The California Legal Update

Remember 9/11/2001; Support Our Troops

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This Edition of the *California Legal Update* is dedicated to the memory, and in honor of, New York City Police Officer (promoted to Detective, posthumously) *Brian Moore*, murdered in the line of duty.
EOW: May 2, 2015.

THIS EDITION'S WORDS OF WISDOM

"*There are no winners and losers; only triers and quitters.*" (Unknown)

IN THIS ISSUE:

CASES:

***Traffic Stops and a "De Minimis" Extension of the Detention*:**

Rodriquez v. United States **(Apr. 21, 2015) __ U.S.__ [2015 U.S. LEXIS 2807]**

Rule: Even a "de minimis" extension of the detention time needed to conduct a traffic stop beyond that which is reasonably necessary for the issuance of a traffic citation violates the Fourth Amendment.

Facts: Valley Police Department K-9 Police Officer Morgan Struble observed defendant's vehicle veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds, then jerk back onto the road. It was about 12:06 a.m. on March 27, 2012. Nebraska state law

prohibits driving on highway shoulders. (Neb. Rev. Stat. § 60-6.142 (2010)) Officer Struble pulled defendant's vehicle over and contacted him, obtaining his license, registration and insurance documentation. Defendant told the officer that he'd swerved to avoid a pothole in the road. A passenger told Officer Struble that they were returning to Norfolk from Omaha where they'd been looking at a vehicle that was for sale. Officer Struble wrote defendant a warning for the violation and returned his documentation to him, completing the purposes of the stop. By then it was 12:27 or 12:28 a.m. However, instead of letting him go, Officer Struble asked defendant for permission to walk his drug-sniffing police dog around defendant's car. Defendant declined. So Officer Struble instructed defendant to turn off his ignition, exit the vehicle, and stand in front of the patrol car while they waited for a second officer. Upon the second officer's arrival, Officer Struble walked his K-9 around defendant's car. The dog alerted to the presence of drugs halfway through the second pass. It was 12:33 a.m., some 27 minutes after the initial stop. A search of the car resulted in the recovery of a large bag of methamphetamine. Defendant was indicted in federal court on one count of possession with intent to distribute 50 grams or more of methamphetamine (21 U.S.C. § 841(a)(1) & (b)(1)). He moved to suppress the evidence seized from his car on the ground, among others, that Officer Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff; i.e., a search. Defendant's motion was denied, the magistrate finding defendant's detention beyond the time it took to issue the traffic warning (i.e., seven to eight minutes, per the court, or five to six minutes, by my count) to be "*de minimis*," and not constitutionally significant. The Eight Circuit Court of Appeal affirmed. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court in a split (6-to-3) decision reversed. The issue on appeal was whether police may extend an otherwise completed traffic stop, absent additional reasonable suspicion or consent, in order to conduct a dog sniff. A majority of the Supreme Court ruled that such a suspicionless extension of a traffic stop violates the Fourth Amendment. A routine traffic stop is considered by the courts to be more analogous to a so-called "*Terry* stop" (i.e., a detention; *Terry v. Ohio* (1968) 392 U.S. 1) that a formal arrest, given its relatively low-key level of intrusion. Like any *Terry* stop, as a Fourth Amendment "seizure," the allowable duration of the contact is determined by the "mission" involved; i.e., the time it would reasonably take to attend to handling the traffic infraction that justified the stop in the first place, plus any related safety concerns. "Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.' (Citation) Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." These tasks include "ordinary inquiries incident to [the traffic] stop," such as making a determination as to whether to issue a traffic ticket (as opposed to merely a warning), checking the driver's license, vehicle registration and insurance, and checking for warrants. But having a drug-sniffing dog do a pass around the vehicle is not a part of the ordinary traffic stop procedure. Some lower appellate court cases have held that a so-called "*de minimis*" extension of the time it reasonably takes to issue a citation is constitutionally insignificant, and allowable. In this case, both the trial court and the Eighth Circuit Court of Appeal found that the eight to nine minutes it took to develop the necessary probable cause to search the vehicle (i.e., the time between when the traffic stop was completed and the dog's alert on the car) was just such a de minimis extension of time, and not illegal. Disagreeing, the majority of the Supreme Court here held that the Fourth Amendment does not allow for such an extension. In so holding, the Court further held that the government's strong interest in interdicting the flow of illegal drugs along

the nation's highways is insufficient to allow for the investigation of "ordinary criminal wrongdoing" not related to the traffic stop itself, at least if such an investigation requires an extension of the time it would have taken to write a ticket. And it was also held that an officer rushing the issuance of a citation does not serve to earn him "bonus time" to investigate matters other than the traffic violation in that it is expected that he will be moving with reasonable diligence in any case. However, it was also noted by the Court that should an officer, before completing the lawful traffic stop, develop reasonable suspicion related to other criminal activity, that newly developed reasonable suspicion would allow for an extension of the detention to give the officer time to investigate further. In this case, because it was not litigated as to whether Officer Struble had developed such a reasonable suspicion *before* he finished issuing the traffic warning, that defendant and his passenger were engaging in other criminal activity, the case was remanded to the lower courts for consideration of that issue.

Note: This case is really nothing more than a reiteration of the rule on "unlawfully prolonged detentions" that has existed in California for a long time. (See *People v. McGaughran* (1979) 25 Cal.3rd 577.) But its importance lies in doing away with the argument that a de minimis extension of the detention time is allowable. Until now, this "de minimus" rule has been upheld in California under both state (*People v. Brown* (1998) 62 Cal.App.4th 493) and Ninth Circuit (*United States v. Turvin et al.* (9th Cir. 2008) 517 F.3rd 1097.) authority. This case does *not* hold, however, that you cannot make inquiry concerning other criminal activity during the time the traffic violator is being lawfully detained. (E.g.: "*I'm going to write you a citation for speeding, and by the way, have you molested any children lately*?") The argument that you are not allowed to "enlarge the scope" of the original detention during the time period the person is lawfully detained has long since been disapproved by the United States Supreme Court in authority cited with approval in this new case. (See *Illinois v. Caballes* (2005) 543 U.S. 405; and *Muehler v. Mena* (2005) 544 U.S. 93.) The dissenting justices, by the way, would have upheld the dog sniff in this case, arguing that (1) "*reasonableness*" is supposed to be the test, and defendant's 29-minute (27 minutes, by my count) detention between being stopped and the dog's alert on his car was not unreasonable, and (2) Officer Struble legally had sufficient reasonable suspicion to detain defendant longer than it took to write the warning. This second conclusion was based upon facts brought out in testimony, but not litigated at the Eighth Circuit level and not discussed in the majority opinion; i.e., a strong odor of air freshener in the car consistent with drug smuggling, abnormal nervousness of the passenger, implausible excuse for why they were out so late at night, and implausible excuse for swerving off the road. So that issue will now be the subject for a new round of appeals.

***Attempted Criminal Threats, per P.C. §§ 664/422*:**

***People v. Chandler* (Aug. 28, 2014) 60 Cal.4th 508**

Rule: The crime of "*attempted criminal threat*," per P.C. §§ 664/422, requires both proof of a subjective intent to threaten and, under the circumstances, that the threat was sufficient to cause a reasonable person to be in sustained fear.

Facts: Defendant, for reasons not explained in the case decision, was angry at Jamie Lopez. In January, 2009, he appeared in front of her house a couple of times calling her names and yelling

profane epitaphs, suggesting she have an illicit relationship with herself. He also indicated that he knew when she was alone; a statement that scared her. At times, "weird" things would happen, such as a tennis ball being bounced off her windows, a pipe being thrown at the front door, and nails being spread out in the street at the entrance to her driveway. Profanity was also spray-painted on the street in front of her house. On January 29th, Lopez saw defendant walking up the street, carrying "an object," and yelling that he was going to kill her. These actions caused Lopez to have her neighbor take her children for a night while she spent the night at the home of another neighbor, Deborah Alva. Both Lopez and Alva heard defendant outside singing a song with lyrics that included the words, "somebody's watching me." Lopez called the police. The next day, defendant approached Lopez in her car and told her that he was going to kill her. The police were called again. With all this frightening her, Lopez called the police a total of seven times during this time period. She eventually moved away. Defendant, in one instance, as he walked up the street while swinging a golf club, confronted Alva, telling her that he was going to kill her as well. This resulted in Alva's husband calling the police. Although Alva later testified that she wasn't afraid of him, she thought he might do something to her car. She also was concerned enough to turn on the house lights and sleep in the living room. She testified that she was unable to sleep for the entire weekend. Defendant was later arrested and charged in state court with one count of stalking Lopez (Pen. Code, § 646.9(a)) and two counts of making a criminal threat (P.C. § 422), with Lopez and Alva being the victims. As for the criminal threat counts, the trial court instructed the jury that they must find beyond a reasonable doubt that defendant willfully threatened to kill or cause great bodily injury, that he intended his statements to be understood as a threat and that they be communicated to each victim, that the threats were so clear, immediate, unconditional, and specific that it communicated to the victims defendant's serious intention and immediate prospect that the threat be carried out, that the threats actually caused the victims to be in sustained fear for her safety or the safety of her immediate family, and that the fear experienced by the victims was reasonable under the circumstances. (See CALCRIM No. 1300) The trial court also instructed the jury on the lesser included crimes of "attempt;" i.e., that in order to constitute an attempt, the People must prove that defendant took a direct but ineffective step towards committing stalking as to count one, and criminal threats in counts two and three; and that he intended to commit stalking or criminal threats. (See CALCRIM No. 460.) The jury was *not* told that an attempted threat had to be sufficient to cause a reasonable person to be in sustained fear. Defendant was convicted of the attempts to commit criminal threats, as a lesser included offense of P.C. § 422, as to both victims, while acquitting him of the greater offenses. The jury hung on the lesser offense of attempted stalking. With the trial court finding true certain "strike priors" and other enhancements, defendant appealed from his 33 years-to-life sentence. The Fourth District Court of Appeal (Div. 2) affirmed, rejecting defendant's argument that the crime of "attempted criminal threat" requires a finding that the intended threat reasonably could have caused, under the circumstances, sustained fear, as was held in *People v. Jackson* (2009) 178 Cal.App.4th 590. The California Supreme Court granted review.

Held: The California Supreme Court unanimously upheld defendant's conviction, but split (4-to-3) on the majority's conclusion that the crime of "*attempted criminal threat*" requires that a reasonable person would view the defendant's threats as sufficient to create a sustained fear (as discussed below). It has already been established that there *is* such a thing as the crime of "*attempted criminal threat*." (*People v. Toledo* (2001) 26 Cal.4th 221.) But the only thing

Toledo tells us, while citing the attempt section, P.C. § 664, is that; "a defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." *Toledo* did *not* address the question whether to be a completed attempt, the threat made had to be sufficient to cause a reasonable person to be in sustained fear. In other words, is it necessary for the threat made to be "*objectively threatening*?" The majority of the Court here held that it does. The majority decision launched into a protracted discussion of the danger that converting the spoken word into a criminal violation (i.e., "criminalizing speech") may run afoul of the First Amendment freedom of expression. To avoid such a result, the Court determined that the offense of attempted criminal threat must be construed to require proof that both (1) the defendant had a subjective intent to threaten *and* (2) that the intended threat under the circumstances was sufficient to cause a reasonable person to be in sustained fear. A jury should be so-instructed. They were not instructed as to the second element in this case. However, whether or not the jury instructions in this case adequately conveyed this later element (i.e., that a reasonable person would have felt a "sustained fear" as a result of the defendant's threat), the Court found any error to be harmless beyond a reasonable doubt. At trial, no one contested that defendant's threats were insufficient to cause a reasonable person to be in "sustained fear." Defendant's defense was centered on his denial that he had ever made any threats in the first place; a contention that the jury had rejected. Therefore, under the evidence as presented, the Court found that "no reasonable juror could have failed to find defendant's threats sufficient under the circumstances to cause a reasonable person to be in sustained fear." He was therefore properly convicted.

Note: This is the first opinion I've briefed that was written by Associate Justice Goodwin H. Liu; a recent Governor Jerry Brown appointee to the Supreme Court. And I have to say that while obviously intelligent and very knowledgeable, he really has a tendency to ramble on, . . . *and on*, . . . *and on*. By the time I got through the whole decision, and even after re-reading it a couple of times, I was totally confused as to what the issue even was. But somehow I muddled through it all and was able to boil it down into what I hope is an intelligible discussion, or at least an understandable conclusion. For prosecutors, this decision is very important, requiring an addition to the CALCRIM No. 460 instruction, at least when the charge of an "*attempted criminal threat*" is an option. For police officers, this only reemphasizes the need for a lot of detail in the nature of the threats made and its affects upon the victim. Somewhere, somehow, the jury got confused in this case because there is no reason why defendant shouldn't have been convicted of a completed criminal threat, at least as to victim Lopez. That was our fault. A better investigation, or a better presentation to the jury, or both, should have cleaned this up.

***Theft; Aggregating the Loss*:**

People v. Whitmer **(July 24, 2014) 59 Cal.4th 733**

Rule: Separate thefts, even though all part of a common plan or scheme, but so long as each is pursuant to a separate fraudulent intent, are to be separately charged and punished.

Facts: Defendant was the manager of a motorcycle dealership. While acting in that capacity, defendant set up the fraudulent sales of 20 motorcycles, motorized dirt bikes, all-terrain vehicles

(ATVs), and similar recreational vehicles. Each sale was purportedly made to a different fictitious buyer, using falsified financing agreements and credit purchases, usually on different days, and always with separate paperwork and documentation. The value of the stolen vehicles ranged from $9,100 to over $20,000 per vehicle, resulting in a total loss to the dealership of over $250,000. Defendant was charged in state court with 20 counts of grand theft—one count for each vehicle—with an enhancement allegation that he took property valued at more than $250,000 (former P.C. § 12022.6(a)(2)), along with other charges. Upon conviction by a jury, the court sentenced defendant to prison for a total of 12 years. Arguing that he should only have been convicted of a single count of grand theft, Defendant appealed. The Second District Court of Appeal (Div. 4) affirmed. Defendant's petition for review was granted.

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Held: The California Supreme Court, in a split 6-to-1 decision, reversed, ruling that defendant could only be convicted of a single count of grand theft. But the Court did so only because defendant was entitled to the benefit of the then-existing prevailing rule that such a series of crimes, based upon a single "*common plan or scheme*," is but one offense. However (and more to the point), the Court also held that under these circumstances, convicting defendant of one count of grand theft per illegal transaction (for a total of 20) was *not* error under the rule as established by this case. Some 54 years ago, the Supreme Court decided *People v. Bailey* (1961) 55 Cal.2nd 514. In *Bailey*, the defendant received a series of welfare payments that were the result of a single misrepresentation on her part made to the welfare office. Individually, each payment constituted no more than a misdemeanor. But when added together, the total monies she received illegally was sufficient to be a felony (i.e., over $200 at the time). The Supreme Court upheld her conviction for a single count of grand theft, ruling that when a series of thefts "are all motivated by one intention, one general impulse, and one plan, the offense is grand theft;" i.e., it is but a single crime. Defendant in this new case argued that based upon this rule as established in *Bailey*, with all his crimes being pursuant to "one intention, one general impulse, and one plan," he committed but a single offense of grand theft. The Court looked at other lower appellate court decisions decided since *Baily* and determined that defendant's argument is consistent with this prevailing view. However, per the Court, these cases interpreted *Bailey* too broadly. In *Bailey*, the defendant made but a single misrepresentation. And even though she subsequently received a series of illegal payments, all the money she got out of this scheme was still the product of a single fraudulent act. As such, the total money received must be aggregated for purposes of determining the proper charge (i.e., one offense or a series of smaller offenses). In this new case, defendant committed 20 separate fraudulent acts, as opposed to one, profiting by each individually. *Bailey* does not dictate that merely because the individual crimes are similar in their execution, and that each is a part of a "common plan or scheme," only one crime occurred. Per the Court, where there is more than one fraudulent act, "a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." Defendant, in this case, committed a series of 20 separate and distinct, albeit similar fraudulent acts in the preparation of separate paperwork and documentation for each illegal transaction. Each fraudulent act was accompanied by a new and separate intent to commit that individual fraud. He should not, in effect, be given 19 free grand thefts under such circumstances. He was therefore properly convicted of 20 separate counts of grand theft. However, because the prevailing interpretation among lower appellate courts is consistent with defendant's argument, he is entitled to the benefit of that interpretation even though erroneous. "Courts violate constitutional due process guarantees when they impose

unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." Therefore, even though defendant was properly convicted of 20 separate counts of grand theft, the case must be remanded to the trial court for resentencing for one count of grand theft.

Note: *Bailey*, by the way, was not overruled, but merely explained and limited to its facts. The key, it appears, is that we have to look at the number of separate fraudulent acts involved when determining whether we are to aggregate damages into one charge, or charge them separately. On remand, the Second District Court of Appeal considered a whole new batch of issues not decided on its first trip up the appellate scale, such as the stealing of a motorcycle or dirt bike not being a grand theft-auto, and when P.C. § 532a(1) (making false financial statements) applies and doesn't apply, before remanding the case to the trial court for resentencing. (See *People v. Whitmer* (Oct. 21, 2014) 230 Cal.App.4th 906.) So we haven't yet heard the last of this case. But it's good, in the meantime, to get some resolution on the issue of when a series of acts under one plan or scheme is to be combined or charged separately. I've been asked this a number of times and could only respond, in lawyer-like fashion, that "*It depends*." And what it depended on, I was never really sure. So now we know.

***The CASE Act*: *Human Trafficking*:**

In re M.D. **(Nov. 24, 2014) 231 Cal.App.4th 993**

Rule: An adult prostitute being in the company of a minor does not establish as a matter of law that the adult caused, induced, or persuaded the minor to engage in a commercial sex act.

Facts: On July 26, 2013, officers of the Concord Police Department's Special Victims Unit and the Special Enforcement Team conducted a joint operation in an area of Concord known for its high level of prostitution-related activity. At about 7:30 p.m., defendant, a 16-year-old minor, was observed in the company of an adult female, Shiquenta Antonio, walking down a sidewalk, side by side, talking to each other. Both were dressed in a manner consistent with other prostitutes in the area, scantily dressed so as to attract men. At different times, both females were observed contacting the occupants of different vehicles as the other stood by watching from some 30 feet away. Both females were observed long enough so that the officers were able to form the opinion that they were loitering with the intent to commit prostitution (P.C. § 653.22). Both were arrested. Defendant, not denying the charge, subsequently admitted to police officers that she'd been a prostitute since March. Defendant indicated that she and Antonio had come to the area via BART (Bay Area Rapid Transit) and that Antonio had told her that prostituting herself was a lucrative occupation. (Antonio's case, which included a count of pimping, was still pending at the time of this decision.) A petition was filed in Juvenile Court alleging that defendant was delinquent pursuant to W&I Code § 602 for having committed a misdemeanor violation of P.C. § 653.22. Prior to the jurisdictional hearing, defendant filed a motion in limine, seeking to exclude evidence of her alleged commercial sexual activity pursuant to E.C. § 1161(a), arguing that she was a victim of human trafficking as defined in P.C. § 236.1. The Juvenile Court magistrate denied the motion. At the conclusion of the jurisdictional hearing, the court found the allegation that defendant loitered with intent to commit prostitution to be true. At

the dispositional hearing, the court declared her to be a ward of the juvenile court and placed her on probation. Defendant appealed.

Held: The First District Court of Appeal (Div. 3) affirmed. On appeal, defendant argued that she was a victim of "human trafficking," as that offense is defined in P.C. § 236.1. As a human trafficking victim, under the so-called Californians Against Sexual Exploitation Act (CASE Act), E.C. § 1161 makes inadmissible against her any evidence of her prostitution-related activities**.** The CASE Act, approved by voters in November, 2012, was directed at the problem of the sexual exploitation of minors; i.e., "*Human Trafficking*," a modern-day form of slavery. The adult female, Shiquenta Antonio, in the company of defendant at the time of her arrest, and who was in fact arrested for pimping, was alleged by defendant to be the human trafficker who caused her to engage in prostitution. But for Antonio to be guilty of human trafficking (thus making E.C. § 1161 applicable to defendant), it must be shown that Antonio "cause(d), induce(d), or persuade(d) (or attempted to do so), a minor to engage in a commercial sex act, with the intent to effect or maintain a violation of" certain listed sex violations. Of the listed violations, only P.C. § 266i (pandering) was potentially applicable to this case. Section 266i(a)(2) provides that any person who "[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute" is guilty of pandering. Defendant's argument on appeal, as it was at her pre-jurisdictional hearing motion, was that the evidence showed that Antonio was leading her "on the streets in an area known for prostitution activity, while demonstrating methods for luring potential customers." Defendant noted that the police officers reasonably believed that Antonio was pimping, as demonstrated by the fact that they arrested her for that crime. The Court agreed that this evidence might have been sufficient to support a finding that defendant was a victim of human trafficking, but it did not establish this defense as a matter of law. The evidence was also consistent with numerous other possibilities, such as that she and Antonio were merely friends, both of whom voluntarily and on their own initiative were soliciting prostitution. Neither the fact that Antonio was somewhat older than the minor, nor that she was arrested for pimping, necessarily compels the conclusion that the minor was a victim of Antonio's trafficking. The Court, therefore, found no error in the court's denial of defendant's pretrial motion on this issue.

Note: A large part of this decision was taken up by the Court's determination that it was the defendant minor who had the burden of proof on the issue of the applicability of E.C. § 1161; something that must be decided in an Evidence Code section 405 pre-trial evidentiary hearing. Generally, it is the party who seeks to exclude evidence that has the burden of proof. The Court found no reason to shift the initial burden of proof (i.e., "the burden of going forward with the evidence") to the prosecution in a human trafficking case. While E.C. § 405 hearing issues are a matter of concern to the attorneys and the court only, police officers must be aware that all evidence, pro or con, of another person's influence on the illicit activities of a prostitute is extremely relevant in such a hearing where your testimony, as evidence, will be hotly contested. Where it is found that E.C. § 1161 is in fact applicable (i.e., the prostitute is in fact the victim of human trafficking), then there is no case against her (or him). This, perhaps, is as it should be in that the whole purpose of the CASE Act is protect minors from being exploited. Also note that E.C. § 1161 which, again, is the authority for excluding evidence of the prostitute's illicit activities, is not limited to minors. And lastly, see *In re Aarica S.* (Feb. 21, 2014) 223 Cal.App.4th 1480, briefed in *California Legal Update*, Vol. 19, No. 13, where it was held that

having been the victim of human trafficking in the past does not provide the necessary "causal connection" to excuse current commercial sexual activity not related to the sexual exploitation of another.

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

People v. Toure **(Jan. 5, 2015) 232 Cal.App.4th 1096**

Rule: Exigent circumstances will allow for a warrantless blood draw in a DUI case.

Facts: On December 23, 2012, at between 8:30 and 9:00 p.m., defendant was seen by other persons on the road driving a tractor-trailer semitruck westbound on State Route 58 in the County of San Bernardino. People in the vehicle behind him could see that he was weaving over the lane line into the eastbound lane of travel, it apparently being a two-lane (one in each direction) highway at that location. Finally, defendant moved completely into the opposite lane where he traveled for approximately two miles towards on-coming traffic, forcing other cars off the road and eventually side-swiping a gray passenger car. Despite defendant's left front tire being destroyed in the collision, he continued on for another couple of thousand feet before pulling off to the right side of the road. Other drivers stopped and checked on defendant, finding him alone in the cab of the semitruck, smelling of alcohol. One such good Samaritan took the keys out of the ignition (later giving them to responding Highway Patrol officers) to keep defendant from attempting to leave. The CHP was called at 9:07 p.m. The occupants of the gray car, with its left side destroyed by the impact with defendant's truck, complained of neck and back pain. Defendant, when contacted by CHP officers, had to be told to exit his truck more than once. An officer could smell the odor of alcohol on him as the uncooperative defendant yelled obscenities. With clenched fists, an angry defendant refused to submit to a pat down for weapons, attempting to hit one of the officers with his elbow. As defendant continued to yell obscenities and to struggle, he was finally handcuffed. A "spit sock" had to be used to keep him from spitting on the officers. As the officers struggled to subdue him, they could see that his eyes were red and watery, his speech was slurred, and he had the odor of alcohol on his breath. Under the circumstances, a field sobriety test could not be administered. Leg restraints had to be used to prevent him from attempting to kick at the officers. Continuing to use profanity, defendant declined to submit to a blood test. By that point, defendant had been "hogtied" for approximately one to two hours and the officers wanted to limit the time defendant was in that position. Also, two hours (it now being 11:03 p.m.) had already passed since the traffic collision. Because it could not be determined when defendant had had his last drink, and because they were unsure of the availability of a magistrate who could issue a warrant, the officers obtained supervisory authorization to force a blood draw without first obtaining a search warrant. The results of the tests on defendant's blood showed a 0.15% blood-alcohol level. Defendant was charged in state court with driving under the influence of alcohol causing injury (V.C. § 23153(a)) with a special allegation that he refused to submit to chemical testing (V.C. § 23612); driving with 0.08% or higher blood-alcohol level (V.C. § 23153(b)); driving on a

suspended license (V.C. § 14601.2(a)); and resisting an executive officer (P.C. § 69). Tried by a jury, defendant brought a mid-trial motion (it's supposed to be done pre-trial) to suppress the results of his blood test, arguing that because it was obtained without the use of a search warrant, it should be suppressed. The trial court denied his motion. He was thereafter convicted of all counts and later sentenced to four years and eight months in state prison.

Held: The Fourth District Court of Appeal (Div.2) affirmed (except to remand the case back to the trial court for resentencing; see Note, below). On appeal, defendant argued that pursuant to *Missouri v. McNeely* (2013) 569 U.S. __ [185 L.Ed.2nd 696], a warrant was necessary in order to extract blood from him over his objection, absent exigent circumstances, and that the People had failed to establish the necessary exigent circumstances. The Court of Appeal disagreed, upholding the trial judge's conclusions on this issue. The United States Supreme Court held some five decades ago in *Schmerber v. California* (1966) 384 U.S. 757, that warrantless blood draws are lawful. However, *Schmerber* involved some unique circumstances where, due to the defendant's injuries and the need to investigate the traffic collision in which he'd been injured, the need to determine his blood alcohol level, which was rapidly dissipating, necessitated immediate action. *McNeely* finally ruled, while recognizing that a blood draw is a search under the Fourth Amendment, that *Schmerber* involved certain exigencies that excused the lack of a warrant. The run-of-the-mill DUI case, on the other hand, and in considering each such case on its own facts, does not necessarily involve such an exigency. In determining the need to obtain a search warrant for a blood draw, a court must consider the "totality of the circumstances." As a general rule, per *McNeely*, a DUI arrest will require a search warrant for a blood sample absent the suspect's consent. The natural dissipation of one's blood-alcohol level, by itself, is not enough to justify the lack of a warrant. In this particular case, the Court found sufficient delaying circumstances justifying the obtaining of a sample of defendant's blood without a search warrant. There had been a traffic accident in which at least one person sustained injuries approximately 2,000 feet from where defendant finally came to a stop after blowing the tire of his semitruck. Defendant was combative, requiring the administration of physical restraints, delaying the CHP officers' investigation of the accident. Defendant's combativeness also prevented the officers from conducting a field sobriety test. Further, defendant refused to provide officers with information, yelling profanities at them instead, thereby preventing the officers from determining when he had had his last drink and complicating any attempt to calculate what his blood-alcohol level might have been at the time of the accident. Because of the necessity to investigate the circumstances of the accident and to provide care for the other injured people at the scene, along with defendant's lack of cooperation, two hours had already expired before officers were even ready to obtain a blood sample. These were circumstances that were not present in *McNeely*, and were even more extreme than in *Schmerber*. It was therefore not unreasonable for the officers to force a blood draw over defendant's objection and without taking the extra time it would have required to obtain a search warrant.

Note: The Court could have also noted (but didn't) that defendant's arrest occurred before *McNeely* was decided (Apr. 17, 2103), and that *McNeely* is not retroactive. (*People v. Youn* (2014) 229 Cal.App.4th 571, 576-579; *People v. Rossetti* (2014) 230 Cal.App.4th 1070, 1074-1077.) Prior to *McNeely*, it was pretty much assumed that *Schmerber* allowed for a warrantless blood draw in just about any DUI situation. You might also note that warrantless blood draws have been upheld where the subject is on a Fourth waiver. (*People v. Jones* (2014) 231

Cal.App.4th 1257.) Also, California's "*implied consent law*," Veh. Code § 23612, has been held to be sufficient to allow for a warrantless blood draw absent an express withdrawal of that consent (e.g., a "refusal") by the arrested DUI suspect. (*People v. Harris* (2015) 234 Cal.App.4th 671, 681-692.) So it cannot be said that *McNeely* is not without its exceptions. *And a note to prosecutors*: Defendant's case had to be remanded for resentencing because his prior DUI convictions, which the trial court used to aggravated his sentence, had not been pled or proved. Why this oversight occurred was not explained. So I only note it here as a reminder to prosecutors that unless a defendant's prior DUI convictions are included in the allegations, and proven (or admitted) in court, his conviction in the instant case will be treated as a first-time offense.