Deason was not in custody during the interview; therefore, the agents were not required to provide him Miranda warnings.

For the court's opinion: https://cases.justia.com/federal/appellate-courts/ca11/17-12218/17-12218-2020-07-17.pdf?ts=1595008851

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