The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM

"*To argue with a person who has renounced the use of reason is like administering medicine to the dead.*" (Thomas Paine)

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ADMINISTRATIVE NOTES:

Senate Bill 178 (P.C. §§ 1546 et seq.) and Fourth Waivers*:** Effective January 1, 2016, Senate Bill 178, also known as the ***California Electronic Communications Privacy Act, or "***CalECPA***," as will be set out in P.C. §§ 1546 et seq. after the first of the year, generally prohibits a government entity from seeking or gaining access to electronic communication information or electronic device information without a warrant, wiretap order, order for electronic reader records, or subpoena. Subdivision (a) of 1546.4 provides that a violation of the provisions of this Act make any resulting evidence subject to suppression in a P.C. § 1538.5 motion. I've been asked whether these all-

encompassing restrictions, and its suppression provisions, apply to suspects who are subject to parole or probation Fourth waiver search and seizure conditions.

My initial opinion (as related to several people who asked me early on) was that it *does not*; i.e., that a "Fourth waiver" trumps the requirements of these new statutes. But having had a chance to review the entire Act, and in thinking about it, I'm no longer so sure. Typically a Fourth waiver negates the need for a search warrant or other court order in just about any detention or search situation. And also, typically, violation of a state statute only, as opposed to a constitutional requirement, does not require the suppression of any resulting evidence. However, under P.C. § 1546 et seq., these statutes specifically (and uniquely) call for the suppression of any evidence obtained in violation of the Act regardless of whether or not the Fourth Amendment is also violated.

On its face, therefore, it appears that you will need a warrant or other court order despite a suspect's prior Fourth waiver. That's the bad news. The good news is that subdivision (c)(3), of section 1546.1, provides an exception to the suppression requirements when the search is "(*w*)*ith the specific consent of the authorized possessor of the device*." "*Specific consent*" is defined in subdivision (k) of section 1546 as "*consent provided directly to the government entity seeking information, . . .*" What this really means is anybody's guess. It could be interpreted to mean that a suspect's prior Fourth wavier, allowing any "*peace officer*" (P.C. §§ 3067(a), 3453(f)) or "*any law enforcement officer*" (Cal. Code of Regs, Title 15 § 2511) to subject the suspect to a temporary detention and a search of his home, vehicle, or other possessions, excuses the need to comply with the restrictions of CalECPA. Or (and in my opinion, more likely), a court might apply a more restrictive interpretation to the phrase; "*the government entity seeking information*," holding that the general prior consent provided for under the standard probation search and seizure conditions is not sufficient; i.e., that the consent has to be given "*specific*(*ally*)" to the agency seeking to do the search.

It must also be remembered that parole searches (as opposed to probation Fourth waiver searches, under P.C. § 1203.1(j)) are *imposed* upon the parolee with or without his or her consent. So I'm afraid I just don't know how CalECPA's "*specific consent*" requirement will be interpreted by the courts, but I fear that the more restrictive interpretation is going to be used. In the meantime, pending some court's opinion on this issue, my suggestion is that unless you want to make case law for me, and unless you personally get the "specific consent" of the person who owns or controls the electronic communication information or electronic device information (as defined in subdivisions (c) through (h) of P.C. § 1546) you hope to get into, you should probably get a warrant or other court order before seeking such information. If you'd like the materials related to CalECPA that I'm working from, let me know and I'll send it all to you.

***Beheler Update*:** In the California Legal Update, Vol. 20, #10 (Oct. 10, 2015), I briefed *People v. Morales* (July 14, 2015) 238 Cal.App.4th 814, out of San Bernardino County, where the defendant's un-*Mirandized* incriminating statements were held to be inadmissible despite his interrogation being conducted after a so-called "*Beheher admonishment*;" i.e., telling the defendant that he was not under arrest and was free to

leave. Having received protests from both the investigating detective and the San Bernardino District Attorney's Office, I asked for their version of the facts under which an argument could be made that the Fourth District Court of Appeal was simply wrong.

What I got in response, finally, was the conclusionary and very unhelpful statement that "the interview was good and there was no violation of *Miranda*." Also, except for a difference of opinion as to when in the sequence of events the defendant was finally read his rights under *Miranda* (the Court saying "several hours" after defendant failed the polygraph and began to weaken and make admissions, and the detective indicating at some unspecified point much earlier than that), the only issue raised here between the Fourth District Court of Appeal and San Bernardino seems to me to be what the legal effects on one's custody status (for purposes of *Miranda*) might be of a failed polygraph examination thrust in a suspect's face and an interrogator calling him a "liar" and confronting him with the evidence against him.

However, the issue is now moot, at least for the present, in that the California Supreme Court denied review and depublished the decision on October 28th. That means simply that the reversal of defendant's conviction stands, but that this decision is not citable as authority for any rule of law. Too bad. It would have been nice to know the answer to the questions raised in this case by the Appellate Court and as challenged by San Bernardino. But stay tuned for more *Beheler* cases, this becoming the issue de jure.

CASES:

***Brady Violations*:**
***Identification Evidence*:**
***Third Party Culpability Evidence*:**

Carrillo v. County of Los Angeles **(9th Cir. Aug. 26, 2015) 798 F.3rd 1210**

Rule: For law enforcement investigators to hide suspect identification evidence, portraying various identifications as positive when they were actually tentative at best, is a *Brady* violation. Failing to divulge possible third party culpability evidence may also be a *Brady* violation.

Facts: This civil suit involved two plaintiffs, both of whom were convicted of murder in separate cases decades ago. (1) *Frank O'Connell*: In January, 1984, Jay French was murdered. Los Angeles County Sheriff's Department (LASD) homicide detectives were responsible for investigating the murder. Through investigation, it was determined that plaintiff O'Connell had been romantically involved with French's ex-wife, Jeanne Lyon, the summer before. At the time of French's death, he (French) and Lyon were engaged in a heated battle over the custody of their children. French was shot in a parking lot where, as he lay dying, he gave a dying declaration to the effect that someone in a yellow pinto had shot him, and that it was someone who Lyon used to "hang around with." Three witnesses helped detectives determine that O'Connell was the murderer. Daniel Druecker was the only witness to the shooting itself. He identified O'Connell as the killer at trial and testified he had selected O'Connell from a photo lineup shown to him by the officers.

Years later, while still in prison, O'Connell filed a habeas corpus petition alleging that investigators had failed to provide critical evidence to the prosecution or to the defense. As for Druecker, it was discovered in the habeas hearing that he is nearsighted and wasn't wearing his glasses at the time of the shooting. He also testified at the habeas hearing that he only saw a profile of the shooter. When asked by detectives during the initial investigation, he told them that he didn't remember what the shooter looked like, asking to be hypnotized to help him remember (a request that was turned down). When they later showed him a six-photo lineup, he figured that he was required to identify someone. So he pointed to photo #3 (showing O'Connell) and asked, "Is this the guy?" When asked if he was identifying the shooter, and thinking that the officers already knew who the shooter was, and even though he remembered that the shooter did not have a mustache like those depicted in the lineup, Druecker responded, "I think that's the guy." He testified that the officers told him he had to be certain, so he eventually said he was.

But at the evidentiary hearing on O'Connell's habeas petition, he testified that he only identified O'Connell out of intimidation. In truth, he did not recognize the photo but was simply guessing. Druecker explained that he did not disclose this uncertainty either during the preliminary hearing or at trial because he was afraid and believed, based on his interactions with the officers, that he had identified the correct person. None of the details of Druecker's identification were contained in any police investigative reports. Another witness who was nearby, and who allegedly was able to identify the man who fled the murder scene in the shooter's yellow Pinto, was Arturo Villareal. The detectives testified that Villareal had readily chosen O'Connell from a photo lineup. However, not disclosed was the fact that Villareal, when shown the photo lineup, selected two photographs and said that O'Connell "looked like the person who was there, but I'm not positive."

It was also discovered at the habeas petition hearing that there existed handwritten notes detailing the investigators' interview with another witness, Maurice Soucy. The official police reports indicated that Soucy had "immediately pointed out photograph number three in a photo lineup, identifying O'Connell as a person he'd seen in a yellow pinto and kissing Lyon. However, the investigator's notes, which were never given to the prosecution nor the defense, showed that Soucy had only identified O'Connell as a "possible," with a tentative ID of #1 in the photo lineup as well.

Other written investigative notes came to light during the habeas petition hearing, previously unknown to both the defense and the prosecution, indicating that another person, identified as "Randy Smith," along with Lyon, had tried to kill French once before by trying to run him down in a vehicle, and that Randy Smith looked similar to O'Connell. O'Connell's habeas petition was granted based upon all this newly discovered evidence. The district attorney's office declined to re-prosecute O'Connell and, in June 2012, all charges against him were dismissed. He subsequently sued the detectives and the County of Los Angeles in federal court pursuant to 42 U.S.C. § 1983.

The civil defendant's (the detectives) motion for judgment on the pleadings based on qualified immunity was denied, and they appealed this pre-trial determination. (2) *Francisco Carrillo*: In January, 1991, Donald Sarpy was killed in a gang-related drive-by shooting in Lynwood. Five

witnesses were brought to the LASD's station to be interviewed, one of whom was a 16-year-old minor named Scott Turner. Turner was interviewed by a LASD deputy and member of Operation Safe Streets, the sheriff's gang enforcement unit. During his interview, Turner was shown a "gang book" containing 140 photographs of Latino teenagers believed to be members of the street gang involved. Turner randomly selected several photos from the gang book but was told each time by the deputy that his selection "could not be the suspect." Eventually, Turner made a tentative identification of Carrillo as the shooter, which he quickly changed to "(m)atter of fact, it is him." The deputy responded that Turner had made the "right choice."

The deputy next showed Turner a six-pack photo lineup with Carrillo's photo in the #1 position. Turner selected Carrillo's photo. In a police report, the deputy wrote that Turner had selected Carrillo's photo in the six-pack lineup but did not mention that he'd also selected several photos of other individuals from the gang book first, or that the deputy had confirmed Turner's choice before being shown the six-pack lineup. None of this information came out until Carrillo filed a habeas corpus petition years later, well after he'd been convicted of the murder. Also, after Turner's identification of Carrillo, he (Turner) told other eyewitnesses that he'd chosen the first photo in the lineup. The other eyewitnesses, who were only shown the photo lineup, chose Carrillo as the perpetrator based upon what Turner had told them.

After two trials, and although Turner recanted his identification at the second trial, Carrillo was convicted of murder. He subsequently filed this petition for writ of habeas corpus where the above information relative to how he had been identified as the killer first came to light. The petition was granted and the D.A. elected not to retry him. Carrillo sued pursuant to 42 U.S.C. § 1983 in federal court alleging a *Brady v. Maryland* violation. The deputy moved for a pre-trial summary judgment arguing that he was entitled to qualified immunity because it was not clearly established in 1991 that *Brady* applied to police officers as well as prosecutors. The district court denied his motion, and the deputy appealed. Both appeals were heard together by the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal affirmed the granting of the petitions in both cases. The issue on appeal was whether the police officers in these two cases were entitled to qualified immunity for their alleged failure to disclose material and exculpatory evidence as required by *Brady v. Maryland* (1963) 373 U.S. 83. Qualified immunity shields police officers from civil liability under 42 U.S.C. § 1983 unless they violated a statutory or constitutional right clearly established at the time of the challenged conduct. The officers in these cases did not dispute that the information withheld from the plaintiffs back in 1984 and 1991, respectively, constituted "*Brady* material" (i.e., evidence favorable to an accused which is material either to guilt or to punishment, or to the credibility of the witnesses).

The Court therefore was left with two issues to determine; (1) whether it was clearly established in 1984 and 1991 that police officers (as well as prosecutors) were bound by the *Brady* decision, and (2) whether the identification evidence withheld in these cases was clearly established to be *Brady* evidence so that the officers should have known it at the time they withheld it. (1) The Court first determined that it was clearly established well before both prosecutions that *Brady*, decided in 1963, applied to police officers as well as prosecutors. In *Brady*, the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon

request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Subsequent case law established the rule that *Brady* was violated even without a request from the defense; an issue not discussed here.)

Citing its earlier decision of *Mooney v. Holohan* (1935) 294 U.S. 103, the *Brady* Court held that the principle involved is not to punish society for misdeeds of a prosecutor, but rather to avoid an unfair trial of the accused. Building on this, the Fourth Federal Circuit first held in 1964 that *Brady* applied to law enforcement officers as well as prosecutors. (*Barbee v. Warden* (4th Cir. 1964) 331 F.2nd 842.) The Ninth Circuit published its agreement with *Barbee* in 1978 when it rejected the government's argument that no *Brady* violation occurred because investigative agents, and not the prosecutor, were responsible for the nondisclosure of promises made to certain prosecution witnesses. (*United States v. Butler* (9th Cir. 1978) 567 F.2nd 885.) Per the *Butler* Court; "The prosecutor is responsible for the nondisclosure of assurances made to his principal witnesses even if such promises by other government agents were unknown to the prosecutor. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure." Law enforcement's responsibilities under *Brady*, therefore, were well established well before the prosecutions in these two cases at issue here.

(2) The next question is; would a reasonable police officer have understood that the specific evidence allegedly withheld in these cases to be clearly subject to *Brady's* disclosure requirements? Answering in the affirmative, the Court held that the purposeful suppression of the specific evidence withheld in these two cases was clearly established as *Brady* violations before 1984. *Brady* defines the type of material the government is obligated to disclose very clearly as anything that is "favorable to the accused, either because it is exculpatory, or because it is impeaching." In reviewing the facts of both cases as described above, it was clear that had the defense been aware of the circumstances behind the various witness' identifications of each respective criminal defendant, they would have had some very effective impeachment evidence that surely a jury needed to know.

Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the "rudimentary demands of justice." Also, in the O'Connell case, the Court found it a *Brady* violation to have failed to disclose the information about Randy Smith, being similar in appearance to O'Connell and who had allegedly attempted to kill Jay French on a previous occasion. And while the investigators later testified to this information being a "dead end," the Court held that this was not their decision to make in attempting to downplay the importance of such evidence. The defense should have been allowed to decide for themselves whether to follow up on this information.

Certainly, this evidence (as "third party culpability evidence") would have cast doubt on O'Connell's culpability and would have instilled French's dying declaration—in which French said the killer was someone his ex-wife used to "hang around with"—with an alternative meaning. In summary, the Court here found that "(t)he law clearly established, well before the events in these cases, that police officers were bound by *Brady* and that the evidence allegedly

withheld in these cases fell within *Brady's* scope." The Court therefore affirmed the denial of qualified immunity in both cases and remanded to the district court for further proceedings.

Note: We don't know whether Frank O'Connell or Francisco Carrillo committed these murders, and now never will know. But I have long since advocated caution in "ID cases," where there is little or no corroborating evidence, warning prosecutors and cops alike that if we ever convict innocent people, it's based upon victim and witness identification evidence. Juries tend to put a lot of weight on such evidence. Misidentifications are easily made and, in my experience, are not at all uncommon. And then for investigators to taint such evidence, totally destroying whatever value a weak identification may have had, by portraying it to be a positive identification when in fact it was, at best, tentative or equivocal, is just asking to convict an innocent person.

Playing this game is certainly grounds for a reversal under *Brady*. Mischaracterizing such evidence as something it is not, potentially leading to the conviction of an innocent person, is not the business we're in. This case illustrates the need for a "*Brady* rule," as much as many of us dislike the consequences when it kicks in. The simple answer to this problem is to not mischaracterize the evidence we have, as was done here, and save both the prosecution and the defense (not to mention the officers involved) a lot of unnecessary heartache.

***DUI Chemical Test Refusals and P.C. § 148(a)(1)*:**

***People v. Valencia* (Sep. 29, 2015) 240 Cal.App.4th Supp. 11**

Rule: The mere verbal refusal to submit to a chemical test when arrested for driving while under the influence is *not* a violation of P.C. § 148(a)(1); resisting, delaying, or obstructing a peace officer.

Facts: Officer Brian Seel of the California Highway Patrol and his partner made a traffic stop on defendant after observing him drive through a red light, make a wide turn, and straddle the dividing line between two lanes at about 1:40 a.m. on September 11, 2013. In contacting defendant, he was asked to roll his window down lower than the 2 inches it was already. Defendant refused despite being asked to do so six times. Even so, Officer Seel noticed several physical signs indicating that defendant was intoxicated; i.e., the odor of alcohol, extremely red and watery eyes, and slurred, jumbled, and repetitious speech. Defendant also ignored 15 requests to step out of his car until the other officer was able to open the passenger-side door by reaching through the slightly open window.

Defendant eventually stepped out of the vehicle at which time the "overwhelming odor of alcohol" and his state of inebriation was even more obvious. In addition to challenging the officer's conclusion that he was driving under the influence, asking for leniency in the form of a warning or citation, and offering various other protests, defendant refused to answer any questions or to participate in a field sobriety test. Based upon the observed indications of being under the influence, defendant was arrested for driving while under the influence, per V.C. § 12152(a).

Consistent with his overall attitude, defendant also refused to submit to a chemical test of his blood or breath despite being told that such a refusal would result in an automatic suspension of his driver's license and other sanctions. Defendant thereafter was charged in the Riverside Superior Court with one count each of resisting, delaying, or obstructing an officer (P.C. § 148(a)(1), driving on a suspended license (V.C. § 14601(a)), and driving while the under the influence of alcohol.

At trial, the court read a modified version of CALCRIM No. 2656, telling the jury that: "The People allege that the defendant resisted, or obstructed, or delayed (Officer) Brian Seel by doing the following: failing to roll down the drivers [sic] side window after being asked six times to do so, by failing to exit the vehicle after being ordered to do so fifteen times by more than one California Highway Patrol Officer, failing to perform Field Sobriety Tests requested by the officer, and failing to submit to a chemical test of either his breath or blood." The jury was also told that in order to find defendant guilty of a violation of P.C. § 148, they must all agree that defendant committed at least one of the alleged acts, and on which act he committed. The jury found defendant guilty on all three counts without specifying which of defendant's acts constituted a violation of the P.C. § 148(a)(1) charge. Defendant admitted to two separate prior DUI convictions within 10 years. The trial court placed him on summary probation for 60 months and ordered him to serve 186 days in custody. Defendant appealed.

Held: The Appellate Department of the Riverside Superior Court reversed defendant's conviction on the P.C. § 148 charge, but otherwise affirmed. The issue on appeal was whether defendant's non-violent, verbal refusal to submit to a chemical test of his blood may be used as a basis for a "resisting" charge, under P.C. § 148(a)(1). Section 148(a)(1) makes it a misdemeanor to "resist[], delay[], or obstruct[] any … peace officer . . . ."

In determining whether this charge can be lawfully used in a simple DUI refusal situation, the Court looked to the Legislative intent in enacting section 148. In doing so, it was noted that California also has an "implied consent" statute (V.C. § 23612) which provides for several inducements to help encourage a DUI arrestee to voluntarily provide a blood or breath sample (e.g., license suspension and the "refusal" being used in court as evidence of guilt). Also provided for are limited "moderately enhanced criminal" penalties (i.e., V.C. § 23577, providing for between 2 to 18 days in jail, depending upon the person's priors) which kick in upon conviction for the underlying DUI charge (and which, for reasons unexplained, the Riverside prosecutors failed to allege in this case).

The Court here found it significant that the California Legislature has never expressly made it a "stand-alone" criminal offense for a DUI arrestee to refuse to submit to a chemical test. The Court held that this was because the implied consent law, including section 23577, already provides certain sanctions in the refusal situation. To allow P.C. § 148(a)(1) to be used in this context, imposing up to a year of additional incarceration, would totally negate the Legislature's intent in enacting the intentionally more moderate criminal sanctions as provided for under V.C. § 23577. "The requisite implication is therefore that the Legislature intended that section 148 not be used to prosecute a DUI arrestee's refusal to submit to a chemical test." Additionally, the

Court held that punishing a DUI arrestee for refusing to submit to a chemical test of his blood or breath would be unconstitutional.

Subjecting a person to a blood or breath test has been held to be a "search," under the Fourth Amendment. As a general rule, warrantless searches are per se unreasonable unless the search falls within a recognized exception. Absent a search warrant or exigent circumstances excusing the lack of a warrant, a person may not be constitutionally required to submit to a search. It has been held that the normal dissipation of the blood-alcohol level in one's system does not per se constitute an exigency. Therefore, in the typical DUI arrest situation, the arrestee is not required to consent. For that reason, it would be unconstitutional, under the Fourth Amendment, to attempt to impose criminal sanctions on such a refusal.

The "implied consent" sanctions under V.C. § 23612 are an exception, they being administrative-type sanctions only, which are necessary to encourage an arrestee to voluntarily submit to a blood or breath test and thus avoiding the possibility that force might be used (which it can if a warrant is obtained or the circumstances involve an exigency). And the enhanced penalties imposed under V.C. § 23577 apply only upon conviction for the underlying DUI offense itself. For these reasons, the Court found it "inappropriate" to charge and convict a person of P.C. § 148(a)(1) in the non-violent DUI refusal situation. In this particular case, the jury was given the option of four different theories for finding defendant guilty of P.C. § 148. Because it is impossible to tell which theory the jury might have used (implying that the other three [see above] would have been okay), the Court found it necessary to reverse defendant's conviction on this charge.

Note: The Court was careful to limit its ruling to the non-physical, non-violent, and even non-manipulative (where the arrestee "purposely manipulates events . . . in order to delay an eventual forced test so that his or her blood-alcohol level will have declined as much as possible beforehand") situation. "In other words, (the Court held) that the mere fact of refusal cannot support a section 148 conviction, not that the manner of refusal can never do so." I don't know who thought up the idea that charging someone with "resisting" or "delaying" or "obstructing" an officer in a DUI refusal situation, but the idea was worth a shot. The court's analysis, however, and its rejection of the attempt, makes a lot of sense.

***Consensual Encounters, Detentions, and Requesting Identification*:**

People v. Linn **(Oct. 8, 2015) 241 Cal.App.4th 46**

Rule: Asking for and holding onto a person's identification documents is but one factor which may convert an otherwise consensual encounter into a detention, depending upon whether a reasonable innocent person would feel free to leave under the circumstances.

Facts: Motor Officer Thomas Helfrich of the City of Napa Valley Police Department observed defendant driving a motor vehicle from which the passenger was observed flicking an ash from a cigarette out the window. Suspecting this to be a Vehicle Code violation (V.C. § 23111), Officer Helfrich followed defendant's car as it pulled into a parking stall and stopped. Officer Helfrich

did not use his siren or emergency lights, but rather pulled up to and stopped within three feet of defendant's already parked vehicle. From there, the evidence was conflicting. But based upon the officer's testimony, defendant's testimony, and the officer's body camera which was activated at a point part way through the contact, the following apparently occurred.

As the officer dismounted his motorcycle, defendant and her passenger were already exiting their vehicle. Officer Helfrich walked up to defendant and told her why she was being contacted, explaining to her that her passenger had flicked a cigarette ash out the window. At some point during this initial contact, he asked her for her driver's license, using it to call in on his radio for a records check, but without explaining to her what he was doing, or why. He also apparently asked her to put out her cigarette and put down a soda can she was holding.

Although the evidence was conflicting at this point, defendant may have been told either to "stand there," or at least not to walk away, while the officer contacted the passenger. It was during the officer's contact with the passenger that the body camera was first turned on. As he was talking to the passenger about his "ash flicking" offense, and getting his identification information, Officer Helfrich suddenly turned to defendant, standing nearby, and told her; "I'm smelling alcohol right now." Officer Helfrich testified that it was perhaps two minutes into the contact that he first smelled the odor of alcohol on her person. Officer Helfrich finished his contact with the passenger, including calling in his identification information over the radio while writing it down onto a form, before he turned back to defendant. He then told defendant to stand next to him, checked her eyes, and "investigated her sobriety."

Defendant was arrested for driving while under the influence. She was later charged in the Napa County Superior Court with one count each of misdemeanor driving under the influence of alcohol (V.C. § 23152(a)) and misdemeanor driving with a blood-alcohol concentration of 0.08% or higher (V.C. § 23152(b)). Defendant pled not guilty to both counts and filed a motion to suppress, alleging that she had been illegally detained by the time the officer noted the odor of alcohol, arguing that all the evidence related to the driving under the influence charges was therefore the product of an illegal detention. The trial court agreed and granted her motion. The Appellate Division of the Superior court reversed this decision, concluding defendant's encounter with Officer Helfrich was consensual up to the time that he reasonably suspected she had been driving while under the influence. The appellate division certified the case for transfer to the Appellate Court.

Held: The First District Court of Appeal (Div. 2) reversed, reinstating the trial court's suppression finding. The issue here was whether, by the time the officer noted indications of defendant being under the influence of alcohol, she was already being detained. It was conceded that up until the officer noted the odor of alcohol on her person, there was no legal justification for detaining her. The prosecution argued that up until that time, defendant was the target of a "consensual encounter" only, for which there was no need to justify. The defendant, on the other hand, argued that she was detained from the very beginning when Officer Helfrich first contacted her and took her identification. For the most part, the parties argued over conflicting case law discussing whether asking for, and receiving, a subject's identification constitutes a detention. The trial court had ruled in defendant's favor on that issue, finding the obtaining of defendant's identification and holding onto it to be the "definitive factor" in discussing the issue of defendant's possible detention.

The Appellate Court, however, ruled that while taking a person's identification is certainly one factor to consider, it is not dispositive of the issue. The "totality of the circumstances" have to be considered. The test is that while considering the "totality of circumstances," "whether an objectively reasonable person, who is innocent of any wrongdoing, would have believed he or she was free to go."

The totality of the circumstances here included: (1) the fact that the officer, in full uniform, stopped his marked police motorcycle within three feet of defendant's already stopped vehicle as she exited her vehicle; (2) talking with her about her passenger flicking ashes out of the vehicle's window for which, by "implicating her in the illegal activity of her passenger," she may reasonable have felt she bore some legal responsibility; (3) asking her for her driver's license without explanation and then retaining her license as he conducted an unexplained record check on her; (4) commanding her to put out her cigarette and put down her soda can; (5) and then questioning the passenger, asking for personal details that the officer recorded on a form, perhaps causing defendant to feel that she may be next. (The Court discounted the possibility that she may have been commanded to remain at the scene in that the evidence on that was conflicting.)

Under these circumstances, according to the Court, a reasonable person in defendant's shoes would have felt like she was not free to leave. Defendant, therefore, had been detained before the officer noted the odor of alcohol, with such detention unsupported by any reasonable suspicion, up to that point, of criminal activity on her part. "No objectively reasonable person would believe she was free to end this encounter under the totality of these circumstances, regardless of the officer's polite demeanor and relatively low-key approach." With the indications that defendant may have been under the influence not being observed until after she was unlawfully detained, the evidence of her being under the influence was properly suppressed by the trial court.

Note: There's a touch of "hair-splitting" going on here, but this case provides an excellent (and exhaustive) discussion of the rules on detentions in general, describing in detail the case law related to a police officer "asking for" identification, recognizing that such a request does not necessarily result in a contact being any more than a mere "consensual encounter." You may even be able to hold onto the ID documents for a limited time (which may or may not constitute a detention), depending upon the "totality of the (other) circumstances." The Court does suggest, however, that if you wish to make sure you keep such a contact at the consensual encounter level, "(t)he taking of defendant's driver's license would be less significant if (the officer) . . . merely take(s) defendant's driver's license, examine(s) it, and promptly return(s) it to her," preferably without ever leaving the person's immediate presence, and holding onto it no longer than it takes to write down the information that you need. Even still, however, the other circumstances surrounding the contact cannot be ignored, as illustrated by this case. So while you may not agree with the results of this case, in that some of its reasoning can be described as a bit "strained" at times, it's a great case with which to be familiar in keeping your contacts at the consensual encounter level.