The California Legal Update

Remember 9/11/2001, 12/7/1941; Support Our Troops; Support Our Cops

Vol. 22 March 24, 2017 No. 3

Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*I fear the day that technology will surpass our human interaction. The world will have a generation of idiots*." (Albert Einstein) (Editor's Note: "*Are we there yet*?")

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Smoking and Transporting Marijuana in a Vehicle: It is now legal for anyone 21 years of age or older to possess up to an ounce of marijuana, and to smoke the stuff if he or she is so inclined (**H&S § 11362.1(a)(1)** & **(3)**) The person need no longer have a medical necessity for doing so. (See the "**Compassionate Use Act of 1996**," **per H&S §§ 11362.5 et seq.**) In other words, the "*recreational use*" of marijuana is now lawful in California. But there are limitations. On the limited issue of the use or possession of marijuana in vehicles, the following statutory restrictions are important: **H&S § 11362.3(a)** makes it illegal (an infraction) to smoke or ingest marijuana (*1*) in a public place (**subd. (a)(1)**, which arguably includes in a vehicle while out on the public streets or in any other public place), (*2*) anywhere where smoking tobacco is prohibited (**subd. (a)(2)**), (*3*) within 1,000 feet (including simple possession, whether or not it's being smoked, if on the grounds) of a school, day care center, or youth center while children are present (**subd. (a)(3)** & **(5)**), or (*4*) while driving or operating, or when riding in the passenger seat or compartment, of a motor vehicle, boat, vessel, or aircraft (**subd. (a)(7)** & **(8)**). It is also illegal for anyone to (*5*) possess (whether or not it's being smoked) an open container or open package of marijuana while driving, operating, or riding in the passenger seat of a motor vehicle, boat, vessel, or aircraft. (**Subd. (a)(4)**) So in recognizing all these restrictions, the burning (no pun intended) question is now this: *What may a police officer do upon legally stopping a motor vehicle and developing probable cause to believe that there is at least some marijuana in the car?* In other words, *is a warrantless search of that vehicle lawful*? And if the occupants of the vehicle claim a medical marijuana excuse, or that they aren't otherwise in violation of any of the **section 11362.3** restrictions, *can the officer still conduct a search of the vehicle to verify compliance with the statutes*? The necessary probable cause to search the vehicle is typically developed through an officer's observation of even a minimal amount of marijuana (***People v. Waxler*** (2014) 224 Cal.App.4th 712, 718-725; ***People v. Steele*** (2016) 246 Cal.App.4th 1110, 1115-1120.), or simply by smelling the odor of burnt or bulk marijuana. (***United States v. Johns*** (1985) 469 U.S. 478; ***United States v. Snyder*** (10th Cir. 2015) 793 F.3rd 1241; ***United States v. Smith***) (8th Cir. 2015) 789 F.3rd 923; ***People v. Lovejoy*** (1970) 12 Cal.App.3rd 883, 887; ***People v. Gale*** (1973) 9 Cal.3rd 788, 793, fn. 4.) However, if an officer conducts a vehicle search based upon no more than observing less than an ounce of marijuana in a car, when it is not being smoked, not in an open container, or otherwise not in violation of any of the **section 11362.3** restrictions, we can expect a defense attorney to later argue that such a search is illegal. There is statutory and case authority for such an argument. Specially, **H&S § 11362.1(c)** clearly provides that marijuana possessed under lawful circumstances is "not contraband nor subject to seizure," nor does a subject's lawful conduct pursuant to **section 11362.1(a)** "constitute the basis for detention, search, or arrest." Also, ***People v. Torres et al.*** (2012) 205 Cal.App.4th 989, 993-998, held that a warrantless search upon the speculative belief that more marijuana than lawfully allowed may be found is illegal. However, ***Torres*** is a residential search case. With a vehicle, having a lower expectation of privacy as compared to a residence (see ***People v. Valencia*** (2011) 201 Cal.App.4th 922, 938-939.), we also have a strong argument that evidence of the presence of some marijuana, despite no observable or admitted **section 11362.3(a)** violations, supplies the required "*fair probability*" (which is

all you need to establish probable cause; ***Illinois v. Gates*** (1983) 462 U.S. 213.) to believe that a search of the entire vehicle will uncover more marijuana and a violation. Four cases support this argument: In ***People v. Strasburg*** (2007) 148 Cal.App.4th 1052, it was held that an officer's probable cause to believe that a person is in illegal possession of marijuana was not diminished by the fact that the person produced a medical marijuana identification card or a physician's authorization. The Court held that defendant was lawfully detained and his car lawfully searched despite producing a doctor's authorization to use marijuana for medical purposes. Also, in ***People v. Waxler***, *supra*, it was held that the odor of marijuana in a vehicle, with the plain sight observation of a marijuana pipe with what appeared to be a small amount of marijuana in the bowl, supplied the necessary probable cause and allowed for the warrantless search of the entire vehicle. The fact that possession of less than an ounce of marijuana was (at the time this case was decided) only an infraction, or that the defendant had a medical marijuana card, was held in ***Waxler*** to be irrelevant. Lastly, according to ***People v. Dey*** (2000) 84 Cal.App.4th 1318, and ***People v. Hunter*** (2005) 133 Cal.App.4th 371, discovery of a limited amount of contraband in the passenger area of a vehicle supplies the necessary probable cause to search the entire vehicle for more. Until we get an **11362.1/11362.3** case on point, however, we don't know at this time which of the above two theories the appellate courts will adopt. I personally feel strongly that such searches will be upheld under the theory that because you only need probable cause of an **11362.3** violation to justify a further search, and with case authority saying that observation of a legal amount of marijuana in a car supplies that necessary probable cause to believe there may be more, a search of the vehicle for more marijuana is lawful. But which way you might want to go depends upon how far you like to push the envelope. I'll have to leave that decision up to you.

Patdowns and Reasonable Suspicion: To justify a patdown for weapons, you must be able to articulate why you believed the detainee was both armed *and* dangerous. This raises the question: When you have a reasonable suspicion to believe that a detained individual is armed, do you also necessarily have a reasonable suspicion to believe that he may be a danger? This was the issue in an interesting case out of the federal Fourth Circuit Court of Appeal: ***United States v. Robinson*** (4th Cir. Jan. 23, 2017) 846 F.3rd 694.). While I'd never given the issue much thought, thinking that the answer was obvious, we now have a citable case decision (even though from another federal circuit) that spells out the answer: If you reasonably believe a person is armed, then, *as a matter of law*, you can assume that he is also potentially dangerous. A patdown for weapons is lawful. Also note that while ***Robinson*** is a firearm case, there's no reason to believe that a court would find any differently where other weapons are involved.

Discoverability of Personal E-Mail and Text Messages: In a civil suit where the petitioner (Ted Smith) requested discovery of a long list of city records, including the emails and text messages "sent or received on private electronic devices used by" certain listed city officials "and their staffs," the California Supreme Court reversed the District Court of Appeal and granted the petitioner's request. (***City of San Jose v. Superior Court of Santa Clara County* [*Smith, Real Party in Interest*])** (Mar. 2, 2017) __ Cal.5th __ [2017 Cal. LEXIS 1607].) In making its ruling, the Court noted that; "when a city

employee uses a personal (e-mail or text) account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act." This means that if you use your personal cellphone, iPad, or other electronic device in your day to day activities for work, those e-mail and text (or other written) messages are potentially discoverable. In addressing privacy considerations, the Court noted that "an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search *their own* personal files, accounts, and devices for responsive material" and make that information available to the defense upon request. Your agency is to "adopt policies that will reduce the likelihood of public records being held in employees' private accounts." But in the meantime, it is suggested that you either *not* use your personal devices to send or receive written work-related messages, or you do so with the knowledge that such messages are something that you may have to someday provide to the defense.

Videotaping the Police (or, how to get sued without really trying): What do you do when you observe someone videotaping police activity, or maybe the entrances or exits to your police station? A federal court has held that at best it is (or was prior to this decision) an undecided issue, at least in Texas, providing officers with qualified immunity from civil liability when they detained a person videotaping a police station's entrances and confiscated his video camera. The detention was justified under the theory that, at least under the facts of the case at issue, he might have been planning an attack or stalking a particular police officer. Despite this, however, the Court emphasized that the general rule is that the **First Amendment** protects a person's right to photograph the police, subject to "reasonable time, place or manner restrictions" (a notion that was not expanded upon). But the Court also held that arresting him was clearly a **Fourth Amendment** violation for which the officers were *not* entitled to qualified immunity. (***Turner v. Driver*** (5th Cir. Feb. 16, 2017) 848 F.3rd 678.) In the Ninth Circuit (which, of course, includes California), the issue has never been directly decided, nor is there any California state case on point. But the Ninth Circuit is clearly leaning towards finding **First** and/or **Fourth Amendment** violations for interfering with a person taking photographs or videotaping the police or police activity in a public place, and/or confiscating the person's camera. (See ***Fordyce v. City of Seattle*** (9th Cir. 1995) 55 F.3rd 436, 439-440, recognizing, although not discussing, the **First Amendment's** protections for one who records bystanders who happened to be viewing public demonstrations even without their consent, and the unpublished opinion of ***Adkins v. Limtiaco*** (9th Cir. 2013) 537 Fed. Appx. 721 [2013 U.S. App. LEXIS 16643], where the Ninth Circuit, citing ***Fordyce***, further recognized the **First Amendment** right to photograph the scene of a traffic accident.) While maybe still an undecided issue in some jurisdictions, including California, the clear weight of authority nationally is to the effect that absent some articulable justification for doing so (e.g., stopping suspects from videotaping an airport security check point, finding such an area to be a "uniquely sensitive setting" where "order and security are of obvious importance;" see ***Mocek v. City of Albuquerque*** (10th Cir. 2015) 813 F.3rd 912; discussing, but not deciding the issue), stopping someone from videotaping or photographing the police or police activity, at least when in public, is a **First** (and, if you detain or arrest the subject, a **Fourth**) **Amendment** violation. And

note also that the California Legislature apparently agrees, amending **Penal Code sections 69** and **148** (effective 1/1/2016) to specifically provide that photographing, videotaping, or audio recording, is *not* an interference with the officer's performance of his or her duties. (**Subdivisions (b)** and **(g)**, respectively.) *So be forewarned*. If this topic is of interest to you, I have a four-page memo on this and other related issues (i.e.; "*Confiscating Video Evidence*") that I'll send to you upon request.

CASES:

***DUI Blood Extractions and Consent*:**

People v. Mason **(Dec. 29, 2016) 8 Cal.App.5th Supp. 11**

Rule: A DUI arrestee's consent to submit to a blood draw must be free and voluntary, based upon an evaluation of the totality of the circumstances. California's implied consent statute equals actual consent only when the circumstances show a voluntary consent to submit to a blood draw. Failing to advise a DUI arrestee of the consequences of refusing to submit to such a test is a factor to consider in determining whether the arrestee understood that she had a choice.

Facts: A Campbell police officer observed defendant driving the wrong way on a one-way street. Upon making a traffic stop, the officer smelled an odor of alcohol on defendant's breath and noted other indications that she'd been drinking. Upon being asked, defendant admitted to having drunk "one or two margaritas" at a nearby restaurant. A field sobriety test was administered, on which defendant did poorly. After defendant declined to submit to a preliminary alcohol screening (PAS) test, which she was told was "optional," the officer arrested her for driving while under the influence of alcohol and transported her to the "Alcohol Investigation Bureau" (AIB). While at the AIB, the officer told defendant that she was "required" (or words to that effect) to provide a blood or breath sample, although upon testifying at the later motion to suppress, he could not remember the exact words he used. He did testify, however, that his "standard practice" was to tell a DUI arrestee that he or she had a choice of providing either a blood or a breath sample; that it was up to the person to decide. The officer further testified that he did *not* advise defendant of any consequences of refusing to submit to a blood or breath test. He explained to the court that it was his general practice to not inform an individual about the consequences of refusing a chemical test unless and until the person actually refused, believing that he was under no obligation to "let (defendant) know the admonishment on the back of the "DS-367 DMV form" unless she declines to "provide a sample." In other words, the officer failed to comply with V.C. § 23612(a)(1)(D), which says that the person "*shall* be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of (driving while under the influence)," and the suspension of the person's privilege to operate a motor vehicle for one year, or the revocation of his or her license for two or three years depending on certain prior Vehicle Code violations. Nor did the officer comply with subdivision (a)(4) of V.C. § 23612, which likewise provides that the officer "*shall* also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during the administration of the test or tests chosen, and that, in the event of a refusal to submit to a test or tests, the refusal may be used

against him or her in a court of law." (Italics added.) Defendant opted to take a blood test. She did not inquire into other alternatives and did not otherwise verbally or physically resist the blood draw. No search warrant was obtained, the officer testifying that it was his belief that a warrant was necessary only if a DUI suspect physically resisted the procedure and actual force had to be used. No evidence was presented at the motion to suppress as to whether defendant was a licensed driver. Defendant was charged by misdemeanor complaint with driving under the influence of alcohol and driving with a blood alcohol level of 0.08%, per V.C. § 23152(a) and (b), respectively. The trial court denied defendant's subsequently filed motion to suppress the results of the blood draw, ruling that although a "very close" case, defendant, in the court's opinion, had voluntarily submitted to having her blood taken. Defendant appealed this ruling.

Held: The Appellate Division of the Santa Clara County Superior Court reversed. The issue is whether defendant had voluntarily consented to having her blood drawn. The Court ruled that in considering the "totality of the circumstances," the prosecution had failed to meet its evidentiary burden of proving that defendant's consent to the blood draw was voluntary. The extraction of blood or other materials from a person's body for purposes of chemical testing is a search and seizure under the Fourth Amendment. For such a search to be constitutional, the prosecution has the burden of proving that either a search warrant had been obtained, or an exception to the search warrant requirement existed. Two possible exceptions to the warrant requirement are "exigent circumstances" and "consent." Per the U.S. Supreme Court decision of *Missouri v. McNeely* (2013) 133 S.Ct. 1552, we now know that the natural dissipation of the blood alcohol content in a DUI arrestee's system under normal circumstances is not enough, by itself, to constitute an exigent circumstance justifying a warrantless blood draw. In this case, there was nothing in addition to the natural dissipation of defendant's blood alcohol level sufficient to constitute an exigent circumstance. The People, however, argued that defendant had consented. Such a consent, however, has to be freely and voluntarily obtained. "Where the prosecution relies on consent to justify a warrantless search or seizure, it bears the burden of proving that the defendant's manifestation of consent was the product of his (or her) free will and not a mere submission to an express or implied assertion of authority." The Court found here that under the totality of the circumstances, defendant's consent to submit to a blood test was coerced, having submitted to an "express or implied assertion of authority." In support of this conclusion, the Court pointed out that defendant had been told that providing a PAS sample was voluntary. Based upon this advisement, she declined to provide the requested PAS sample. But then this was followed up with her being told that she was "required" (or words to that effect) to provide a breath or blood sample. At no point was she advised that she had a choice. Under the Fourth Amendment, no person is required to consent to a search. The officer's advisal that she was required to provide a breath or blood sample was therefore, at best, misleading. The error of this advisal was compounded by the officer's failure to explain to her the administrative consequences (e.g., suspension of her license, etc.) of failing to provide a breath or blood sample, as described in V.C. § 23612(a)(1)(D) and (a)(4). Had she received such an advisal, as is mandated by the Vehicle Code, she would (or should) have understood that she had a choice even though choosing to refuse (as was her constitutional right) had consequences. Consequences or not, it was her constitutional right to choose whether she wished to refuse to submit to a breath or blood test. California's "*implied consent law*," V.C. § 23612(a)(1)(A) & (B), where the mere act of driving constitutes the driver's "deemed" consent to having his blood or breath tested, was also discussed by the Court. This provision, however, is only one factor,

among the "totality of the circumstances," to consider in determining whether or not a DUI arrestee has given "actual consent" to a warrantless blood draw. Implied consent, by itself, is not actual consent. "(I)t is not real or actual consent in fact for purposes of the Fourth Amendment, though it may be perfectly fine for purposes of administrative proceedings involving forfeiture of driving privileges under the implied consent law upon a refusal to submit to a duly requested chemical test." Actual consent for Fourth Amendment purposes will only be found when such implied consent is followed up by circumstances consistent with an arrestee's free and voluntary decision to give consent to a search. In this case, the circumstances following her arrest suggested that defendant did not believe she had a choice. There was therefore no actual consent. The results of her blood test should have been suppressed.

Note: Police officers typically like, and appreciate, in our legal world of inferences and vague guidelines, whenever we can be provided with hard and fast rules; referred to as a "bright line" test. Well, here is one for you. When you arrest a person for DUI, and are asking him or her to submit to a breath or blood test, you must read to him in their entirety the admonitions provided for in V.C. § 23612(a)(1)(D) and (a)(4), as these statutes are described in the *Facts*, above. While you can perhaps "wing it," and summarize or even skip parts of such an admonition (e.g., see *People v. Agnew* (2015) 242 Cal.App.4th Supp. 1.), why generate unnecessary issues? Just read it and not chance an appellate court later describing how you (naming you by name, as it did in this case) screwed up. It was also noted, by the way, that under V.C. § 13384 (effective since 1999), anyone obtaining a new or renewed driver's license must now provide an actual written consent to submit to a chemical test or tests of that person's blood, breath, or urine when requested to do so by a peace officer. An applicant is required to sign a written declaration to this effect. However, in this case, because the prosecution failed to offer any evidence that defendant was even licensed, the record was devoid of any evidence that she had ever signed such a declaration. The Court here, however, surmised that even such an overt prior "consent" might not be enough to overcome other circumstances indicating a lack of actual consent.

***Disorderly Conduct per P.C. § 647(j)(1)*:**
***Reasonable Expectation of Privacy*:**

In re M.H. **(June 21, 2016) 1 Cal.App.5th 699**

Rule: A student in a high school bathroom stall has had his reasonable expectation of privacy violated when he is videotaped, the video tape being disseminated on social media.

Facts: Matthew B. was a ninth grader at University City High School in San Diego. On a Friday afternoon in 2013, Matthew and his friend, Erik J., entered a boys' bathroom to use the facilities. Matthew entered one of the two stalls in the bathroom, the interior of which, although not having a door, was not visible from the sinks or the urinals. While standing and facing the toilet, Matthew began making moaning sounds as if he were masturbating. Erik, who was using the other toilet stall, believed that Matthew was merely joking around because he "was like that. Like, he would just mess around." As this was occurring, 11th grader M.H. entered the bathroom and heard Matthew. Using his smartphone, M.H. recorded a 10-second clip of Matthew's antics, complete with "easily audible" groaning sounds. Visible in the recording between the bottom of the stall's side partition and the floor were Matthew's feet, wearing shoes and socks that were

distinctive to him. M.H. subsequently uploaded the video to his Snapchat "stories" application with the caption; "I think this dude is jacking off," or something similar. M.H. later testified that he thought the video was funny and he uploaded it to "get a laugh." At the school's football game that evening, M.H. talked to Erik and another student, showing them the Snapchat video. Both students identified Matthew as the person in the stall. By Monday, everyone at school was talking about Matthew and the Snapchat video. Two weeks later, Matthew committed suicide. In a suicide note, Matthew wrote that he'd been planning on taking his own life for some time. However, he also said: "I can't handle school anymore and I have no friends." The San Diego County District Attorney's Office filed a juvenile delinquency petition under W&I Code § 602, alleging that M.H. engaged in an unauthorized invasion of privacy by means of a cellphone camera in violation P.C. § 647(j)(1); a misdemeanor. The Juvenile Court magistrate found true the allegation. M.H. appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. On appeal, M.H.'s primary contention was that the evidence was insufficient to support the juvenile court's finding that he violated P.C. § 647(j)(1). A violation of section 647(j)(1) includes (among other actions) the recording by mobile phone of the interior of various listed private areas including bathrooms, where "the occupant has *a reasonable expectation of privacy*, with the intent to invade the privacy of a person or persons inside." (Italics added) The issue here was whether, under the circumstances of this case, Matthew had a reasonable expectation of privacy in the public restroom stall where he was when M.H. videotaped him. M.H. argued that Matthew did not in that M.H. only recorded what Matthew had exposed to public view, with his feet showing through the gap between the bottom of the toilet stall partition and the floor, and with loud sounds Matthew was making for anyone and everyone to hear. The Court found, however, that "privacy" is not an all-or-nothing proposition. "Privacy expectations can be reasonable, even if they are not absolute." The reasonableness of one's expectation of privacy depends upon the circumstances. Bathrooms, including a public bathroom stall, is, per the Court, "perhaps the epitome of a private place." California case law clearly ensures that persons using a public toilet may reasonably expect they are not being secretly watched, let alone recorded. The Court found there to be a vast distinction between simply being overheard and being surreptitiously recorded. "The possibility of being seen or overheard by others in the bathroom does not render unreasonable a student's expectation that his conduct in a bathroom stall will not be secretly recorded and uploaded to social media." Even when a person knows that a select few are watching or listening to him, he may still reasonably expect that his or her actions will not be electronically recorded and distributed for purposes of general public entertainment. In such a situation, the victim is denied a key feature of privacy; i.e., the right to control the dissemination of his image and actions. As these principles affected Matthew himself, it was noted that "(t)he last thing a high school student in a bathroom stall should have to worry about is that someone may be secretly recording everything done and uttered there for the possible entertainment of fellow students." The Juvenile Court Magistrate, therefore, properly found the P.C. § 647(j)(1) allegation to be true.

Note: Although the Court never uses the term, M.H.'s actions here were nothing short of another form of mean-spirited "*bullying*." (See Ed. Code § 48900, as amended this year: *Bullying by an Electronic Act and Cyber Sexual Bullying*.) While certainly a source of some entertainment to M.H., and I'm sure a lot of other University City High School students, the

devastating effects of such an act on Matthew, as evidenced by his later decision to take his own life, cannot be over emphasized. Matthew's suicide no doubt in turn caused unbearable and seemingly unending heartache and mourning for his entire family and those friends that he did have. Such a tragedy, affecting so many people, all because M.H. thought it was funny, should never have occurred. We've all seen it, from one perspective or another, although we didn't always use the catchall term "*bullying*." Now that we have this convenient label and can recognize it for what it is, it's about time we did something about it.

***V.C. § 2800.2*; *A Distinctive Uniform*:**

***People v. Byrd* (Aug. 19, 2016) 1 Cal.App.5th 1219**

Rule: The wearing of a "distinctive uniform" by the pursuing police is a necessary element of V.C. § 2800.2 (Vehicular Evading of a Police Officer) that must be proven at trial.

Facts: Responding to a midnight radio call concerning a report of a shooting, Sacramento police officers found the dead victim, shot in the neck, sitting in a vehicle with its engine running. Ten minutes later, Sacramento Police Officers Carl Chan and David DeLeon, on routine patrol near the shooting scene, driving a fully marked traditional black-and-white police car, observed an SUV driving without its headlights on. The SUV did a "burn out," accelerating at a high rate of speed away from the officers. The officers activated the patrol car's emergency overhead red and blue lights, attempting to initiate a traffic stop. The SUV initially slowed and started to yield, but then suddenly accelerated and drove off. The officers activated the patrol car's siren and a high-speed pursuit ensued, ending with the driver, later determined as defendant, stopping, abandoning his vehicle, and fleeing on foot. A perimeter was established, resulting in defendant being arrested several house later. Defendant was subsequently charged with first degree murder with an allegation that he used a firearm in the commission of the murder. He was also charged with a violation of V.C § 2800.2(a); driving in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing police officer. Convicted in a jury trial of all counts, and sentenced to 50-years-to-life plus a determinate sentence of an additional two years for the section 2800.2(a) violation, defendant appealed.

Held: The Third District Court of Appeal, in a split 2-to-1 decision, reversed his conviction for V.C. § 2800.2. On appeal, defendant argued that his conviction for violating section 2800.2 was not supported by substantial evidence in that there was no proof that either of the pursuing officers wore a "distinctive uniform." The majority of the Court agreed. V.C. § 2800.2(a) provides that a person is guilty of a felony if he "flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property." To constitute a violation of 2800.1—such a violation being a necessary element of a section 2800.2(a) charge—four elements must be met: (1) The peace officer's motor vehicle exhibited at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp; (2) the peace officer's motor vehicle sounded a siren as may be reasonably necessary; (3) the peace officer's motor vehicle was distinctively marked; and (4) the peace officer's motor vehicle was operated by a peace officer, and that peace officer was wearing a distinctive uniform. It is the prosecution's burden to prove each of these elements beyond a reasonable doubt. The element in issue here

was, as required under #4, whether one of more of the pursuing officers wore a "distinctive uniform" during the chase. Prior case law has established that for purposes of section 2800.2, an officer's "distinctive uniform" is the clothing prescribed for or adopted by a law enforcement agency which serves to identify or distinguish members of its force. It is not required that the uniform be of any particular level of formality or that it be complete" (although it has been held that a badge alone is not enough). Nor is it required that the defendant actually see that the police officer is wearing a uniform. But there has to be some proof ("substantial evidence;" i.e., "evidence that is reasonable, credible, and of solid value") in the record that a distinctive uniform was in fact worn by one or more of the pursuing officers. Here, there was no such proof. The People argued that a reasonable jury could have inferred from the circumstances (i.e., that the officers were driving a marked patrol car while performing a patrol function) that they were in uniform. The Court held, however, that there is no authority for such an inference being sufficient to constitute the necessary "substantial evidence" of a necessary element of the charged offense. The 2800.2(a) charge, therefore, should have been dismissed.

Note: The dissenting opinion agreed with the People; i.e., that there was enough circumstantial evidence in the record (e.g., defendant's testimony that he knew he was fleeing from the police, along with the fact that the officers were on patrol in a marked patrol vehicle) to support the jury's conclusion that the officers were in uniform. But either way, the whole issue would have gone away if the prosecutor had simply used a written list of the necessary elements, checking them off as the required questions were asked, a practice I commonly followed as a trial attorney, at least until that point in my career where I felt I knew it all. (Note the tongue in check.) So now we've lost those important two years defendant would have been required to serve after he'd completed his 50-years-to-life. (Again, "tongue in cheek.") So why did I brief this case? V.C. § 2800.2 is an important offense, given the dangers involved in any high-speed chase. This case is a good review of the necessary elements in any section 2800.2 case, made somewhat confusing by 2800.2's incorporation of section 2800.1.

***Vehicle Inventory Searches*:**
***Vehicle Searches Incident to Arrest*:**

People v. Quick **(Nov. 22, 2016) 5 Cal.App.5th 1006**

Rule: (1) The impoundment of a vehicle is lawful so long as there is statutory authority for the impoundment *and* the "community caretaking doctrine" is satisfied. An inventory search of an impounded vehicle is lawful when done according to department's standardized procedures. (2) A warrantless search of a vehicle incident to arrest is lawful when it is reasonable to believe that evidence relevant to the cause of the arrest may be found in the vehicle.

Facts: Defendant was suspected by Atascadero police of being involved in narcotics activity and illegally possessing numerous firearms as a convicted felon. When Officer Matthew Chesson was notified by a narcotics detective that defendant was leaving his home, the officer followed him, watching for any reason to stop him. Defendant complied by committing three traffic infractions. Upon making a traffic stop, Officer Chesson noted that defendant appeared to be under the influence of a controlled substance. Defendant in fact admitted to ingesting Percocet and marijuana earlier that day. Defendant initially refused to get out of his car when asked, but eventually complied. However, when he finally did so, he took off his jacket, tossed it on the

driver's seat, rolled up the car window, tossed his keys inside the car, and locked and shut the car door. Officer Chesson found this to be "odd" behavior. (*Ya think*?) After failing to do well on a field sobriety test, Officer Chesson arrested defendant for driving while under the influence of a controlled substance. Defendant's vehicle was thereafter towed because it was parked some two feet into the traffic lane on a narrow street, creating a traffic hazard, and partially blocking a driveway. An pre-impound inventory search resulted in the recovery of 25.9 grams of methamphetamine, found in defendant's jacket pocket, two methamphetamine pipes, and a Taser. Charged in state court with possession of a controlled substance for purposes of sale and driving while under the influence of a controlled substance, defendant's motion to suppress the items recovered from his car was denied. He pled guilty and appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Defendant's argument on appeal was that his detention and arrest were merely a ruse to conduct a narcotics investigation. The Court of Appeal, on the other hand, found the search of his vehicle to be lawful under two legal theories. (1) *Inventory search*: Under the so-called "community caretaking doctrine," police may, without a warrant, impound and search a vehicle so long as they do so in conformance with the standardized procedures of the local police department *and* in furtherance of a community caretaking purpose. "The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 369.) Here, it was uncontested that defendant's vehicle after his arrest, aside from blocking a private driveway, was protruding some two feet into a narrow street. Leaving it there would have created a traffic hazard to any passing vehicles. Atascadero Police Sergeant Jason Carr, who was at the scene of the arrest, testified that once it was decided to impound defendant's car, the inventory search was required by department policy to document what was in the vehicle and to protect the tow company and the police department. Although Sergeant Carr was aware of the narcotics investigation, he testified that the sole purpose of the impound search was to inventory what was in the vehicle and to verify that nothing was missing when the vehicle was returned to defendant. Impounding the vehicle, thus triggering the inventory search requirement, was authorized pursuant to V.C. § 22651(b) and (h). Subdivision (b) provides that a peace officer may remove a vehicle: "When a vehicle is parked or left standing upon a highway in a position so as to obstruct the normal movement of traffic or in a condition so as to create a hazard to other traffic upon the highway." Subdivision (h)(1) also allows for the impounding of a vehicle: "When an officer arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody." Because defendant's vehicle, after his arrest, was parked illegally and creating a traffic hazard, both the Vehicle Code requirements and the community caretaking doctrine were satisfied. When a vehicle is lawfully impounded, an inventory search pursuant to an established, standardized procedure does not violate the Fourth Amendment. Impounding the vehicle and conducting the subsequent inventory search of its contents was therefore lawful. (2) *Search Incident to Arrest*: Defendant argued that searching his vehicle incident to his arrest violated the principles of *Arizona v. Gant* (2009) 556 U.S. 332. In *Gant*, the U.S. Supreme Court held that a warrantless search of a vehicle after the arrest and securing of the driver violates the Fourth Amendment. *Gant*, however, also describes an alternate theory for conducting a lawful warrantless search of a vehicle incident to arrest; i.e., when there is "a reasonable basis for believing that evidence 'relevant' to that type of offense might be in his vehicle." Here, defendant was initially arrested for driving while under the influence of a controlled substance. It is undisputed that with probable cause to believe that

defendant is guilty of this offense, it is "reasonable to believe" that evidence of the controlled substance he had consumed might be found in the vehicle. (*People v. Nottoli* (2011) 199 Cal.App.4th 531.) A search of defendant's vehicle incident to arrest was therefore also lawful.

Note: Defendant throwing his jacket and keys into his car and locking the door, although noted as "'odd' behavior," was not really part of the necessary probable cause leading to his arrest or the justification for searching his vehicle. The Court did comment, however, that these actions were "tantamount to a 'do it yourself' suppression motion, . . . a sophomoric attempt to thwart the lawful seizure of evidence and a crime itself, i.e., a willful obstructing of a peace officer. (Pen. Code, § 148, subd. (a)(1).)" The Court also pointed out, in a bit of an understatement, that: "The interaction between a peace officer and a person suspected of committing a crime is not a game," and that "A person detained for investigation has no constitutional right to dispose of evidence. (Citations)" These are all great quotes for prosecutors to use in responding to frivolous defense motions to suppress in future cases. It is also interesting to note that despite defendant's argument that his stop, arrest, and search, were all part of a ruse to conduct a narcotics investigation without any probable cause for doing so, this contention was not directly addressed by the Court. Had the Court done so, however, it could (and would) have merely cited *Whren v. United States* (1996) 517 U.S. 806, which upheld the legality of "pretext stops." So long as there is some legal basis for a stop and arrest, it is irrelevant that defendant was targeted because of an officers' prior suspicions that he was dealing in dope. It is also irrelevant whether doing the inventory search was motivated solely by the department's policies and procedures in such case, as testified to by Sgt. Carr, or whether in the back of the officers' collective minds, they were also looking for narcotics evidence and/or firearms. The Court missed an opportunity for not reaffirming this basic, yet important, search and seizure principle.