San Diego District Attorney

LEGAL UPDATE

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Vol. 16 February 14, 2011 No. 2
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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*The truth is that parents are not really interested in justice. They just want quiet*." (Bill Cosby)

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ADMINISTRATIVE NOTES:

Impounding Vehicles per V.C. § 14602.6: Two issues: (1) There's been some question, I'm told, about the legality of using V.C. § 14602.6(a)(1) to impound the vehicle of someone driving on a suspended or revoked license, or never had a license, and holding the vehicle for the statutory 30 days, even in cases where law enforcement's "*community caretaking function*" requirement is otherwise satisfied (e.g., the car is illegally parked, subject to being vandalized or stolen, etc.) The recent First District Court of Appeal case of *Alviso v. Sonoma County Sheriff's Department et al.* (2010) 186 Cal.App.4th 198, should put an end to these concerns. In this civil suit, the plaintiff alleged constitutional

equal protection, due process, and Fourth Amendment unreasonable seizure (for holding onto his car for 30 days) violations. The Court, however, while noting the post-impound administrative hearing procedures outlined in sections 14602.6(b) and 22852, rejected all these arguments and found the section to be constitutional. A more recent federal case, *Salazar et al. v. City of Maywood et al.* (9th Cir. Feb. 8, 2011) 2011 U.S. App. LEXIS 2519, reached the same conclusion (except to add that failure to give notice to the owner of the car that he can contest the 30-day hold on his car would be a violation of state law). The federal case, however, is unpublished and therefore not available for citation. (2) Neither of these cases, however, discussed the impoundment of vehicles when done in violation of law enforcement's community caretaking function. Both cases dealt only with the legality of holding onto the plaintiffs' cars for 30 days. Both courts, however, did express its agreement with some legislative findings that a "disproportionate number of serious accidents (are) caused by unlicensed drivers" (*Alviso*, pg. 206), and that "(s)uspensions that do result in impoundment under section 14602.6 are primarily tied to offenses involving more dangerous behavior" (*Alviso*, pg. 207). In *Legal Update* Vol. 15, No. 14 (Dec. 28, 2010), I made the argument that the fact a driver is not legally licensed *does not*, by itself, constitute a community caretaking factor and is therefore probably not grounds to tow his vehicle even if it is possible he might continue his unlawful driving after the officer leaves. These quotes in *Alviso* and the 9th Circuit's similar finding in *Salazar* might make for a good argument that when a driver operates a motor vehicle with a suspended or revoked license, or never had a license, this alone *does in fact* constitute a community caretaking consideration thus justifying the impoundment of his car. Unfortunately, however, neither case said this, nor even discussed this issue.

CASE LAW:

***Searches of the Person Incident to Arrest*:**

People v. Diaz **(Jan. 3, 2011) 51 Cal.4th 84**

Rule: The warrantless search of a cell phone (or other personal property) is lawful so long as it is "*immediately associated with the person of an arrestee*," even if the search is delayed.

Facts: Defendant was the driver of a vehicle involved in a controlled narcotics buy of Ecstasy, unwittingly transporting the seller to the location of the sale with an undercover informant. The transaction was monitored by law enforcement officers. After the sale, Senior Deputy Sheriff Victor Fazio of the Ventura County Sheriff's Department stopped defendant's vehicle and arrested him. Six tabs of Ecstasy and some marijuana were seized. He also had a cell phone in his pocket. Transported to the sheriff's station, a detective seized the cell phone and Deputy Fazio put it with other evidence while defendant was interviewed. Defendant denied any knowledge of the drug buy. After the interview, some 90 minutes after defendant's arrest, Deputy Fazio finally retrieved the cell phone, "manipulating" through various applications until finding the text messages. One message read "6 4 80," which Deputy Fazio interpreted in his expertise to mean "six pills of Ecstasy for $80." He showed this text to defendant who then cop'd to participating in the sale of Ecstasy. Charged in state court with selling a controlled substance, defendant filed a motion to suppress the text message and his resulting confession,

arguing that the warrantless search of his cell phone was a violation of the Fourth Amendment. The trial court denied the motion and defendant pled guilty. The appellate court upheld his conviction. The California Supreme Court granted defendant's petition for review.

Held: The California Supreme Court, in a 5-to-2 decision, affirmed, upholding the search of the cell phone and thus the legality of the subsequent confession as well. After first noting the presumptive illegality of warrantless searches, the Court recognized a "*search incident to arrest*" as one of the "specifically established exceptions to the Fourth Amendment's warrant requirement." Such a search has traditionally been justified by the need to search "for weapons, instruments of escape, and evidence of crime" upon performing a custodial arrest. Defendant in this case did not contest his arrest, nor the seizure of his cell phone. Rather, he argued that looking into the contents of his cell phone was too remote in time to qualify as a valid search incident to arrest. Citing three U.S. Supreme Court cases as precedent, the Court disagreed. First, in *U.S. v. Robinson* (1973) 414 U.S. 218, the warrantless search of a crumpled cigarette package found in the arrestee's coat pocket was upheld as a reasonable "full search of the [arrestee's] person." In *Robinson*, it was noted that such a search was not dependent upon having probable cause to believe the arrestee had contraband on him, but rather was justified by the fact of the custodial arrest alone. The cigarette package was subject to being both seized, and inspected. Second, in *U.S. v. Edwards* (1974) 415 U.S. 800, it was held that the search incident to arrest theory also justified the seizure and inspection of the defendant's clothing, taken from him some 10 hours after his arrest. *Edwards* held that following a lawful custodial arrest, "the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant *even though a substantial period of time has elapsed* between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other." As noted, this rule applies whether the searched property is seized from him immediately upon his arrest or even a "*substantial period of time*" after his arrest and incarceration. *Edwards* established the rule that just because the item is removed from the defendant's possession and secured does not eliminate the government's right to search it later. "(S)earches and seizures that [may] be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." Per the Court, a delayed search of personal property found upon an arrestee's person no more imposes upon the arrestee's constitutionally protected privacy interests than does a search at the time and place of his arrest. In contrast, the Court next reviewed *United States v. Chadwick* (1977) 433 U.S. 1, where a footlocker recovered from an arrested defendant's car was seized and searched some 90 minutes later. The High Court rejected the Government's argument that the footlocker was lawfully searched incident to the defendant's arrest, noting that while the arrestee may have had control over it at the time of his arrest, it was *not* property "*immediately associated with the person of the arrestee* to (his) exclusive control," and that there was no longer any exigency after it had been seized and searched "remote in time (and) place from the arrest." *Chadwick* highlights the distinction between the search of an arrestee's person, including personal items carried on his person (i.e., "*immediately associated with his person*"), and other possessions that are merely "within an arrestee's immediate control." The former are subject to seizure and a warrantless search. The later may be seized, but require prior judicial authorization to search. Taken together, these three U.S. Supreme Court cases dictate that defendant's cell phone, as his personal property "*immediately associated with his person*," is subject to a warrantless search even when done "*a substantial period of time*" after his arrest. In

so finding, the majority of the Court rejected the defendant's argument (as well as the Court's dissenting opinion) that cell phones (as well as other electronic containers of information) were entitled to greater privacy protections merely because of the volume and types of personal information such items are capable of containing. Specifically, the Court found that the "nature or character" of the item searched is irrelevant to the issue. Similarly, the Court declined to find any difference between the cell phone container itself and the contents of that cell phone. Case law clearly notes that incident to a lawful arrest, the police may not only seize anything found on an arrestee's person, but may also open it and examine what they find whether or not the item seized is considered to be a "container." For these reasons, defendant's cell phone was lawfully searched, the contents from which could then be used to motivate defendant's confession.

Note: *But beware*; the dissent makes some very strong arguments (I, myself, had predicted we'd lose this one) that when *Robinson*, *Edwards* and *Chadwick* were decided (in the '70s), cell phones and other mini-computers that we now commonly carry on our person did not exist. What you might hide in a crumpled cigarette package is a far cry from the vast amount of personal information cell phones are capable of containing. The Ohio Supreme Court agrees with California's dissenting justices, as held in the recent case of *State v. Smith* (2009) 920 N.E. 949. This makes the issue ripe for U.S. Supreme Court review; an occurrence many experts are already predicting. So don't put all your eggs in this basket until we see whether the issue is in fact taken up. While we're waiting, note that the Court never specifically defines for us what they mean by "*immediately associated with the person*." But because the justices do make a distinction between this and other containers "*within an arrestee's immediate control*" (the former, as I read it, being a *Diaz* situation, the latter being a *Chadwick*, footlocker situation), it is my opinion that they are talking about actually on the arrestee's person; e.g., in his pocket, on his belt, in his hand, or in some similar physical contact with the arrestee. Also, Missing in *Edwards* and *Diaz* is any discussion about when a "*substantial period of time*" might expire, if ever. In *Edwards*, it was noted that the delay in seizing the defendant's clothing was "*reasonable*" in that aside from the fact that the defendant was still in custody, no substitute clothing was available for him until the next morning. Per the Court, it would have been unreasonable to strip him naked while awaiting other clothing to arrive. In *Diaz*, the issue is simply not discussed at all. Therefore, should the delay between the arrest and the subsequent search be unexplained or otherwise unjustified, a search warrant would certainly be the prudent way to go.

***Frisks for Weapons*:**

United States v. Burkett **(9th Cir. July 20, 2010) 612 F.3rd 1103**

Rule: A vehicle passenger's furtive movements and unreasonably explanation justify a pat-down of his person for weapons under the facts of this case.

Facts: Washington State Trooper Benjamin Blankenship observed a vehicle coming up behind him "at a pretty good clip" as the officer was on patrol at 1:00 a.m. in Grays Harbor County, Washington State. Using his rear antenna radar, the officer clocked the vehicle at 67 in a 55 mph zone. Using his overhead emergency lights, Trooper Blankenship attempted to stop the vehicle. But instead, the vehicle continued on for another 8/10 of a mile despite there being a number of safe places for it to stop. While it continued on, Trooper Blankenship illuminated the passenger

compartment with his spotlight and called for backup. In so doing, he could see the right front seat passenger (later identified as defendant) lean forward while keeping his head rigid, continuing to look to the front as if trying to disguise his movements. It appeared to the officer that defendant was either hiding or retrieving something from under his seat. When the car finally stopped, Trooper Blankenship contacted the female driver and asked for her driver's license and registration. At the same time, he used his flashlight to illuminate defendant's hands. Initially, his hands were in his lap, but they didn't stay in that position or remain within view. Both defendant and the driver appeared to be unusually nervous. Defendant was asked what he was doing when he was moving around right before the car was stopped, to which he responded "nothing." Knowing this not to be true, the officer told defendant that he saw him put something under the seat. Defendant claimed to have merely taken a drink, pointing to a cup on the center transmission hump. The officer knew that this was not consistent with the movements he'd seen. Concerned that defendant might be armed, Trooper Blankenship ordered defendant out of the car. Defendant reached over with his left hand and opened the car door, an "unusual movement" under the circumstances, hiding both hands from the officer's view. As he got out of the car, defendant appeared to be attempting to find the pocket to his knee-length jacket. The officer immediately pulled him to the rear of the car and ordered him to put his hands on the trunk lid and spread his legs so that he could conduct a pat-down for weapons. As he did this, defendant attempted a couple of times to pull his right hand off the trunk, turning his torso as he did so. Just then, the cover unit arrived. Seeing this, defendant said; "You've got me," and admitted to having a gun in his right jacket pocket. A .380 automatic pistol was recovered and defendant was arrested. Charged in federal court with being a felon in possession of a firearm, defendant filed a motion to suppress the gun. In an evidentiary hearing, defendant admitted to much of what the officer had testified to seeing (i.e., the furtive movements, etc.), but argued that he was merely setting an open container of beer on the floor and not reaching for a weapon. Upon denial of his motion, defendant submitted to a court trial and was convicted. He appealed.

Held: The Ninth Circuit Court of Appeal confirmed. The Court noted that it is not relevant what defendant's apparent innocent explanations might be for his furtive movements. The issue was whether the officer, right or wrong, was reasonable in concluding that defendant might have been armed under the circumstances, based upon the facts as known to him at the time. It need only be proved that the officer had a "*reasonable suspicion*" to believe defendant was armed to justify the pat-down for weapons. Based upon the "*totality of the circumstances*," as apparent to Trooper Blankenship at the time, the Court easily found that the record "amply supports a conclusion that the 'stop and frisk' in this case was reasonable."

Note: The Court had absolutely no difficulty in upholding the frisk in this case. The reason it was such a slam-dunk is because the 22-year veteran officer and/or the prosecutor (likely a combination of the two) did a thorough and professional job of explaining via the testimony at the suppression motion what happened, step by step, in excruciating detail. It is not unusual for law enforcement supervisors to complain to me about the difficulty they have in impressing upon some of their officers the need to put absolutely everything into their reports and not assume the courts will automatically find a valid reason for the contact, the detention, the pat-down, the search, and/or the arrest. In the written decision in this case, the factual description of the stop and pat-down is roughly 3½ times as long as the Court's analysis upholding the legality of

everything the officer did. With such detail in the factual description, there was no need for the Court to finesse the law to justify the officer's actions. Good job by everyone concerned.

***Use of Deadly Force*:**

Wilkinson v.Torres **(9th Cir. July 6, 2010) 610 F.3rd 546**

Rule: A police officer's use of deadly force is constitutional when an escaping suspect constitutes a threat of serious physical harm to officers or others.

Facts: City of Vancouver (Washington) Police Officer John Key observed a minivan parked near a known drug house. Checking the license plate, it was discovered that the van was stolen. An individual later determined to be Jason Scott Wilkinson (relative of the plaintiffs) was at the wheel. Wilkinson drove off after Officer Key attempted to get his attention by yelling at him. A high speed (i.e., 5 to 10 miles over the speed limit) chase ensued with officers using emergency lights and sirens in pursuit. Officer Rick Torres (defendant in this civil suit) took over the chase and attempted to stop the minivan by using the "PIT" (*Pursuit Immobilization Technique*) maneuver. Despite causing the minivan to go into a spin, Wilkinson recovered and continued fleeing. A second PIT maneuver caused Wilkinson to lose control and spin off the road into a yard. When a patrol car blocked his path out of the yard, Wilkinson drove the minivan into a telephone pole. Officers Key and Torres got out of their respective police cars. Officer Key ran up to the driver's side window and attempted to open the door. But Wilkinson, refusing to give up, backed the minivan, knocking Key to the ground. From Officer Torres' perspective, he couldn't tell if Key had been merely knocked down or run over. (In fact, Officer Key was able to jump out of the way so he wouldn't get hit.) As the minivan's wheels spun on the wet ground, throwing up mud and slowing its progress as it backed up, Officer Torres began shooting through the passenger side window. After a brief pause, during which Torres "assessed the situation," he continued firing at Wilkinson until the van, having arced around him, began to slow down. Having fired a total of eleven rounds, Officer Torres called in to report that shots had been fired. Wilkinson was dead at the scene. Less than nine seconds had elapsed between the final PIT maneuver and when Officer Torres called in to report that shots had been fired. Wilkinson's relatives sued in federal court, alleging an excessive use of force under the Fourth and Fourteenth Amendments. The trial court judge denied the civil defendants' motion for summary judgment (i.e., to dismiss the lawsuit prior to trial). Arguing that he was entitled to qualified immunity from civil liability, Officer Torres appealed.

Held: Finding as a matter of law that Officer Torres had *not* used excessive force under the circumstances, the Ninth Circuit Court of Appeal reversed. In determining whether an officer using deadly force is entitled to qualified immunity from civil liability, a court must decide (1) whether the facts as alleged by the plaintiff constitute a violation of a constitutional right, and if so, (2) whether the right at issue was clearly established at the time of the civil defendant's alleged misconduct. The use of excessive force is a Fourth Amendment (i.e., "seizure") issue. In this case, the Court never had to get to question #2 because Officer Torres used force that was not excessive under the circumstances, and therefore did not violate Wilkinson's constitutional rights. In evaluating the legal issues, the Court first noted it is constitutionally reasonable to use deadly force to prevent an escape whenever an officer has probable cause to believe that the

suspect poses a threat of serious physical harm, either to the officer or to others. In making this decision, a court must consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat of serious physical harm to the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of the force used must be judged from the perspective of a reasonable officer on the scene. Also, the court must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. The availability of a less intrusive alternative will not, by itself, render an officer's conduct as unreasonable, the force allowed under the circumstances encompassing a range of conduct. The ultimate question is whether an officer's actions are objectively reasonable in light of the facts and circumstances confronting him. In this case, the evidence as presented at the summary judgment motion clearly showed that Officer Torres had "*probable cause*" to believe that Wilkinson's actions posed an immediate threat of serious physical harm to Officer Key as well as to himself. After repeated refusals to submit, Wilkinson demonstrated his intent to violently escape by accelerating in reverse while a fellow officer appeared to be either lying on the ground or standing nearby. The situation was rapidly evolving with no more than nine seconds between the last PIT maneuver and the end of the shots being fired. From Officer Torres' perspective, "a reasonable officer had probable cause to believe that the threat to safety justified the use of deadly force." Therefore, Officer Torres did not violate Wilkinson's constitutional rights by shooting him.

Note: The Fourteenth Amendment allegation made by plaintiffs was to the effect that Wilkinson's relatives had been denied their "due process" right to "familial association" with the deceased. The Court ruled that summary judgment in the officer's favor should have been granted on this issue as well in that it was not shown that Officer Torres acted with an "*intent to harm*," but rather with a "*legitimate law enforcement objective*." As to the use of deadly force under the Fourth Amendment, if it's one thing (or rather, *one of the things*) I never really understood as a cop (way back in the '70's) was when it might be appropriate to use deadly force. Fortunately (for both me and the crooks with whom I was confronted), while I had a few opportunities in my short career as a cop to use deadly force, I was never personally put to the test. But the likelihood that *you* will have to use deadly force someday is greater than it was in my day as the world gets more and more dangerous. So it's important to review the standards applicable to this important issue. *And then use your common sense*. It's always been my position that just because you can legally shoot someone doesn't necessarily mean you should. I'm familiar with a number of instances where officers have shot suspects armed with "weapons" less than a car (as in this case), a gun, or a knife (e.g., sticks, rakes, etc.); circumstances where we used to just disarm the sucker and physically subdue him. (I was going to say ". . . *and then beat him with it*," but we didn't really do that.) But now that's a decision *you'll* have to make.

***Consensual Residential Entries and the Scope of the Consent*:**

People v. Smith **(Nov. 29, 2010) 190 Cal.App.4th 572**

Rule: A consent to enter a residence must be free and voluntary to be valid. The scope of that consent depends upon a balancing of the intrusion into a person's privacy with the governmental interests involved.

Facts: Members of the "L.A. Saves Probation-Parole Task Force," with officers from the Los Angeles Police Department and the L.A. County Probation Department, conducted probation and parole compliance checks in a housing development. One of the places they wanted to check was the last listed residence of a probationer named Tyrell Jones whose probation conditions for a domestic violence-related conviction included a Fourth Amendment wavier. Upon knocking on the door of Jones' listed residence at 6:00 a.m. on June 4, 2009, defendant (not Jones) could be seen through a front window asleep on a couch. Waking defendant and talking to her through the window, the officers told her why they were there. Defendant told them that Jones was not there and didn't even live there. One of the officers, not necessarily believing her, told defendant, "Well, we'd like to check." Defendant responded, "Hold on. Let me get dressed." Although she appeared to be already dressed, she disappeared back into the kitchen area of the residence. From outside, the officers could hear what sounded like dishes being moved and a clothes dryer being started. The dryer made a loud noise as though metal was banging around inside it. Defendant then opened the front door and stepped aside so that the officers could enter, not blocking the door in any way. One of the officers told defendant that they just wanted to make sure Jones was not there. Defendant told the officers that they could check, but that the only people in the apartment, aside from herself, were her kids and her brother. Upon entering the residence, the officers could smell fresh marijuana. The odor was even stronger in the kitchen. A shoebox filled with cash and "one-by-one" individual plastic bags, similar to those often used to package marijuana, were in plain sight. The dryer, located in the kitchen, was still making a lot of noise. Wanting to call for defendant's brother to come down from the upstairs bedroom area so that they could verify his identity, one of the officers opened the dryer door "for the sole reason of turning it off." When he did so, he saw in plain sight in the dryer a package of marijuana wrapped in cellophane. Also in the dryer was some loose change and a "Hello Kitty" bag containing 22 one inch square baggies of marijuana. Defendant admitted that the marijuana was hers. Charged in state court with possession of marijuana for sale, defendant filed a motion to suppress. Upon denial of her motion, she pled no contest, and appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. On appeal, defendant argued that the officers' entry into her residence was obtained through an invalid consent. And even if her consent was valid, opening the door of the dryer exceeded the scope of that consent. The Court rejected both arguments. As for the initial entry, the Court noted that entering a residence with an occupant's consent has long been an exception to the general rule that a warrant is needed. So long as the consent is obtained freely and voluntarily, the entry is lawful. In this case, the officers explained to defendant why they wanted to come in and compliantly waited outside while defendant disappeared into the residence, purportedly to get dressed. Then, without objecting, she opened the front door and stood aside so that the officers could enter, telling them that they were free to look for the probationer Jones. The entry was lawful. As for whether opening the dryer door exceeded the scope of the defendant's consent to look for Jones, the issue was whether opening the door was reasonable under the circumstances. In determining the reasonableness of this action, a court must balance the extent of the intrusion into defendant's privacy rights with the governmental interest justifying it. In this case, the intrusiveness in opening the door to the dryer is diminished by the fact that defendant had already consented to the officers' search for Jones which, at the very least, extended to every room of the residence. Also, defendant was never held at gunpoint, nor handcuffed. Further, with this all occurring inside defendant's residence, she was not unduly embarrassed as she might have been had it

occurred in a public place. Lastly, the act of opening the door to a dryer itself is less intrusive than other types of privacy invasions. These factors are to be balanced with the governmental interests involved in checking for a Fourth wavier subject whose probationary offense was domestic violence-related. This fact alone added a certain danger to the compliance check the officers were conducting. Also, evidence of narcotics sales was observed in plain sight; i.e., the money and baggies. "In the narcotics business, 'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia.'" Particularly when in a private residence, it can be expected that there may be firearms accessible to the occupants. Lastly, it was known that there were children in the apartment and a male adult upstairs. The officers reasonably needed to check the identity of this adult. But the noise being made by the dryer was inhibiting their ability to communicate with that adult and to otherwise maintain control of the situation. For the safety of the officers and the other persons in the apartment, it was not unreasonable to commit the minimal intrusion of opening the dryer door for the purpose of eliminating the distracting noise. The marijuana thus observed in plain sight was lawfully discovered and admissible against defendant.

Note: "*So what did the court say*?", you might ask. All that this legal mumbo jumbo means is that you need only to use your common sense, keep safety as your primary objective, and then act reasonably. The problem, of course, is that we're not all blessed with the common sense needed to properly determine what is reasonable under any given set of circumstances. That's not meant as an insult to any particular police officer (although you and I both know someone who fits into that category). We can all look back at decisions we've made and wonder how stupid we must have been at the time. It is my belief, however, that common sense for all of us comes with experience and education, few if any of us being fortunate enough to have been born with it. Experience comes with time, and getting involved. Education comes with reading these cases and getting comfortable with what the courts expect of you (recognizing that even the courts don't always display what the rest of us might consider to be good common sense). In this case, an officer would be hard pressed to convince a court that it was reasonable to believe Jones might be in the noisy dryer. So looking for him there would not have been upheld. But maintaining control of the scene, while insuring everyone's safety as they checked for Jones, is in fact a valid reason for needing to eliminate distractions and unnecessary noise that impeded the officer's otherwise lawful actions. That is an exercise of an officer's common sense.

***Warrantless Testing of Abandoned DNA*:**

People v. Gallego **(Nov. 22, 2010) 190 Cal.App.4th 388**

Rule: Abandoned DNA may be used to identify a criminal suspect as the perpetrator of a crime in a pending criminal investigation.

Facts: In August, 1991, Leticia Estores was found dead on her kitchen floor, having been stabbed at least 50 times. A bloody towel was found on the floor near the front door. The towel was later subjected to forensic testing by the Sacramento County Crime Lab. At least five stained areas on the towel were found to contain human blood. Estores' nephew, defendant in this case, was questioned. Although his alibi ("I was off gambling in Reno at the time") was easily found to be full of holes, there was insufficient evidence with which to charge him. The

evidence, therefore, was filed away. In April, 2006 (15 years later), another criminalist conducted DNA testing on the same bloodied towel and determined that the blood revealed a male DNA profile that had similarities to the victim, suggesting that the suspect was related to her. This fact renewed law enforcement's interest in defendant. The police surreptitiously obtained a sample of defendant's DNA by following him until he discarded a cigarette butt on a public sidewalk. His saliva from the recovered butt was tested and found to match the DNA from the towel. Defendant was arrested and charged with murder. His motion to suppress the result of the DNA testing was denied. With the DNA evidence being used against him at trial, he was convicted of second degree murder. Sentenced to prison for 16 years to life, he appealed.

Held: The Third District Court of Appeal (Sacramento) affirmed. Defendant's argument on appeal was not that the police couldn't collect his discarded cigarette butt, but rather that to test it for DNA without a search warrant was a Fourth Amendment violation. The Court disagreed. Whether or not the testing of the DNA constitutes a search depends upon the existence of a reasonable expectation of privacy in that DNA. A defendant must not only subjectively believe he has a privacy right in that which is tested, but his expectation must be one which society recognizes as reasonable. To the defendant's detriment, the law is well settled that a warrantless examination of property abandoned in public does not constitute an unlawful search because of the lack of a reasonable expectation of privacy in such property. Having abandoned the cigarette butt, any expectation of privacy defendant might claim in the butt is not reasonable. The Court also rejected defendant's argument that the concept of "abandonment" does not apply to DNA. This argument is based upon the theory that people involuntarily leave a trial of their DNA everywhere they go and do not purposely abandon it. But in this case, defendant voluntarily abandoned the cigarette butt that was tested. Also, the fact that DNA might contain private information, including medical conditions and familial relations, even if a valid argument, is irrelevant in this case where the DNA testing is used to determine nothing other than his identity in a pending criminal investigation. (See P.C. §§ 295 et seq., mandating the warrantless collection of DNA from felony offenders and arrestees for the purpose of identifying suspects in criminal cases.) "On these facts," the court concluded that there wasn't a reasonable expectation of privacy in the testing of the cigarette butt for DNA. The DNA evidence, therefore, was properly admitted into evidence against him.

Note: While this decision did not answer the question whether it's okay to trick a suspect into providing his DNA sample, they do cite other out-of-state cases that have found no violation under a variety of such circumstances. For example, testing cigarette butts and a soda can left behind after an interview with police. (*Commonwealth v. Perkins* (Mass. 2008) 883 N.E.2nd 230; *Commonwealth v. v. Bly* (Mass. 2007) 862 N.E.2nd 341.) Obtaining a DNA sample from a piece of chewing gum defendant voluntarily discarded during a contrived soda tasting test. (*People v. LaGuerre* (2006) 29 A.D.3rd 822 [815 N.Y.S.2nd 211].) DNA obtained from defendant's saliva from licking an envelope he mailed to detectives in a police ruse. (*State v. Athan* (Wash. 2007) 158 P.3rd 27.) But note that there is Supreme Court authority that arguably stands for the proposition that the collected DNA may not be used for purposes other than to identify the suspect in a pending criminal case. (See *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602.) But at least by this new case, we know that abandoned DNA is ours to use to compare with DNA collected at a crime scene. That's at least a foot in the door.