The California Legal Update

Remember 12/7/1941 & 9/11/2001: Support Our Troops; Support our Cops

Vol. 23 December 20, 2018 No. 14

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

www.legalupdate.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

THIS EDITION'S WORDS OF WISDOM:

"'*Stressed*' *spelled backwards is* '*desserts*." *Coincidence*? *I think not*!" (Unknown)

IN THIS ISSUE:

***ADMINISTRATIVE NOTES*:**

***Firearm Requirements and Impossibility of Compliance*:** On June 28th, the California Supreme Court issued an interesting (albeit not worth briefing) decision, reversing the Fifth District Court of Appeal where the lower court had invoked Civil Code § 3531 to invalidate a statute that mandates what's referred to as "*dual placement microstamping*," per P.C. § 31910(b)(7)(A). (*National Shooting Sports Foundation, Inc. v. State of California* (2018) 5 Cal.5th 428.) "*Dual placement microstamping*" is a process whereby semiautomatic pistols are "designed and equipped with a microscopic array of characters that identify the make, model, and serial number of the pistol, etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol, and that are transferred by imprinting on each cartridge case when the firearm is fired . . . ." Failure to be so equipped requires that the pistol be placed on a statutorily-mandated list of "*unsafe handguns*" (See P.C. §§ 31900-32110); a violation of which is a misdemeanor. (P.C. § 32000(a)) It has been determined, however, at least in the opinion of the experts, that equipping semiautomatic pistols in such a manner is simply impossible to do; the validity of that expert opinion being an issue—if it is an issue—not ruled upon by the California Supreme Court. As a result, an organization named the National Shooting Sports Foundation (NSSF) filed a lawsuit invoking Civ. Code § 3531, attempting to invalidate P.C. § 31910(b)(7)(A) altogether. Civ. Code § 3531—one of the so-called "*Maxims of Jurisprudence*"—provides that "(*t*)*he law never requires impossibilities*." The Fifth District Court of Appeal, ruling in NSSF's favor, held that because duel placement microstamping is impossible to accomplish, Civ. Code § 3531 mandates that P.C. § 31910(b)(7)(A) is, in effect, null and void. (See *National Shooting Sports Foundation, Inc., v. State of California* (2016) 6 Cal.App.5th 289; *Review Granted*.) The California Supreme Court rejected this conclusion and held that while impossibility may sometimes provide an exception to compliance with a statute's requirements, it does not invalidate the statute itself. I guess what all this means is that if duel placement microstamping is ever determined to be possible, the legal requirement that it be used in all semiautomatic pistols (at least in California) becomes effective.

***Politics, Political Correctness, and P.D. Policies*:** The San Francisco Police Department's Police Chief William Scott recently published within his department a directive instructing his officers to "avoid . ." sitting detained subjects (handcuffed or not) on the ground or sidewalk. Chief Scott is of the opinion that leaving detainees standing is necessary, "in order to carry out (an officer's) duties respectfully and professionally, . . ." Per the Chief's directive, "sitting a subject on the ground or sidewalk should be done only as a last resort and only when necessary." Exceptions are allowed in "(e)ceptional circumstances" such as (but presumably not limited to) when necessary to take a resisting subject to the ground. And even then, the subject is to be taken off the ground and put into a police car as soon as practical to do so. Instances where a detainee is seated on the ground or a sidewalk must be documented, presumably for later Monday-morning quarterbacking and critiquing of the officer's actions. One can only guess what prompted such a directive. But its apparent intent is to minimize whatever embarrassment to the detainee might result from being forced to sit on the

ground or sidewalk while exposed to public view. What this directive ignores is the need (if not the right) of an officer who detains a suspect to do what he or she feels is necessary for his or her own safety, the safety of anyone else in the immediate vicinity, as well as the safety of the detainee himself. The directive also ignores case law that clearly provides that the greater the obtrusiveness of the contact, the more likely the contact will be considered an arrest with its concurrent probable cause requirement. Sitting a detainee on the ground is generally considered to be a lot less intrusive than handcuffing him. And then isolating him in a police car only adds to that intrusiveness. If the circumstances don't justify a finding of probable cause, the use of handcuffs and/or the backseat of a police car, as opposed to merely directing the person to temporarily sit on the ground, may very well convert what was only intended to be a *lawful* detention into an *unlawful* arrest. I don't usually comment on an agency's internal policies, necessarily assuming that a police department's administration knows what's best for its own agency. But when those policies so obviously compromise officer safety, not to mention the potential legality of an officer's actions in the field, I have to think it's time to reconsider the often delicate balance between the forced imposition of politics and political correctness on an officer's discretionary decisions in the field, with the officer's safety and the legality of his or her actions. SFPD's ill-advised policy of not allowing its officers to require detainees to briefly take a seat on the ground clearly imposes the former on its officers while totally ignoring the latter.

CASE LAW:

***DUI Cases and Warrantless Blood Draws*:**

People v. Meza **(May 18, 2018) 23 Cal.App.5th 604**

Rule: A DUI arrestee's blood draw results are inadmissible in evidence absent a warrant, consent, or exigent circumstances. The fact that the arrestee was injured in a traffic accident and requires medical attention is not enough, by itself, to excuse the lack of a search warrant authorizing a blood extraction.

Facts: On September 1, 2013, defendant went over to his girlfriend's house after a day of golfing. Apparently, the golf game included the consumption of an unknown number of beers. Upon defendant and his girlfriend leaving her house, defendant took it as a challenge when another driver passed him in a posted 45-mile-per-hour speed zone. When defendant sped his own car up to at least 90 miles-per-hour, the girlfriend finally asked him to slow down. He complied. However, as the slowed, his car began to fishtail and he lost control. The car "catapulted across the median and oncoming traffic, and fell down an embankment." The time was about 6:28 p.m.; at least an hour or more since defendant had consumed his last beer. Officers from the Concord Police Department were called to the scene. Defendant's injured girlfriend had to be "dragged" from the damaged car. Officer Danielle Cruz assumed the responsibility for the DUI investigation while three other officers handled the accident scene. Upon contacting defendant, Officer Cruz noted various signs indicating that defendant was under the influence of alcohol including a "slight" to "moderate" odor of alcohol on his breath. But because of his injuries (complaints of neck and back pain), no field sobriety test was

administered. He was instead transported by ambulance to a local hospital. At the hospital, at 7:08 p.m., medical personnel extracted a blood sample from defendant which was to be used to allow the doctors to determine how to treat him. It was later determined via this blood sample that defendant's blood-alcohol level at that time was 0.148%. Later, Officer Cruz told defendant that she was arresting him for driving under the influence of alcohol and that he was therefore subject to a blood draw, and that a phlebotomist was on his way for that purpose. Defendant did not object, responding only with an "*Okay*." The phlebotomist subsequently took a blood sample at 8:25 p.m. When later tested, this blood sample showed defendant's blood-alcohol level to be 0.11%. Officer Cruz later testified that she never attempted to get a warrant before directing the phlebotomist to draw defendant's blood for forensic purposes. Officer Cruz acknowledged that she had earlier received training on both the need to obtain a search warrant should a DUI arrestee refuse and the procedures for obtaining such a warrant on short notice from an on-call judge. But feeling that she had defendant's consent (or, at least, he wasn't objecting), she did not feel that a search warrant was necessary. Defendant was charged in state court with driving while under the influence causing injury (V.C. § 23153(a)), and driving with a blood-alcohol level of 0.08% or more, causing injury (V.C. § 23153(b)), both with attached allegations the he had personally inflicted great bodily injury upon another (i.e., his passenger; P.C. §§ 12022.7(a)). Two prior DUI convictions were also alleged (per P.C. § 23566). Defendant's motion to suppress the blood-alcohol results from the blood draw obtained by Officer Cruz was denied even though the trial court rejected the People's argument that defendant had consented. Instead, the trial court ruled that exigent circumstances justified the warrantless blood draw. At trial, in addition to laying the foundation for the admissibility of the blood test results from the blood Officer Cruz had obtained, the prosecution's experts testified as to the validity of the blood test results stemming from the blood sample the hospital extracted for its own purposes. Although the experts did not know the extent to which the hospital's procedures complied with Cal. Code Regulations, title 17, for forensic alcohol analysis, it was known that the hospital was licensed by the state to analyze blood draws and that the procedures used were sufficiently rigorous that doctors relied on the test results in making treatment decisions. The experts also testified as to the standard expected dissipation rate, concluding that defendant's blood-alcohol level at the time of the accident was 0.14%, with a margin of error of 0.01%; well above the legal limit of 0.08%. With further expert testimony that anyone with a blood-alcohol level of 0.08% or higher is too impaired to drive safely, defendant was convicted on all counts and allegations. Sentenced to 6 years in prison, he appealed.

Held: First District Court of Appeal (Div. 2) affirmed. However, it also found that defendant's blood-alcohol results from the blood test ordered by Officer Cruz was obtained in violation of the Fourth Amendment and should have been suppressed, but that its admission into evidence was harmless error. Recognizing that drawing blood from a criminal suspect constitutes a search and seizure under the Fourth Amendment, the rule for years was that because of the dissipation rate (about 0.015% per hour) of the blood-alcohol content in one's blood, DUI cases constituted an exigency exception to the general rule that a search warrant is generally necessary. (*Schmerber v. California* (1966) 384 U.S. 757.) In 2013, however, the U.S. Supreme Court limited *Schmerber* to its facts and ruled that the acknowledged dissipation of one's blood-alcohol content does not constitute a per se rule excusing the lack of a search warrant in non-consensual blood extraction DUI cases. (*Missouri v. McNeely* (2013) 569 U.S. 141.) *Schmerber* was a case involving a traffic accident where the suspect had been transported to a hospital for treatment of

injuries from the accident; similar to the instant case. In *McNeely*, on the other hand, no traffic accident was involved. This has led to the common misconception that the occurrence of a traffic accident, necessitating a time-consuming investigation in addition to the DUI arrest itself, is the difference for when a search warrant is necessary and when it is not. However, it's not as simple as that. (*When is it ever*?) The correct rule is that whether or not a search warrant is necessary in order to lawfully extract blood from a non-consenting DUI arrestee depends upon an evaluation of the "*totality of the circumstances*," the dissipation rate (which the Court noted was "gradual" and "relatively predictable") being but one of those circumstances. Other circumstances that need to be considered include the number of officers available to assist. Here, Officer Cruz had the assistance of three other officers, anyone of whom could have helped obtain a warrant. Also of note is the "technological" "advances in the 47 years since *Schmerber* . . . that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple." In this case, the blood draw ordered by Officer Cruz did not take place until two hours after defendant's traffic accident. There was no reason reflected in the record justifying why Officer Cruz could not have used some of that time to obtain an expedited search warrant, as she had been trained to do. The Court therefore concluded that "exigent circumstances" did not justify the lack of a search warrant under the facts of this case. Defendant's blood-alcohol results, therefore, should have been suppressed. However, finding that with the foundation laid by the prosecution for the admissibility of the blood-alcohol results of the blood draw obtained by the hospital, the trial court's failure to suppress Officer Cruz's blood draw evidence was harmless error. In other words, defendant would have been convicted anyway. On that basis, defendant's conviction was affirmed.

Note: So why was defendant's "consent" to the blood draw not sufficient to justify the warrantless taking of his blood by Officer Cruz? This issue was not discussed by the Court except to note in a footnote (pg. 611, fn. 2) that the mere "acquiescence to a claim of lawful authority" will likely "vitiate" any consent given. In this case, Officer Cruz *told* defendant that they were going to be extracting blood, to which defendant acquiesced: "*Okay*." For a court to accept the People's argument that an arrestee consented, he should have been asked for an express consent (preferably in writing) and not merely told what was about to happen. (See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548-549; *People v. Ling* (2017) 15 Cal.App.5th Supp. 1, 8; *People v. Mason* (2016) 8 Cal.App.5th Supp. 11, 31-33; *People v. Vannesse* (2018) 23 Cal.App.5th 440.) Also note the prosecution's foresight in introducing foundational evidence sufficient to allow the results of the hospital's blood draw into evidence, having the People's experts testify to the fact that although the hospital was not licensed for forensic testing, it was licensed by the State Department of Public Health and accredited by the College of American Pathologists as a clinical laboratory, and that treating physicians rely on the accuracy of the results of its tests. This highly relevant evidence—an example of the wisdom of a prosecutor throwing everything he or she has against the wall and seeing what sticks—literally saved the conviction in this case.

***Disrupting a Government Meeting*:**
***Civil Liability and Retaliatory Arrests*:**

Lozman v. City of Riviera Beach **(June 18, 2018) __ U.S.__ [138 S.Ct. 1945; 201 L.Ed.2nd 342]**

Rule: Statutes prohibiting the disruption of a government meeting are generally constitutional and enforceable upon a showing of probable cause. However, a person can sue the governmental agency causing such an arrest, even if supported by probable cause, if he or she can show that the arrest was merely a part of a governmental retaliatory policy to intimidate the plaintiff.

Facts: Lying quietly on the Atlantic coast of Florida, 75 miles north of Miami, is the city of Riviera Beach; population 32,500 (as of 2004). Fane Lozman, plaintiff in this lawsuit, moved there in 2006, parking his floating home in the City-owned marina. Lozman quickly became a pain in the City's proverbial neck, attending city council meetings and complaining about most everything. One such bone of contention involved the City's plan to use its eminent domain powers to seize homes along the waterfront for private development. In addition to using the public-comment period at city council meetings to criticize the mayor, councilmembers and other public employees, Lozman also filed a lawsuit alleging that the Council's approval of an agreement with developers for the waterfront development violated Florida's open-meeting laws. In June of 2006, the City Council held a closed-door session (ironically) where they discussed the open-meetings lawsuit that Lozman had filed. According to the transcript of the meeting, one of the councilmembers (unwisely) suggested that the City use its resources to "intimidate" Lozman and others; an idea that was agreed to by other councilmembers. Lozman alleged that these remarks reflected an official city policy to intimidate him. The City, on the other hand, maintained that the only consensus reached during that meeting was to invest the money and resources necessary to fight plaintiff's lawsuit. Five months later, Lozman again rose to speak at a City Council meeting. When he began to discuss matters unrelated to any City business, one of the councilmembers directed him to stop making those remarks. When Lozman ignored this command, continuing on about other extraneous topics, the councilmember called for the assistance of a police officer in attendance. The officer approached Lozman and asked him to leave the podium. Lozman refused. So the councilmembrer directed the officer to "carry him out." The officer handcuffed Lozman and ushered him out of the meeting. Lozman was charged with disorderly conduct and resisting arrest without violence and then released. The State's attorney later determined there was probable cause to arrest Lozman for these offenses but dismissed the charges anyway, electing not to file the case in court. Although the City contended that Lozman's arrest was in accordance with its rules of procedure about attempting to discuss issues unrelated to the City and then refusing to leave the podium when told to do so, Lozman alleged that his arrest was in retaliation for his filing of the open-meetings lawsuit against the City and his prior public criticisms of city officials. As a result of his arrest, Lozman sued the City again in federal court, alleging a number of harassment-related incidents in addition to his arrest as described here. As to his arrest, the Federal District (trial) Court amended the charge to allege a violation of a Florida statute that prohibits interruptions or disturbances in schools, churches, or other public assemblies: i.e., Florida. Stat. §871.01 (2017). After a 19-day trial, the

jury returned a verdict for the City on all of the claims. Lozman appealed only as to the alleged retaliatory arrest at the November 2006 city council meeting. The Eleventh Circuit Court of Appeal affirmed (681 Fed. Appx. 746 (2017)). The U.S. Supreme Court granted certiorari.

Held: The United States Supreme Court, in an 8-to-1 decision, vacated the jury's verdict as it related to the alleged retaliatory arrest. The issue on appeal was whether the existence of probable cause to arrest Lozman defeated his First Amendment (freedom of speech and to petition the government for redress of grievances) claim of an retaliatory arrest. In other words; assuming for the sake of argument that Lozman's arrest was supported by probable cause (i.e., that it was lawful; a conclusion that Lozman did not contest), does this fact alone prevent him from filing a retaliatory-based federal civil suit? Florida has a state statute criminalizing the disruption of public assemblies. (Fla. Stat. § 871.01.) It was assumed in this appeal that Florida's statute is constitutional. In vacating the jury's verdict on this issue, the Court did not decide whether the City Council did in fact maintain an official policy discriminating against defendant, but only whether a lawful arrest, supported by probable cause, bars a First Amendment retaliation claim and attendant lawsuit. The U.S. Supreme Court previously held that where probable cause supports the underlying criminal charges in a criminal prosecution, a subsequent civil suit alleging that the prosecution was instigated for purposes of retaliation is bared. (*Hartman* v. *Moore* (2006) 547 U.S. 250.) Although in the instant case Lozman was not prosecuted, but merely arrested, it would seem that *Harman* would prevent this civil suit. But Lozman's retaliation claims were based upon more than just his arrest, including as well the allegation that the City itself retaliated against him pursuant to an "official municipal policy" of intimidation. "In particular, (Lozman) alleges that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit. And he asserts that the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting." The bottom line is that the existence of probable cause supporting his arrest does not prevent, in itself, a subsequent lawsuit when that lawsuit is based upon more than just the arrest. The case was therefore remanded for a determination of the following issues: (1) Whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session, and thus a *Monell* (see above) violation; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; or (3) whether the City has proved that it would have arrested Lozman regardless of any retaliatory animus.

Note: In other words, while a person will not successfully sue a government agency based upon a lawful arrest alone, at least when supported by probable cause, he or she *can* sue if that arrest was merely a part of a governmental retaliatory policy to intimidate the plaintiff. California also has a statute criminalizing the disruption of public meetings, similar to Florida's: Cal. Pen. Code § 403. California's § 403 statute has been held to be constitutional. (*CPR for Skid Row v. City of Los Angeles* (9th Cir. 2015) 779 F.3rd 1098.) It is also worth noting that the police officer who actually arrested Lozman in this case was held *not* to be civilly liable for his actions based upon a theory of the officer's good faith; seeing a criminal violation occur in his presence and not having been a party to any retaliatory policy maintained by the government entity itself. But the result might have been different if Lozman had had any evidence to the effect that the officer was personally involved in the City's alleged retaliatory policy against the plaintiff. I have a memo (my First Amendment, "*Constitutionally Protected Expressive Activity*: *Who Ya Gonna*

Call," memo, dealing primarily with trespassing leaflet distributors) which includes, in part, a section (pages 15-18) a discussion about the problems involved the enforcement of P.C. § 403 at government meetings such as the city council meeting at issue here. As before, I will send you this memo in its entirety upon request. If you already have a copy of this memo, note that your copy has not yet been updated with the addition of this new case.

***High Speed Chases*; *Use of Force*:**
***PIT Maneuvers and Immunity from Civil Liability*:**
***Written Pursuit Policies*; *Necessary Training and Certifications*:**

Ramirez v. City of Gardena **(Aug. 13, 2018) 5 Cal.5th 995**

Rule: Vehicle Code § 17004.7 provides for immunity from civil liability for public agencies that adopt and implement an appropriate vehicle pursuit policy, requiring officers to receive annual training and certification in writing to having received, read, and understood the policy. While such a pursuit policy is required in order to have immunity, 100% compliance with the written certification requirement is not a prerequisite for immunity to apply.

Facts: On February 15, 2015, Officer Michael Nguyen of the Gardena Police Department was engaged in a high speed pursuit of a pickup truck. Mark Gamar was a passenger in the truck. In order to end the pursuit, Officer Nguyen used a "PIT" maneuver (i.e., "*Pursuit Intervention Technique*"), bumping the left rear of the truck with the right front of the officer's patrol car, causing the pickup truck to spin out of control and careen into a streetlight pole. Gamar was killed in the accident. Officer Nguyen had received training in the use of such a maneuver as a part of his POST (Peace Officers Standards and Training) training in handling high speed pursuits, pursuant to P.C. § 13519.8, and had certified electronically that he received, read, and understood the Gardena's written pursuit policies, as mandated by V.C. § 17004.7(b). Gamar's mother (Plaintiff Ramirez in this case) filed a wrongful death suit in state court against the City of Gardena, alleging that Officer Nguyen committed a battery while acting negligently. The City claimed immunity from civil liability pursuant to V.C. § 17004.7. The trial court granted the City's summary judgment motion, dismissing the lawsuit. Plaintiff appealed. California's Second District Court of Appeal (Div. 1) affirmed. (*Ramirez v. City of Gardena* (Aug. 23, 2017) 14 Cal.App.5th 811; Review granted.) The California Supreme Court granted review.

Held: The California Supreme Court unanimously affirmed. Gov't Code § 815(a) provides a public entity (i.e., the City of Gardena, in this case) with civil immunity for any injuries caused by its employees. Veh. Code § 17001 creates a statutory exception, providing "(a) public entity *is* liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment." However, V.C. § 17004.7 contains an exception to the exception, affording immunity to public agencies that adopt and implement appropriate vehicle pursuit policies. Specifically: Section 17004.7(b)(1): A public agency employing peace officers that adopts and promulgates a written policy on, and provides regular and periodic training on an annual basis for, vehicular pursuits complying with subdivisions (c) and (d) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the

law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public entity. (*Note*: Subdivision (c) lists the "*minimum standards*" for an agency's written policy. Subdivision (d) defines "*regular and periodic training*" to be annual training, which includes, at a minimum, those standards listed in Subd. (c).) Section 17004.7(b)(2): Promulgation of the written policy under paragraph (1) shall include, but is not limited to, *a requirement that all peace officers of the public agency certify in writing that they have received, read, and understand the policy*. The failure of an individual officer to sign a certification shall not be used to impose liability on an individual officer or a public entity." (Italics added) In the instant case, evidence was presented to the effect that Gardena Police Department did in fact have a written pursuit policy on which annual training was provided. Gardena's officers were also required to certify in writing that they had received, read, and understood the policy. Officer Nguyen (the officer involved in this fatal PIT maneuver) was in full compliance with the training and certification requirements. However, a training log produced by the City showed that only 81 of the City's 92 officers had completed the annual training and that only 64 of the officers had attested to the fact that they had received, read, and understood the City's pursuit policy. (It was assumed by the Court for purposes of this appeal that these records were accurate, although there was evidence that some of the necessary documentation may have been lost during the police department's move to a new station.) The issue here, therefore, was whether Gardena is entitled to V.C. § 17004.7(b)(1) immunity under theses circumstances, or must the public agency prove that it not only imposed a training requirement, but that *all* of its officers have complied with it. Prior case law (*Morgan v. Beaumont Police Dept.* (2016) 246 Cal.App.4th 244.) held that the latter is the rule; i.e., that "*all* peace officers of the public agency are required to have certified in writing that they had received, read, and understand' the agency's vehicle pursuit policy. The California Supreme Court disagreed, overruling *Morgan* to the extent it is inconsistent with this current decision. As the Supreme Court interprets subdivision (b)(2) of section 17004.7 (agreeing with the Second District Court of Appeal in this case), it means that to obtain immunity, a public agency must *require* its peace officers to certify in writing "that they have received, read, and understand" the agency's pursuit policy. However, so long the agency actually imposes such a requirement, complete compliance with the written certification requirement is *not* a prerequisite for immunity to apply. More specifically, the Court noted that subdivision (b)(2) *does not* say that for the public agency to obtain immunity, all of its peace officers must have actually made the certification; only that such a requirement is contained within the department's written policy. The second sentence of subdivision (b)(2) supports such a conclusion: "*The failure of an individual officer to sign a certification shall not be used to impose liability on an individual officer or a public entity*." Therefore, the trial court was correct in granting the City of Gardena immunity under the circumstances of this case.

Note: The Court further noted that it was *not* deciding whether a more extensive lack of compliance with the certification requirement, or a "meaningful implementation" of a pursuit policy, might fail to satisfy the statute's requirements. Also left undecided is whether immunity is appropriate when the high-speed pursuit officer himself (or herself) has failed to either take the required training and/or failed to meet the certification requirement, even though maybe everyone else on the department has complied. So stay tuned on more law on this issue. Subdivision (a) of section 17004.7, by the way, provides (in part) that "(t)he adoption of a vehicle pursuit policy by a public agency pursuant to this section is discretionary." Why any

agency, however, would wish to forgo immunity by declining to adopt such a policy, is beyond me. But nothing surprises me anymore.

***Detentions*:**
***Patdowns*:**
***Inevitable Discovery and Equitable Estoppel*:**
***Fourth Waiver Search and Seizure Conditions*:**

People v. Thomas **(Dec. 3, 2018) __ Cal.App.5th __ [2018 Cal. App. LEXIS 1130]**

Rule: (1) The detention of an individual is illegal when based upon no more than a vague physical description of the person, the information is hours old, and without an allegation of any specific criminal activity. (2) Wearing bulky clothing on a warm day is not enough, by itself, to justify a patdown for weapons. (3) The doctrine of "Equitable estoppel," by falsely claiming to not to be on probation, *may* excuse an officer's pre-search lack of knowledge that the person is subject to a warrantless search. (4) The specific terms of a warrantless search condition must be entered into the record in order for such a search based on that theory to be upheld.

Facts: The Sacramento Police Department received a 9-1-1 call from a business owner at about 12:23 p.m., in April, 2016, that a black male adult, wearing a gray hooded sweatshirt and black pants, was harassing customers in front of the business in the Del Paso Heights area. It was also reported that the subject had "set up camp" at that location and that he "appeared to have something mental going on," seemingly not understanding when people spoke to him. The Del Paso Heights area in general has a high crime rate with a high number of transients and homeless people in the area. There is also a "fair amount" of foot traffic in the area due to retail shops and restaurants being located there. Responding officers did not get to the scene until some two hours and twenty minutes later. When they did, all they found was defendant, seated some 70 to 80 yards away from the complaining business, with no one else in the immediate vicinity. Despite it being "pretty warm" out, defendant was wearing "bulky clothing, a hooded sweatshirt and bulky ('dark') pants, as well as a windbreaker jacket on top of that." (The color of the clothing was not mentioned in the record.) Upon contacting defendant and explaining to him why they were there, defendant became uncooperative and refused to give them his name. Asked if he had any weapons on him, defendant replied that he was not on probation and did not have to speak with them. He attempted to walk away. As he did so, one of the officers put defendant into a "control hold" and handcuffed him. A patdown search resulted in the recovery of a fixed blade knife from the lining of his jacket. A "narcotics pipe" was found in a jacket pocket. Also recovered was an EBT card with his name. A records check showed that defendant was in fact on searchable probation. A full search of his person resulted in the recovery of methamphetamine from the same pocket where the narcotics pipe had been. Arrested and charged in state court with carrying a concealed dirk or dagger, felony possession of methamphetamine, and possession of a narcotics smoking device, all with a prior strike alleged, defendant's motion to suppress the above was denied. Convicted after a jury trial on all charges and sentenced to prison for four years, defendant appealed.

Held: The Third District Court of Appeal reversed, based upon defendant's argument that he had been detained and patted down illegally.

(1) *Detention*: Defendant's first argument on appeal was that he was detained without a reasonable suspicion given that by the time he was contacted, the information the officers were acting on was stale, the physical description they had was too general, and that there was at best only a vague assertion of any criminal activity. The Court first noted (and the People did not disagree) that defendant was in fact "detained." "A seizure of the person (e.g., a detention) occurs 'whenever a police officer by means of physical force or show of authority' restrains the liberty of a person to walk away." Here, when defendant attempted to walk away, he was physically stopped and handcuffed. The People argued, however, that the detention was lawful when considering the 9-1-1 call, coupled with defendant's attire, his uncooperative behavior, his lying, his refusal to identify himself, and his attempt to walk way, providing the officers with the necessary reasonable suspicion to justify his detention. The general rules are well-settled: The People must show that the officers had at the very least a "*reasonable suspicion*" to believe that defendant was, is, or is about to be, engaged in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1.) "[T]o justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him (or her) to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he (or she) intends to stop or detain is involved in that activity." The other side to this coin is the rule "that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*In re Tony C.* (1978) 21 Cal.3rd 888.) It is the prosecutor's burden to prove that any such warrantless search or seizure was lawful. In this case, the officers were acting on information that was almost two and half hours old. Defendant, when contacted, only vaguely matched the description provided by the 9-1-1 caller, wearing dark pants and a hooded sweatshirt (the color of which was not shown in the record). Aside from being a "black male," there were no further matching descriptive factors such as the individual's age or physical build. When observed, defendant was also some 70 to 80 yards away from the complaining business, being the only one in the area at the time. Per the Court, such "(a) vague description does not provide reasonable suspicion to stop every person falling within that vague description." Also, when contacted, there was no indication that he was "harassing" anyone, or that he had "set up camp," as indicted by the 9-1-1 caller. When contacted, defendant was not reported to be displaying any behavior suggesting a mental health problem or a lack of understanding when the officers spoke to him. Aside from this, even if defendant was the person complained about by the 9-1-1 caller, it was never alleged that he had committed (or had been, or was about to commit) a crime; a necessary predicate to a lawful detention. "Harassing" conduct is not, in itself, a crime. Based upon the above, the officers did not have the necessary "*reasonable suspicion*" to justify a detention. As such, defendant was not obligated to identify himself, talk to the officers, or remain at the scene. Stopping him and handcuffing him when he attempted to walk away was therefore unlawful.

(2) *Patdown for weapons*: Immediately upon being detained, defendant was patted down for weapons. Such a patdown is lawful so long as the officer can point to specific and articulable facts which, when considered in conjunction with rational inferences to be drawn therefrom, give rise to a reasonable suspicion that the suspect is armed and dangerous. The Court found here that the officers did not have the necessary reasonable suspicion to justify patting defendant down for weapons. "A claim of 'harassing' customers of a business, with no reports of violence, battery, assault, threats or weapons does not reasonably suggest the presence of weapons. Nor did

defendant's conduct, or wearing a jacket and sweatshirt on a 'pretty warm' day provide reasonable grounds to believe he was armed and/or dangerous and might gain immediate control of a weapon." The recovery of the knife, as well as the narcotics pipe, was therefore illegal. These items should have been suppressed.

(3) *Inevitable Discovery and Equitable Estoppel*: Once defendant's identify was discovered, he was found to be on searchable probation. It is a general rule the People cannot use the fact that a suspect was subject to a warrantless search condition to justify a search of his person when the fact that he was subject to such a condition was unknown to the officers at the time. (*People v. Sanders* (2003) 31 Cal.4th 318.) In this case, however, the People argued that discovery of the knife, pipe, and drugs was "inevitable" under the theory that had defendant "been forthcoming with his identity from the beginning, the officers would have learned of [his] probation condition sooner and would have inevitably searched [him] and discovered the evidence." In analyzing this issue, the Court held that the People are correct: "A) defendant who intentionally misrepresented his identity to prevent law officers from discovering his probation or parole status and search conditions (is) *equitably estopped* from challenging the search as a probation search." (*People v. Watkins* (2009) 170 Cal.App.4th 1403.) However, the People failed to make this argument at the trial court level, raising it for the first time on appeal. "[F]or a suppression ruling to be reviewable, the underlying objection, contention or theory must have been urged and determined in the trial court." (*People v. Manning* (1973) 33 Cal.App.3rd 586.) Having failed to raise this issue before, it was considered "waived."

(4) *The Search Conditions*: Lastly, it was also noted by the Court that even if the officers had known about the search condition, there was no evidence in the record showing what defendant's search conditions would have allowed a search of his person. In order for a search condition to justify the search of defendant's person, the specific terms of defendant's search condition needed to be introduced into evidence. Some search conditions are limited in their scope to specific circumstances and/or for specific evidence. The specific terms of defendant's search condition is unknown in this case, not having been introduced into evidence by the prosecutor.

Conclusion: The judgment was reversed and the case remanded to the trial court with instructions to vacate its order denying the motion to suppress and to enter a new order granting the motion to suppress.

Note: No one contested the legality of "consensually encountering" defendant. The officers could have simply walked up to defendant and engage him in conversation. So there was no problem up until the point when, after volunteering to the officers that he was not on probation and that he didn't have to talk to them, defendant was physically stopped from walking away. Had the People raised the "equitable estoppel" issue at the motion to suppress in the trial court, we would have had a decision from the Appellate Court as to whether the *Watkins* equitable estoppel rule applied to these circumstances; certainly a debatable issue under the circumstances. As for the value of wearing "bulky clothing" on a warm day, the Court ruled here that that fact alone is insufficient to justify a patdown for weapons. But that ruling was under the circumstances of this case; i.e., in an area frequented by homeless people. Although not discussed, one can surmise that defendant himself was homeless, or at least appeared to be. And it is not usual for homeless people to be wearing everything they own, whether it's warm out or not. Switch this scenario to a gang-infested area with indications that defendant was member of a criminal street gang, then the bulky clothing on a warm day might very well justify a patdown for weapons. Lastly, the scope of one's search and seizure conditions under a "Fourth waiver" is

in fact important to know. In San Diego County, at least when I worked there, the courts typically and uniformly used an all-inclusive Fourth waiver that includes the right to search one's person, home, papers, belongings, etc. But not all counties abide by this practice, some limiting Fourth waivers to the circumstances of the defendant's conviction. It is the prosecutor's burden to prove that a Fourth waiver search complies with the defendant's specific conditions as expressed in the waiver he or she agreed to.