San Diego District Attorney

LEGAL UPDATE

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Vol. 13 October 19, 2008 No. 10
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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*If at first you don't succeed, try again. Then quit. There's no use being a damn fool about it*." (W.C. Fields)

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ADMINISTRATIVE NOTES:

***Cell Phones and Other Handheld Devices in Motor Vehicles*:** At the request of those who have to teach and/or enforce the new cell-phones-in-vehicles prohibitions (i.e., V.C. §§ 23123, 23123.5 & 23124), I've put together a short outline on each section breaking them down by elements, and some answers to

"*frequently asked questions*." Although there are no reported cases on these sections yet, this outline might help you use them until there is. If you'd like a copy, merely let me know and I'll e-mail it to you.

CASE LAW:

***Bringing Weapons into a Jail, per P.C. § 4574(a)*:**

***People v. Ross* (May 12, 2008) 162 Cal.App.4th 1184**

Rule: Knowingly bringing a deadly weapon into a jail is a violation of P.C. § 4574(a) even though the person has been arrested and is involuntarily being brought into the jail.

Facts: Defendant was arrested for assault with a knife. She was patted down for weapons prior to being taken to jail, but nothing was found. At the jail, the arresting officer asked defendant whether she had any narcotics, drugs, or weapons on her. Defendant responded that she did not. Later, during the booking process, defendant was subjected to a more thorough search. A knife was found in the inseam of her undergarments. As a result, she was charged with the felony of bringing a deadly weapon into the jail, per P.C. § 4574(a). Defendant filed a motion to dismiss this charge (per. P.C. § 995) arguing that because she was "involuntarily" brought into the jail, she couldn't be charged with voluntarily bringing a weapon in with her. The trial court bought this argument and dismissed the charge. The People appealed.

Held: The Second District Court of Appeal (Div. 6) reversed. Going back to the basics, the Court noted that every crime (other than a "strict liability" crime) has two parts; the "actus reus" (an act or omission) and "mens rea" (the required mental state). The actus reus of a P.C. § 4574(a) violation is the bringing of a deadly weapon into a jail. The mens rea is knowing that she has a deadly weapon and knowing that the place she is entering is a jail. Defendant admitted to the mens rea. But she argued that for the actus reus to be proved, there must be evidence that she "*voluntarily*" came into the jail while in possession of the knife. Pursuant to this theory, she argued that being arrested, she didn't voluntarily enter the jail with the knife. Engaging in some statutory interpretation, the Court noted that section 4574(a) only requires proof that defendant knowingly took or carried a deadly weapon into the jail. It is irrelevant that she, herself, was brought into the jail against her will. The whole purpose of this section is to deter persons from bringing deadly weapons into a jail whether they have been arrested or not. Defendant also argued that the Fifth Amendment's protection against self-incrimination shielded her from having to volunteer that she possessed the knife (the hidden knife apparently being the weapon used in the assault that got her arrested). However, the Court noted that the Fifth Amendment protects her right to remain silent. It does *not* give her the right to lie. The arresting officer, under the "*public safety*" exception to *Miranda*, had a right to ask about weapons without admonishing her of her rights. Defendant's choice at that point was to either remain silent or to tell the truth.

Note: This is consistent with prior case law. (See *People v. James* (1969) 1 Cal.App.3d 645.) A similar case involving P.C. § 4573 (knowingly bringing a controlled substance into a jail) is presently pending before the California Supreme Court. (See *People v. Gastello* (2007) 149 Cal.App.4th 943; review granted 6/13/07.) What's difficult to understand is why anyone is having a hard time seeing the difference between involuntarily being put into a jail by being arrested and voluntarily bringing a weapon (or controlled substance) in with you in the process.

***Illegal Lane Change, per V.C. § 22107*:**

People v. Logsdon **(May 28, 2008) 164 Cal.App.4th 741**

Rule: Failing to signal while changing lanes where "any other vehicle may be affected by the movement," per V.C. § 22107, applies even though the only affected vehicle is a police car.

Facts: Anaheim Police Officer Daniel Lambaren observed defendant driving a Mustang out of a gas station parking lot at about 1:20 a.m., crossing all but one lane of a seven-lane boulevard, and then driving down the middle lane. Officer Lambaren followed defendant in his patrol car at a distance of about 100 feet. Defendant then moved from the center lane to the far right lane without signaling. Lambaren stopped defendant for a violation of V.C. § 22107, for failing to signal the lane change. Defendant was subsequently arrested for driving while under the influence of alcohol (with three prior convictions for the same offense). After defendant's motion to suppress evidence was denied by the trial court, he pled guilty and appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. Defendant's argument on appeal was that because there were no cars behind him that could be affected, other than the patrol car, he didn't violate V.C. § 22107. The traffic stop, according to defendant, was therefore illegal and all evidence of his alcohol influence should have been suppressed as a product of that illegal stop. V.C. § 22107 does in fact indicate that the lane change without signaling must be under circumstances where "any other vehicle may be affected by the movement." But, as the Court noted, Officer Lambaren was behind defendant, within 100 feet, and could well have been affected. The failure to signal leaves *any driver* behind him "in bewilderment as to what to expect." "Actual impact is not required by the statute; potential effect triggers the signal requirement." This effect on other drivers applies to a police officer in a patrol car "irrespective of the lack of any other traffic." The traffic stop, therefore, was lawful.

Note: The decision in this case seems obvious, but there are those who feel that a police officer's right of way cannot be violated. I've always objected to the idea that police officers cannot be victims in minor cases such as traffic infractions. The violation is no less hazardous just because it's a cop who is left in "bewilderment" by an inconsiderate driver. Good case.

***Computers and Search Warrants*:**

United States v. Giberson **(9th Cir. May 30, 2008) 527 F.3rd 882**

Rule: Seizure of a computer, even though not listed in a search warrant, is proper when searching for documents likely to be found in a computer.

Facts: Defendant was stopped in North Las Vegas with expired license plates. During the traffic stop, it was determined that he was using a false Nevada identification card in the name of Charles F. Walsh, III. Defendant was arrested when it was discovered that he had three outstanding traffic warrants and no valid driver's license. Defendant admitted to the arresting officer that he used the false name of Walsh in order to avoid his child support obligations. A later investigation by United States Health and Human Services Agent David Klesow resulted in the discovery that defendant was $108,000 behind on a Minnesota state court child support order. Agent Klesow therefore obtained a search warrant for defendant's Nevada residence to look for bank records, other documents related to the use of false I.D. and other financial, employment and tax records. In the execution of the warrant, a personal computer, connected to a printer, was found next to what appeared to be fake Nevada I.D. cards and other fake documents in the name of Charles Walsh and others. Although computers were not listed in the warrant, Agent Klesow seized the computer after consulting an Assistant U.S. Attorney by telephone. A second search warrant was obtained to search the computer for records related to the fake documents and related records. While executing this warrant, a computer specialist found what he believed to be child pornography. The specialist stopped his search and called Agent Klesow. Klesow told him to continue looking for records and not for pornography, but that if he saw any more child pornography to print it out. The specialist did that, finding a number of such photos. An F.B.I. special agent later obtained a third search warrant specifically searching for more child pornography in defendant's computer. Some 700 such images were recovered. Defendant was later charged in federal court with various offenses related to the receiving and possession of child pornography. His motion to suppress the results of the search of his computer was denied by the trial court. Defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. In his appeal, defendant first complained about the seizure of the computer when it wasn't listed in the warrant as an item to be searched or seized. The Court, however, noted that when a warrant authorizes the seizure of specific items, the search of containers that might contain those items is lawful. Here, with a warrant allowing for the seizure of certain documents, defendant's computer was a container where those documents might logically be found. Failing to anticipate the precise container in which the material might be found is not fatal. With fake I.D. documents being found near the computer and an attached printer, the investigators reasonably determined that the computer likely contained related evidence. And while on the topic, the Court also rejected defendant's argument that computers, having the capacity to contain far more information than other lesser containers, should be subject to a higher standard. Seizing the computer was therefore lawful. Defendant also complained that the search of the computer, under the second warrant, should have

been limited to files that could contain only documents as opposed to photos. The Court rejected this argument as well, noting that images of fake I.D.s could have been within any type of file, including graphics files. The Court lastly praised the investigators' limiting of their search under the second warrant to fake I.D. evidence, waiting until they obtained a third warrant to specifically look for child pornography. This showed that the computer specialist did not use the fake I.D. warrant as an excuse to look for something not authorized by the warrant; i.e., child pornography. Any such child pornography inadvertently observed in the process was properly used as probable cause for the third warrant. The child pornography, therefore, was lawfully seized.

Note: The Court strongly hinted that the second warrant (i.e., to search the computer for fake I.D. evidence) was probably not necessary, although they certainly didn't criticize Agent Klesow for erring on the side of caution. As a container of the type of documents the agent was already authorized to be looking for, particularly with printed-out fake I.D.s and other such documents right there in plain view, he could have used the first warrant to get into the computer even though the computer was not specifically listed. That being said, it is strongly suggestion that you make it a habit of listing computers in any search warrant where evidence of the suspected crimes are likely to be found in one. It matters not that you don't have any specific information that your suspect actually has a computer. It should be a part of your training and experience that everyone, including thieves, dopers, rapists, killers, child molesters, or just about any other type of criminal, all use computers in one way or another to further their nefarious activities.

***Switchblade Knives*:**
***Graffiti Implements*:**

In re Angel R. **(June 5, 2008) 163 Cal.App.4th 905**

Rule: (1) A knife, the blade of which can be opened by one hand with a flip of the wrist, is a switchblade knife whether or not there is a detent mechanism providing some minimal resistance to doing so. (2) Adhesive stickers with graffiti already written on them, possessed with the intent to commit vandalism or graffiti, is a graffiti implement as prohibited by P.C. § 594.2(a).

Facts: Anaheim police officers responded to a complaint of gang members standing around and displaying their gang signs. Defendant and three other gangsters were found at a nearby park. Defendant showed signs of being under the influence of marijuana. When asked, he admitted to having some "weed" on him and consented to being searched. A baggie of marijuana, an orange florescent marker, and a pocketknife were found on him. Later, adhesive stickers on which there were written graffiti-style lettering and the initials of a "tagging crew" were found in his shoe. The pocketknife was a folding knife that locks when opened. As originally designed and manufactured, the knife would remain in the closed position unless specific pressure was exerted on a button that was there for that purpose. However, the knife had been either intentionally modified or accidentally damaged so that the resistance mechanism did not function. As a result, the knife would open with a flick of the wrist and then lock into the opened

position. A Juvenile Court petition was filed charging defendant with possession of less than an ounce of marijuana (H&S § 11357(b)), a switchblade knife (P.C. § 653k), and a marking substance or implement with the intent to commit vandalism or graffiti (P.C. § 594.2(a)). After a true finding was made by the Juvenile Court magistrate, defendant appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. (1) Defendant first argued that the evidence was insufficient to prove that his pocket knife was a "switchblade." A switchblade is defined as a knife with a blade of two or more inches in length "and which can be released automatically by a flick of a button, pressure on the handle, flip of the wrist . . . or is released by the weight of the blade." However, "it does *not* include a knife that opens . . . (by) thumb pressure applied solely to the blade . . . (so long as) the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade, or that biases the blade back toward its closed position." Defendant argued that his knife didn't fit the definition of a switchblade knife because it had a detent mechanism that provided *some* resistance, although maybe so slight that it could still be opened with a "*strong* flip of the wrist." The Juvenile Court magistrate, however, as the "trier of fact," found that whether the resistance mechanism was modified or just worn out, the blade opened without any built-in resistance. Absent proof to the contrary, the Appellate Court is bound by that determination. And even if there was some resistance, the statute (P.C. § 653k) does not except knives with minimal resistance. So long as the knife can be opened with a flick of the wrist, it's a switchblade. (2) Defendant further argued that the orange florescent marker did not meet the legal definition of a "felt tip marker" as listed in P.C. § 594.2(c)(1); i.e., "with a tip exceeding three-eights of one inch in width." The Court noted, however, that the prosecutor didn't argue that the marker was the "implement" leading to the P.C. § 594.2(a) (possession of a marking substance) charge. Rather, it was argued at trial that the stickers defendant possessed were the basis for the charge. P.C. § 594.2(c)(2) defines a "*marking substance*" as "any substance *or implement*, other than aerosol paint containers and felt tip markers, that could be used to draw, spray, paint, etch or mark." The stickers meet the definition of an implement that can be used to mark surfaces, doing its damage without the time expenditure that either painting or writing requires. Defendant, therefore, was found to have committed both of these offenses.

Note: If you're not familiar with them, I'm told that these stickers are the new trend, used by taggers to mark walls and other surfaces without the necessity of taking the time felt markers and spray cans might take. The graffiti is already on the stickers. The tagger just slaps it onto the targeted surface. *Slick*. The switchblade knife decision is no surprise. As noted by the Court, P.C. § 653k is very clear. The Court was not about to let this defendant read between the lines and argue that his knife wasn't a switchblade just because there might have been some minimal resistance. If you can flick it open with one hand, and it otherwise fits the definition, it's a switchblade.

***Observations from Outside the Curtilage of the Home*:**
***Detentions and Miranda*:**
***Frisks*:**
***Warrantless Vehicles Searches Based Upon Probable Cause*:**

United States v. Davis **(9th Cir. June 30, 2008) 530 F.3rd 1069**

Rule: (1) Observations from outside the curtilage of a home are lawful. (2) The detention of a person who walks into a search warrant situation is lawful where there is evidence connecting the person to the illegal activity. (3) A frisk of a person with a reasonable suspicion to believe he may be armed is lawful. But the recovery of illegal contraband (as opposed to a weapon) during the patdown is lawful only when it is "*immediately apparent*" that the object is contraband. (4) With probable cause to believe a person is involved in illegal drug activity, his vehicle is subject to a warrantless search.

Facts: Narcotics detectives in Josephine County, Oregon, got a tip from a confidential informant about a marijuana growing operation on an 80-acre parcel near Grants Pass. Records showed that Defendants Jeffrey and Cynthia Davis were the owners of the property. On the property was a residence and a large workshop, the two structures being separated by some 180 feet and a chain link fence that partially surrounded the workshop. The area in general is very rural, heavily wooded, and hilly, the nearest neighbor being almost a half mile away. Defendant Richard Davis, Jeffrey's brother, owned another nearby 40 acres. The detectives drove out to the property after dark to see what they could see in an attempt to corroborate the informant's information. They drove to the end of the paved road and then walked another 300 feet to a closed electric gate with "no trespassing" signs. The officers walked past the gate and signs to within 500 feet of the Davis's residence. From there, they could smell the odor of "green growing marijuana." They left the road and walked through the woods until they reached the chain link fence that surrounded the workshop, some 200 feet away from the Davis's house. The workshop was extremely well-lit. Commercial equipment could be seen inside. An exhaust pipe coming from the work shop, one foot in diameter, was found sticking out of an embankment outside the fence in heavy brush. Warm, humid air and the smell of green growing marijuana was coming from the pipe. A generator and an exhaust fan from up inside the pipe could be heard. With this information, the officers sought and obtained a search warrant which they executed 10 days later. Some 3,200 marijuana plants were recovered from the workshop, along with 60 pounds of dry, processed marijuana prepared for sale, $50,000 in cash, and over 60 firearms. While executing the warrant, Richard Davis drove onto the property. He told the deputies that he was there to see his brother (Jeffrey). When he later asked if he could leave, he was told "no," he could not. After the search warrant was read to him, he was patted down for weapons, resulting in the recovery of a small tin containing hashish oil. In a "casual, low key" conversation with the officers, Davis admitted knowing "everything" about what was going on in the workshop and that he "helped" in the marijuana production. After Davis indicated that he wanted to talk to his attorney, he was handcuffed and his vehicle was searched. Thousands of dollars, several handguns, and a pair of scissors with a residue

stain were recovered. A second search warrant was obtained for Richard Davis's house, resulting in the recovery of another 150 plants. Charged in federal court with numerous marijuana-related offenses, defendants (Jeffrey, Cynthia and Richard) filed various motions to suppress, all of which were denied. They then pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. (1) All three defendants argued that the detectives obtained the probable cause for the first search warrant by making illegal, warrantless observations from inside the curtilage of Jeffrey and Cynthia's residence. The curtilage of a person's home enjoys the same Fourth Amendment protections as does the home itself. The curtilage of one's home is that "area around the house to which the activity of home life extends." In determining the boundaries of a residence's curtilage, four factors are generally considered: (a) The proximity to the home; (b) whether the area is included within an enclosure encompassing the house; (c) the nature of the uses to which the area is put; and (d) the steps taken by the residents to protect the area from observation by passers-by. Here, the house and the workshop were some 180 feet apart, with the officers another 20 feet away. The workshop was not within any enclosures that encompassed the house, and in fact was separated from the house by a chain link fence. The workshop was not being used for any residential purpose. While the workshop was in a secluded area, with "no trespass" signs displayed on the road to the area, the workshop itself was behind a chain link fence only which, by its very nature, didn't do much to protect it from being observed. In all, the factors heavily weighed against a finding that the workshop itself, as well as where the officers were standing when they made there observations, were within the curtilage of the defendants' home. The observations, therefore, were lawful. (2) Richard Davis further argued that his statements admitting participation in the marijuana grow should have been suppressed as the product of an unlawful detention. The rule is that when officers are executing a search warrant, residents may be temporarily detained for officer-safety purposes and to prevent flight in the event incriminating evidence is found. This rule can extend to non-residents where there is evidence connecting the non-resident to the illegal activity. In this case, the officers knew that Richard had passed through an electric gate that required knowledge of a particular code to open. He also indicated that he had come to visit his brother. This was enough to connect him to the illegal activity at the residence, and to justify his temporary detention so that officers could verify his participation. The Court also noted that no *Miranda* admonishment is necessary when a person is only being detained. (3) Next, defendant Richard Davis argued that the recovery of the tin containing hashish was done illegally. The Court agreed. Richard had been patted down for weapons. The Court first noted that a patdown for weapons is generally lawful when the suspect is involved in narcotics activity, it being reasonable to believe that such suspects may be armed. The standard of proof to pat down for weapons and to recover any possible weapons felt is a "reasonable suspicion." It is also a rule that during such a patdown, should the officer feel an object that he immediately recognizes as contraband (as opposed to a weapon), the officer may seize that contraband. But unless it is "*immediately apparent*" that the object is contraband, manipulating the object in an attempt to verify that it is contraband is an illegal search done without probable cause. In this case, there was no evidence in the record that the officer who patted Richard Davis down immediately recognized the tin as contraband. It can only be assumed, therefore,

that the tin was seized illegally. However, with all the other evidence of his guilt, the Court found that admission of the hashish into evidence to be "harmless error." (4) Defendant Richard Davis next complained of the warrantless search of his car. The Court upheld this search, however, under the so-called "automobile exception" to the search warrant requirement. The necessary probable cause justifying the search was supplied by the officers' knowledge that defendant had passed through the electric gate, driving up to Jeffrey and Cynthia's house where large quantities of marijuana had already been found, and his admission to knowing of the marijuana operation and his participation in it. Lastly, the Court found that with the above information, the search warrant for Richard Davis's house was supported by probable cause.

Note: Good case with a lot of good case law about curtilages, detentions, *Miranda*, patdowns, and warrantless searches of persons and vehicles. If you're wondering why the officers were allowed to wander onto the defendants' property despite the "no trespassing" signs, an issue not discussed by the court, it's because of what is commonly known as the "open fields" doctrine. The rule has been for a long time that it is lawful for officers to walk onto a person's "open fields" without probable cause, and without a warrant, so long as they don't go into the "curtilage" of the person's home. (*Oliver v. United States* (1984) 466 U.S. 170; *United States v. Dunn* (1987) 480 U.S. 294; *People v. Channing* (2000) 81 Cal.App.4th 985.)

***Abandoned Property and Expectation of Privacy*:**

People v. Parson **(July 10, 2008) 44 Cal.4th 332**

Rule: Abandonment of property, eliminating any reasonable expectation of privacy in that property, is an issue of the defendant's apparent intent as determined by an objective evaluation of the circumstances. The defendant's actual intent is irrelevant.

Facts: Defendant, a heavy drug abuser and life-time criminal, was acquainted with Theresa Schmiedt, a 59-year-old nurse who lived by herself in an apartment in Sacramento. On the evening of January 1, 1994, defendant visited her for the apparent purpose of getting money from her with which to buy drugs. Theresa Schmiedt was found the next day bludgeoned to death by a hammer with at least 18 blows to her head. Her purse and identification were missing. Over the next several days, defendant and some of his acquaintances used Schmidt's ATM cards and checks to obtain money. On the evening of January 4, defendant checked into a motel in Gilroy, telling the manager that he intended to stay only the night but might stay longer. Defendant paid for one night only. The next day, the manager checked defendant's room when he failed to check out or pay for another day. Although defendant's car was still in the parking lot, no one answered the door which was locked from the inside with the security chain attached. Eventually, the manager discovered that the back bathroom window was open and a damaged window screen was on the ground. He entered the room through the window and found no one there. The police were finally called some 6 to 7 hours after checkout time. Gilroy police, federal marshals and detectives from the Sacramento Sheriff's Department all responded. Unconvinced that defendant was not inside (the

back of the motel having been unattended between that time when the motel manager went through the window and the police arrived), the officers decided to make a warrantless entry to check for defendant. Although defendant was gone, his personal belongings were still there along with Theresa Schmidt's purse and ID. A hammer was also observed. The bed did not look like it had been used. After consulting with a Sacramento deputy district attorney, and deciding to error on the side of caution, the officers left the room, secured it, and obtained a search warrant for the room and defendant's car. Execution of the warrant resulted in the recovery of piles of evidence connecting defendant with Schmidt's murder. Defendant was arrested almost two weeks later in Vancouver, Washington. Charged with capital murder, defendant's motion to suppress all the evidence from the room and his car was denied. Defendant was convicted and sentenced to death. Appeal to the Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues on appeal was the lawfulness of the search of defendant's motel room and vehicle. The defendant's argument was that the initial entry into the motel room was illegal and that the probable cause for the search warrant, incorporating observations made during the entry, was therefore also unlawful. The prosecution's primary theory was that defendant had abandoned the motel room and its contents, and that he therefore lacked "standing" (i.e., "*no reasonable expectation of privacy*") to challenge the entry. The Court agreed. The warrantless search and seizure of abandoned property is not unlawful because no one can claim a reasonable expectation of privacy in such property. When a day-to-day hotel or motel room guest leaves his room with no intention of returning or occupying the room any longer, and without making arrangements for payment of his bill for another day, an inference arises that he has abandoned his tenancy. One's intent to abandon is determined by objective factors, not the person's subjective intent. This objective evaluation of the facts requires a consideration of the person's words, acts, and other objective facts. Also, abandonment is not an issue of strict property rights, but rather whether the person has so relinquished his interest in the property that he's forfeited any reasonable expectation of privacy. In this case, defendant argued that because he left all his personal property in the room, not to mention his car, it was apparent that he did not intend to abandon the motel room or his car. But looking at all the other facts, the Court held (as did the trial court) that when defendant disappeared in the middle of the night, having fled through a rear bathroom window in an apparent rush, without making arrangements to pay for another day's rent and not to be heard from again until some two weeks later when arrested in another state, it was objectively reasonable for the officers to believe that defendant had abandoned the motel room, its contents, and his car.

Note: The Court also held, by the way, that the fact a motel has a policy of not immediately assuming that a tenant has abandoned a room, giving the tenant a 24-hour grace period before storing all his property and repossessing the room, is irrelevant. The test is an objective one, as indicated above, and not what the motel manager might think, or even what the police may believe (they having taken the precaution in this case of getting a search warrant). It's what the Court later determines is objectively reasonable, based upon the known facts and circumstances, that counts.