San Diego District Attorney

LEGAL UPDATE

(COPY - - DISTRIBUTE - - POST)

Vol. 15 May 14, 2010 No. 4
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:

> "*A veteran is someone who, at one point in his* (*or her*) *life, wrote a blank check made payable to the United States of America for an amount up to and including his* (*or her*) *life. That is honor, but there are far too many people in this country who no longer understand it*." (Anonymous)

IN THIS ISSUE: Page:

***Case Law*:**

CASE LAW:

***Searches Incident to Arrest*:**

United States v. Ruckes **(9th Cir. Nov. 9, 2009) 586 F.3rd 713**

Rule: Searches of vehicles incident to an occupant's arrest, where the occupant has already been secured inside a patrol car, are illegal absent limited exceptions. But where the car is to be impounded and thus subject to an inventory search, the doctrine of inevitable discovery may save the evidence.

Facts: Defendant was stopped for speeding on Interstate 5 by Washington State Trooper Wiley. Asked for his driver's license, registration and proof of insurance, defendant proudly announced that he had none, nor any other form of identification. During this fruitless conversation, Trooper Wiley noticed some loose money and a prescription bottle with the label removed in the open center console. Wiley had defendant step out of his car, patted him down for weapons, and put him into the back seat of the patrol car, unhandcuffed. A computer check revealed that defendant's driver's license had been suspended due to delinquent child support payments. Driving on a suspended license is an arrestable offense under Washington state law. Defendant had also been ticketed once before for driving on a suspended license which, again, under Washington law, allows for the impounding of his car for 30 days. Wiley, however, first asked if anyone else was available to drive defendant's car home. Defendant responded that the car belonged to his mother, but that she would not likely be available to take it. Trooper Wiley therefore decided to impound the car. A search of the car resulted in the recovery of a bottle of crack cocaine. Defendant was handcuffed at this point. A further search of the vehicle resulted in the recovery of a loaded 9 mm handgun under the driver's seat. Indicted in federal court, defendant made a motion to suppress the evidence found in the car, arguing that because he was not formally arrested until after the recovery of the crack cocaine, the search was not a "*search incident to arrest*," and therefore unlawful. The trial court judge denied the motion, finding that Trooper Wiley had probable cause to arrest defendant (for the driving-on-a-suspended-license charge) before the search was conducted and that whether or not he'd been "formally" arrested by then was irrelevant. Also, as the court ruled, the contraband would all have inevitably been discovered upon impounding the car anyway. Defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal, although finding the search to be illegal, affirmed. While this case was pending appeal, the United States Supreme Court decided *Arizona v. Gant* (2009) 129 S.Ct. 1710, making defendant's trial-level argument (whether the search occurred before or after his arrest) irrelevant. *Gant* held that when a vehicle's occupant has already been secured and can no longer "lunge" for evidence or weapons, a warrantless search incident to arrest is unlawful. *Gant* overruled the long-standing rule of *New York v. Belton* (1981) 453 U.S. 454, which had authorized such a search. The only exception is when there is a "*reasonable basis to believe*" that the vehicle contains evidence related to the cause of the search. Because defendant in this case had been secured in the patrol car, and because there wasn't a "reasonable basis to believe" that the car contained any evidence related to his driving on a suspended license (the only then-existing probable cause justifying an arrest), *Gant* dictates that searching the car incident to arrest was unlawful. However, because the trooper had testified that with no one available to take possession of the car he had intended to impound it, the Court determined that the evidence would have been inevitably discovered anyway. Therefore, under the "*inevitable discovery doctrine*," the evidence was not subject to suppression.

Note: Without discussing the issue, the Court assumed that putting a suspect into a locked patrol car, even though unhandcuffed, was sufficient to trigger the rule in *Gant*. But apparently the opposite is not true. Merely handcuffing a suspect, but *not* putting

him into a locked patrol car, does not necessarily secure him sufficiently to prevent an officer from doing a lawful search incident to arrest. (See *People v. Leal* (2009) 178 Cal.App.4th 1051, 1062.) Also, the Court does not discuss the constitutionality of impounding his car under these circumstances (see *Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3rd 858; and *People v. Williams* (2006) 145 Cal.App.4th 756.) But it was noted that a Washington statute allows for the impounding of a car when not to impound it means it's going to be left unattended upon a highway (i.e., Interstate 5; a "freeway") where the vehicle might be an obstruction to traffic or jeopardize public safety. So apparently it wasn't enough of an issue for the Court to make a big deal over it. Lastly, this case highlights the importance of a cop (doing the search) and the prosecutor (arguing the legality of the search in court) not relying upon a single legal theory to justify a warrantless search. With *Gant* making irrelevant the prosecutor's trial court argument (i.e., whether the search was incident to, or before, defendant's formal arrest), it was necessary on appeal to fall back on the prosecutor's second theory of inevitable discovery. Had this theory not been raised in the trial court, it would have been waived on appeal and the evidence would have been suppressed.

***First Amendment Freedom of Expression and Disrupting Meetings*:**

***Norse v. City of Santa Cruz* (9th Cir. Nov. 3, 2009) 586 F.3rd 697**

Rule: Reasonable rules for the conduct of meetings may allow for the ejection of a person whose disruptive actions are not themselves an expression of a viewpoint protected by the First Amendment.

Facts: Plaintiff Robert Norse in this civil suit attended a meeting of the Santa Cruz City Council. At one point in the meeting, the Mayor, enforcing the council's pre-established rules, told a member of the public who was addressing the Council that her time for speaking was up. The speaker was visibly upset by this ruling. Two other members of the audience created a disruption (the nature of which was not described in the decision) that had to be subdued by the Mayor. At that point, plaintiff stood up and silently displayed a Nazi salute, directed at the Mayor. The salute was obviously intended as a criticism or condemnation of the Mayor's ruling. Council members had previously expressed concern that Norse's Nazi gestures, which he had apparently displayed on prior occasions, were offensive. Faced with what was clearly intended to be a disruption of the meeting in violation of the Council's rules which authorized the removal of "any person who interrupts . . . or otherwise disrupts the proceedings of the Council," the Mayor ordered plaintiff's removal. Plaintiff resisted attempts to remove him from the meeting and was therefore arrested. He later sued in federal court, alleging that his First Amendment freedom of expression rights had been violated. The federal trial court granted the City's motion for summary judgment, dismissing the action. Plaintiff appealed.

Held: The Ninth Circuit Court of Appeal, in a 2-to-1 decision, affirmed. Officers presiding over public meetings have "great discretion" in enforcing reasonable rules for the orderly conduct of meetings. Santa Cruz's rules governing disruptions in their

meetings (as quoted above) have previously been held by the 9th Circuit to be reasonable. A City Council has a right to restrict the speaker to a specific time limit, calling a halt to the debate at a specified time. But a presiding officer's right to exercise discretion in enforcing the rules is not without restriction. "(R)ules may not be enforced in order to suppress a particular viewpoint." In this case, however, plaintiff's Nazi hand gesture was not an expression of any particular viewpoint on any matters that were the subject of debate. Rather, it was in apparent protest of the Mayor's attempt to enforce the rules (cutting off the speaker for exceeding her time limit) and in support of the disruption that had just occurred in the back of the meeting room. Because his ejection was not on account of any permissible expression of a point of view, and therefore not in violation of his First Amendment freedom of speech, his arrest for refusing to leave was lawful.

Note: The dissent disagreed, finding plaintiff's Nazi salute to be an expression of a viewpoint in itself, and thus protected by the First Amendment. But even so, First Amendment freedoms have never been held to be absolute. There has to be some point where the need to be productive in the conduct of a meeting outweighs a protester's right to loudly and/or disruptively disagree with what is going on. Although the Court did not discuss the relevant statutory law, California's "Disturbing A Meeting" law in contained in P.C. § 403. Under this section, it is a misdemeanor whenever a person "disturbs or breaks up any lawfully conducted assembly or meeting" (with listed exceptions). What little case law there is discussing this statute tells us that in order to preserve the constitutionality of the section, courts must narrowly construe its provisions, balancing the First Amendment rights of a person to express his or her views with the right of the assemblers to conduct their meetings without unnecessary interference from others. (*In re Kay* (1970) 1 Cal.3rd 930, 939.) "Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment." (*Id*., at p. 938.) "(S)ection 403 authorizes the imposition of criminal sanctions only when the defendant's activity itself—and not the content of the activity's expression—substantially impairs the effective conduct of a meeting." (*Id*., at p. 942.) So be careful in going overboard in trying to enforce section 403. The courts have suggested strongly that in close cases, the persons causing the disruption should be verbally warned once and only arrested or cited if the offending activity continues after the warning. (*Id*., at p. 945.) By the way, an "en banc" (full panel) rehearing has been granted in this case. So we will hear about it again. But I thought the point was important enough to talk about today.

***Miranda*; *Implied Waivers and Interrogation Techniques*:**

People v. Rios **(Nov. 19, 2009) 179 Cal.App.4th 491**

Rule: Implied waivers may be valid, depending upon the circumstances. Leaving the suspect to think about it for awhile between admonition and questioning is lawful.

Facts: Howard Stewart was sitting in his 1999 Firebird enjoying his Taco Bell takeout when defendant, brandishing a pistol, walked up to his window and demanded that he get out of his car or he'd shoot him. Knowing that no one would ever go to such an extreme

to steal a chicken taco, particularly from Taco Bell, Steward determined that defendant must be after his car and considered briefly starting it and driving away. Defendant told Stewart; "Start it and I'll shoot you." Stewart decided not to risk it and got out of the car, fleeing as defendant and a second suspect drove away in his Firebird. The next day defendant was arrested while still driving the car (you don't just dump a 1999 Firebird). Taken into custody, defendant was put into the back seat of a patrol car and immediately advised of his *Miranda* rights. The arresting officer, Los Angeles County Sheriff's Deputy Sean Cariaga, asked defendant if he understood his rights. Defendant responded that he did. Then, "*as a matter of interrogation technique*," Deputy Cariaga left defendant alone for about 5 or 10 minutes to think about it. The deputy then returned and, without ever asking defendant if he waived his rights, began questioning him. Defendant admitted to stealing the car at gunpoint. Charged with carjacking and the use of a firearm, defendant's pretrial motion to suppress his confession was denied by the trial court. Convicted and sentenced to prison for 13 years, defendant appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. Recognizing that prior case law (e.g., *North Carolina v. Butler* (1979) 441 U.S. 369.) has held that *Miranda* doesn't necessarily require that an interrogated suspect *expressly* waive his right to silence and to the assistance of counsel, defendant argued on appeal that the more recent case of *Missouri v. Seibert* (2004) 542 U.S. 600, abrogated that rule, requiring an express wavier as a matter of law. The Court disagreed. Since *Butler* was decided some 31 years ago, there has been "no requirement that an in custody accused expressly waive the right to counsel and silence after being advised of those rights." So long as it is proved that the defendant understood his rights, a court "*may* find an intelligent and understanding rejection of counsel in situations where the defendant did not *expressly* state as much." (Italics in original) "[I]f the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension . . . a court [may] properly conclude that the *Miranda* rights have been waived." Here, defendant was not under the influence of anything and he was not coerced. The lack of any reluctance on defendant's part to answer questions, after indicating that he understood his rights, support the trial court's determination that defendant had impliedly waived his rights. However, defendant further argued that *Missouri v. Seibert* dictates that his implied waiver was invalid because of Deputy Cariaga's trickery, advising him of his rights and then leaving him to think about it for 5 or 10 minutes before initiating the actual questioning. In *Seibert*, it was held that an in-custody suspect's waiver of rights was not "*intelligent and understanding*" when the interrogating officers employed a two-step interrogation technique. Specifically, the officers in *Seibert*, without advising the defendant of her rights, obtained a full confession. She was then given a short break followed by a second interrogation. This second interrogation, however, was preceded by a full *Miranda* admonishment and an express waiver. She confessed a second time. The Supreme Court held that because she likely did not understand that the first confession was inadmissible, her subsequent waiver of rights was invalid. Having confessed once, she would not have understood that there was an advantage to invoking her rights after the fact. "The core issue . . . is whether an in custody accused made an uncoerced and fully aware choice not to assert the right to counsel or silence." In *Seibert*, not understanding the legal implications of having confessed once prior to the

admonishment, she could not have made an intelligent waiver. In the instant case, however, there was no such "two-step interrogation technique" used. Leaving the defendant alone for 5 to 10 minutes is completely different than employing the tactics used in *Seibert*. Defendant was not under the influence of anything, was not coerced, and "readily answered" questions when the interrogation was begun. His confession, therefore, was properly admitted into evidence against him.

Note: Those who have heard my rantings and ravings against the wholesale use of "*implied waivers*" are no doubt smirking right now, saying; "*See, they're legal*." But note the language of the appellate courts: I.e., that such a wavier "*may*" be legal, depending upon the circumstances. *North Carolina v. Butler* itself, in giving birth to the implied waiver theory, uses qualifying phrases such as; "(I)n *at least some cases* wavier can be clearly inferred" (pg. 373), and that an express waiver "is not *invariably* necessary." (pg. 376.) With the legal presumption being that an in-custody suspect did not waive his Miranda rights—a presumption that a prosecutor bears the "*heavy burden*" of overcoming (*People v. Cruz* (2008) 44 Cal.4th 636, 667.)—just assuming that all implied waivers are good is playing Russian roulette with your resulting confession. An "*express waiver*," on the other hand, almost always eliminates the issue altogether. Also, I have been asked before about the wisdom of using this "interrogation technique" of advising a suspect of his rights and then leaving him for awhile to think about it before either asking for an express waiver or merely launching right into the questioning, as was done in this case. As it was told to me, this is done for the express purpose of increasing the likelihood that the suspect will talk. While it may not have been enough to require the suppression of defendant's confession in this case, I'm not a fan of such ploys and am quite surprised the Court in this case wasn't more critical of it, particularly in light of the deputy's admission that it was intentionally done as an "*interrogation technique*." I'm not sure I agree with the Court when it apparently concludes that unless a ploy or "*technique*" amounts to a *Seibert* violation, you can do whatever you want to do to increase the likelihood of a getting a confession. But for those of you who think that the "technique" used here is a valid practice, you now have a case to support you doing so.

***Registration Stickers and Reasonable Suspicion*:**

People v. Dotson **(Nov. 30, 2009) 179 Cal.App.4th 1045**

Rule: A traffic stop for driving an unregistered vehicle requires only a reasonable suspicion. Two missing license plates supplies the necessary reasonable suspicion. Failure to actively look for a red temporary operating permit in the vehicle's windows does not negate that reasonable suspicion.

Facts: Placer County Deputy Sheriff Eric Bakulich observed defendant driving a pickup truck at about 4:00 a.m. As defendant drove towards him, he noticed that there was no front license plate. As the truck passed him, he could see that there was also no rear license plate. Suspecting a violation of V.C. § 5200(a), Deputy Bakulich made a traffic stop. The deputy noticed that defendant appeared to be under the influence of a central nervous system stimulant, and arrested him. A firearm, ammunition, and some

methamphetamine was later found in the car. Defendant filed a motion to suppress these items. During cross-examination, defense counsel asked Deputy Bakulich if he ever looked in the rear window of defendant's truck to see if there was a red temporary operating permit. The deputy answered that he didn't recall if he'd looked, and didn't recall if there was one there or not. Despite this testimony, the trial court denied defendant's motion to suppress. After being convicted by a jury, defendant appealed.

Held: The Third District Court of Appeal affirmed. The issue was whether the deputy had the necessary reasonable suspicion to believe that defendant was driving the motor vehicle without the necessary license plates in violation of V.C. § 5200(a). Consistent with the defendant's argument, the Attorney General's conceded that the deputy had some sort of affirmative duty to make a "reasonable effort" to check the rear window for a valid red temporary operating permit, and that not having done that, "the exclusionary rule cannot be avoided." The Court of Appeal ruled that both the defendant *and* the AG are wrong, and that there was in fact reasonable suspicion to justify the traffic stop. As the evidence was produced at the suppression motion, Deputy Bakulich did not see any license plates. And there was no evidence that he *did* see a temporary operating permit. The lack of any license plates provides the necessary reasonable suspicion to justify the traffic stop, "(u)nless there are other circumstances that dispel that suspicion." "The uninvestigated chance that a temporary operating permit might be displayed somewhere on the vehicle is not such a dispelling circumstance." The stop, therefore, was lawful and the trial court was correct in denying defendant's motion to suppress.

Note: While there's really no excuse for the deputy not being prepared to testify to whether or not there was a temporary operating permit in the window, the really important fact is that there is no legal duty for him to look for one that is not readily visible before making the stop. This is consistent with *In re Raymond C.* (2008) 45 Cal.4th 303, where it was held that an officer is not required to drive around the vehicle looking for a sticker before making a stop. Good case, making allowances for the fact that none of us in this business is perfect. But we try. That's all the courts really expect.

***Expectation of Privacy; Searching Containers*:**

United States v. Monghur **(9th Cir. Dec. 4, 2009) 588 F.3rd 975**

Rule: Overhearing a defendant talk to another person about contraband hidden in a container, even though the defendant knows police are listening, does not waive the defendant's expectation of privacy in the contents of that container particularly when the contraband and container are described in ambiguous terms.

Facts: Defendant, a convicted felon, was arrested and bucketed on a Nevada state warrant charging him with attempted murder and battery on his girlfriend, Antoinette Wilson. Held at Nevada's Clark County Detention Center, defendant had access to a telephone. Next to the telephone was a placard cautioning an inmate that calls were subject to being monitored and recorded. The person on the outside who would be the recipient of jail calls is subjected to an auditory warning to the same effect. On the day

of his arrest, defendant made several calls to a friend named Prince Bousley. In the first call, Bousley asked defendant if he'd been caught with "the thing." Defendant said that he had not, and that "the thing" was hidden in Wilson's apartment where he'd been staying off and on for several months (between attempts to kill and batter her, I guess). During a second call, Bousley volunteered to retrieve "the thing" from Wilson's apartment. In a third call, defendant instructed Bousley to come to the jail to pick up the key to Wilson's apartment, telling him that "the thing" was in his room and that it was located "in the green." FBI agent Gary McCamey, who knew defendant as a local gang member, reviewed the recordings of these calls and correctly surmised that "the thing" was a firearm. Six agents went to Wilson's apartment and received her permission to retrieve the gun and remove it from the apartment. She voluntarily took them into her son's room where defendant stayed when he was there. The agents found an opaque green plastic storage container on the shelf in the closet. They opened the container and found a .38 caliber revolver. No search warrant was obtained. Indicted in federal court on charges relating to being a felon in possession of a firearm, defendant filed a motion to suppress. Although finding that the officers searched the green container without express or apparent consent, and that there were no exigent circumstances (rulings the Government did not contest on appeal), the trial court held that defendant, by discussing the existence and location of the gun over the knowingly monitored jail telephone, waived any expectation of privacy in the contents of the green container. Defendant's motion to suppress was denied. He thereafter pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal reversed. The Government's argument on appeal invoked the rule that whatever a person exposes to public view is not subject to the protections of the Fourth Amendment. Specifically, the Government argued that "by making statements to [Bousley], knowing that jailors were listening, [defendant] disavowed his expectation of privacy in the container." The Court rejected this argument. While there is authority for the argument that whenever a suspect voluntarily tells a law enforcement officer, directly, that there is contraband within a particular container, he has waived any expectation of privacy he might have had in that container. No search warrant, therefore, is required under those circumstances. (See *United States v. Cardona-Rivera* (7th Cir. 1990) 904 F.2nd 1149.) But that rule does not extend to this case. Here, even though defendant knew that his telephone conversations were likely to be monitored, he purposely attempted to disguise the subject matter of the conversation in question by using ambiguous, generic language to describe the handgun and its whereabouts. (I.e., "*the thing*," and "*in the green*.") As such, there was no "*direct and explicit*" waiver of his right to privacy in the contents of the green plastic container. While the Court conceded that FBI Agent McCamey had probable cause to believe defendant was hiding a gun in the green container found in Wilson's apartment, there was no exigency excusing the opening of that container. Further, defendant's act of talking about the firearm over the telephone, in the disguised fashion that he did, did not waive his expectation of privacy in the contents of the green container. The container should have been seized, sealed, and then a search warrant obtained before opening it.

Note: When in doubt, get a warrant. I'm sure the agents here thought that having Wilson's consent to look into the closet of her apartment was also sufficient to look into

the green container in that closet. But if they'd stopped and thought about it for a couple of minutes, they would have remembered that while there are a number of exceptions (none of which applied here), searching containers generally requires a search warrant. (*Smith v. Ohio* (1990) 494 U.S. 541.) Having probable cause only gets you halfway there. You then have to ask yourself; "Well, I know it's in there, but is there an exigency or some other excuse for looking without a search warrant." If in doubt, get a warrant.

***Confidential Informants and Cooperation Agreements*:**

People v. C.S.A. **(Jan. 29, 2010) 181 Cal.App.4th 773**

Rule: A "cooperation agreement" between a criminal suspect and a law enforcement agency involving a promised dismissal of charges is unenforceable absent proof that the agency was authorized to enter into the agreement *and* that defendant acted in detrimental reliance upon the agreement. Where the agreement was not legally authorized, defendant may still get relief if any detrimental reliance was of constitutional consequence.

Facts: C.S.A. entered into a "cooperation agreement" with officers from a Sonoma County law enforcement agency, agreeing to work with them by providing information in exchange for the dismissal of a pending felony criminal case and related probation violations; i.e., that the charges would "*go away*." The details of the agreement (except that it was to supply information to the police), C.S.A.'s true identity, and other relevant facts, were all under seal with the court in order to protect the informant. C.S.A. did in fact cooperate with the law enforcement officers, as he agreed to do. The prosecution, however, declined to honor the agreement. C.S.A. therefore filed a motion for dismissal with the trial court. The trial court judge found that the officers who entered into the agreement with defendant had the "apparent authority" to do so because of the "agency" relationship between the law enforcement agency and the district attorney. The court also found that defendant acted in detrimental reliance of the agreement. The court therefore agreed with defendant that he was entitled to the benefits he had bargained for and dismissed the case and the probation violations. The People appealed.

Held: The First District Court of Appeal reversed. While promises made by a prosecutorial agency (e.g., the District Attorney), such as a grant of immunity or reduced charges as a part of a plea bargain, must be honored, the same is *not* true for "*cooperation agreements*" entered into between a criminal suspect and a law enforcement agency. For a defendant to enforce such a cooperation agreement, he must show both that (1) the agency or its officers with whom he entered into an agreement had the authority to do so, *and* (2) that he detrimentally relied upon it. Where, however, he fails to prove the first prong, he may still be entitled to the benefit of his bargain if his detrimental reliance is shown to be of "*constitutional consequence*," i.e., where failing to honor the agreement constitutes a "*due process*" violation. Examples of such a "*constitutional consequence*" are when, as a part of the agreement, he is induced into giving up his right to counsel (6th Amendment) or his right not to incriminate himself (5th Amendment), or to furnish information useful to the government in developing the case against him, or to plead guilty. Taking into account the above requirements, the Court first found that the trial

court judge in this case was wrong in finding that the law enforcement agency had any authority to enter into such an agreement with the defendant. While there is no state authority for this conclusion, federal cases have held that law enforcement does not have the legal right ("*apparent*," "*implied*," or otherwise) to enter into dismissal or plea bargain agreements with criminal suspects. And there is no applicable "*agency*" theory between law enforcement and the prosecution that confers such authority on a police department. "The prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor . . . [who] ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." "Local law enforcement officers have no independent authority to make promises about the filing and prosecution of state criminal charges." As to whether defendant's reliance upon the agreement was of "*constitutional consequence*," it was noted that it takes more than merely providing information, as defendant did here, before his constitutional "*due process*" rights are implicated. "(T)he detrimental reliance required to enforce an unauthorized cooperation agreement must be more than simply providing the requested or specified cooperation." It was not argued that defendant was induced into giving up his right to counsel, his right not to incriminate himself, to furnish information useful to the government in developing a case against him, or to plead guilty. There was, therefore, no detrimental reliance of constitutional significance. A defendant may also seek dismissal of charges when the criminal act he seeks to have excused is committed pursuant to the agreement itself, i.e., acting with "*public authority*," or, stated differently, at the suggestion of law enforcement. In this case, however, the criminal acts defendant sought to have excused occurred prior to entering into the cooperation agreement; not as a consequence of the agreement. So the "public authority" defense does not apply. Having failed to prove that the officers involved were legally authorized to promise defendant a dismissal, or that any reliance he might have incurred was of constitutional consequence, and because the "public authority" defense is inapplicable to this situation, the trial court was in error when it dismissed defendant's pending felony case and probation violations.

Note: The law enforcement officers testified at the motion for dismissal that they never promised defendant that the pre-existing felony case and probation violations would "*go away*," or otherwise be dismissed. They claimed to have told defendant only that they would inform the district attorney of his cooperation and inquire as to whether he might receive some leniency as a result, but that the decision on this issue was up to the prosecutor. This is really about all a police officer is legally allowed to do. But the trial court found that there was more to this agreement and that the officers did in fact promise to have the pending felony case and probation violations dismissed. This is why all such cooperation agreements need to be in writing. Confidential informants are not your friends. They will take you down in a heart beat if it serves their purpose at the time. But assuming the trial judge in this case was right about what the agreement really entailed (and I'm not saying he was), you need to know that a police officer *does not have the right or the power* to plea bargain a case or to grant immunity from prosecution. That is exclusively a prosecutor's venue, with the concurrence of a court. Stay away from this bucket of worms and you may just be around long enough to someday enjoy the privilege of retiring in beautiful South Dakota.