The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

Vol. 24 January 23, 2019 No. 2

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:

"*Best friends are those who don't say anything when you show up at their door with a dead body. They just grab a shovel and follow you*." (Unknown Author)

IN THIS ISSUE:

CASE LAW:

***P.C. § 245(a)(1); ADW With a Butter Knife*:**

In re B.M. **(Dec. 27, 2018) __ Cal.5th __ [2018 Cal. LEXIS 9912]**

Rule: For an object—such as a butter knife—to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only capable of producing, but also likely to produce, death or great bodily injury.

Facts: B.M. lived with her sister and step-sister. (It's unknown if B.M.'s parents also lived there.) After a night out carousing, 17-year-old B.M. discovered upon her early morning return that the door locks had been changed and that her key didn't work. When knocking on the door had negative results, B.M. entered through a window. A "mad" and "upset" B.M. went upstairs to the bedroom of Sophia—one of her sisters—and asked why she had changed the locks. Not getting a satisfactory response, B.M. threw a phone at Sophia. She then went downstairs and in "the heat of the moment" grabbed a knife off the kitchen counter. The knife was described as being about six inches long overall with a three-inch blade that was *not* sharp, and that had "small ridges" on one side. The knife was described as a "*butter knife*." B.M. returned to Sophia's room with the knife and confronted Sophia who was clothed only in a towel, just having gotten out of the shower. Seeing B.M. with the knife, and not knowing what B.M. intended to do with it, Sophia covered herself with a blanket from the bed. She later testified that she "was pretty scared" because she thought B.M. "could really … hurt [her]." B.M., on the other hand, denied making any "motion like to stab her," at least initially. But B.M. approached Sophia as the latter was lying on top of the bed with her knees bent. Per Sophia's account, B.M. came "came … at (her) trying to stab (her)." From a distance of about three feet, B.M. made several "downward . . . slicing" motions with the knife, striking the area around Sophia's legs. Sophia further testified that the knife hit her blanketed legs "a few" times and that the amount of pressure B.M. used was "maybe like a five or a six" on a scale from one to ten with "one (being) the least amount of pressure and ten . . . the most pressure." Sophia initially said B.M. poked her with the knife, but she later clarified that B.M. did not poke or stab her and that B.M. did not "hurt" her. B.M. testified that she only "wanted to scare [Sophia]" and "had no intentions in actually stabbing (Sophia) with (the knife)." B.M.'s stepsister then intervened. A verbal argument quickly degraded into an actual physical fight. The fight moved from the bedroom, down the stairs, and to the outside. Sophia called the police who, upon arrival, took B.M. into custody. The arresting officer later testified that B.M. told him "she (had) wanted to scare Sophia and admitted to making several (downward) stabbing motions at the bedding (and) that Sophia had pulled (the blanket) up over her and the bed." A juvenile wardship petition was filed pursuant to W&I Code § 602, alleging that B.M.'s use of the butter knife against Sophia was an assault with a deadly weapon under P.C. § 245(a)(1). The Juvenile Court Magistrate sustained the petition. B.M. appealed. The Second District Court of Appeal (Div. 6; Ventura) affirmed. (*In re B.M.* (Apr. 20, 2017) 10 Cal.App.5th 1292; review granted.) The California Supreme Court granted review.

Held: The California Supreme Court unanimously reversed. Penal Code section 245, subdivision (a)(1), prohibits "*assault*[*ing*] … *the person of another with a deadly weapon or*

instrument other than a firearm." The issue on appeal was whether or not the knife used in this case, under the circumstances, constituted a deadly weapon. As used in P.C. § 245(a)(1), a "*deadly weapon*" is defined as "any object, instrument, or weapon which is used in such a manner as to be *capable* of producing and *likely* to produce, death or great bodily injury." (Italics added) It is recognized that some objects, such as dirks, daggers, and blackjacks, whose primary purpose is to cause death or great bodily injury, are considered to be deadly weapons as a matter of law. Knives, however, do not fall into this category. In determining whether a knife is a deadly weapon, the trier of fact is required to consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. In this case, the Court ruled that the Juvenile Court Magistrate, while determining that the knife used by B.M. was "*capable*" of causing death or great bodily injury, failed to consider whether it was also "*likely*" to have done so under the circumstances present here. Using the dictionary definition of the term "*likely*" (Merriam-Webster Collegiate Dict. (11th ed. 2014) p. 721), it was noted that "*likely*" is defined as "*having a high probability of occurring or being true*" and "*very probable*." Black's Law Dictionary (10th ed. 2014, at p. 1069) defines it as merely being "*probable*." Prior case law (see *People v. Valdez* (2002) 27 Cal.4th 778, 784; a felony child abuse case.) defines "*likely*" as where "*the probability of serious injury is great*." (See also *People v. Sargent* (1999) 19 Cal.4th 1206, 1223.) At the very least, to be "*likely*," it must be shown that there is more than just the mere *"possibility*" that death or great bodily injury may result. In determining whether B.M.'s actions in this case constituted a violation of P.C. § 245(a)(1), the Court also took into consideration what was necessary to constitute an "*assault*." An assault, being a general (as opposed to specific) intent crime, does *not* require a specific intent to cause injury. But it does require proof "that defendant's act by its nature (would) probably and directly result in injury to another." In this case, the evidence showed that B.M. used the butter knife only in the area of Sophia's legs which, at the time, were covered with a blanket. The fact that B.M.'s use of the butter knife could possibly, or may even have increased the likelihood, of causing, serious bodily injury, does not establish that her use of the object was, under the circumstances, "*likely*" to cause serious injury. There was no evidence to suggest that B.M. went after any other area of Sophia's body, or that she used any more than a "moderate" amount of force against the blanket covering Sophia's legs. A dull "butter knife"-type knife was not shown to have likely penetrated the blanket, or that it was likely to have caused any serious injury under these circumstances. In fact, no injury resulted from B.M.'s actions. Although a conviction for assault with a deadly weapon does not require proof of an injury, the lack of any injury resulting from a defendant's actions is relevant to the issue of the *likelihood* of a serious injury. Given these circumstances, the Court determined that no substantial evidence supported the Juvenile Court Magistrate's true finding and that the Court of Appeal's decision had to be reversed.

Note: This decision, of course, relates only to the Juvenile Court Magistrate's true finding as to the commission of an ADW. It does not address whether or not a simple assault or a battery occurred. And it does not appear that anything related to B.M.'s altercation with her step-sister was charged. So it is not likely that B.M. is going to get off "scot-free." And while you may disagree on the question whether flailing at another with a butter knife—even if the target of such an assault is covered by a blanket, and even if the knife used happens to be dull—is likely or not likely to cause death or great bodily injury, at least now we have a definitive analysis of the issue from the California Supreme Court. "*Likely*," although obviously a matter of degree, requires more than just the mere "*possibility*" that death or great bodily injury will result.

***Marijuana* (*Cannabis*); *Return by Law Enforcement When Lawfully Possessed*:**

Smith v. Superior Court (San Francisco Police Department) **(Aug 16, 2018) 28 Cal.App.5th Supp. 1**

Rule: Official retention of legal property—including under an ounce of marijuana—when there is no further criminal action pending, violates the owner's Fourteenth Amendment due process rights. A police department, when acting in its official capacity, must return a defendant's marijuana under such circumstances despite federal statutes to the contrary.

Facts: On January 9, 2018, Robert T. Smith (i.e., "petitioner") was involved in an altercation (the details of which are not described), resulting in his arrest by officers of the San Francisco Police Department. He was subsequently charged with making criminal threats (P.C. § 422) and disturbing the peace (P.C. § 415(3)). In a search of petitioner's backpack incident to arrest, 21.8 grams of marijuana and $574.21 in cash were recovered. The criminal charges were later dismissed (the reasons for the dismissal were also not discussed, except to note that it was pursuant to P.C. § 1385; i.e.; "*in the furtherance of justice*."). With no further charges pending, and feeling the need to once get buzzed, petitioner filed a motion in the Superior Court seeking the return of his 21.8 grams marijuana. The Superior Court judge denied his motion. Petitioner filed a petition for writ of mandate in San Francisco County's Appellate Division of the Superior Court, seeking an order for the return of his dope. The Appellate Division issued an order to the San Francisco Police Department to show cause why SFPD should not be ordered to return petitioner's property.

Held: The Appellate Division of the Superior Court ultimately granted the petition for writ of mandate, ordering the return of the marijuana to the petitioner. At the time of petitioner's arrest and the confiscation of his 21.8 grams of marijuana, the possession of not more than 28.5 grams of marijuana (now referred to as "*cannabis*") was legal for persons 21 years of age or older. (H&S § 11362.1; added by Proposition 64; i.e. "*Control, Regulate and Tax Adult Use of Marijuana Act*," and effective November 8, 2016). Petitioner, being over 21 years of age, therefore lawfully possessed the 21.8 grams of marijuana in issue here. The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law" (see also Cal. Const., art. I, § 15.). Continued official retention of legal property with no further criminal action pending violates the owner's due process rights. California statutes also provide an exception to the rule that contraband will be destroyed; i.e., when "the court finds that the controlled substances . . . were lawfully possessed by the defendant." (H&S Code § 11473.5(a)) The problem with the San Francisco P.D. returning petitioner's marijuana to him is that to do so potentially puts SFPD in violation of federal law. Under the federal Controlled Substances Act (21 U.S.C. §§ et seq.), the "simple possession" of marijuana is still a misdemeanor (see 21 U.S.C. § 844(a)). More to the point, federal law provides that it is unlawful for any person to knowingly and intentionally "distribute" marijuana. (21 U.S.C. § 841(a)(1).) "*Distribute*" is defined under the federal statutes as "to deliver . . . a controlled substance or a listed chemical" (21 U.S.C. § 802(11).), and includes "the actual, constructive, or attempted transfer of a controlled substance." (21 U.S.C. §

802(8).) The San Francisco P.D.'s concern, therefore, was that to give petitioner back his marijuana would violate these federal statutes. *Not so*, ruled the Court in this case. While the U.S. Constitution's "Supremacy Clause" (U.S. Const., art. VI, cl. 2.) grants Congress the power to preempt state law, the Court noted that such preemption takes place only when: (1) Congress explicitly proclaims that its enactment preempts state law; *or* (2) the enactment regulates conduct in a field that Congress intended the federal government to occupy exclusively; *or* (3) the state law conflicts with federal law, making it impossible for a private party to comply with both state and federal requirements. In evaluating these three factors, the Court noted that the federal Controlled Substances Act, at 21 U.S.C. § 903, explicitly states that its provisions do *not* preempt state law and are *not* intended to exclusively occupy any field to the exclusion of state law, eliminating factors (1) and (2) as listed above. The only issue left to consider is whether the federal Controlled Substances Act preempts state law due to an actual conflict (#3, above), making it impossible for a private party (SFPD, in this case) to comply with both the state and federal requirements. The Court held that *it does not*. Citing *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, as its authority, the Court first noted that the federal Controlled Substances Act does *not* apply to persons who regularly handle controlled substances in the course of their professional duties. In giving petitioner back his marijuana, the San Francisco Police Department would be doing so pursuant to a court order, and not acting as drug "pushers" the Controlled Substances Act was designed to combat. As such, the Court found no "positive conflict" between California law and the Controlled Substances Act such that the two could not consistently stand together. Further, the Court found that the federal Controlled Substances Act, under 21 U.S.C. § 885(d), provides immunity in this type of situation. Section 885(d) states that "no civil or criminal liability shall be imposed by virtue of this subchapter . . . upon any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." There is federal authority from another federal circuit for the argument that section 885(d) was intended to protect accepted law enforcement duties "in which officers handle and transfer drugs." (See *United States v. Cortés-Cabán* (1st Cir. 2012) 691 F.3rd 1, 20.) The Court therefore found that these immunity provisions necessarily include California's statutory scheme for the return of marijuana that is "lawfully possessed" under California law. The Court therefore granted petitioner's petition for writ of mandate, and ordered the lower court to vacate its order denying his motion for the return of his marijuana.

Note: The day will eventually come when the U.S. Congress finally gives up and follows suit by legalizing marijuana. According to one chart I found (via Google, last updated 12/4/18), 33 states (plus Washington D.C.) have legalized "medical" marijuana while ten states (plus D.C.) have legalized "recreational" marijuana, adding just that many more buzzed-out inebriates to the domestic violence disturbances and other 415's police have to respond to, while also allowing them out onto our streets and highways, endangering those of us (not to mention our loved ones) who, as a rule, prefer to maintain at least some control over our mental faculties. *But what the hey*: In this "*feel good*" society that is slowly taking over our lives, what difference is one more brain-cell-destroying, mind-numbing, escape-from-reality, making-us-less-responsible-and-less-productive, intoxicant, going to make? (Not that I have an opinion on this subject.)

***Search Warrants*:**
***Fourth Amendment Overbreath*:**
***Fifth Amendment Self-Incrimination*:**
***Biometric Features and Electronic Devices*:**
***The Foregone Conclusion Exception*:**

In re Search of a Residence in Oakland **(N.D. Cal. Jan. 10, 2019) __ F.Supp.3rd __ [2019 U.S. Dist. LEXIS 5055]**

Rule: A search warrant asking for permission to search digital devices belonging to any and all persons present at a particular location without facts supporting probable cause is overbroad and in violation of the Fourth Amendment. A court order to the effect that a criminal suspect must provide passcodes and/or biometric features to law enforcement for the purpose of allowing access to cellphones and other digital or electronic devices violates the suspect's Fifth Amendment Self-Incrimination rights.

Facts: As part of a federal investigation into alleged extortion activities of two specific individuals, where the suspects used Facebook Messenger to communicate a threat to a victim—threatening to distribute an embarrassing video of him if he did not provide the suspects with monetary compensation—government agents (the agency not being identified) submitted an application to a federal Magistrate Judge for a search warrant for a residence in Oakland. Listed in the warrant application as things to be seized and searched were all electronic or digital devices found in the residence. Also included in the warrant application was a request for authority to compel any individual present at the time of the search to press a finger (including a thumb), or utilize other biometric features such as facial or iris recognition, for the purpose of unlocking any or all digital devices found at the scene, in order to permit a search of the contents of each respective digital device. Federal Magistrate Judge Kandis A. Westmore declined to authorize the warrant, and wrote a published opinion as to her reasons.

Held: The Magistrate Judge found both Fourth (search & seizure) and Fifth (self-incrimination) Amendment reasons for why the requested warrant was constitutionally defective.
(1) *Fourth Amendment Overbreath*: The Fourth Amendment protects "(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Under the Fourth Amendment, law enforcement is required to demonstrate the presence of "*probable cause*" in order to justify the search and/or seizure of any of the protected areas or things (i.e., "*persons*, *houses*, *papers* (or) *effects*"). Although the Magistrate Judge found sufficient probable cause to justify a search of the listed premises and the two suspect individuals (based upon facts not described in the decision), the government's warrant sought far more. Specifically, the agents asked for permission to compel "any individual . . . found at the Subject Premises and reasonably believed by law enforcement to be a user of the device, to unlock the device using biometric features . . . ." The Court found this request to be overbroad in that it was neither limited to a particular person or persons (i.e., the two suspects in the extortion) nor to a particular device. The Court found insufficient probable cause to compel anyone other than the two listed suspects to do anything, or to include within its provisions the right to search any and all unspecified digital devices that might be found at the premises during the search.

(2) *Fifth Amendment Self-Incrimination*: As for the electronic or digital devices found at the scene, the Court noted that even if probable cause existed to seize all devices located during a lawful search of the premises, this does not permit the Government to also compel a person to waive rights otherwise afforded by the Constitution, such as his or her Fifth Amendment right against self-incrimination. Individuals have had the ability to lock their personal electronic and digital devices for decades, using numeric or alpha-numeric passcodes. Prior case law tells us that a person cannot be compelled to provide a passcode to a digital device under the Fifth Amendment (absent an exception; see below) in that the act of providing law enforcement a passcode is a "*testimonial communication*." It is "*testimonial*" because it constitutes "[t]he expression of the contents of an individual's mind. . . ." (See *Fisher v. United States* (1976) 425 U.S. 391; *United States v. Kirschner* (Mich. 2010) 823 F. Supp.2nd 665; and the dissenting opinion [pp. 219-221] in *Doe v. United States* (1988) 487 U.S. 201.) In discussing this issue, the Court noted the difference between compelling a person to provide his or her passcode to a cellphone, for instance, and providing other "*real or physical*" evidence, such as DNA, fingerprints, or a blood sample. The latter is *not* protected by the Fifth Amendment. (See *Schmerber v. California* (1966) 384 U.S. 757.) The former is. Looking at the law as it applies to passcodes, the Magistrate Judge found that requiring a person to provide his passcode "falls squarely within the protection of the Fifth Amendment" and is not "akin" to being required to provide real or physical evidence. This rule, however, is not limited to passcodes. Passcode technology has advanced in recent years to other shortcuts utilizing biometric features instead, such as one's fingerprint, thumbprint, iris, face, or other biometric features, to unlock a digital device. The Court found no reason not to apply the same Fifth Amendment self-incrimination prohibitions applicable to passcodes to these biometric features as well. "(I)f a person cannot be compelled to provide a passcode because it is a testimonial communication, a person cannot be compelled to provide one's finger, thumb, iris, face, or other biometric feature to unlock that same device." The government's warrant application, if approved by the Magistrate Judge, would have violated this Fifth Amendment principle.

(3) *The* "*Foregone Conclusion Exception*:" There is an exception to this passcode/biometric feature rule called the "*foregone conclusion*" exception. For instance, when a government agency seeks particular documents that they know exist, and it is a "foregone conclusion" where these documents can be located (e.g., particular bank accounts), a court order requiring the target of an investigation to produce those documents is *not* protected by the Fifth Amendment. (See *United States v. Bright* (9th Cir. 2010) 596 F.3rd 683.) The foregone conclusion exception has been held to apply in circumstances where a criminal suspect is ordered by a court to provide passwords. (See *United States v. Apple Mac Pro Computer, John Doe, et al.* (3rd Cir. 2017) 851 F.3rd 238; and *United States v. Kirschner* (Mich. 2010) 823 F. Supp.2nd 665.) The Magistrate here, however, noted that cellphones and other electronic or digital devices are accorded a higher expectation of privacy than other types of "storage equipment," be it physical or digital. (*See Riley v. California* (2014) 573 U.S. ___, 134 S. Ct. 2473.) Also, the foregone conclusion doctrine does *not* apply when the Government cannot show prior knowledge of the existence or the whereabouts of the information ultimately produced in response to a court order. In this case, we're dealing with an attempt to gain access to the suspects' cellphones or other digital devices without any prior knowledge of what information and/or documents might be obtained via a search of these digital devices. The Magistrate therefore found that the foregone conclusions exception does not apply.

Note: Note that this is a decision from a lower federal court magistrate, and not necessarily binding on California state courts. But the reasoning is consistent with higher court authority and cannot (or should not) be ignored. The bulk of the case law on this topic deals with various government entities seeking records from a suspect's bank accounts or other private record depositories. But, as noted by the Magistrate and as supported by case law, the same line of thinking applies to efforts to obtain electronic device passcodes as well. Biometric features, as used in digital devices (such as my own new iPhone Xs where I merely need to look at the screen up close to open it), are really no different than a passcode. If you are surprised that passcodes and biometric features are considered to be "*testimonial communications*," as the "the expression of the contents of an individual's mind," check out *Doe v. United States* (1988) 487 U.S. 201. In *Doe*, the majority (7 to 1) of the U.S. Supreme Court held that being forced to sign consent forms authorizing the defendant's banks to release to a grand jury potentially incriminating documents did *not* violate the Fifth Amendment. But as noted by the sole dissenting justice, there is really no difference between being ordered to give one's consent to access documents and being ordered to provide one's passcode. Bottom line is that not everyone is in agreement as to what's considered to be a "*testimonial communication*" and what is not. Expect more cases on this topic in the near future.

***Traffic Stops and Reasonable Suspicion*:**
***Border Stops and Roving Patrols*:**

United States v. Raygoza-Garcia (9th Cir. Aug. 31, 2018) 902 F.3rd 994

Rule: Border Patrol Agents, in making drug-smuggling traffic stops, must be able to articulate sufficient suspicious factors to justify a determination of a reasonable suspicion that the person stopped is engaged in such activity.

Facts: Border Patrol Agents Manuel Rivera (a 13-year veteran) and Juan Aguayo Robles (six years' experience)—out of the Murrieta Border Patrol Station—were parked in a marked Border Patrol vehicle at the side of Interstate 15, some 70 miles north of the United States-Mexico border. At about 11:30 a.m., they observed defendant traveling northbound in a Dodge Neon. As defendant passed the Agents, he was observed in the 70 mph speed zone to suddenly slow down to 50 to 55 miles per hour. Defendant slowed so abruptly that other vehicles behind him had to change lanes to go around him. The Agents later testified that in their experience, drug smugglers will often quickly reduce their speed when they pass a law enforcement vehicle. The Agents also observed defendant sitting upright with a rigid posture; not looking at them. The Agents testified that drug smugglers often react in such a manner because of their nervousness. Their suspicions aroused, the Agents decided to follow defendant. As they did so, they noticed that the license plates on the Neon were Baja California, Mexico plates. Doing a moving records check on the car's license number, the Agents were told that that car had crossed the United States-Mexico border earlier that morning. They also discovered that the car had crossed the border multiple times in the prior month. In four of those crossings, the vehicle had been referred to the secondary inspection area, but that no contraband was ever discovered. Agent Rivera later testified that the recent secondary referrals raised his suspicions because, in his experience, drug organizations often will "burn the car." "Burning a car" means that a car would be brought across the border several times without contraband to develop a clean crossing

history. As they continued to follow the Neon, Agent Rivera characterized the Neon's movements in a number of ways, testifying that the car was "drifting," made an "an abrupt change," was "swerving back and forth," and was "jerking." At another point in his testimony, when asked about the lane changes, Agent Rivera stated that he couldn't recall. In declarations filed prior to trial, the Agents stated that in their experience, defendant's swerving indicated to them that the driver was focused on the Border Patrol vehicle rather than the road, and that the Agents had seen smugglers behave this way multiple times. Agent Rivera also testified that defendant, was paying attention to the Agents, which led to his swerving, and that he found this suspicious. However, Agent Rivera later testified that defendant *was not* paying attention to the Agents, which he found to be even more suspicious. While continuing to follow the Neon, the Agents noticed when they passed a marked Riverside County Sheriff's vehicle parked at the side of the freeway, defendant suddenly "grip(ped) the steering wheel with both hands and reduce(d) his speed to 45-50 miles per hour." To the Agents, this was a sign of nervousness that smugglers exhibit. Lastly, the Agents determined via their database that defendant was not the same person who had driven the Neon across the border that morning. (Unknown if this was somehow accomplished before the traffic stop.) In the Agents' experience, switching drivers was a common drug-smuggling operations tactic. Based upon the above, the Agents, believing that defendant was a smuggler of contraband, initiated a traffic stop. Upon contacting defendant, it was noted that a single key was in the ignition. In the Agents' pre-trial declarations they stated that the key did not have "a keychain or additional keys attached to it," which was indicative of a drug smuggling operation in that smugglers were provided "with only the key necessary for the vehicle." The Agents' declaration indicated that they had previously apprehended "multiple smugglers in vehicles with only one key in the ignition." However, six months later, the Agents submitted amended declarations in which they both stated that their previous statements "[were] an incorrect recollection made at the time of the declaration," and "[a]fter recently reviewing reports and photos from the case, [they] now recall that there was a single key in the ignition *with* a keychain." The key to the Dodge Neon was in fact attached to a silver fish-shaped keychain. At the evidentiary hearing, upon cross-examination, Agent Aguayo's testimony went back and forth on whether he in fact had a clear view of the key in the car's ignition. He testified that he could not recall whether or not he initially noticed a keychain. Agent Aguayo eventually testified that what mattered to him was the existence of a single key, not whether or not there was a keychain. Based upon the above, the Agents asked defendant for consent to a canine sniff of the vehicle. Defendant consented. The resulting search yielded an unspecified number of packages of methamphetamine and heroin. Charged in federal court, the district (trial) court denied defendant's motion to suppress the drugs found in the Neon, specifically finding the Agents to be credible and defendant, who denied all the above-described furtive acts, not to be credible. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed, finding sufficient reasonable suspicion to justify the traffic stop. The law is clear that Border Patrol Agents on roving border patrols may conduct "brief investigatory stops" without violating the Fourth Amendment, so long as the stop is supported by "a '*reasonable suspicion*' to believe that criminal activity may be afoot." The Court defined "*reasonable suspicion*" as having a particularized and objective basis for suspecting the particular person stopped of being engaged in criminal activity. Such a suspicion requires something more than a simple "*hunch*," but is less than "*probable cause*" or even a "*preponderance of the evidence*." In evaluating the possible existence of a reasonable suspicion,

the Court is to consider "*the totality of the circumstances*." The totality of the circumstances may include, but is not limited to, the characteristics of the area, its proximity to the border, usual patterns of traffic and time of day, previous alien or drug smuggling in the area, behavior of the driver, appearance or behavior of passengers, and the model and appearance of the vehicle. The agents' training and experience is also to be taken into account. In this case, the Ninth Circuit found that the magistrate's conclusion that the agents were credible was not "*clearly erroneous*," which is all that is necessary on appeal. In so ruling, the Court found that the Agents had the necessary "particularized and objective basis for suspecting that (defendant) was engaged in criminal activity." Specifically, the necessary reasonable suspicion that defendant was engaged in criminal activity was found by considering that the Agents had 13 and 6 years of experience, respectively, as Border Patrol Agents, with at least some of that experience being in the investigation of drug-smuggling operations. Significant factors noted by the Agents included the change of the Neon's drivers from when it crossed the border earlier that morning, the vehicle's recent border-crossing activity which included the tactic of "burning" the vehicle, and the significance of defendant's unusual driving behavior. In evaluating the above, the Court noted that an officer cannot rely solely on generalizations that, if accepted, would cast suspicion on large segments of the law-abiding population. This would include slowing down upon observing a law enforcement vehicle (which we all do), or driving with Mexican plates some 70 miles north of the border. But when considered with the above described suspicious activity, in the totality of the circumstances, these very *un*-suspicious factors may also be considered in determining whether the Agents had sufficient reasonable suspicion to justify a traffic stop. The district court magistrate, therefore, was sustained in his finding that the traffic stop in this case was lawful.

Note: I expended a lot of ink under the Facts, above, on the inconsistencies reflected in the Agents' various descriptions of the defendant's driving and whether the key in the ignition had a key chain or not. Those inconsistencies reflect either poor report writing or a serious lack of preparation for trial. More importantly, a good defense attorney can be expected to argue even worse; i.e.; that the Agents were lying; making up facts to support the traffic stop. Either way, the district court magistrate, in ruling at the evidentiary motion to suppress, could very well have accepted defendant's denials and rejected the Agents' testimony based upon these inconsistencies alone. And note that the Ninth Circuit did not say that they believed the Agents. Rather, they only ruled that the magistrate's credibility findings were not "*clearly erroneous*." Food for thought. On another topic, two of the justices here authored a concurring opinion, agreeing that there was sufficient reasonable suspicion to justify the traffic stop, but questioning the use at all of such innocent factors as being only 70 miles from the border, having a Mexican license plates, crossing at the Otay Mesa port of entry, or even slowing upon observing a law enforcement vehicle up ahead. In so doing, the concurring justices note the correct rule for determining whether reasonable suspicion exists (which I paraphrase here): *Is the person being observed doing something suspicious that is so unusual that it sets him or her out from the crowd*? The concurring justices question whether some of what the Agents found suspicious should be given any weight at all, even when considered in the "totality of the circumstances." More importantly, the concurring justices caution law enforcement on the improper use of one's race or heritage as a factor. Although there was no evidence in this case that the Agents considered defendant's apparent Latin heritage, the concurring justices infer that this had to have been in the back of the Agents' collective minds in deciding to stop defendant. To quote the

Court: "(W)here a large portion of the area's population is Latino (as it is in California), officers cannot rely on an individual's apparent Latino appearance in making a reasonable suspicion determination because one's ethnicity or race is not sufficiently particularized to indicate the criminality of a particular person." The inference in the justices' comments here is that if defendant had been Mr. Magoo (as opposed to Raygoza-Garcia), they never would have stopped him. Again, something to think about.