San Diego District Attorney

D.A. LIAISON LEGAL UPDATE

(COPY - - DISTRIBUTE - - POST)

Vol. 12 November 21, 2007 No. 14
www.legalupdate.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

Remember 9/11/01; Support Our Troops

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

THIS EDITION'S WORDS OF WISDOM:

"*A life spent making mistakes is not only more honorable but more useful than a life spent doing nothing.*" (George Bernard Shaw)

IN THIS ISSUE: Page:

***ADMINISTRATIVE NOTES*:**

Retirement Celebration: My wife and I would like to extend our sincere thanks and deepest appreciation to all those who attended our recent retirement celebration. We particularly thank those who used this opportunity to contribute to the Escondido Humane Society and/or Operation Homefront. Between the two organizations (not counting those who contributed directly), we collected $2,025 which has already been passed on to them. Those who wrote checks (as opposed

to donating cash) should be hearing directly from the organization to which you contributed.

CASE LAW:

***Consent and Voluntariness*:**

United States v. Rodriquez **(9th Cir. Oct. 5, 2006) 464 F.3d 1072**

Rule: A voluntarily obtained consent to search is lawful. Use of a written consent form is helpful in proving voluntariness.

Facts: Defendant, convicted of various felonies in the State of Washington, absconded from parole. With felony warrants outstanding, a joint fugitive task force was actively looking for him. Officers from the task force took up a surveillance on a woman that they were told was visiting defendant on a regular basis. They followed this woman to an apartment complex in Spokane. When defendant was observed talking to the woman outside the rear door to apartment #36, he was arrested. A search of his person incident to arrest resulted in the recovery of a bag of heroin and $900 in cash. Defendant denied living in apartment #36 but gave conflicting excuses for how he happened to be at its rear door when arrested. At this point, Tammi Putnam arrived on the scene. She too denied living in #36, claiming to live next door in #35. But when the occupants of apartment #35 told officers that she didn't live there, it was determined that Tammi was in fact a resident of #36. An officer advised Tammi that "it was a criminal offense to make a false or misleading statement to a public servant." She appeared to be "nervous" and "upset" during this conversation, perhaps believing that she was about to be arrested. Believing that defendant lived in #36 with Tammi, officers told her that they wanted to search it. It was explained to her that they could either (1) get a search warrant, during which delay her apartment would be secured so nothing would be disturbed, or (2) that she could give them her consent to a warrantless search. Tammi was told that she had the right to refuse to consent. She was read a "*search consent card*" which she reviewed, signed, and dated. Upon receiving her consent, the officers searched the apartment where they discovered a gun underneath a couch. Other evidence showed that defendant had obtained this firearm from another person for the purpose of getting rid of it. Charged in federal court with being a felon in possession of a firearm, defendant made a motion to suppress the gun, arguing that Tammi's consent was not voluntary. The trial court denied the motion. After being convicted by a jury, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. "It is well settled that a search conducted pursuant to a valid consent is constitutionally permissible." But the consent to search must be voluntarily obtained. Whether or not a consent is voluntary depends upon an analysis of the "*totality of the circumstances*." In evaluating these circumstances, the Court identified five factors that must be considered: (1) Whether the person consenting was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings had been given; (4) whether the person consenting was told that he or she had a right not to consent; and (5) whether the person consenting was told that a search warrant could be obtained should he or she refuse to consent. Holding that no one

factor is determinative, and that not all of the factors must apply, the Court compared them to the facts in this case. *First*, Tammi was not in custody when she gave consent. *Second*, no firearms were drawn or exhibited. *Third*, *Miranda* was not required because Tammi was not in custody. *Fourth*, Tammi knew she had the right to refuse, and in fact was specifically told of this right by the officers. And *fifth*, threatening to get a search warrant is not an important factor unless it is done in a threatening manner. In this case, it was not. Also, having probable cause to get a search warrant (as in this case) "significantly diminish(es)" the importance of this factor. The Court also noted the importance of the use of the consent-to-search form. "(E)xecution of a consent form is one factor that indicates that consent was voluntary." Based upon these circumstances, Tammi's consent was not involuntary. The search of her apartment, and the recovery of the gun, was therefore lawful.

Note: Nothing really new here, but a good refresher on the issue of the need for a "*free and voluntary*" consent. I'm afraid I see all too often situations where an officer uses some sort of trick, ruse, threat, or other clever technique to convince a suspect of the wisdom of consenting to a search. And while I generally encourage the use of search warrants, given the propensity of some courts to lend credence to a defendant's later dishonest claim that he or she was coerced into consenting, there is nothing wrong with using consent as the legal justification for a search so long as it is properly and completely documented. And note the Court's emphasis on the use of a "*consent to search*" form even though such a form is not legally required. While I discourage the use of those consent forms that list every right known to man and tend work too hard to talk a suspect out of giving his consent ("*KISS*;" *Keep It Simple, Stupid*), getting *something* in writing goes a long way in keeping a trial judge on our side despite a defendant's later claim that he or she was coerced into signing it.

***Traffic Stops; Prolonged Detentions*:**

***People v. Verdugo* (Apr. 17, 2007) 150 Cal.App.4th Supp. 1**

Rule: Citing a vehicle's driver for failing to produce proof of insurance, per V.C. § 16028(a), is prohibited unless the driver is also cited for some other offense or is involved in a traffic accident. Also, taking the time to verify that the driver is insured after determining that he is not in violation of any other Vehicle Code section constitutes an illegally prolonged detention.

Facts: San Bernardino County Sheriff's Deputy W. Martin was on routine patrol when he noticed defendant driving with an expired registration sticker on the rear license plate. Using his vehicle's computer system, the deputy verified through DMV that the registration was expired. He therefore made a traffic stop on defendant intending to cite him accordingly. Upon stopping defendant, Deputy Martin asked him for his driver's license, vehicle registration and proof of insurance. Defendant produced a valid temporary registration that had been affixed to his rear window, but that the deputy hadn't seen because of the dark tint on the window. Defendant was unable to produce the required proof of insurance, however, so Deputy Martin cited him for failing to have with

him evidence of financial responsibility, per V.C. § 16028. Defendant later made a motion to suppress, arguing that once he provided Deputy Martin with a valid temporary registration for the vehicle, Deputy Martin should have let him go. The trial court denied the motion and defendant appealed.

Held: The Appellate Department of the Superior Court (San Bernardino) reversed. The initial traffic stop was legal. When Deputy Martin observed the expired registration tab, and verified via his computer that the vehicle's registration was no longer valid, he had a reasonable suspicion of a traffic violation sufficient to justify a traffic stop. The fact that a temporary registration sticker was in the window did not negate the deputy's reasonable suspicion because it was not visible to the deputy through defendant's tinted windows. The deputy, however, was justified in detaining defendant only as long as it took to ask for his registration and driver's license. Once the deputy discovered that the vehicle was properly registered, his justification for detaining defendant ceased. Continuing the detention further for the purpose of verifying compliance with the requirement that defendant have proof of insurance constituted an illegally prolonged detention. Also, Vehicle Code section 16028, by its terms (subdivisions (b) & (c)), notes that a driver is only required to show evidence of financial responsibility if he is being cited for another Vehicle Code violation or is involved in an accident. Defendant here was neither cited for another offense nor involved in an accident. He could not be cited, therefore, for violating section 16028(a).

Note: This, to me, borders on being a throw-back to the Rose Bird era of splitting hairs and looking for excuses to dump on good police work. To argue that the request for proof of insurance occurred during an illegally prolonged detention, when it all occurred, literally, in the same breath ("*Sir, may I see your driver's license, registration and proof of insurance*.") is a bit of a stretch. It is a stronger argument that subdivisions (b) and (c) of section 16028 preclude an officer from citing a driver for failing to produce proof of insurance when there is no other violation nor a traffic accident, but I have to question whether that was the intention of the Legislature when they wrote this section. Subdivision (a) says that "a peace officer shall not stop a vehicle for the sole purpose of determining whether the vehicle is being driven in violation of this subdivision." Deputy Martin was in compliance with this restriction. To interpret subdivisions (b) and (c) as prohibiting an officer from citing for an offense that comes to light during an otherwise lawful traffic stop is, in my never-to-be-so humble opinion, over-kill.

***Trespass on Private Property*:**

Edgerly v. City and County of San Francisco **(9th Cir. Jul. 17, 2007) 495 F.3d 645**

Rule: Being on another's property, even though gated, with "No Trespass" signs posted, and without permission, is *not* a criminal offense under California's trespass statutes.

Facts: Two San Francisco Police Department officers on routine patrol observed Erris Edgerly standing inside the gated area of the Martin Luther King/Marcus Garvey Housing Cooperative, next to a playground area. "No Trespassing" signs were posted at

the Cooperative's gated entrances. About five minutes later, the officers noticed that Edgerly was still there. The officers recognized Edgerly, knew that he didn't live at the Cooperative, and knew that he had a prior drug-related arrest. The officers also knew that the area was considered to be a "high-crime" area and that Edgerly was an "associate" of neighborhood gang members. When asked what he was doing there, Edgerly told the officers that he was "just chilling." Determining that Edgerly was on the grounds of the Cooperative for no specific reason, and because the Cooperative's management had requested that the officers enforce the "No Trespassing" signs, they arrested him for trespassing per P.C. §602(*l*) (now 602(m)). Edgerly was patted down for weapons and transported to the station where a more thorough search was conducted. He was cited for trespass and released. No criminal charges were ever filed. Edgerly later sued the officers and everyone up the chain of command in state court (the suit later being transferred to federal court) for illegally arresting and searching him. The civil suit was eventually dismissed, the trial court ruling that if not section 602(*l*), Edgerly must have violated a trespass of "*some sort*." Edgerly appealed.

Held: The Ninth Circuit Court of Appeal reserved, holding that "*as a matter of law*," the officers did not have probable cause to arrest Edgerly and thus violated the Fourth Amendment in doing so. If it could be shown that Edgerly was violating "*some sort*" of trespass, or loitering, statute, the arrest would have been lawful. The problem is that he was not. In making this ruling, the Court considered, one by one, the available trespass statutes. *P.C. § 602(l)* (now *(m)*): This section requires proof that a person "willfully . . . [e]nter[s] and occupie[ies] real property or structures of any kind without the consent of the owner." The California Supreme Court has previously held that this section only applies where the "entering and occupying" is a "nontransient, continuous type of possession," and where the trespasser had the "specific intent to remain permanently, or until ousted." (E.g., a "*squatter*.") There was no evidence that this is what Edgerly had intended to do. *P.C. § 647(h)*: This loitering section requires that the alleged loiterer "delay or linger" on the property "for the purpose of committing a crime as opportunity may be discovered." There was no evidence that Edgerly was planning to commit some crime on the grounds of the Cooperative. *P.C. § 602.5*: This trespass statute is limited to one who enters, or refuses to leave, a "noncommercial dwelling house, apartment, or some such place;" i.e., "*places of habitation*." No dwelling was entered in this case. *P.C. § 602.8(a)*: This section prohibits the entering, without written permission, "lands under cultivation or enclosed by fence . . . [or] uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to a mile." First, the Court questioned whether this section applies to residential property, there being some prior authority indicating that it does not. Second, the offense is only an infraction (for the first offense) and does not justify a custodial arrest. Therefore, there being no criminal offenses that are applicable to what defendant was doing at the time he was arrested, taking him into custody violated the Fourth Amendment. The Court further held that these officers should have known this, and were therefore not even entitled to qualified immunity from civil liability.

Note: This is a problem I have been harping on for some time; i.e., that calling a "*trespass*" a "*trespass*" doesn't necessarily make it a "*trespass*." Again, the problem is

that there is a big difference between a *criminal trespass* (as defined by one or more California criminal statutes) and a *civil trespass* (which is all Edgerly was doing in this case). Don't make the mistake of confusing a property owner's right to civilly enjoin someone from going onto his property with your right to arrest the "trespasser," absent a specific statute, all the elements of which are covered by whatever it is your arrestee is doing. There is no such thing as the offense of "P.C. § 602, Trespass." It has to be "P.C. § 602, '*subdivision something*'" (or some similar statute) to be a criminal trespass.

***Detaining and Identifying Misdemeanor Suspects*:**

United States v. Grigg (9th Cir. Aug. 22, 2007) 498 F.3rd 1070

Rule: Stopping and detaining a suspect for a past, non-violent, non-continuing misdemeanor is unlawful, at least where there are other means available to later identify the perpetrator.

Facts: A Nampa, Idaho, resident called police to report that the kids in the neighborhood were harassing him with loud music, as they had been doing for years. Specifically, on this occasion, defendant had been driving his Mercury Cougar up and down the street "booming music" several times in the preceding days. There was some indication that defendant had been verbally warned by the police once before. On this occasion, the complainant identified defendant's car to the responding police officer, parked in front of an address down the street. As the officer was taking the information for the complaint, defendant got into his car and drove by them. But this time, defendant was driving lawfully, *and quietly*. The officer directed another officer who had just arrived to stop defendant. Upon making the stop, defendant immediately told the officer that he had a "hunting rifle" in the car. In fact, an SKS rifle (an unregistered automatic weapon), along with ammunition for it, and some .380 caliber handgun shells, were observed on the seat. Defendant was patted down and arrested when he was found to be in possession of concealed brass knuckles. The officers had not intended to arrest defendant on the noise complaint, it being a misdemeanor that had occurred at some earlier time and not in their presence. Idaho law (as in California) does not allow an arrest in such a circumstance. Defendant was charged in federal court with the illegal possession of an unregistered automatic firearm. In response to a motion to suppress, the federal district court judge held that the traffic stop was a lawful detention, necessitated for the purpose of allowing the officers to determine defendant's identity as the perpetrator of the noise violation. Defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. The trial court used the prior United States Supreme Court decision of *United States v. Hensley* (1985) 469 U.S. 221, as authority for justifying the detention of a person who is the suspect in a crime. Per *Hensley*, law enforcement's right to prevent crime outweighs a detainee's interest in personal security from government intrusion. The problem is that in *Hensley*, the suspected crime was a felony robbery. Where the person to be detained is a suspect in a robbery, or even a misdemeanor that carries with it the potential for repeated dangerous acts (e.g., DUI, reckless driving, etc.), then that person may be stopped for the purpose of

identifying him and/or stopping the dangerous activity. But in the case of non-violent misdemeanors, at least when it is something that occurred in the past and is not continuing in the officer's presence, then the need to intrude into the suspect's right to be free from government interference is severely diminished. The misdemeanor at issue here was not one that had the potential for ongoing or repeated danger; it was a misdemeanor noise compliant. "(I)t is difficult to imagine a less threatening offense than playing one's car stereo at an excessive volume." The officers also had alternative means of identifying defendant, such as by checking the address where his car had just been parked or investigating the prior complaint that had been made. Under these circumstances, stopping and detaining defendant was unreasonable. The stop being illegal, the trial court should have suppressed the officer's observations and the firearm.

Note: While as outrageous as this decision sounds at first blush, I have to tell you that it is supported by some pretty strong prior case authority. It is also consistent with a trend I've seen in a number of cases from the U.S. Supreme Court on down, balancing a person's privacy interest (typically in a residence) with the government's interest in effective law enforcement. These cases tend to find that minor offenses, absent an imminent threat of violence, may not justify law enforcement's intrusion into areas where people have an expectation of privacy, such as in a residence. The right not to be stopped and detained in a vehicle comes in a close second place to a person's privacy rights in his or her home. Having said that, I must also say that I personally disagree with this case. I don't find a traffic stop and temporary detention for the purpose of identifying a suspect in a crime, no matter how minor, to be all that intrusive. We'll just have to wait and see whether this case reflects a trend in the area of vehicle stops and other detentions.

***Miranda and Offers of Leniency*:**

People v. Chun **(Sept. 14, 2007) 155 Cal.App.4th 170**

Rule: Telling a defendant that confessing will lead to a more lenient sentence is an "*offer of leniency*" and will cause the resulting admissions to be suppressed.

Facts: Sixteen-year-old defendant belonged to a Stockton street gang known as the "Tiny Rascals Gangsters," or "TRG." TRG doesn't get along with the "Asian Boys" street gang, or "ABZ." In September, 2003, defendant and two other TRG members drove up next to a car on Lan Arc Street, shooting at who they believed to be an ABZ gang member. That vehicle's occupants, however, were the sister of the person they thought they were shooting at and two of her friends. Defendant and his associates shot at least six rounds from three guns into the victims' car, killing one person and seriously wounding the other two. No arrests were made. Two months later, defendant was arrested while riding in a van believed to have been involved in another shooting which occurred on Bedlow Drive. Arrested and taken to the police station, defendant was Mirandized and questioned for several hours concerning the Bedlow shooting. Denying any involvement, defendant was held for hours until eventually questioned about his possible involvement the Lan Arc shooting. As to Lan Arc, defendant started out by telling the detective that he didn't remember being involved. The detective told him that

he better remember because he was already going to go to prison for the Bedlow shooting and that whether he talked or not, he was going to be charged with the Lan Arc murder. The detective falsely told defendant that his friends had said he was there. Defendant was also told that the detective would write the judge, urging him to "*help* (*defendant*) *out here*." He also told defendant to learn from his mistake; that at 16 years old he was not that tough. "*When you go to prison, you ain't gonna be tough 'cause on a soaking wet day you maybe weighing one hundred fifty pounds, that's it. You get guys* (*in prison*) *that are huge. Okay? I'm not trying to scare you or nothing like that. Just be aware of it, that no matter what you say to me tonight you are going to prison. You understand that*?" Defendant was then told to be honest because "*this is gonna depend on whether you're gonna go to prison for the rest of your life or just gonna go to prison for a couple of years or couple of months, whatever. . . . But as of now what I have on you is you're gonna go to prison for the longest time if you don't speak out.*" In trying to convince defendant that it would be easier on him if he told the truth, and while telling him that his gun was not the murder weapon (an untrue statement), the detective told defendant that "*it was a mistake and you were young, 16 years old. Okay? I can live with that, you know. But the thing is don't try to cover up. Learn from your mistake. That's all I'm telling you.*" Shortly thereafter, defendant finally admitted to shooting into the victims' car. This admission was used against him at trial. He was subsequently charged in adult court with the Lan Arc murder and other related charges. At trial, the prosecution invoked the second degree felony murder rule (i.e., a murder committed during the commission of the inherently dangerous felony of shooting into an occupied vehicle, per P.C. § 246). The jury rejected the allegation of a first degree murder but convicted him of murder in the second degree, along with other charges and allegations. Sentenced to prison for 55 years to life, defendant appealed.

Held: The Third District Court of Appeal reversed. Finding some of the detective's statements to defendant to be an "*offer of leniency*," making defendant's resulting admissions "*involuntary*," the statements should have been suppressed. "A confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied." Merely "advice or exhortation by a police officer to an accused to 'tell the truth' or that 'it would be better to tell the truth' unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary." And pointing out benefits that flow "naturally from a truthful and honest course of conduct" is okay. *But* (and this is a "*big butt*"), "if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible." Also; "Such an offer or promise of leniency may be from equivocal language not otherwise made clear." Initially, the Court found the detective's comments about the harsh realities of prison life, particularly for a 150 pound sixteen year old, nothing more than a valid comment on the "realities of the situation." And telling him that what he said could make a difference between life in prison or only a few years or months was not a false promise of leniency. But then when the detective later told defendant that by admitting to being one of the shooters, while at the same time falsely claiming that his gun was not the murder weapon,

inferring to defendant that this fact was to his benefit, and that "learn(ing) from (his) mistake" would mean less time for him in prison, was both factually and legally incorrect. Also, while it is not improper to tell a defendant that the officer will advise the prosecution that the defendant was cooperative, in this case the detective, by saying he'd write to the judge encouraging him to help the defendant out, was offering to be an advocate for defendant. Such advocacy is improper. In summary, the detective told defendant, in effect, that his cooperation would earn him a more lenient sentence. As the Court noted; "The interrogation was over the line." Such an "offer of leniency" makes any resulting confession or admission inadmissible in court. Defendant's statements, being the only evidence supporting a second degree murder conviction under the second degree felony murder rule, mandates that the conviction on that count be reversed.

Note: Defendant here had been worked on in the interrogation room for almost 24 hours or so before he weakened and starting making useful admissions. The detective's frustration under these circumstances is certainly understandable. But it is still improper to let such frustrations lead an interrogator to the point where he or she is telling a suspect, even by inference, that cooperation is to his benefit from a sentencing standpoint. With the possible exception of being usable by a defense attorney as a factor in mitigation (i.e.; an "*early admission of guilt*") during sentencing, confessing one's culpability almost never works to a defendant's benefit come judgment day. Telling a defendant that he will get less time by confessing most often qualifies as an "*offer of leniency*." Such an "*offer of leniency*" can only cause the suppression of a defendant's resulting inculpatory statements. On another topic, by the way, I skipped the legal argument on how losing his admissions negates the use of the second degree felony murder theory. That's a whole different topic involving assaults that are also inherently dangerous felonies, and how they relate to the charge of murder, as well as the legal effect of the so-called "merger doctrine." I've briefed this theory in other cases. But if you want to educate yourself on how this works, the Court's legal discussion on this convoluted issue starts, most appropriately, at page 187 of the written decision.

***Threatening A Victim or Witness, per P.C. § 136.1*:**

People v. Foster **(Sept. 19, 2007) 155 Cal.App.4th 331**

Rule: To commit the crime of making threats to a crime victim (or witness), per P.C. § 136.1, the threat itself may be conveyed through a third party. It is also not legally required that the victim ever even be told of the threat.

Facts: Defendant and his girlfriend, Genevieve S., got into an argument that resulted in defendant hitting her in the mouth with a flashlight. The resulting injury required medical treatment at a hospital. Defendant was arrested. From jail, defendant made a number of telephone calls to a mutual friend, Gladys Buchanan. In the first call, defendant told Buchanan that he and Genevieve had been in a fight and "hurt each other," requiring both of them to get hospital treatment. In a second call, he told Buchanan that Genevieve got him into a lot of trouble; that she had forgotten that she was injured when she was attacked by two women at a park, and that defendant had seen Genevieve in

court and "that's not a good idea." He asked Buchanan to give Genevieve "a message" and tell her "not to tell" on him. He gave Buchanan a telephone number where she could call Genevieve. He told her to tell Genevieve that he was "in big trouble here." He also told Buchanan to tell Genevieve that it would be bad for her to testify because "that's gonna look bad on her cause she's takin the psych meds and she was drunk and she don't know what happened." In a later telephone call, defendant told Buchanan; "I hope she don't show up to none of the courts . . . because she's going to get into trouble," and that she would be arrested, and that "it's not good for her" to testify. Buchanan told defendant she would pass on the message. However, she did not. All these conversations were recorded by jail personnel and later played for the jury in defendant's subsequent trial. Defendant was convicted of a felony violation of attempting to dissuade a witness, per P.C. § 136.1(a)(2), among other charges. He appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. With defendant arguing that it cannot legally be an "*attempt*" to dissuade a witness from testifying, per P.C. § 136.1, when he never talked to the witness/victim himself, the issue here was what it takes to constitute a violation of this section. The Court found that to be a violation of section 136.1, the prosecution only needs to prove that defendant "[k]knowingly and maliciously" attempted "to prevent or dissuade any witness or victim from attending or giving testimony at any trial . . . ." The prosecution must present evidence that defendant's acts or statements (were) intended to affect or influence a potential witness's or victim's testimony or acts . . . ." With proof of such an intent, the People must then prove that defendant's act or acts went "beyond mere preparation" and "show that the perpetrator is putting his or her plan into action." There is no restriction on the means the defendant uses to communicate his threat, nor is it required that he deliver the message to the witness himself. There is also no requirement that the victim or witness is actually deterred, or that the message is ever even delivered her. "(I)t is immaterial that for some collateral reason he could not complete the intended crime." The Court also rejected defendant's argument that at worst, his acts constituted no more than a solicitation to commit a crime. With his plan "clearly shown, slight acts done in furtherance of that (plan) will constitute an attempt." There is no legal requirement that defendant's acts "be the ultimate step toward the consummation of the design; it is sufficient if it is the first [one]." With these principles in mind, the Court found that defendant's acts clearly constituted a completed attempt to dissuade Genevieve from testifying against him. He dictated to Buchanan how Genevieve would be dissuaded by (1) giving her instructions on how to contact Genevieve, (2) telling Buchanan what to say to her, and (3) obtaining Buchanan's assurance that the message would be passed on. "Apparent possibility" of completion is all that is necessary to constitute an attempt. That standard was met here.

Note: Great case. In an era where witness intimidation is all too common (a problem discussed by the Court in its decision), thwarting any number of otherwise provable prosecutions, P.C. § 136.1 is an extremely important section to use when the crime occurs. Giving it a broad interpretation obviously makes it available to use more often then it would be if strictly construed. It needs to be made clear to garbage like Kevin Foster that messing with our victims and witnesses will never be condoned and will be harshly penalized when it does occur.