San Diego District Attorney

LEGAL UPDATE

(COPY - - DISTRIBUTE - - POST)

Vol. 16 July 24, 2011 No. 6
www.legalupdate.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates/

Remember 9/11/01: Support Our Troops

Robert C. Phillips (858) 395-0302 (C)
Deputy District Attorney (Ret.) RCPhill808@AOL.com

THIS EDITION'S WORDS OF WISDOM:

"*Not all chemicals are bad. Without hydrogen or oxygen, for example, there would be no way to make water, a vital ingredient in beer*." (Dave Berry)

IN THIS ISSUE: Page:

ADMINISTRATIVE NOTES:

The Odor of Marijuana and Warrantless Residential Entries: It's been pointed out to me that some officers might interpret my brief in *Kentucky v. King* (May 16, 2011) __ U.S. __ [179 L.Ed.2nd 865] (*Legal Update*, Vol. 16, #5, p. 2) as a police officer's ticket to make a warrantless, forced entry into a residence based upon no more than the odor of burning marijuana. *Not so*. *People v. Hua* (Jan. 11, 2008) 158 Cal.App.4th 1027, specifically held that you *cannot* make such a

forced entry where your only probable cause is the occurrence of a non-bookable misdemeanor; e.g.; H&S 11357(b). And, as noted in my brief, *King* itself specifically declined to rule on the issue of whether the facts in its case, which involved significantly more than just the odor or burning marijuana, were sufficient to constitute exigent circumstances justifying an immediate warrantless entry.

CASE LAW:

***Miranda; Selective Invocation of Right to Silence*:**

Hurd v. Terhune **(Aug. 23, 2010) 619 F.3rd 1080**

Rule: A suspect may make a selective invocation of his Fifth Amendment right to silence without making a general invocation. Refusal to reenact an occurrence while continuing to answer other questions is such a selective invocation. Using that refusal against the suspect is a violation of *Miranda* and improper impeachment.

Facts: Beatrice Hurd separated from defendant, her husband of eight years, in March, 1993, seeking a divorce. It was estimated that defendant was going to have to pay Beatrice between $2,800 and $3,300 a month in spousal support out of his $8,593 a month income. Beatrice served defendant with divorce papers on April 1. On April 17, she came to defendant's home in Los Angeles to pick up their two children, bringing with her a pile of papers presumably related to the divorce. While upstairs with defendant, Beatrice was shot one time in the chest. She died shortly thereafter. She also sustained some bruises and abrasions to her face and scalp. After taking his sons outside, defendant called the police. He later claimed that he had been showing her how to use a pistol that she wished to borrow for self-defense (the verdict acquitting four officers of beating Rodney King had just been decided and the City of Los Angeles was rioting at the time) when it went off accidentally. Officers arriving at the scene took defendant into custody and advised him of his *Miranda* rights, which he waived. After telling a detective that the shooting had been accidental, defendant was offered the opportunity to take a polygraph exam with a promise that he'd be released if he passed. He declined, saying that he didn't trust polygraph exams. Defendant was then asked to demonstrate how the shooting had occurred. He again refused. During the continued questioning, defendant was repeatedly asked to either take a polygraph exam or to reenact the shooting, and how bad it would look should he decline. Defendant continued to refuse to do either. Later charged with first degree murder with a special circumstance of murder done for financial gain, defendant made a motion to suppress his statements made during the interrogation including the fact of his refusal to reenact the shooting. As to the reenactment, his motion was denied. (Polygraph results, including any reference to taking, offer to take, or failure to take, a polygraph, is statutorily inadmissible at trial: Evid. Code § 351.1.) At trial, the prosecutor made repeated references to defendant's refusal to reenact the shooting, arguing that his lack of cooperation on this issue was affirmative evidence of his guilt. Upon retrial after one hung jury, defendant was convicted and sentenced to life without the possibility of parole. His conviction was upheld on appeal. (See *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1092-1094, holding

that defendant's refusal to do the reenactment was *not* a *Miranda* invocation.) Both the California and the United States Supreme Courts declined to hear the case. Defendant then filed a petition for writ of habeas corpus in federal court. His petition was denied by the federal district court. Defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. On appeal (as in the trial court), defendant argued that use of his refusal to reenact the shooting was a violation of his right against self-incrimination under *Miranda v. Arizona* (1966) 384 U.S. 436, and an illegal use of his silence as affirmative evidence of guilt in violation of *Doyle v. Ohio* (1976) 426 U.S. 610. The Court agreed on both counts. Although it is true that defendant waived his rights, and responded to questioning while giving an explanation for how his wife had been shot, it is a rule of law that a suspect may selectively invoke his right to silence. Under *Miranda*, waiving one's rights and answering some of an interrogator's questions does not prevent the person from invoking his right to silence as to other specific questions. Also, under *Doyle*, *Miranda* warnings contain an implicit promise that remaining silent will carry no penalty. In other words, it is improper for a police officer to tell a suspect that he has a right to silence only to have a prosecutor later use that silence against him by impeaching his credibility with it when the case goes to trial. In this case, defendant's refusal to reenact the shooting (i.e.; his decision to remain silent as to that question) even went a step further than in *Doyle*. It was not limited to impeaching defendant's credibility, but rather used as affirmative evidence of guilt. The People argued that because the U.S. Supreme Court in *Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, held that one's invocation of his right to silence must be clear and unequivocal, and that remaining quiet throughout most of an interrogation by itself is not in itself an invocation, defendant's refusal to participate in a reenactment did not effectively invoke his right to silence. The Court rejected this argument, noting that defendant did in fact specifically and unequivocally tell the officers that he did not want to reenact the shooting. In *Berghuis*, defendant's silence was not used against him; only the selective responses he did make. In this case, defendant determined that he did not wish to cooperate in a reenactment of the shooting. This is a selective invocation of his right to silence on that issue alone. While a clear and unequivocal general invocation of one's right to silence terminates a police officer's right to ask any question, a selective invocation affects only that question or topic to which it relates. As an invocation of his right to silence on the issue of the reenactment, it was improper under *Miranda* and *Doyle* to use defendant's refusal to participate in a reenactment, i.e.; his silence, against him.

Note: I think the problem in wrapping one's mind around the reasoning in this case is the Court's use of a refusal to reenact the shooting as a form of silence, as protected by the Fifth Amendment. The Ninth Circuit never explained this leap in its legal reasoning on this issue, just assuming everyone will naturally understand the correlation between the two. What's interesting is that a trial judge, a California Court of Appeal, and a federal district court judge didn't seem to pick up on this idea. Also, the California and United States Supreme Courts refused to even hear the issue, inferring their concurrence with the trial judge's conclusions. So you'd think that this issue would be one that is ripe for appeal except that the U.S. Supreme Court has already denied the state's petition for a hearing on the Ninth Circuit's conclusions. So we're stuck with this rule; right or wrong.

***Mental Patients and Firearms*:**

People v. Jason K. **(Oct. 7, 2010) 188 Cal.App.4th 1545**

Rule: A person committed to a mental health facility pursuant to W&I §§ 5150 and 5151 is not entitled to get his firearms back for five years so long as the District Attorney can prove by a preponderance of the evidence that the person is *not* likely to use firearms in a safe and lawful manner.

Facts: Jason K., a 26-year-old married man with a two-year-old son, had a lot of stresses in his life. His issues came to a head one day when his wife came home to find Jason passed out drunk when he was supposed to have been babysitting their son. During the ensuing argument, Jason grabbed a handgun, cocked it, and threatened to shoot himself. Jason's wife was able to restrain him until he dropped the gun. He left the house and promptly checked himself into Balboa Naval Hospital (his wife being active duty Navy). The Navy transferred him to Paradise Valley Hospital (where they had a mental health facility) where Jason told doctors that he was depressed, had financial worries, and was having difficulty communicating with his wife. He further indicated that his drinking was getting worse, he used medical marijuana for back problems, had trouble sleeping, and would break down crying about twice a week. Physically, he had abrasions on his fist from punching a wall. He denied intending to commit suicide, however, claiming that he only grabbed the gun to get his wife's attention. A psychiatric resident found that there was probable cause to believe that Jason was a danger to himself and should be admitted for a 72-hour evaluation pursuant to W&I § 5150. While there, Jason was diagnosed with "[m]ajor depressive affective disorder, single episode, severe, without psychotic behavior." His prognosis was listed as "[g]uarded due to chronic mental illness, chronic relapse, and chronic noncompliance." It was discovered that Jason possessed some 20 firearms, two of which had been confiscated by police with the rest being held by Jason's grandfather. Upon being discharged from the hospital two days into his 72 hours, he was advised that he was prohibited from possessing firearms for five years, but that he had a right to request a court hearing to obtain relief from this prohibition. (W&I § 8103(f)(3)) Jason requested such a hearing. At the hearing, the People submitted into evidence Jason's confidential medical records and a police report. Except for an allegation that he had put the barrel of a shotgun in his mouth, Jason admitted that the information in these reports was essentially accurate. Jason testified that he'd owned firearms since the age of 18 and only wanted them back so that he could go hunting. He also testified that he regretted the incident with his wife, that he had made an "extremely dumb" mistake, and that he was attending church again and seeing a therapist. The trial court, however, found that the People had met their burden of proof; i.e., by a "*preponderance of the evidence*," to the effect that to return his firearms to him would likely result in endangering himself or others. Jason appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. The procedures for confiscating and withholding firearms from mental patients is completely statutory. W&I §§ 5150 and 5151 provide for the taking into custody and holding for 72 hours in a mental health facility a person when there is probable cause to believe that he or she is a

danger to him or herself, or others, as a result of a mental disorder. Upon admission into a mental health facility under these sections, the person loses his right to own, possess, control, receive, purchase, or attempt to do so, any firearm for a period of five years from the time of his or her release from the facility. (W&I § 8103(f)(1)) A peace officer is authorized to seize any and all firearms (and other deadly weapons) from a person who is detained under these provisions. (W&I § 8102(a)) It is the responsibility of the mental health facility to give notice to the patient of this restriction upon his release, and also that he has the right to petition to the superior court for the return of such weapons. (W&I § 8103(f)(3)) At the hearing, it is the *People*, represented by the District Attorney, who shall bear the burden of showing by a "*preponderance of the evidence*" that the person would *not* likely use *firearms* in a safe and lawful manner. (W&I § 8103(f)(6)) Hearsay, including medical records and police reports, is admissible at the hearing. (W&I § 8103(f)(5)) Jason first argued that there was insufficient evidence to support the trial court's verdict in this case. Noting that an appellate court need only find that the trial's court's conclusions as to the sufficiency of the evidence need only be supported by "*substantial evidence*," the Court rejected Jason's argument. A person who under stress resorts to alcohol and threats of suicide by introducing a loaded, cocked firearm into an argument, and is worried enough about his own ability to control himself that he seeks psychiatric help on his own, is a person who could lose it again and, next time, perhaps hurt himself or others. The trial court's conclusion on this issue is well supported by the record. Jason further argued that in order to take away one's constitutional right to own and possess firearms (i.e., the Second Amendment), a standard of proof higher than a preponderance of the evidence is required. In an interesting discussion of the differing standards of proof (i.e.; "preponderance of evidence," "clear and convincing evidence," and "proof beyond a reasonable doubt"), the Court concluded that in considering (1) the private interest affected by the proceedings, (2) the risk of an erroneous deprivation of the interest created by the state's chosen procedure, and (3) the countervailing governmental interest supporting the use of the challenged procedure, a preponderance of the evidence standard is sufficient to protect a mental patient's due process rights. As for Jason's "private interest," although the right to possess a firearm is constitutionally protected, it is also subject to numerous restrictions. A mental patient's limited right to possess firearms is one of those recognized restrictions. Also, a person committed under W&I §§ 5150 and 5151 only stands to lose his right to possess a firearm temporarily; i.e., for five years. Further, this situation involves only the loss of property, not physical liberty or severance of family ties. Lastly, while losing one's guns might compromise his ability to defend physically himself, there are other substitutes available (e.g., home security systems). When balanced with the state's strong governmental interest to protect society from the potential misuse of firearms by mentally unstable people, a preponderance of the evidence is constitutionally adequate.

Note: Although the procedures to be used by law enforcement to physically confiscate firearms from a mental patient is not an issue in this case, or at least was never discussed, it is noted that there existed a police report and that two of Jason's firearms were in police custody. So I included above the statutory authority for your right as a peace officer to confiscate firearms owned or possessed by a W&I § 5150 mental patient. (i.e., W&I § 8102(a)) But remember that absent consent or plain sight, a search warrant, per

P.C. § 1524(a)(1), is necessary. Also note that while W&I § 8102(a) deals with firearms and "*other deadly weapons*," the hearing procedures dealt with by this case refer to firearms only. There is no procedural method for a mental patient to secure an early release of deadly weapons other than a firearm that may be taken from him. A "*deadly weapon*," by the way, is defined in W&I § 8100(e) as any weapon, the possession or concealed carrying of which is prohibited by P.C. § 12020. But the main reason I briefed this case at all is to conduct a review for you of the procedures for dealing with mental patients and their weapons, and how more times than not, we need to work to keep them separated. While you may never have to testify at one of these hearings (hearsay being admissible), your police report will be there. So make your paperwork clear, concise, and thorough unless you'd prefer to face your mental patient the next time with him holding a gun in his hand. Also, if you want it, I have a 46-page training outline on the topic of mental patients and weapons I can e-mail you upon request.

***Officer's Rights*:**

Bautista v. County of Los Angeles **(Nov. 9, 2010) 190 Cal.App.4th 869**

Rule: Off-duty activities and associations of a police officer are subject to reasonable regulation by the officer's law enforcement agency.

Facts: Plaintiff Emir Bautista was hired as a Los Angeles County deputy sheriff in 1996. In the next six years, he was never subject to any disciplinary actions. In August, 2002, while driving a marked Department bus, Bautista observed an obvious working prostitute, Shawn Crook, on the street. He stopped to engage her in conversation so that he might get to know her and understand why she was a prostitute, all with the idea that he could help her reform. Because he enjoyed talking to her, the two of them formed a friendship. As their friendship developed, he eventually gave her his home phone number. He would drive her places, including dinner and to a methadone clinic where she was receiving treatment for her heroin addiction. He would also give her a ride to her home in the early morning hours, after her "work." The problem is that the Sheriff's Department's Manual of Policy and Procedures included a provision that: "Members shall not knowingly maintain a personal association with persons who are under criminal investigation or indictment and/or who have an open and notorious reputation in the community for criminal activity, where such association would be detrimental to the image of the Department, unless express written permission is received from the member's unit commander." Bautista was given a copy of this manual when first hired. He did not seek permission from the Department to associate with Crook, nor did he report his friendship with her. During the summer of 2003, Bautista was contacted a couple of times by Gardena Police officers while he was in the company of Crook. He freely identified himself to the officers, explaining to them that Crook was merely a friend. Both times, he was warned by the officers that associating with Crook was not conducive to a long law enforcement career. His contacts with Crook were reported to the Sheriff's Department, resulting in an internal affairs investigation. After being served with an official letter of intent to discharge him, Bautista requested an evidentiary civil service hearing. In his defense, Bautista pointed out that he had in fact been successful in

steering Crook away from her life of prostitution and off the dope. (He in fact later married her after all this was over.) The hearing officer recommended Bautista's discharge after four days of testimony. He was eventually fired. Bautista filed a petition for a writ of mandate in the superior court alleging that being terminated for befriending Crook violated his First Amendment right to freedom of association and his federal civil rights. The superior court denied his petition and he appealed.

Held: The Second District Court of Appeal (Div. 7) affirmed. The First Amendment protects two types of associations; "*expressive association*" and "*intimate association*." A person's right to expressive association protects those activities incident to speech, assembly, petition for the redress of grievances, and the exercise of religion. The right to intimate association is protected as an "intrinsic element of personal liberty." This includes activities associated with the creation and sustenance of a family including marriage, childbirth and cohabitation. Bautista's arguments relate to his right of intimate association. But like most other constitutional rights, the right of intimate association is not absolute. A law (or law enforcement policy) need only have a rational relationship to a legitimate governmental interest in regulating behavior to outweigh one's right of intimate association. The L.A. Sheriff's Department has such a legitimate interest in regulating the behavior of its sworn officers. That interest involves the need to minimize conflicts of interest and to protect the credibility and integrity of the Department. This balancing of interests (Bautista's vs. the Sheriff's Department's) also takes into account the fact that police officers are subject to higher standards of conduct than other public employees. At Bautista's civil service hearing, evidence was put on through the testimony of a Department administrator as follows: "In order to be an effective law enforcement agency with other agencies, they (the other agencies) need to feel confident that we are an organization that has employees that can perform their duties in a manner that is of the highest degree; that they (the employees) can maintain confidentiality; that they can be trusted to obey the law, to not compromise their relationship as a law-enforcement officer with anyone in the community. . . Same thing in dealing with people out in the field (i.e., the public). There are those whom we come in contact with who are victims of crimes. Those who are witnesses of crimes that trust us to do the right thing and ensure their safety and protection. We can't compromise that and even give the perception of compromise by our actions in showing that we can't be trusted." Declining to decide whether it was necessary to show actual harm to the Sheriff's Department, the Court found from this testimony that Bautista's open association with a known prostitute to be sufficient to justify his termination.

Note: For those of you who thought your private life is none of your Department's business; guess what. *You're wrong*. While I normally limit myself to search and seizure, or statutory interpretation cases, I thought it was important for you all to know (if you didn't already) that what you do off-duty can affect the reputation and credibility of your agency, as well as law enforcement in general. Your agency has a right to protect itself from your indiscretions. While trying to save a heroin-shooting prostitute from herself, by itself, is not the most egregious thing you can do, the potential problems to which such an unauthorized endeavor can lead (e.g., blackmail, family problems, conflicts of interest, courtroom credibility issues [i.e., *Brady*], etc.) are career busters. So

rather than getting upset about Emir Bautista's former Department messing with his privacy rights, *think*. If that's too high a standard for you to accept, then I know some private security companies that are hiring.

***Traffic Stops and Detentions*:**
***Use of Force*:**
***Prolonged Detentions*:**
***Consent to Search*:**

<u>Liberal v. Estrada</u> (9th Cir. Jan 19, 2011) 632 F.3rd 1064

Rule: (1) Traffic stops, to be lawful, must be supported by at least a reasonable suspicion that a traffic offense had occurred. (2) Force used during a detention must be reasonable under the circumstances. (3) Detentions are lawful only for so long as reasonably necessary to accomplish the purposes of the stop. (4) A consent to search is valid only if not the product of coercion.

Facts: Plaintiff in this civil suit, Kesner Junior Liberal, an African-American male, was acting as the designated driver (although he too had been drinking) after a night out partying. Although it was 1:40 in the morning, the front windows of his car were rolled down. The rear side windows and the back window were all covered with a reflective tint. Per Plaintiff, he was driving lawfully and within the speed limit on a main thoroughfare in Menlo Park, California, when Officer Eduardo Estrada observed him driving by. Plaintiff and Officer Estrada made eye contact. Estrada made a U-turn through a red light and turned on his overhead emergency lights. Officer Estrada later testified that the purpose of his attempt to stop Plaintiff was because his front side windows (the ones Plaintiff said were rolled down) were illegally tinted. Seeing the officer coming up behind him with his emergency lights but still some 300 feet away, Plaintiff made an immediate right turn at the next intersection and then an immediate left into an unlit parking lot behind a burger stand. He stopped his car near a dumpster and turned off his lights. Feeling a bit "agitated," "a little pumped up," and "a little scared," but not fooled, Officer Estrada pulled up behind Plaintiff and shined his spotlight into his car. With his hand on his holstered gun, Estrada approached Plaintiff, ordering him and his two passengers to show their hands. He then asked Plaintiff for his driver's license and registration. When asked why he was being stopped, Estrada answered by accusing Plaintiff of trying to flee. Within a minute of the stop, Estrada asked for a DMV check on the license plate. Within another 45 seconds, the first cover unit arrived. Plaintiff at that time was "verbally confrontational," accusing the officer of stopping him "for no reason." Other officers began to arrive at the scene until there were a total of seven. Officer Estrada yelled at Plaintiff's passenger in the right front seat to get off of his cell phone. Either Estrada or another officer told Plaintiff to get out of the car. As Plaintiff started to do so, one of the officers grabbed him by the wrist, pulled him out of the car, spun him around, and forcefully pushed him against the rear door of the car where he was handcuffed. Plaintiff claimed to have felt like he was being arrested. One of the officers turned on a tape recorder; a fact apparently unknown to Officer Estrada as he continued to accuse Plaintiff of trying to flee. After an incomplete *Miranda* admonishment (being advised only of his right to silence), Estrada told Plaintiff that if he had not tried to

"ditch" him, they would be having a much more cordial conversation. He also told Plaintiff that he was going to have to decide whether he was going to let "three little punks walk all over me." He then told Plaintiff that while he may be able to get away with that with younger cops, he wasn't going to do that with him (Estrada). "(S)ince I had (sic) no desire to become sergeant, I really don't give a rat's ass who I piss off. I don't care about complaints." (Plaintiff's response: "I can see that.") A sergeant told Plaintiff at one point that pulling into a dark alley was "just being damn right ignorant," and that he could have gotten shot doing that. Estrada later told Plaintiff and his two passengers, as the three of them were lined up in front of their car, that had they made a wrong move, he would have "busted a cap" in them right between the eyes, noting that he and his partner liked to go to "night target practice." Plaintiff was asked if they could search his car, to which he consented. It was searched, but nothing illegal was found. Asked if he'd had anything to drink, Plaintiff admitted to "probably two beers." A short field sobriety test resulted in a determination that he was not under the influence. Estrada told Plaintiff that he wished he was drunk so he could take him to jail. After about a 45 minute detention, 25 to 30 minutes of which Plaintiff was in handcuffs, they were all allowed to go free apparently with no citations being issued. Plaintiff later sued Officer Estrada and others in federal court, per 42 U.S.C. § 1983. The district court judge for the most part denied Officer Estrada's (and other's) motion(s) for summary judgment. The officers/defendants appealed.

Held: The Ninth Circuit Court of Appeal affirmed most of the trial court's rulings and remanded the case back for trial. In such an appeal, the appellate court must assume that the Plaintiff's version of the facts are true, and then determine whether there are any triable issues for a jury to hear. Taking the issues one by one:

(1) *The Traffic Stop*: A traffic stop must be supported by at least a reasonable suspicion to believe that a traffic offense has occurred. The stated reason for the traffic stop was that Plaintiff's front windows, left and right, were illegally tinted. Plaintiff claimed that the windows were rolled down and not visible to the officer. Noting that Officer Estrada could have merely been mistaken, it is a rule that a mistake of fact, "*held reasonably and in good faith*," will provide an officer with qualified immunity from civil liability. But assuming that Plaintiff is correct (which we must at this stage) that the windows were rolled down and therefore not visible, then Officer Estrada's mistake was not reasonable. Officer Estrada, therefore, did not have cause to stop Plaintiff. Also, the fact that Plaintiff appeared to be attempting to evade the officer is irrelevant. Absent a legal reason to detain him, a person is not required to submit to being detained. The legality of the traffic stop (i.e., were the left and right front windows visible?), is therefore at issue in a later civil trial.

(2) *The Excessive Force Claim*: Plaintiff alleged that excessive force was used when he was forcefully pulled out of his car, pushed up against it, and then handcuffed. The Court found that here too were issues to be litigated. The initial detention must be lawful and then the amount of force used must be reasonable under the circumstances. The use of force cannot be justified merely by a person "smarting off." Here, a jury may very well find that the initial stop was illegal (as noted above). And the Plaintiff, while perhaps verbally confrontational, never resisted the detention nor, once stopped,

attempted to flee. A jury must determine, therefore, whether under these circumstances the force used on Plaintiff was reasonable.

(3) *Duration of the Detention*: Plaintiff was detained for up to 45 minutes. Although his apparent attempt to evade the officer certainly complicated the situation, the Court still found that the officers continued to prolong the detention beyond what was legally necessary. "The critical inquiry is whether the offices 'diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly during which time it was necessary to detain the defendant.'" Plaintiff contends that much of the time expended was used by the officers to inflict an "attitude adjustment." The facts as known (as borne out by the tape recording) seem to support this allegation. Once it was determined that Plaintiff and his companions were not engaged in any illegal activity (within the first 5 to 10 minutes, in the Court's estimation), they should have been released. That was not done here.

(4) *Search of the Car*: Plaintiff consented to the search of his car. But the consent, under these circumstances if the Plaintiff is to be believed, was coerced and invalid. In evaluating the likelihood that a consent is the product of coercion, five factors are typically considered: (1) Whether defendant was in custody; (2) whether the arresting offices had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that he had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. In this case, three of these factors support Plaintiff's contention that his consent was involuntary. First, he felt that he was in custody, which was not unreasonable after having been pulled out of his car and handcuffed. Second, the *Miranda* admonishment as administered to him was incomplete. And third, he was not told that he could refuse to give consent. Although guns weren't drawn and no one threatened Plaintiff with getting a search warrant, the factors overall balance out in favor of a finding that the consent he gave to search his car was coerced. Add to this that Plaintiff was surrounded by seven police officers, it was the middle of the night, and the officers had control over his car, a jury could very well find that his consent was involuntary. The officers further argued that under the circumstances, they had the right to do a protective search (i.e., similar to a "pat down") of the car for weapons. The Court disagreed, finding "no specific and articulable facts that would reasonably warrant a belief that Plaintiff was dangerous or that he might gain immediate control of a weapon."

These were all issues that are to be decided by a jury on remand.

Note: Litigation in the trial court is pending, so I'm hesitant to say anything here. And if Plaintiff is to be believed, the problems are obvious and don't require my sarcastic analysis. But what is on that tape recorder is apparently irrefutable (although even recordings can be taken out of context). All I can say is that in this era of cellphone cameras, video cameras, and tape recorders (whether carried by your partner or the person you stopped), you *better* give a "rat's ass" what you say and do in your public contacts. Not caring whether you make sergeant or how many complaints you collect is not the issue. The issue is how the public perceives law enforcement in general after even one officer loses his cool. Officer Estrada was right in telling Plaintiff that he, the officer, had to be in control. The problem is, *he wasn't*.