The California Legal Update

Remember 9/11/2001; Support Our Troops; Support Our Cops

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*I don't have an attitude problem. I just have a personality you can't handle.*" (Anonymous)

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ADMINISTRATIVE NOTES:

> ***SB 385/W&I Code § 625.6*:** If you've heard rumors about a new statute that requires law enforcement officers to provide minors, age 15 and younger, with an attorney for consultation purposes before any custodial interrogation, those rumors are true. But it's not effective until January 1, 2018. In the meantime, I'm writing up a review of the new statute and what it means which, upon request, and as soon as I get it done, I will forward on to you.

CASES:

***P.C. § 148(a)(1) and Flight from an Attempted Detention*:**

In re Charles G. **(Aug. 25, 2017) 14 Cal.App.5th 945**

Rule: A violation of P.C. § 148(a)(1) (Resisting or Delaying a Peace Officer in the Performance of His Duties) is not proven in an attempted detention situation absent sufficient evidence that the defendant, when fleeing, knew, or reasonably should have known, that officers were pursing and attempting to detain him.

Facts: A private citizen reported to Officer Michael England of the Oakley Police Department that a lady had told him that she had been burglarized, pointing out to him the two burglars in a nearby park. Officer England was on patrol in full uniform. The citizen then pointed out to Officer England two individuals who were walking down the street, identifying them as the ones the lady had said were the burglars. Defendant Charles G. was one of them. Both subjects carried backpacks. Officer England radioed to other officers what he knew about the incident while driving his marked patrol car in defendant's direction. As he got to within 30 yards of the two subjects, they ran into a restaurant. At the same time, Officer Curtis Berkley was also on duty and in uniform. He observed two individuals, both with backpacks, and one later identified as defendant, slowly jogging across the street into a shopping that included the restaurant Officer England saw the subjects enter. One of the individuals was quickly detained by other officers in the shopping center parking lot; but not defendant. Driving his marked patrol car to the rear of a grocery store next to the restaurant, Officer Berkley saw defendant; now without a backpack. Defendant looked at Officer Berkley and then jumped over a fence. Defendant, sans his backpack, was quickly detained by other officers. Officer Logan Cartwright also responded to the area where he saw defendant and another individual being detained. Told that defendant had earlier had a green backpack with cartoon characters on it, he checked the area behind the grocery store and found the backpack, complete with depictions of Ninja Turtles, in the bushes

by a dumpster. The backpack was searched and a .22-caliber revolver was recovered. As a result, the Contra Costa County District Attorney filed a petition in Juvenile Court alleging that defendant, along with two firearms-related offenses, committed a misdemeanor violation of P.C. § 148(a)(1) for resisting, obstructing, or delaying a peace officer in that officer's performance of his duties. After defendant's motion to suppress was denied, the Juvenile Court magistrate found all the allegations (including the P.C. § 148(a)(1) charge) to be true. As for the 148 charge, the magistrate ruled that the evidence was insufficient to prove that defendant had fled from Officer England, but that defendant did knowingly flee from Officer Berkley when, seeing the officer approach, he jumped over the fence in an attempt to flee; the act of fleeing being a violation of P.C. § 148(a)(1). After reducing the weapons charges to misdemeanors, the magistrate committed the little bugger to a six-month program in the Orin Allen Youth Rehabilitation Facility. Defendant appealed.

Held: The First District Court of Appeal (Div. 2) reversed the true finding on the P.C. § 148(a)(1) charge, affirming in all other respects. The issue was whether the evidence as presented in defendant's jurisdictional hearing was sufficient to show that defendant did in fact flee from Officer Berkley when he jumped the fence behind the grocery store. In this case, the prosecution attempted to show that defendant violated of P.C. § 148(a)(1) by willfully resisting, delaying, or obstructing a peace officer in the performance of that officer's duties when he resisted Officer Berkley's attempt to detain him. Defendant's argument was that Officer Berkley's testimony lacked sufficient evidence to prove beyond a reasonable doubt that defendant had reason to believe Berkley sought to detain him. The People's argument, on the other hand, was that defendant's flight from the officers and abandonment of his backpack demonstrated his knowledge that they sought to detain him, as did his climbing over a fence when Officer Berkley, dressed in a police uniform and driving a marked patrol car, spotted him. The Court agreed with defendant, failing to find any evidence to suggest that defendant could have known that Officer Berkley was attempting to detain him. Although defendant's actions may have been suspicious (*ya think*?), the Juvenile Court could not reasonably infer from defendant's abandonment of his backpack and scaling a fence that he knew the police were after him. Defendant's conduct, per the Court, was consistent with a general intent to "*avoid detection*" as opposed to "*avoid detention*." Unless and until a subject knows that the police wish to detain him, he is free to leave the area and not wait around to see if the police might want to talk to him. Defendant did not violate P.C. § 148(a)(1) by jogging across the street, abandoning his backpack, or jumping a fence to avoid the police unless he knew, or reasonably should have known, the police were pursuing him. The burden was on the People to establish that this was the case. Absent some evidence showing that Officer Berkley had attempted to stop defendant, and that defendant either knew or reasonably should have known this fact, the People failed to prove this necessary element.

Note: On appeal, the People need only show "substantial evidence of evidence beyond a reasonable doubt that (defendant) willfully resisted Berkley's efforts to stop him." The People's

argument was that the evidence as presented (e.g., running into a restaurant, his partner being detained, abandoning his backpack, jumping over a fence after looking at the approaching uniformed officer) met this standard. A rational mind might agree, particularly when you consider that circumstantial evidence is supposed to be sufficient, and a trier of fact is allowed to make reasonable inferences from the evidence before him or her. I didn't find the People's argument to be unreasonable. But it would have helped had there been some evidence that Officer Berkley yelled some detention-type commands, which apparently did not happen. So it is what it is.

***P.C. § 1170(h)(5); Mandatory Supervision Searches*:**

United States v. Cervantes **(9th Cir. June 19, 2017) 859 F.3rd 1175 [As Amended at 2017 U.S. App. LEXIS 18017; Sep. 12, 2017]**

Rule: A probationer under the California's Criminal Justice Realignment Act of 2011, while subject to post-incarceration mandatory supervision, is subject to warrantless, suspicionless searches of his residence and any premises over which he has control. Such a probationer has the privacy rights of a parolee, as opposed to the less restrictive rights of an actual probationer.

Facts: Defendant pled guilty in state court in 2014 to felony counterfeiting and drug charges. Pursuant to P.C. § 1170(h)(5), under California's "Post-Release Community Supervision Act of 2011" (a part of California's Criminal Justice Realignment Act of 2011), defendant, instead of going to state prison, was sentenced to a "divided" (or "split") sentence of three years in county jail, one year of which was suspended. The suspended portion of his sentence was to be subject to "mandatory supervision." Offenders on mandatory supervision are supervised in the same manner as offenders who are on probation: "During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court." (P.C. § 1170(h)(5)(B)) As part of his plea bargain, defendant agreed to abide by certain conditions during the period of mandatory supervision, each of which the court formally imposed at sentencing. One of those conditions (as mandated by P.C. §§ 3453 & 3465) was a warrantless, suspicionless search condition, which provided as follows: "Submit your person and property including any residence, premises, container, or vehicle under your control, to search and seizure at any time of the day or night by any law enforcement officer, probation officer, or mandatory supervision officer with or without a warrant, probable cause or reasonable suspicion." After serving his county jail time, defendant was released from custody and began serving his mandatory supervision time. In 2015, while still subject to the mandatory supervision provisions, defendant and his girlfriend, Samanthe Farish, were stopped by a Huntington Beach police officer for jaywalking. Defendant told the officer that he was on probation and subject to search conditions; a fact the officer confirmed via a radio records check. Defendant's person was searched and a room key to the Ayres Hotel was found in his pocket. Defendant told the officer that he and

Farish were indeed staying at the hotel and that his personal belongings were in the room. Nothing found during the search of defendant's person or disclosed during questioning gave the officer any reason to suspect that he was engaged in criminal activity. Defendant and Farish were released without being cited. However, unbeknownst to defendant or Farish, the officer immediately went to the Ayres Hotel where he determined that Farish had rented the room, using her credit card. The officer was admitted into the room by hotel employees. No warrant was obtained. Upon searching the room (avoiding any areas that might have been exclusive to Farish), found in plain sight was some counterfeit currency in various stages of production, along with equipment used to make it. (A testament to the rehabilitative efforts of California's new "be kind to criminals" sentencing philosophy.) Defendant was subsequently arrested. Charged in federal court with unlawfully possessing counterfeit currency and images of counterfeit currency (per 18 U.S.C. §§ 472 & 474), defendant filed a motion to suppress the items seized from his hotel room. The District Court judge denied the motion and, after a bench trial, convicted him of all counts. Sentenced to a year and nine months in prison, to be followed by five years of supervised release with search and seizure conditions, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, as in the trial court, defendant argued that the warrantless, suspicionless search of his hotel room violated the Fourth Amendment. The Court first recognized that persons subject to search and seizure conditions are divided into two categories; i.e. probationers and parolees. Parolees are generally entitled to less protection than probationers, given the increased seriousness of their crimes, thus resulting in them being subjected to stricter scrutiny. The mandatory supervision that is a part of the type of sentence defendant here served pursuant to the "Post-Release Community Supervision Act of 2011" is really neither probation nor parole, but rather on the continuum of punishments somewhere between the two. Defendant in this case, under California law, is said to be a "*probationer*," supervised by a probation officer. But he is in fact serving a prison sentence in county jail. Per the Court, "(t)he State's interest in supervising offenders placed on mandatory supervision is considerably stronger than its interest in supervising probationers. A defendant receives mandatory supervision as part of a sentence of imprisonment, only after a court determines that a sentence of probation is *not* appropriate." Probation, on the other hand, is in lieu of such punishment. Deciding, therefore, that mandatory supervision is "more akin to parole than probation," at least for Fourth Amendment purposes, the Court found here that defendant should be held to the standards of a parolee rather than one who is placed on local probation. California courts are in accord, holding that a split sentence under P.C. § 1170(h)(5) is "akin to a state prison commitment," and that mandatory supervision is therefore "more similar to parole than probation." (See *People v. Martinez* (2014) 226 Cal.App.4th 759, 763.) This is an important distinction because the U.S. Supreme Court had held that the residence of a parolee may be subjected to warrantless, suspicionless, searches, so long as this is one of the conditions he agreed to under the terms of his release. For a probationer, however, under the Ninth Circuit rule (the issue not having yet been decided by the Supreme Court), suspicionless searches of a

probationer's home are only valid if the crime for which the person was on probation is a "violent felony." Defendant also argued that the evidence was insufficient to show that the Ayres Hotel room was subject to being searched under the terms of his waiver. In this case, defendant's search condition authorized warrantless, suspicionless searches of his "residence" and any "premises" under his control. Recognizing that one's "premises" (where he is staying temporarily) may be different than his "residence" (where he lives), the Court had no problem finding that as a parolee, with "clear and unambiguous" search terms, that the search of the hotel room was reasonable under the Fourth Amendment. The evidence supported the trial court's conclusion that the hotel room in this case was under his control. He had the key to the room in his pocket. He told the officer that he was staying there and that his possessions were in the room. Although the room had been rented with Samanthe Farish's credit card, it was clear that the two were co-occupants. Finding the standard as to whether defendant was at least in joint control over the hotel room to be "*probable cause*," this standard was clearly met based upon the evidence in this case. But also, to be a "*reasonable*" search under the Fourth Amendment, it has to be shown that the search was not conducted in an "arbitrary, capricious, or harassing" manner. The Court found no evidence of such abuses under the circumstances of this case. Although conducted without any suspicion that defendant was involved in criminal activity, it was also noted that the officers who orchestrated the search did not know defendant and had no prior encounters with him. Nothing in the record suggests that the officers conducted the search for an improper purpose, such as a desire to harass him or out of personal animosity toward him, appearing instead to have conducted the search solely for legitimate law-enforcement purposes. Nor did the officers conduct the search at an unreasonable time or in an unreasonable manner. Based upon all of the above, the Court held that the trial court had properly denied defendant's motion to suppress.

Note: Good case, providing excellent authority for strict parole-type scrutiny of probationers sentenced to do their prison time in a county jail under the "Post-Release Community Supervision Act of 2011." The only possible issue left untouched is whether there is a problem doing such a search in the suspect's absence. Noting that the parties did not address this issue, the Court didn't discuss it. Ordinarily, the California rule is that the probationer (or parolee) need not be present. (See *People v Lilienthal* (1978) 22 Cal.3rd 891, 900.) But the language of the waiver must be looked at. There is some older authority to the effect that if a particular Fourth waiver includes language authorizing a warrantless search only "*upon request*," "*as requested*," or "*whenever requested*," then the suspect must either be present, or at least be notified beforehand about an impending search. If he is not, the resulting evidence might be suppressed. (See *People v. Mason* (1971) 5 Cal.3rd 759, 763; *People v. Superior Court* [*Stevens*] (1974) 12 Cal.3rd 858, 861.) Fortunately, in that we don't need a suspect's consent to do a Fourth waiver search, we don't see that type of wording used in a waiver anymore.

***P.C. § 245(c)*: *Assault on a Peace Officer*:**

People v. Nguyen **(May 30, 2017) 12 Cal.App.5th 44**

Rule: A suspect who comes at a police officer with a knife may validly be convicted of aggravated assault on a peace officer, per P.C. § 245(c). The fact that the suspect is 10 to 15 feet away does not prevent a finding that the suspect had the "present ability" to commit a violent injury on the officer.

Facts: Garden Grove Police Officers John Raney and Joshua Olivo responded to a call concerning a man (the eventual defendant) making threats while carrying a large knife or samurai sword in the caller's home. (The defendant turned out to be the caller's son.) Arriving at the scene, the caller, who appeared stressed and nervous, told the officers that the man was inside the house and that he was "loco." As the officers approached the open front door, the defendant came around a corner inside the house and stopped some 10 to 15 feet from the officers. With his left arm obscured by his body, Officer Olivo told defendant to show both hands or he would be shot. Defendant lifted his left hand, exposing a 12 to 15 inch knife, and raised it to his throat while telling the officers to "shoot me." Upon seeing the knife, Officer Olivo removed his gun from its holster. The officers unsuccessfully attempted to get defendant to drop the knife. Instead, defendant moved the knife away from his neck and pointed it in the direction of the officers as he took a step in their direction. Fearing for their safety, Officer Olivo shot three rounds at defendant, wounding him. Defendant was taken into custody, and survived. He was subsequently charged in state court with one felony count each of aggravated assault on a peace officer, per P.C. § 245(c), and of resisting an executive officer, per P.C § 69. Defendant was convicted by a jury of both counts, sentenced to three years in prison, and appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. Defendant, challenging his conviction on the P.C. § 245(c) charge only, argued on appeal that, as a matter of law, he could not be found guilty of aggravated assault on a peace officer because he "did not have the 'present ability' to strike the officer[s] with [the] knife" due to the distance between him and the officers. In order to be guilty of the crime of assault on a peace officer under P.C. § 245(c), it must be shown, among other elements, that defendant committee an assault. An "*assault*" includes proof that defendant had the "*present ability . . . to commit a violent injury*." To have a "*present ability*," there must be threat of "*a present, and not a future injury*." "[W]hen a defendant equips and positions himself to carry out a battery (i.e., a 'harmful or offensive touching of another'), he has the 'present ability' required . . . if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." Defendant argued that in order for an assault to occur when the victim is some distance (i.e., "several steps away") from the perpetrator, the weapon used must be a firearm. The Court declined to limit assaults to firearms noting that such assaults have been upheld in prior cases with swords, hatches, and bayonets. The Court also declined to set a specific distance between the suspect and the victim in order for the suspect to have the "*present ability*" to commit a violent injury. It is a factual issue for a jury to decide as to whether a suspect is too far away from his intended victim that it can no longer be said there is a "present ability" to commit a violent injury. Citing an ancient California Supreme Court decision (*People v. Yslas* (1865) 27 Cal. 630) upholding an assault conviction where the suspect, armed with a

hatchet, was seven to eight feet away from his intended victim, this Court ruled here that: "We decline to distinguish, as a matter of law, a situation involving seven or eight feet of separation between the perpetrator and the victim, from that involving 10 or 15 feet, as in the present case. Such is a factual matter within the province of the trier of fact." Defendant's conviction for assault on a peace officer, therefore, was upheld.

Note: I was trained in the Police Academy so many years ago (1971) that a suspect armed with a knife is capable of flicking that knife into your chest faster than you can react by pulling the trigger, even if you already have your firearm drawn. I took that training to heart even though the one time I had the opportunity to test that hypothesis, I chose to ignore it (and got away with it). But that was my choice. Now, from the comfort and safety of my recliner, I'm reminded of that training every time I read a case like this. That doesn't mean that shooting the suspect is necessary in all such cases. But criticism from others that infers that you should have held back to wait and see what your knife-wielding suspect really intends to do comes only from those who have never been faced with such a circumstance. Your job is to stay safe.

***Pretextual Stops*:**
***Administrative Searches*:**

United States v. Orozco **(9th Cir. June 1, 2017) 858 F.3rd 1204**

Rule: Pretextual detentions are illegal when the pretext used to conduct an investigation of "ordinary criminal wrongdoing" is an officer's statutory administrative authority to conduct warrantless and suspicionless inspections, and where the detention and search would not have occurred but for the officer's intent to conduct the criminal investigation.

Facts: Nevada Trooper Adam Zehr was tasked both with enforcing the traffic and criminal laws on Nevada's highways (Nev. Rev. Stat. § 480.360(1)(b)) as well as performing limited administrative inspections of commercial trucks. This later responsibility was for the purpose of "enforce(ing) the provisions of laws and regulations relating to motor carriers, the safety of their vehicles and equipment, and their transportation of hazardous materials and other cargo." (Nev. Rev. Stat. § 480.360) Pursuant to this later administrative responsibility, Trooper Zehr had the legal power to "examine, at any time during the business hours of the day, the books, papers and records of any fully regulated carrier, and of any other common, contract or private motor carrier doing business in this State to the extent necessary for their respective duties." (Nev. Rev. Stat. § 706.171(1)(d)) Nevada has also enacted a "Commercial Vehicle Safety Plan" which complies with the Motor Carrier Safety Assistance Program's requirements for receiving federal highway funding by, inter alia, requiring Nevada Highway Patrol troopers to conduct inspections in a manner consistent with "the North American Standard ["NAS"] Inspection procedure." (49 C.F.R. § 350.211(d)) A "NAS Level III" inspection includes not only the stop of a vehicle, but an entry into the cab for a full review of the driver's papers. The administrative purpose of such inspections is to prevent and deter dangerous driving by, for example, including a review of the driving log which would reveal whether a driver had exceeded the maximum time allowed on the

road, among other possible safety violations. In the Spring of 2013, Trooper Zehr received information from a trucker that another trucking company might possibly be transporting drugs. Passing that information up the chain of command, Trooper Zehr was contacted on April 26th by a detective who told him that information from that same tipster indicated that defendant's specifically described truck "may possibly have controlled substances" the following day. On the 27th, the detective contacted Trooper Zehr again, giving him new information from the tipster concerning when and where the truck would be. The detective warned Zehr, however, "that he would have to develop his own probable cause to get the vehicle stopped" because "there could possibly be drugs in the vehicle," but "[t]here was nothing solid." Based upon this information, Troopers Zehr and Boynton drove to the appointed location to wait for the truck. When defendant's truck appeared as predicted, Trooper Zehr pulled around another commercial truck, got behind defendant's truck, and pulled it over. No traffic violations had been observed. Although the ostensible reason for the stop was to do a NSA Level III paperwork inspection, which the troopers did do, it was clear that defendant's truck would not have been stopped had it not been for the information concerning the possibility that he was transporting drugs. In fact, although numerous violations of the commercial vehicle regulations were discovered, no citations were issued. Instead, the troopers asked for, and received consent to search defendant's tractor-trailer. A drug-sniffing dog was used to make a pass around the truck. The dog made a positive alert for the presence of drugs which was confirmed when the troopers found a duffel bag containing twenty-six pounds of methamphetamine and six pounds of heroin in the sleeper compartment. Charged in federal court with two counts of possession with intent to distribute a controlled substance, defendant filed a motion to suppress the contraband found in his truck. Upon denial of his motion, defendant was convicted and sentenced to 16 years in prison. Defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. It was not an issue in this case whether the state troopers had sufficient reasonable suspicion for a stop and detention in that that issue was waived by the U.S. Attorney's failure to argue that reasonable suspicion justified the troopers' actions. The issue litigated here was whether a lawful administrative purpose may be used as a pretext for a search and seizure that was motivated by an officer's intent to uncover general criminal activity. Trooper Zehr's general authority to do an administrative search of a commercial truck without reasonable suspicion or probable cause has been upheld in similar cases by the U.S. Supreme Court. (E.g., see *New York v. Burger* (1987) 482 U.S. 691.) It has also been held that as a general rule, an officer's subjective motivations for conducting a seizure and/or a search are irrelevant so long as there is some legal theory available under the circumstances that justify the officer's actions. (*Whren v. United States* (1996) 517 U.S. 806.) It is undisputed that Trooper Zehr's used his NAS Level III inspection authority as a pretext to conduct an investigation of "ordinary criminal wrongdoing" concerning defendant's reported transportation of controlled substances. Testimony from Trooper Zehr and others admitted as much, as did concessions by the U.S. Attorney, as well as the uncontested circumstances of the stop. The Supreme Court in *Whren*, however, and other cases as listed in the written decision in this case (see pp. 1210-1212), note that one of the exceptions to the general legality of pretextual detentions and searches is in the area of administrative searches. (*Whren*, at pp. 811-812.) The

Supreme Court has repeatedly disapproved "pretextual searches that were undertaken pursuant to valid administrative schemes." To allow warrantless and suspicionless administrative searches in order to avoid the probable cause and warrant requirements of the Fourth Amendment in cases where the real purpose of a detention or a search is to conduct a criminal investigation of "ordinary criminal wrongdoing" would serve only to sidestep the requirements of the Fourth Amendment itself. However, this is not to say that the presence of a criminal investigatory motive, by itself, will necessarily render an administrative stop and search pretextual in all cases. The presence of a "dual motive—one valid and one impermissible"—does not necessarily make the resulting detention or search illegal. Applying an objective test, the Court here held that a pretextual administrative search will be held to be illegal only in those cases where the officer would not have made the stop or search except for the presence of what is later determined to be an invalid purpose. "(E)ven an 'unlawful secondary search purpose' does not 'invalidate [an] otherwise lawful administrative . . . search' when . .. "the searching officer's actions would have been the same regardless of his true motivation.'" In this case, except for the information Trooper Zehr had concerning defendant's possible transportation of contraband in his truck, he would not have stopped defendant and conducted the search that he did. This fact is sufficient to find that the use of the trooper's administrative search authority as an excuse to conduct a criminal investigation constitutes an illegal pretextual search. The evidence in this case should have been suppressed.

Note: I wasn't there, and I don't know what motivated the U.S. Attorney to fail to argue that the troopers had sufficient reasonable suspicion to conduct a traffic stop of defendant's truck. With information from an individual who would apparently qualify as an identified "citizen informant," corroborated by his accurate predictive information as to when and where this truck would appear (noting, however, that the detective involved apparently didn't think there was anything "solid" enough to justify a stop), all followed by defendant's consent to search the truck, and/or the drug-sniffing dog's alert on certain areas of the truck, appear to provide enough to allow for a legal warrantless stop, search, and recovery of the dope in this case. My philosophy as a prosecutor in such cases has always been to throw all possible or viable legal theories available up against the wall and see what sticks. You need only one to be successful. It's clear, however, that using an officer's administrative search powers as an excuse to conduct an "ordinary criminal wrongdoing" investigation that otherwise wouldn't have occurred is illegal.

***Search Warrants and the Particularity Requirement*:**

People v. Camel **(Feb. 21, 2017) 8 Cal.App.5th 989**

Rule: Listing "any vehicle" on the property in a search warrant for a homicide suspect's residence is not overbroad, at least under the circumstances of this case.

Facts: Defendant was charged in state court with two counts of first degree murder along with a pile of other charges and related allegations, all stemming from two shootings which occurred in

December, 2009, and February, 2010, respectively. In the first, defendant followed the victim, Roberto Hernandez and others to Skyline Drive in Stockton, California, where the subjects were basically hiding from defendant who had earlier threated to kill them all. As Hernandez and his friends were drinking sodas and smoking marijuana, at least nine shots (thirteen shell casings shot from a semiautomatic pistol were later recovered) were fired in rapid succession from behind some nearby bushes. Although the shooter wore a hooded sweat shirt, defendant was identified by one of the victims as the shooter. Hernandez, hit in the pelvic and chest areas, bled out and died. Another subject was wounded in the arm. Two months later, Francisco Bernardino and some of his friends went together to the Palladium Nightclub in Modesto. Defendant and his friends were also there. During the evening, one of Bernardino's acquaintances, Vincente Cardenas, punched one of defendant's friends. Defendant went to his house to get a gun and then drove around the Stockton area looking for Cardenas. Meanwhile, Bernardino dropped Cardenas off at his house and then drove to a USA Gas station with another acquaintance in the early morning hours. As the two sat in Bernardino's car looking at photos, two gunmen came up behind them and fired about 30 shots in rapid succession into the car. Bernardino was hit more than 15 times and died at the scene. His friend was hit several times but survived. Twenty-four casings from a .30-caliber carbine rifle were found at the scene, along with 8 nine-millimeter casings. Defendant called one of Bernardino's friends that morning and bragged about being the shooter in both cases. As a part of the ensuing investigation, a search warrant was obtained for defendant's home where he lived with his mother. Included in the warrant was the magistrate's authorization to search two specifically described vehicles in addition to "*any vehicles under the control of* [*the real property*] *or the occupants of the premises to be searched, at the time the warrant is to be served as established by DMV documents and records, possession of keys or actual use of the vehicles and/or statements of the witnesses*." When the warrant was executed, an inoperable green Saturn (not one of the described vehicles) was found sitting on the front lawn. An officer asked defendant's mother who owned the Saturn. She claimed a friend had left it there. A records check revealed that a release of liability for the car was issued to defendant's mother. An officer began to search the green Saturn. Opening the trunk, he found a rifle with a pistol grip handle. Upon making this discovery, the search of the green Saturn was suspended while officers sought and obtained a second warrant specifically authorizing its search. The rifle found in the trunk of the green Saturn turned out to be the .30-caliber M1 carbine rifle used in the USA Gas shooting. Prior to trial, defendant filed a motion to suppress the rifle, arguing that the first warrant did not authorize the search of the Saturn and the second warrant was the product of the first. The trial court denied the motion, ruling that defendant did not have standing to challenge the search. Convicted of all counts and allegations and sentenced to several lifetimes in prison, defendant appealed.

Held: The Third District Court of Appeal affirmed. One of the issues on appeal was the legality of the search of the Saturn and the recovery of the rifle used in Francisco Bernardino's murder. Defendant continued to argue that he had standing to challenge the legality of the search of the Saturn. The Court, however, declined to decide that issue, holding instead that the search was lawful based upon the magistrate's authorization contained in the first warrant. On that issued, defendant argued that the first warrant was unconstitutionally "overbroad," lacking in

"particularity," by allowing the search of "any vehicles" on the property whether particularly described in the warrant or not. The Court, noting that defendant cited no authority for this argument, disagreed. Whether a warrant is sufficiently particular is a question of law subject to independent review by an appellate court. In analyzing this question, a court is to consider the purpose of the warrant, the nature of the items sought, and the totality of the circumstances surrounding the case. A warrant that permits a search broad in scope may be appropriate under some circumstances even though not in others. The "warrant's language must be read in context and with common sense." In this case, defendant was identified in the affidavit as the principal suspect in the murders. It was not unreasonable to believe that he might have stashed evidence of his crimes in any vehicles found on the premises other than those he was known to drive. The same probable cause that connected defendant to the inside of the residence also connected him to the inoperative green Saturn on his front lawn. Under the circumstances of this case, a search warrant listing "any vehicle" found on the premises as a likely depository of evidence was not overbroad. Therefore, the first warrant did not violate the Fourth Amendment. Also, whether or not defendant had standing was irrelevant in that the trial court would have properly denied his motion to suppress even if it had found standing.

Note: That having been said, because you can never really be sure how a trial judge may rule on such an issue, it was not a bad idea for the officers (perhaps also wondering whether the failure to specifically describe the Saturn would be a problem) to stop their search upon finding the rifle, and obtaining a second warrant just for the Saturn. That way, had the trial court found that defendant did indeed have standing, and if that judge was also concerned about the lack of particularity in listing "any vehicle" on the property, we could have used the second warrant, with the necessary particularity, as our authority for the search of the Saturn. The Court's decision never got into what information was included in the second warrant affidavit, but it would have been a good idea to merely describe how in executing the first warrant, an inoperable green Saturn was observed on the property and that in the affiant's training and experience, such an item would be a likely depository of evidence of defendant's crimes. In writing such a warrant, the affiant should not include anything about the fact that the trunk of the Saturn had already been looked into so that the existence of probable cause could be evaluated by the magistrate without knowing that the officers already knew the rifle (arguably based upon an illegal observation) was in the trunk. Such an "omission" would not invalidate the second warrant because if that information was added, it would only add to the probable cause.