The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops; Stand Up For Our Country

Vol. 26 June 16, 2021 No. 7

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THIS EDITION'S WORDS OF WISDOM:

"*Part of me says; 'I should stop drinking this.' But the other part of me says' 'Don't listen to him, he's drunk.*'"

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

California's Assault Weapons Ban Overturned: Federal District Court Judge Roger Benitez, located in San Diego, ruled on June 4th in a 94-page decision that California's three-decades-old assault weapons ban (**P.C. §§ 30500 et seq.**) violated the **Second Amendment**. (See ***Miller v. Bonta*** (June 4, 2021) __ F. Supp.3rd __ [2021 U.S. Dist. LEXIS 105640].) This includes the popular semi-automatic rifle known as the AR-15. Noting that "(i)n California, murder by knife occurs seven times more often than murder by rifle," Judge Benitez referred to the assault weapons ban as "a continuing failed experiment which does not achieve its objectives of preventing mass shootings or attacks on law enforcement officers." But this obviously isn't the end of this issue. California Attorney General Rob Bonta is appealing this decision. So stay tuned.

Eyewitness Identification and CALCRIM No. 315: The California Supreme Court just published a new case decision telling trial courts to eliminate one of the listed 15 "*factors to consider*" when instructing a jury on what to consider when determining the validity of an eyewitness' testimony identifying a defendant as the culprit in the crime at issue. (***People v. Lemcke*** (May 27, 2021) __ Cal.5th __ [2021 Cal. LEXIS 3523].) The factor dealing with an eyewitness' "*degree of certainty*" (i.e., "*How certain was the witness when he or she made an identification*?") should be dropped in that "empirical research" apparently has determined that "*certainty*" does not equate with "*accuracy*." Because the certainty factor might tend to mislead jurors, the Court exercised its supervisory powers, directing trial courts to omit the certainty factor from **CALCRIM No. 315** pending review by the Judicial Council (although a trial court retains its discretion to include the certainty factor when a defendant requests its inclusion). I've always cautioned prosecutors (and cops) that eyewitness testimony is probably one of the more dangerous (from a standpoint of erroneously convicting an innocent person) forms of evidence a prosecutor has available to him or her. I once bound over a person on a robbery charge where, at the preliminary examination, the victim positively identified the defendant as the robber, only to discover after the fact that I had the wrong person, based upon a belated fingerprint comparison. When the actual robber was later tracked down from those fingerprints, the two individuals did in fact look like twins. So the robbery victim could hardly be faulted. But that experience has made me forever wary of I.D. cases. This new case decision is consistent with that reality.

CASE LAW:

***Probation Fourth Waiver Searches and the Common Authority Theory*:**
***Vehicle Searches and a Passenger's Fourth Waiver*:**
***Good Faith and Fourth Waiver Searches When the Waiver is Later Invalidated*:**

People v. Maxwell **(Dec. 11, 2020) 58 Cal.App.5th 546**

Rule: (1) Upon finding that a passenger in a motor vehicle is on searchable probation, an officer may search those areas of the car's passenger compartment where the officer reasonably expects that the probationer could have stowed or discarded items after noticing police activity. The fact

that the probationer had just left the car when contacted is irrelevant, at least so long as she is still so close to the car that she continues to have access to it. (2) An officer's good faith belief that a suspect is subject to a Fourth waiver justifies a search even though an appellate court later determines that the Fourth waiver is invalid.

Facts: In late 2012, defendant Anthony Paul Maxwell was shacking up with a fellow-doper by the name of Christy Scarbrough. Scarbrough, it seems, had four outstanding arrest warrants and was on searchable probation at the time. On December 17th, officers received an anonymous tip that Scarbrough would be located at a particular location. Going to that location, the officers found her just as she was exiting defendant's car, and arrested her. Defendant, sitting in the driver's seat, was contacted by one of the officers who noted that he had several old injection marks on his forearms and a small patch of soot on his pants that the officer believed came from the underside of a drug user's "cooking spoon." In talking to defendant, it was learned that he had a criminal history for robbery, had a knife in the trunk, and that Scarbrough had left a cigarette pack in his vehicle. Using Scarbrough's Fourth waiver status as their legal authority, the officers searched defendant's car and found multiple used hypodermic needles under the driver's seat, a spoon with soot on its underside and brown residue on its inside, a digital scale, multiple cell phones, and 25.9 grams of black tar heroin. Defendant was arrested and his person searched incident to arrest, resulting in the recovery of $690 in cash, a counterfeit $100 bill, a motel room key, and 0.959 grams of a substance the officer believed was a narcotic. Still using Scarbrough's Fourth waiver status as their legal authority, the officers conducted a warrantless search of their nearby motel room, finding, among other things, multiple used and unused hypodermic needles and some large balls of black tar heroin. Defendant was booked on charges of heroin possession with the intent to sell, and the possession of drug paraphernalia. He was released on bail several months later while the above charges were still pending. But then in August, 2013—months after his initial release—the judge had second thoughts about defendant's bail conditions and decided to add a Fourth-waiver requirement, telling defendant that "[y]ou don't get to have pending controlled substances cases and not have search conditions." Defendant accepted the search conditions "over objection and (under) duress." However, in 2014, the Appellate Court struck those search conditions, finding that the trial court had failed to sufficiently show that they were warranted under the circumstances. (See *In re Maxwell* (Sept. 29, 2014, C075314) [nonpub. opn.].) But *before* this ruling (i.e., while he was still subject to the later-struck search conditions), defendant found himself in hot water again. On September 18, 2013, an officer, relying on defendant's bail release search conditions, searched his person, car, and home. Forty-four methadone pills, packed in four separate plastic bags, were recovered, resulting in his arrest for possessing the methadone with the intent to sell. The District Attorney consolidated defendant's two cases, charging him with a multitude of drug-related offenses. Defendant filed two separate motions to suppress, one for each arrest, both of which were denied by the trial court. After his conviction by a jury and upon being sentenced to prison for 13 years, defendant appealed.

Held: With a modification to defendant's sentence, the Third District Court of Appeal affirmed. On appeal, defendant raised issues related to both the December 17, 2012, and the September 18, 2013, searches.

(1) *The December 17, 2012, Search of Defendant's Car, Person, and Motel Room*: Defendant first argued that the search of his car was illegal, and as a result (under the "fruit of the poisonous

tree doctrine"), the subsequent searches of his person and his motel room were also illegal. The Court disagreed. Pursuant to the Fourth Amendment, the general rule is that for law enforcement officers to conduct a search, a search warrant is required. An exception to this rule is when the subject of the search is on "searchable probation;" i.e., as a condition of probation, he or she has waived his or her Fourth Amendment rights and agreed that law enforcement may search him or his property without a warrant; commonly referred to as a "*Fourth waiver*." (*People v. Woods* (1999) 21 Cal.4th 668.) Of particular significance in this case was the fact that as of December, 2012, it was not defendant who was subject to search and seizure conditions, but rather his passenger; Christy Scarbrough. But this fact does not protect defendant when the search occurs while she is in his car. In *Woods*—a residential search case—the California Supreme Court talked about what is known as the "*common authority*" theory of consent. Pursuant to this theory, anyone with common authority over a residence can consent to the search of that residence. When that "consent" is based upon a resident's Fourth waiver, anyone who lives with him (or her) runs the risk of having any of the common areas of the residence searched (thus excluding areas that are exclusively under the control of the subject who is *not* subject to a Fourth waiver). In searching those common areas, should evidence be found that is attributable to the person who is not subject to the Fourth waiver, then that evidence, having been lawfully recovered, is admissible against him in later court proceedings. The California Supreme Court subsequently extended this theory to automobile searches (*People v. Schmitz* (2012) 55 Cal.4th 909), holding that there is a lesser expectation of privacy in one's car than in his home. *Schmitz* also extended the *Woods* rule (which involved a probation search) to parolees. In *Schmitz*, the California Supreme Court held that an officer may search "those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when (he or she becomes) aware of police activity." This includes (but is not necessarily limited to) "the space at his or her feet, in the door pocket, or in the backseat." In this case, therefore, the officers' search of defendant's car, looking in those areas where the officers might reasonably have expected Scarbrough to have secreted contraband, was legal, despite the lack of any express consent from defendant. At least one court has extended the *Schmitz* rule—a vehicle search where the defendant was a parolee—to vehicle searches where the passenger is a probationer on "searchable probation." (See *People v. Cervantes* (2017) 11 Cal.App.5th 860.) The Court here agreed with *Cervantes*. Defendant also argued that none of the above applied to the search of his car in that Scarbrough had gotten out of his car when the officers contacted her. The Court found this fact to be irrelevant, so long as she "was still so close to the car" at that time, that she "still had access to it." Based upon all of the above, the search of defendant's car was lawful. As such, neither the search of defendant's person nor the search of his motel room were the products of an unlawful search. Evidence recovered from defendant's car, his person, and his motel room, were therefore properly admitted into evidence against him.

(2) *The September 18, 2013, Searches of His Person, Car, and Home*: Defendant's argument here was that even though the 2013 searches were premised upon his own Fourth Amendment waiver (which, if you remember, he gave under protest), that waiver was subsequently held to be invalid by the appellate court. Any evidence recovered as a result of that invalid waiver, therefore, should have been suppressed. The Court disagreed. While the Exclusionary Rule was at one time strictly applied, more modern cases have held that not all violations of the Fourth Amendment require the suppression of the resulting evidence. Suppression is warranted only in "those instances where its remedial objectives are thought most efficaciously served." (*Arizona*

v. Evans (1995) 514 U.S. 1, 11.) Thus, "courts have applied the (exclusionary) rule only when it would 'yield "appreciable deterrence" and where the benefits of suppression "outweigh its heavy costs (of suppression)"'" (*Davis v. United States* (2011) 564 U.S. 229, 237.) In this case, the officer who searched defendant, his car, and his home, was relying in "*good faith*" on the fact that defendant had waived his Fourth Amendment rights as a condition of his release pending trial. The officer had no way of knowing that that waiver would subsequently be invalidated by an appellate court. Suppressing the resulting evidence, therefore, would not serve any "remedial" purpose, and, as such, is unwarranted in this case.

Note: The Court doesn't go into a lot of detail about what areas of defendant's car were subject to search in the 2012 search (based upon Scarbrough's Fourth waiver), mentioning only "the space at (the probationer's) feet, in the door pocket, or in the backseat." But the California Supreme Court, in *Schmitz*, addresses this issue. Per *Schmitz*, a warrantless search is lawful when it involves those areas of the passenger compartment of a vehicle where an officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity, as well as a search of personal property located in those areas, so long as the officer reasonably believes that the parolee owns those items or has the ability to exert control over them. *(Id.*, at pp. 926-928.) This obviously excludes the trunk and engine compartments of the car, but pretty much opens up just about everywhere else in the passenger area, both front and back seat. Also remember that while all parolees are subject to Fourth waivers (not having a choice, it being automatically imposed upon release from prison: Cal. Code of Regs, Title 15, § 2511; P.C. § 3067(b)(3)), not all probationers are. As highlighted by the fact that defendant's Fourth waiver imposed upon his release from his first arrest in this case was struck by an appellate court, a trial court wishing to put a probationer on a Fourth waiver must be able to provide reasons on the record as to why a Fourth waiver is appropriate to the circumstances of the case. So you cannot just assume that a probationer is subject to a Fourth waiver; you have to check. And while checking via a police radio is certainly preferable, simply asking the person may be enough so long as he admits it, in that all you really need is an "*objectively reasonable belief*" that he's subject to a Fourth waiver. (See *People v. Douglas* (2015) 240 Cal.App.4th 855, 868-869.)

***Searches of Vehicles Under the Automobile Exception*:**
***Searches of Vehicles as Incident to Arrest*:**

People v. Sims **(Jan. 12, 2021) 59 Cal.App.5th 943**

Rule: With probable cause to believe a person is drunk in public, sitting in his car, the warrantless search of the entire passenger compartment his vehicle looking for open containers of alcohol is lawful under both the "automobile exception" to the search warrant requirement, and as a "search incident to arrest." The search of the person's vehicle incident to arrest is lawful when the person has yet to be secured, and/or when it is reasonable to believe the vehicle contains evidence of the offense of arrest. Searching the passenger compartment of an arrestee's car is not limited by the fact that this particular person has a physical disability that might have precluded him from reaching into parts of the area being searched.

Facts: Defendant Tony Ramon Sims was found by two police officers passed out drunk in the front passenger seat of his car at 3:00 a.m., in the parking lot of a downtown San Diego bar that had closed an hour earlier. The keys were in the ignition. The officers woke defendant and engaged him in conversation. When they did so, they noted the odor of alcohol emanating from his person, that he had bloodshot eyes, and that his speech was slurred. As defendant fumbled for his wallet, he appeared as though he was about to vomit. Based on these observations, the officers believed defendant was intoxicated and in violation of section 85.10 of the San Diego Municipal Code (i.e., being under the influence while "in or about any motor vehicle" in a public place.) A records check (done via one of the officer's cellphone) showed that a person named Tony Sims was on probation and subject to search and seizure conditions. In talking with defendant, it appeared that he was in fact the same Tony Sims referred to (although it was later determined that he was not, and that he was not subject to a Fourth waiver). Deciding to search defendant's car pursuant to his apparent Fourth waiver, defendant was asked to step out of the car. However, defendant told the officers that because he was paralyzed from the waist down, he couldn't do so without assistance. So the officers searched the car with defendant still siting in the front seat. The search resulted in the recovery of a loaded semiautomatic handgun from the rear passenger floorboard. After removing defendant from the car and handcuffing him, a further search of the car resulted in the discovery of a second loaded semiautomatic handgun under front passenger seat (where defendant had been sitting) and handgun ammunition on the rear driver's side floorboard. Defendant was arrested and charged in state court with two counts of the illegal possession of a firearm by a felon (P.C. § 29800(a)(1)) and one count of the unlawful possession of ammunition (P.C. § 30305(a)(1)). Defendant filed a motion to suppress the evidence recovered from his vehicle. Upon denial of his motion, he plead guilty to the charged offenses and was sentenced to three years' probation. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed (although the case was remanded back to the trial court for a reduction of his probationary term from three to two years, pursuant to the provisions of Assembly Bill No. 1950, amending P.C. § 1203.1(a).). Even though the officers believed that they had the right to conduct a warrantless search of defendant's car under what they believed was a Fourth waiver, the Court determined that in light of its ruling as described below, they did not have to decide whether the officer's good faith belief in the existence of such a waiver excused the lack of a warrant. (See pg. 955, fn. 6, and *Note*, below.) Instead, the Court found two other legal justifications for the search:

(1) *The Automobile Exception to the Warrant Requirement*: The trial court judge found the search of defendant's vehicle was constitutionally permissible under the so-called "automobile exception" to the warrant requirement. The Court agreed. Under the automobile exception, "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found." (*United States v. Ross* (1982) 456 U.S. 798, 800; *People v. Lee* (2019) 40 Cal.App.5th 853, 860–861.) In this case, defendant exhibited clear signs of being under the influence of alcohol—bloodshot eyes, slurred speech, fumbling with his wallet, and on the verge of vomiting—all while emitting an odor of alcohol. With defendant's clear indications of being intoxicated, the Court held that it was reasonable for the officers to believe that a search of the vehicle would produce evidence of his alcohol consumption, such as unsealed alcohol containers. (See *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042.) The Court rejected defendant's argument to the effect that being in the parking lot of a bar, it was more likely that he

had done his drinking in that bar. This possibility was rebutted by the fact that the bar had been closed for an hour, plus one of the officer's testimony to the effect that the parking lot where defendant was parked was "a known place to hang out after [bars closed], drink, [and] loiter around." The Court also rejected defendant's argument to the effect that the officers already had enough evidence to bust him without searching his car. There is no authority for the argument that once probable cause is established, police officers are precluded from looking for more evidence to support the charges. The Court concluded that the offices had sufficient probable cause to justify a search for evidence of his public intoxication, and that under the automobile exception, no search warrant was required to do so.

(2) *Search Incident to Arrest*: As an alternative basis for denying defendant's suppression motion, the trial court judge determined that the warrantless search of his vehicle was permissible as a search incident to defendant's arrest for public intoxication. The Appellate Court again agreed. The legal authority for such a search is the landmark U.S. Supreme Court decision of *Arizona v. Gant* (2009) 556 U.S. 332. "*Gant* provides the generalized authority to search the *entire passenger compartment* of a vehicle and any containers therein incident to arrest." (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 555.) Under *Gant*, a warrantless search of a vehicle is constitutional under two possible scenarios; (a) upon the arrest of a recent occupant of a vehicle so long as "the arrestee is (unsecured and) within reaching distance of the passenger compartment at the time of the search," *or* (b) whether or not the defendant has been secured, whenever "it is reasonable to believe the vehicle contains evidence of the offense of arrest." The Court here found both theories to apply. (a) Upon determining that defendant was drunk, the officers did not remove him from his vehicle at first because, being paralyzed from the waist down, doing so would have been difficult or, at the very least, inconvenient. With probable cause to believe that there might be evidence within the vehicle of his intoxication, the officers therefore searched it while defendant remained, unsecured, in the front passenger search. Defendant argued, however, that because he is paralyzed, it is not likely he could have reached any possible evidence within his car, particularly evidence that might have been in the back seat. The Court rejected this argument noting authority from other jurisdictions to the effect that "[T]he only question the trial court asks is whether the area searched is generally 'reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible.'" (Citing *United States v. Allen* (1st Cir. 2006) 469 F.3rd 11, 15; and *United States v. Stegall* (8th Cir. 2017) 850 F.3rd 981, 985; "'(A)ctual reachability under the circumstances' is irrelevant when considering the scope of a passenger compartment search.") The backseat of a passenger compartment is generally reachable by an unrestrained person seated in the front, irrespective of whether the area was reachable by the defendant in this particular instance. (b) It was already determined that there was probable cause to believe that defendant's vehicle might contain open containers of alcohol (as discussed above under "*The Automobile Exception to the Warrant Requirement*"). Under *Gant's* alternative theory, therefore, this fact is sufficient to justify a warrantless search of an arrestee's vehicle whether or not he had already been secured.

Note: There's a couple of interesting legal theories not discussed here. For instance, the Court chose not to discuss the issue as to whether a search based upon the erroneous, but good faith belief that defendant was subject to a Fourth waiver would have been lawful (ignoring, for the moment, the fact that two other legal theories applied). There is authority for the argument that an officer's good faith reliance on erroneous information will *not* invalidate *an arrest*, even when

that information comes from a law enforcement source, so long as the error was based upon non-reoccurring negligence only. (See *Herring v. United States* (2009) 555 U.S. 135.) So it is arguable that the officers' good faith belief that defendant was subject to a Fourth waiver in this case would have justified the search of his car. There's no case authority, however, to support this argument. So it's too bad this Court declined to decide the issue. Also without discussing the issue, the Court here appears to have employed the legal theory that generally (with limited exceptions), an officer's "*subjective*" belief is irrelevant, at least where "*objectively*, his actions are otherwise legal. (See *Whren v. United States* (1996) 517 U.S. 806.) In other words, the officer's erroneous belief that defendant was subject to a Fourth wavier is irrelevant so long as there is some other legal theory that justifies the search. In this case, two other legal theories saved the day; i.e., the "automobile exception" and a "search incident to arrest." On another topic, we do know that it is irrelevant what offense the officers decided to charge defendant with, so long as some offense applies. The United States Supreme Court has ruled that so long as a police officer has probable cause to arrest for *some* offense, it matters not that the officer, subjectively but erroneously believed that he only had probable cause for a different offense. (*Devenpeck v. Alford* **(**2004) 543 U.S. 146.) Here, the officers chose to charge defendant with a Municipal Code violation where, as pointed out by the Court in the footnotes (fns. 3 and 4), even though the Muni Code violation probably worked, "drunk in public," per Pen. Code § 647(f), would have worked just as well.

***Search Warrants and the Definition of Probable Cause*:**
***The Issue of Overbreadth in Search Warrants*:**

United States v. King **(9th Cir. Jan. 14, 2021) 985 F.3rd 702**

Rule: Including in an affidavit for a search warrant authorization to search for "any firearm," where it is known only that one specific firearm is in a felon's residence, is not overbroad.

Facts: A person unrelated to this appeal got into a violent domestic dispute with his live-in girlfriend (referred to herein only as "the girlfriend"), threatening her with a firearm and then pistol-whipping her with it across the face. Although he got busted as a result, the girlfriend apparently forgave all because she later talked to him while he was in jail in a conversation that was overhead by police. In this conversation, he told her to take the gun he'd hit her with from their residence and give it to defendant. When the police confronted her about this, she admitted to having dutifully done as she had been instructed, describing the particular firearm in some detail (i.e., a "large silver & gold revolver" of an unknown caliber). It was quickly determined that defendant was a convicted felon and could not legally possess a firearm. So a search warrant was obtained for his home, receiving permission from the magistrate to search for the specific revolver in question. Additionally, however, the warrant also authorized officers to search for "*any firearm*," plus various other firearm-related items (what "items" not being described in the case decision). Executing the warrant, the officers found not only the revolver as described by the girlfriend, but three other firearms as well (which, as a matter of interest to some, but unrelated to the issues described in the brief, included an AK-style .545 by 39mm caliber fully automatic machine gun rifle, later determined to have been stolen from an army base). Defendant was charged in federal court with being a felon in possession of a firearm (18

U.S.C. § 922(g)(1)). After his motion to suppress the firearms was denied, he pled guilty and was sentenced to 7½ years in prison. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The primary issue on appeal was the validity of the search warrant, with defendant arguing that as written, the warrant was unconstitutionally "*overbroad*." Of particular concern was the search warrant magistrate's authorization for officers to search for and seize "*any firearm*," when the only evidence of a firearm being in defendant's home was the girlfriend's statements to police about the one, specifically described firearm that she gave to defendant. The Court held here that under the facts of this case, however, the magistrate's authorization to search for and seize "any firearm" was not overbroad. The Court first noted some Fourth Amendment fundamental principles, applicable to search warrants. *First*, and probably most obvious, is that "(a) warrant must be supported by probable cause." "Probable cause" requires only that there be a "fair-probability that contraband or evidence of a crime will be found in a particular place based upon the totality of the circumstances." (*Illinois v. Gates* (1983) 462 U.S. 213.) This, in turn, requires only that there be "circumstances which warrant suspicion," (*Locke v. United States* (1813) 11 U.S. 339, 348.), further noting that probable cause "requires 'less . . . evidence [than that] which would justify condemnation, and may rest upon evidence which is not legally competent in a criminal trial.'" (*United States v. Bridges* (9th Cir. 2003) 344 F.3rd 1010, 1014-1015.) *Secondly*, a search warrant must not be overbroad. "The scope of a warrant must be limited by its probable cause." (*United States v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3rd 684, 702.) It must never include in its authorization to search for more than is justified by that probable cause. (*United States v. Whitney* (9th Cir. 1980) 633 F.2nd 902, 907.) Applying these principles to the warrant's authorization to search for "*any firearm*," the Court found that the warrant in this case was *not* overbroad, and thus did not violate the Fourth Amendment. In so finding, the Court noted the following significant factors: Defendant was known to have a felony record, with the officer describing the nature of those felonies. It was also known that he took possession of a specifically described revolver from the girlfriend. In his affidavit, the investigating officer explained how and why he suspected that other weapons might be present in defendant's residence, specifically noting how "other 'individuals [may] arrive at the scene of [the] search' and that, in his experience (after detailing in the affidavit his "training and experience"), 'many of these individuals are found to be in possession of weapons.'" More importantly, the officer explained that, as a felon, any firearm found in defendant's possession would constitute evidence of a felon-in-possession offense; a crime it was already known that he was committing by accepting the one revolver from the girlfriend. The Court held that based upon this, the magistrate was not incorrect in determining that there was, at the very least, a "fair probability" that other firearms might be found in defendant's home and that if so, they would constitute evidence of a crime. Knowing that defendant accepted and hid a revolver from law enforcement in his home, in the Court's opinion, "raised the fair inference that (he) possessed other firearms." "After all, the (domestic violence) suspect wouldn't have entrusted the revolver to (defendant) if the suspect didn't believe (defendant) was willing and able to covertly store firearms. That (defendant) seemingly served as a 'safe deposit box' for the (domestic violence) suspect's firearm made it likely that (defendant) did the same for other firearms." Based upon these assumptions, the Court found that the warrant was not overbroad when it authorized the searching officers to look for and seize "any firearm" that might be in defendant's house. As a backup justification, the Court further held that the searching officers relied upon the validity of

the warrant in good faith, having no reason to believe there might be an overbreadth issue. As such, the Court found no Fourth Amendment violation.

Note: In reading this case, I found the Court's justifications for upholding the warrant to be a bit strained. I mean, *really*: The likelihood that other armed persons might show up during the execution of a search warrant, with police officers all over the place? How likely is that really? But I don't disagree with the result. Had I been the author of this opinion, I might have simply concluded that where there's probable cause to believe a felon knowingly possesses at least one firearm in his house, there's at least a fair probably that he might have more. Period. End of issue. The affiant to a search warrant should certainly venture an opinion in a case like this that based upon his training and experience, under the circumstances of this case, he believes that other firearms might be found in the house; i.e., that known felons who possess a firearm in their homes often have more than one. But that is all it should really take. Including other firearms in a warrant affidavit in a case like this seems to me to be a non-issue. But at least now we have a case decision that says just that.

***Miranda v. Arizona, and the Issue of Custody*:**
***The Products of a Miranda Violation*:**
***Consensual Searches*:**

United States v. Mora-Alcaraz **(9th Cir. Jan. 21, 2021) 986 F.3rd 1151**

Rule: Whether or not a person is in custody for purposes of *Miranda* depends upon the totality of the circumstances. Evidence seized as the product of a *Miranda* violation does not necessitate its suppression. A consent to search must be freely and voluntarily obtained to be legally valid.

Facts: In November, 2016, defendant Julian Mora-Alcaraz went to the home of his estranged wife, Geneva, and their seven-year-old son, for the apparent purpose of accosting her new boyfriend. During the confrontation, defendant brandished a semi-automatic firearm of some sort (not described in the written decision). Things apparently cooled down to the point where defendant was allowed to stay the night, sleeping on the couch. The next morning, defendant left Geneva's house with their son, apparently with her permission, taking him to a nearby shopping mall. Although not defendant's biological son, defendant and the boy had a close father-son relationship. That same morning, Officer Jackins of the Reno, Nevada, Police Department took a report concerning the domestic disturbance from the night before, including the fact that defendant had brandished a firearm. Officer Jackins called defendant via his cellphone and asked him to meet him at the mall in front of a sporting goods store so they could talk about the events from the evening before, and to do a welfare check on the child. Defendant agreed. When Officer Jackins arrived at the store, he came with three other armed, uniformed, officers, in two police cars (apparently with amber lights flashing). Contacting defendant in front of the sporting goods store as planned, Officer Jackins asked to speak with defendant away from the boy, and defendant agreed. Two of the officers therefore escorted the boy to the entrance of the store, and then inside because the boy was cold. Officer Jackins asked defendant about the events from the night before, the questioning being in what Officer Jackins later described as a low-key discussion; i.e., a technique he referred to as a "kill them with kindness" approach. During the ensuing conversation, a cooperative defendant admitted to Officer Jackins that he was

in the country illegally. He also admitted to having the gun he'd brandished the night, which he kept in his truck. Defendant agreed to let Officer Jackins see the gun. Officer Jackins drove defendant across the parking lot to defendant's pickup truck. Officer Jackins seized the gun from defendant's truck, promptly arresting him for being an alien in possession of a firearm; a violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2). At no time during this encounter was defendant advised of his *Miranda* rights. After being indicted in federal court, defendant filed a motion to suppress the firearm as well as his statements. The district court judge ruled that defendant had in fact been subjected to a custodial interrogation without the benefit of a *Miranda* advisal and waiver, and that his statements to Officer Jackins were therefore inadmissible. Finding that defendant's statements as made to Officer Jackins "may have led to (defendant's) consent to search," the gun was also suppressed. The Government appealed.

Held: The Ninth Circuit affirmed in part and reversed in part. On appeal, the Government argued that neither defendant's incriminating statements nor the gun should have been suppressed.

(1) *Admissibility of Defendant's Statements*: Defendant made certain incriminating statements to Officer Jackins concerning his citizenship status and his ownership of the gun, both of which the trial court suppressed as the product of an un-*Mirandized* interrogation. Whether or not defendant's statements survive a *Miranda* challenge depends upon whether defendant was in custody at the time. In making this determination, the Court looked to five specific factors; i.e., "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." (*United States v. Kim* (9th Cir. 2002) 292 F.3rd 969.) The Court found that each of these factors tended to diminish the coerciveness of the questioning with the sole exception of the last, the police having "undoubtedly (created) . . . a police dominated atmosphere." Specifically, despite expecting to meet only Officer Jackins at the mall, defendant was suddenly confronted by four armed officers in two police cars, with one of the vehicles blocking the travel lane with its amber lights flashing. More importantly, defendant was separated from his seven-year-old son, the Court noting that "the police were well aware that a father would not walk away from a public place and leave his young son with strangers. . . . He could not leave." Based upon this alone, the Court held that "the totality of the circumstances" dictated that defendant was in custody for purposes of *Miranda*, and that the trial court ruled correctly in holding that without an admonishment and wavier, defendant's statements were properly suppressed. (But see "Note," below.)

(2) *Admissibility of the Firearm*: The trial court held that the *Miranda* violation "may have led to (defendant's) consent to search," and thus required that defendant's gun must also be suppressed. The Ninth Circuit, however, held here that such suppression was a bit premature, and reversed this finding. The United States Supreme Court has held that physical evidence obtained as a result of a custodial interrogation without *Miranda* warnings is nevertheless admissible. (*United States v. Patane* (2004) 542 U.S. 630.) In other words, the exclusionary rule does not apply to *Miranda* violations. Defendant appeared in this case to have given his consent to Officer Jackins to enter his truck and seize the firearm. This being the case, the issue left undecided is whether defendant's consent to search his truck and retrieve his gun was freely and voluntarily obtained. The fact alone that defendant was not advised of his *Miranda* rights—although a factor to consider—"is not 'dispositive of whether an individual consented to a

search.'" (*United States v. Ritter* (9th Cir. 1985) 752 F.2nd 435.) The Court therefore remanded the case back to the trial court for an evidentiary hearing on the issue of whether defendant's consent was voluntary.

Note: I have to disagree with the Court here (and the trial court) on the issue of whether defendant was in custody for purposes of *Miranda* when questioned about the gun and his immigration status, and that he needed to be admonished of his *Miranda* rights under these circumstances. Assuming for the sake of argument that defendant was in fact "detained," that fact alone does not, as a general rule, trigger the need for a *Miranda* admonishment. Although it is admittedly difficult to determine where to draw the law between "*Miranda custody*" (as it is often referred to) and a mere detention, the Court here—while finding only one of the five *U.S. v. Kim* factors that applied—totally ignores the clear case law to the effect that a simple detention alone does not generally require that the subject be admonished. I have a pile of cases on this point, but one good one is *People v. Pilster* (2006) 138 Cal.App.4th 1395, at page 1406, where the Court noted: "In contrast (to Fourth Amendment, search and seizure issues), Fifth Amendment *Miranda* custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person (in the defendant's position) would conclude the restraints used by police were tantamount to a formal arrest." In other words, *Miranda* does not generally kick in unless the suspect has actually been arrested, or he subjectively feels like he's about to be arrested. In this case, although defendant was arguably detained after his son was led away, it seems pretty clear that defendant was neither under arrest, nor did anything occur that would have made him feel like he was about to be arrested, until after the gun was seized from his car. I'm sure Officer Jackins didn't consider defendant to be under arrest, or that there was any need for a *Miranda* admonishment until after the gun was seized, so he can hardly be faulted. He certainly did everything he could to keep the contact non-confrontational and low key, which is usually enough to avoid the necessity for a *Miranda* admonishment and waiver. But this case, if nothing else, highlights the simple rule of thumb for officers while questioning a detained suspect: When in doubt, *Mirandize*, or expect a lot of second-guessing from the courts afterwards.