The California Legal Update

Remember 9/11/2001; Support Our Troops

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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 never think about what I'm going to say; I prefer to be just as surprised as you are*." (Anonymous)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***Complaints About the Legal Update Briefs*:** I recently received a telephone call concerning my brief on *People v. Morales* (July 14, 2015) 238 Cal.App.4th 814, as contained in the last *California Legal Update* (Vol. 20, #10, Oct 7, 2015). Basically the caller's comments (not so much a complaint) related to his belief that the Appellate Court had gotten the facts wrong, particularly as they relate to the sequence of events before and after a *Miranda* admonishment, and that the local DA (San Bernardino) believes that the defendant's admissions where lawfully obtained and intends to appeal. Knowing full well that some appellate courts will unabashedly pervert the facts for the sole purpose of making a point, I asked the caller to e-mail me a detailed list of the alleged errors committed by the Court so that I could print a "correction," so to speak, or at least publicize the other side of the story. I never received that e-mail. The caller also accused

the Justice who wrote the *Morales* opinion (Patricia Benke) of being a "liberal" (meaning "pro-defendant") judge; a fact I know not to be true in that having done trials before Judge Benke when she was on the San Diego Superior Court bench, I found her to be an intelligent, unbiased judge. But the reason I'm telling you all this is not as a criticism of the caller, although it would have been a good thing had he followed up on his accusations and taken advantage of my offer to publicize his version of the facts.

My purpose here is to provide the opportunity to anyone who has a criticism of the *Legal Update*, particularly if you feel it was inaccurate in some way, to tell me about it, to vent, and to memorialize your concerns in writing so that it can be passed onto everyone. You can't hurt my feelings. (I'm a lawyer; I have no feelings.) My primary purpose in researching and writing the *California Legal Update* is to educate us all on the intricacies of the law so that we can seek to perfect an already outstanding law enforcement effort as exists in California today. Recognizing our mistakes (whether they're your mistakes or mine) is an important part of that effort.

CASES:

***Threatening a Victim or Witness, per P.C. § 140(a)*:**

***People v. Murillo* (July 22, 2015) 238 Cal.App.4th 1122**

Rule: Threats made in a rap song to "hunt down" and kill women in retaliation for having reported to police that they had been raped is a violation of P.C. § 140(a); threatening a victim.

Facts: In April of 2012, Shane Villalpando, a student at a private high school in Santa Maria, was convicted in state court of various counts of unlawful sexual intercourse committed upon two other students; Jane Doe 1 and Jane Doe 2. After Jane Doe 1 and Jane Doe 2 reported Villalpando, they became targets of harassment and bullying, causing them both to suffer from depression and thoughts of suicide. Both victims eventually changed schools and moved away. Villalpando was sentenced to five years of felony formal probation with a year in county jail. Defendant, who considered himself to be an up-and-coming rapper, was Villalpando's close friend. Offended by Villalpando's conviction, defendant wrote a rap song entitled "*Moment for Life Remix*." In his song, which he dedicated to his "homie Shane," and in which he lamented his friend's conviction, he included profane lyrics referring to the two rape victims by their full names, describing them as "hoe(s)" and other profanities.

The lyrics also stated: "[T]hese bitches caught him slippin [¶] Then they fuckin snitchin [¶] . . . I'm fucking all these bitches [¶] Hunting down all these snitches [¶] . . . Shit you know we have no fear [¶] I'll have your head just like a dear (sic) [¶] It will be hanging on my wall. [¶] . . . I said go and get the Feds [¶] Cuz your gonna to end up dead [¶] You're going be laying on that bed [¶] Cuz im (sic) coming for your head bitch."

In September, 2013, defendant posted "Moment for Life Remix" on Facebook, included with a picture of himself holding a shotgun, where in 26 days before it was removed it was downloaded 1,089 times and played 23,468 times. On September 20, 2013, Jane Doe 2 saw a link to defendant's new song on her Facebook "newsfeed" which she opened and listened to. She was shocked and frightened by the song's lyrics and also by the follow-up comments posted by

others. Jane Doe 2 informed her mother, who then contacted law enforcement. Defendant was subsequently arrested and charged in state court with two counts of threatening to use force or violence against a crime victim, per P.C. § 140(a). The preliminary examination magistrate, however, dismissed the case, holding that "although the lyrics were harassing and dismissive of the rape victims, the lyrics did not establish the element of a willful threat to use force against the victims."

The prosecution filed a motion in the trial court to reinstate the felony complaint, per P.C. § 871.5, which was denied. The judge ruled that defendant's rap song was "closer to protected speech than non-protected speech." The People appealed this ruling pursuant to P.C. § 871.5(f).

Held: The Second District Court of Appeal (Div. 6) reversed. P.C. § 140(a) provides in part that "every person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime . . . because the witness, (or) victim . . . has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding . . . , shall be punished" as a felony-wobbler by up to a year in county jail or four years in state prison. Pursuant to P.C. § 7, subd. 1, "willfully . . . does not require an intent to violate the law, to injure another, or to acquire any advantage." As such, section 140(a) is a general intent crime, whereby it is not necessary to prove that defendant actually intended to harm the victim.

Also, the People are not required to prove that the threat was communicated to the victim, although in this case, Jane Doe 2 did in fact listen to defendant's threatening rap song. Section 140(a) seeks to make illegal only "those threatening statements that a reasonable listener would understand, in light of the context and surrounding circumstances, to constitute a true threat, namely, 'a serious expression of an intent to commit an act of unlawful violence' [citation], rather than an expression of jest or frustration." Also, section 140(a) does not require that a threat to harm a witness or victim be immediate or that the defendant has the apparent ability to carry out the threat.

Noting that a preliminary examination is intended only to establish whether there is sufficient probable cause to hold a defendant to answer, the Court determined that the circumstances here were in fact sufficient to prove that a reasonable listener could have understood defendant's rap song to constitute a true threat to Jane Doe 1 and Jane Doe 2. Per the Court, defendant's ill-chosen words could be understood to convey a serious (as opposed to a joking) expression of intent to commit an act of unlawful violence against the victims. Where defendant says that "you're gonna to end up dead," and "(I'm) coming for your head bitch," while revealing the names of his intended targets who he repeatedly refers to as "snitches," particularly when he adds a picture of himself holding a shotgun, this is enough to prove the threats necessary for a violation of section 140(a). This conclusion is evidenced by the fact that it caused fear in Jane Doe 2 when she heard it, and motivate her mother to call the police. It is then up to a jury to determine whether defendant's words in his rap song meet the threat requirements of P.C. § 140(a) beyond a reasonable doubt.

Note: First; please excuse my use of profanity in this brief. I typically find a way to work around such language. If it doesn't offend you, it does me. But the words used by this defendant are really necessary to the decision itself. More importantly, it's refreshing to see a court taking seriously the threats inherent in some forms of rap, or perhaps what is commonly referred to as

"*Gangsta rap*," which is defined as "a style of rap music featuring aggressive, often misogynistic (hating or distrusting women) lyrics, typically centering on gang violence." (See pg. 1125, fn. 2, of the decision)

We often see similar examples of hate rap targeting law enforcement as well, at least as of late. It's about time we start criminally charging such overt incidents of rappers (or anyone else) who advocate violence or encourage others to commit acts of violence on women and/or the police.

The Appellate Court did not address the trial court's comments about this being closer to "protected speech than non-protected speech." What the trial court was referring to is a person's First Amendment freedom of expression. I see the Appellate Court's failure to discuss this issue as an indication of the ridiculousness of such a holding; not worthy of discussion. The First Amendment does generally not protect speech that advocates violence or other criminal acts. (E.g., see *People v. Lopez*, below, at p. 447 of the court's written decision: "Expressive conduct is protected by the First Amendment as long as it does not threaten the use of unlawful violence.") And kudos to the prosecutors in this case who refused to let it die at the trial court level upon a finding that defendant had a constitutional right to threaten these two young women.

***Detentions and Reasonable Suspicion*:**

People v. Brown **(Aug. 6, 2015) 61 Cal.4th 968**

Rule: The use of a patrol vehicle's emergency lights in contacting an already-stopped motor vehicle is, as a general rule, a detention that must be supported by a reasonable suspicion of criminal activity to be lawful.

Facts: San Diego Sheriff's Deputy Geasland responded to a radio call at 10:37 p.m. on a Sunday evening concerning four males fighting in an alley behind a house on Georgia Street in Imperial Beach. Deputy Geasland was further told that per the 9-1-1 caller, a gun may be involved. Upon arriving in the alley within three minutes of the call, the deputy saw a car coming towards him and away from the reported location of the fight. As he passed the vehicle, Deputy Geasland yelled to the driver: "*Hey. Did you see a fight*?" The driver did not respond and kept driving.

Continuing on down the alley, Deputy Geasland couldn't find anyone else in the area. Suspecting that the driver of the car he'd just passed might have been involved in that he was apparently the only person in the area, was coming from the direction of the reported fight, and failed to acknowledge the deputy's question, Deputy Geasland turned around and went looking for the car. He quickly found it parked on Georgia Street a few houses down from the house behind where the fight had occurred. He pulled in behind the car and activated the overhead emergency lights on his patrol car.

Upon approaching the driver, soon identified as defendant, Deputy Geasland asked him for some identification. An "upset and flustered" defendant produced a driver's license. During this contact, Deputy Geasland noted that defendant was mumbling, had watery, bloodshot eyes, and smelled of alcohol. Defendant admitted both to have been drinking and to being involved in the reported fight. After a standard DUI investigation, defendant was arrested for driving while under the influence of alcohol. He was charged in state court with felony DUI, having three prior DUI convictions. He filed a motion to suppress evidence of his physical condition, statements, and the breath test results as the fruit of an unlawful detention.

After the trial court denied the motion, defendant pled guilty to driving with a blood-alcohol concentration over 0.08% (V.C. § 23152(b)) and admitted that his blood-alcohol concentration exceeded 0.15% (V.C. § 23578). He also admitted to his three prior DUI convictions (V.C. §§ 23550(a) & 23626). He appealed from his felony sentence of two years in county jail. The Fourth District Court of Appeal upheld his conviction, affirming the trial court's suppression motion, ruling that "when a vehicle is already stopped, without police action, merely activating emergency lights on a police vehicle, without more, does not constitute a seizure (i.e., a detention) within the Fourth Amendment." Alternatively, the court held that if a detention did occur, it was supported by a reasonable suspicion. Defendant appealed to the California Supreme Court.

Held: The California Supreme Court unanimously affirmed, although disagreeing with the Court of Appeal on the issue as to whether defendant was detained when the deputy activated his emergency lights. Certainly, defendant was lawfully detained after Deputy Geasland contacted him and noted his apparent intoxication. But if the officer, by turning on his emergency lights, detained defendant at that earlier point, as opposed to it being no more than a consensual encounter, then the act of activating the emergency lights on the patrol car constituted an illegal detention unless justified by a reasonable suspicion that defendant had been involved in some illegal activity. The People argued here that an officer turning on his emergency lights when behind an already stopped suspect vehicle is not a detention. The Supreme Court disagreed.

The general rule on detentions is this: During a "consensual encounter," where a reasonable person would feel that he is under no compulsion to remain at the scene and submit to an officer's attempts to talk with him, there are "no constitutional concerns." Such a contact does not require justification. However, "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen," the officer effects a seizure (i.e., a "detention") of that person which must be justified under the Fourth Amendment.

In holding that defendant was in fact detained under the circumstances of this case, at the time the officer activated his emergency lights, the Supreme Court found that the rule of *United States v. Mendenhall*, 446 U.S. 544, applied. Per *Mendenhall*, a seizure of the person occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The Court also found this case to be similar to *Brendlin v. California* (2007) 551 U.S. 249, where it was held that when the suspect is the passenger in a motor vehicle, he is detained whenever "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission."

The Court rejected the argument that in order for it to be a detention, something else (in addition to the use of the patrol vehicle's lights) must occur evidencing the fact that the person in the car has yielded to that show of authority. Therefore, under the circumstances of this case, defendant was detained when the officer drove up behind him and turned on his emergency lights. However, the Court further found that defendant's motion to suppress was properly denied by the trial court. Where Deputy Geasland responded to a call of people fighting in an alley, arriving at the scene within three minutes, finding no in the area except for defendant who, while leaving the scene acted suspiciously by not responding to the deputy's inquiry about whether

he'd seen anyone else, this was sufficient reasonable suspicion to temporarily detain him to determine his possible involvement in the reported incident. Detaining him by activating the patrol car's emergency lighting was therefore lawful.

Note: The Court further made it clear that it was not adopting a "bright-line rule that an officer's use of emergency lights in close proximity to a parked car will always constitute a detention of the occupants." (p. 980) But as a general rule, this is what the courts are going to hold. So as a patrol officer, you must recognize the legal significance of flipping on your lights, creating a detention situation. Should you choose to use your lights to merely mark your location for other responding units to find you, for instance, your intent is legally less significant than the effect it has upon the suspects you are contacting. It's how a reasonable person would interpret your actions more than your subjective reasons for doing so that is legally significant.

***Searches Incident to Arrest*:**

United States v. Cook **(9th Cir. Aug. 13, 2015) 797 F.3rd 713**

Rule: Whether or not an arrestee may be searched incident to arrest depends upon the circumstances. The fact that he's handcuffed by itself does not mean that the arrestee can no longer lunge for a weapon or destroy evidence.

Facts: Drug Enforcement Administration (DEA) agents, as a part of a drug task force, were surveilling the home of two drug-dealing suspects on 63rd Street in Oakland when defendant was observed arriving at the house carrying a backpack. Defendant apparently dropped something off while in the house in that when he left a short time later, the backpack appeared less full and lighter.

Fifteen minutes later, the two surveilled suspects left the house and headed for a pre-scheduled drug deal with undercover agents. After the drug buy went down, the two suspects were arrested and their house searched, resulting in the recovery of a couple of firearms along with other evidence. One of the arrested subjects told the agents that defendant was their supplier. Cooperating with the agents, that suspect made a controlled telephone call to defendant telling him that the drug sale went down as planned. Defendant responded with; "*Hallelujah. Okay, I'll see you soon*."

Fifteen minutes later defendant reappeared at the 63rd Street residence. Carrying the same backpack, he walked up to the front porch only to be confronted at gunpoint by DEA agents who ordered him to the ground. As a crowd of on-lookers began to gather creating safety concerns, the officers decided that they needed to move defendant to a safer location.

Within one to two minutes of arresting defendant, and with defendant still on the ground, Task Force Officer Robert Knight picked up defendant's backpack lying next to him on the ground and conducted a twenty or thirty-second cursory search for weapons or contraband. Finding no weapons, the agents quickly moved defendant and his backpack to a more secluded restaurant parking lot a few blocks away. There, Officer Knight and Special Agent Jay Dial did a more thorough search of the backpack. During this second search, they found ziplock bags containing MDMA, LSD, marijuana, two mobile phones, and a laptop. Charged in federal court with various drug-related offenses, defendant filed a motion to suppress the items found in his

backpack. The motion was denied. Upon conviction by a jury of conspiracy to possess with intent to distribute and possession with intent to distribute illegal narcotics, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant argued that the initial search of his backpack upon his arrest was unlawful, violating the rule of *Arizona v. Gant* (2009) 556 U.S. 332. The general rule is that a search of an arrestee and the area immediately surrounding him at the time of his arrest incident to that arrest, which includes any container he might have in his possession, is lawful. This rule allows an officer to search the arrestee's person and the area within his immediate control, defined as "the area from within which he might gain possession of a weapon or destructible evidence."

In *Gant*, however, the U.S. Supreme Court held that once an arrestee is handcuffed and secured, it is no longer reasonable to search the area around him incident to that arrest in that he can no longer reach for weapons or destroy evidence. Differentiating this case from *Gant*, the Ninth Circuit held that the fact that a suspect is handcuffed is but one factor to consider in determining the reasonableness of a warrantless search incident to arrest. "(L)ike any mechanical device, handcuffs can and do fail on occasion." In this case, defendant, although handcuffed, was lying on the ground right next to his backpack. In *Gant*, the subject was not only handcuffed, but secured in the back seat of a patrol car. Also in *Gant*, the Court was dealing with a misdemeanor suspect.

Here, defendant was arrested for a variety of felonies where guns had already been located in the house. In this case, the search was both "quick and cursory," with the officer ending it as soon as he verified that there were no weapons to be found. The Court noted that, "(t)he brief and limited nature of the search, its immediacy to the time of arrest, and the location of the backpack ensured that the search was 'commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that [defendant] might conceal or destroy.'" Based upon the totality of the circumstances, the warrantless search of defendant's backpack was lawful.

Note: To summarize; the general rule is that upon an arrest, an arrestee, his person, and the area immediately around him (i.e., the "lunging area") is all subject to search without a warrant. (*Chimel v. California* (1969) 395 U.S. 752.) *Gant* provides an exception to *Chimel*; i.e., when the arrestee has been secured to the point where he can no longer reach for weapons or destroy evidence, then *Chimel* does not apply. This new case is an exception to *Gant*, holding that what constitutes "securing" depends upon the circumstances, but is likely to require more than just the use of handcuffs.

Note that defendant did not contest the second search of his backpack, conducted after defendant was moved to a safer location, where all his drugs were found. That's because of the Ninth Circuit's earlier case of *United States v. Burnette* (9th Cir. 1983) 698 F.2nd 1038, 1049, where it was held that a container (e.g., a purse or a backpack) that was lawfully searched incident to arrest may again be searched at a later time (e.g., at the police station) without a warrant in that with the first incident-to-arrest search, the suspect's expectation of privacy has been reduced to the point where the later warrantless search is thereafter reasonable. But that wasn't the point of this case. The point here is that there are exceptions to the *Gant* rule, depending upon the circumstances under which a search incident to arrest occurs.

***Stalking, per P.C. § 646.9(a)*:**

People v. Lopez **(Aug. 18, 2015) 240 Cal.App.4th 436** (As modified at 2015 Cal.App. LEXIS 870.)

Rule: A stalker's intent to cause fear in his victim may be proved circumstantially. The First Amendment freedom of expression does not protect threatening words and actions.

Facts: Sixteen-year-old Angie Rizzo met 26-year-old defendant Cesar Lopez, who called himself "Cesar Cold," at a San Francisco public library where they initially would help each other with their homework. They also met a couple of times outside the library, taking walks or having lunch.

When Angie turned 18, she agreed to go to a movie with defendant. He showed up with wine and flowers and took her to a movie that was "extremely graphically sexual in nature." During the movie, defendant couldn't keep his hands off of her, kissing and groping her. She went along with his advances because she was very young, nervous, and didn't know how to get out of the situation. Afterwards, however, she attempted to break off all contact with him, ignoring his phone calls and later his e-mails that soon became "angry in tone," long and rambling, described as "manifesto like."

For the next eight years, with the contacts particularly escalating between April and December of 2012, defendant repeatedly attempted to get Angie's attention. Early on, defendant showed up in Los Angeles where she was going to college. Angie told defendant at that time that she wasn't interested in a relationship with him. But the e-mails never stopped. After she returned to San Francisco, he would suddenly appear out of nowhere, trying to get her to talk to him, causing her to become uncomfortable and angry, afraid to even leave the house; a fact that Angie related to defendant several times while telling him to stop.

Packages containing CDs and notes periodically showed up at her mother's house (where Angie still lived) once or twice a year up until 2012, when they started coming more frequently. Angie had to change e-mail addresses. Finally, in 2012, when Angie was 26 years old, she began receiving Facebook messages from "Crystal Snow Lovestar," who she soon determined to be defendant. One such message contained a picture of a labyrinth made of small rocks in the image of Angie's face. She recognized the area as being about five blocks from her house where she would routinely run. The picture was labeled "artwork and picture by CSR Cold," which Angie recognized as defendant's name. She went to the location and found the labyrinth. Under a rock, she found a letter addressed to her. In the letter, along with some personal notes, she found a link to a blog. The blog was about her, with so much content that it took some time to download. The blog contained audio files "about songs with girls with green eyes," an archive of multiple letters defendant had written to Angie, pictures of a "flower commemoration" which defendant called an "Angiesary," commemorating the 10-year anniversary of their first meeting.

On one visit to the labyrinth, showing it to a neighbor, defendant, covered with a hoodie, was seen nearby watching her. An attempt to tell defendant through Facebook that he was scaring her and that she didn't want any more contact with him only resulted in another package being delivered to her home containing more CDs and letters to her. In another couple of messages to

Angie, defendant asked her to meet him at the labyrinth the following weekend at 2:00 p.m., with her dressed "all in white," where they would "perform a special ceremony . . . to cleansing (sic) any remaining past emotional and psychological harm that we might have caused one another."

Finally, on July 22, 2012, Angie called the police. A San Francisco PD sergeant contacted defendant through his e-mail address. Defendant responded, but ignored the sergeant's request for identification information. Defendant told the sergeant in his e-mail that Angie's complaints were "exaggerated," and "not something to be really concerned about." The packages, however, continued to show up at Angie's house.

On September 24, police contacted defendant at the labyrinth and detained him briefly. That evening, defendant confronted Angie, who was out walking near her house, telling her that she'd gotten him "arrested." Angie walked on, but got another letter from him two days later containing a dog-tag necklace engraved with, "Golden Gage Anniversary 75th, San Francisco, California, Angie and Cesar." An accompanying letter asked her to meet with him. On October 8, Angie observed defendant standing behind her at a bus stop, just watching her. She ran home in tears. The next day, she received a letter from him saying that this was his "last personal message, the farewell letter." But then several weeks later, defendant came up behind her on a bus and, putting his hands on her shoulders, whispered to her; "Angie, it's me." She was very shaken, running home and having an anxiety attack and crying. Then again, on a day in mid-November, she saw him on the street. She confronted him and told him to leave her alone.

Defendant apologized, but then asked for a hug. A week later, she again saw him on the street near her house. Defendant approached her asked if they could just be friends. She told him again that she wanted nothing to do with him. He finally said; "(S)o, it's over?", acting like they were just then breaking up. When she told him that it was in fact over, he responded: "No, I can't accept it. I cannot accept that it's over." On December 5, Angie received another letter containing a link to a blog entitled: "love forgiven.blogspot.com." Also in the letter was a CD of songs and a napkin with a heart drawn on it, and the words; "Bernal Hill, 12-8-12, 4:30 p.m. Also in this letter was a note from defendant inviting her to meet him for another "healing ceremony" on that date. Angie again called the police who met defendant at Bernal Hill at the appointed date and time, and arrested him. Defendant was charged in state court with one count of stalking, per P.C. 646.9(a). Upon his conviction, the trial court suspended imposition of sentence and granted probation for a period of five years. Defendant appealed.

Held: The First District Court of Appeal (Div. 2) affirmed. On appeal, defendant argued that the evidence was insufficient to support his conviction. Specifically, defendant maintained that there was no evidence that his conduct communicated an intent to use unlawful violence, or that it he intended to instill fear in Angie, and that in either case, his conduct was protected by the First Amendment. P.C. § 646.9(a), provides in part: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, . . . is guilty of the crime of stalking," a felony-wobbler.

A "credible threat" is defined in subdivision (g) as "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a

pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety, . . . and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety . . . . It is not necessary to prove that the defendant had the intent to actually carry out the threat."

Also, the term "harasses" is defined as "engag(ing) in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (Subd. (e)) "Constitutionally protected activity" is expressly excluded from the definition of "credible threat." (Subds. (f), (g).) Although defendant conceded that his actions may have caused fear in Angie, he argued that there was no evidence that he intended to do so. Section 646.9(a) requires the defendant to have "inten(ded) to place that person in reasonable fear."

The Court, however, noted that intent is something that is typically proven circumstantially. Subdivision (g) specifically states that the defendant's intent may be "implied by a pattern of conduct." Per the Court, the record in this case amply supports the jury's finding that defendant, through a consistent pattern of harassing activity, intended to put Angie in fear for her safety. As for defendant's First Amendment claims; "[e]xpressive conduct is protected by the First Amendment as long as it does not threaten the use of unlawful violence."

After reviewing the continual harassing activity employed by defendant, to the point where Angie felt personally threatened, the Court noted that "(s)uch threats 'pose a danger to society and thus are unprotected by the First Amendment.' (Citation) (Defendant's) construction of the labyrinth, the content of his blogs, messages, letters and packages, and the persistence with which he contacted (Angie) despite being told to stop by her and by the police, reveal an obsession that a reasonable person would understand as threatening." Defendant, therefore, was properly convicted of stalking, per P.C. § 646.9(a).

Note: The Court does a relatively detailed analysis of a pile of stalking cases with many treading that thin line between punishable criminal acts and protected First Amendment expressive activity. They talk about a couple of cases that look pretty threatening to the layman (and to me), but which one court or another excused as nothing more than examples of the defendant's bad taste. Anyone prosecuting or investigating staking cases would be well advised to read this portion of the decision (at pages 448 to 451) to get familiar with what it takes to successfully push a stalking case through to conviction. It's not always as easy as it might look.

***DUI Arrests and Consensual Blood Draws*:**

People v. Harris **(Feb. 19, 2015) 234 Cal.App.4th 671**

Rule: The "actual consent" of a DUI arrestee to a blood draw excuses the lack of a search warrant. Whether or not the arrestee actually consented depends upon an evaluation of the totality of the circumstances.

Facts: Deputy Robinson, a motor officer with the Riverside County Sheriff's Department, was riding his patrol motorcycle near the transition of State Route 60 and Interstate 215 when he observed defendant's silver Honda driving at approximately 90 miles per hour in a 65 mph speed zone. Defendant was weaving across all four lanes of traffic without using his turn signal, driving in an unsafe manner. Deputy Robinson initiated a traffic stop using his loudspeaker to direct defendant to the right shoulder. Defendant, if he heard the officer's directions at all, came to a stop instead in the center median of the freeway.

Upon contacting defendant, Deputy Robinson observed objective symptoms of impairment caused by a stimulant, including a flushed, rigid face, dilated pupils, bloodshot and watery eyes, and "jerky movements." Deputy Robinson, being an expert in drug influence recognition with training in administering and interpreting the results of field sobriety examinations and DUI investigations, conducted the standard field sobriety tests with defendant. Upon completion of the tests, Deputy Robinson concluded that defendant was under the influence of a controlled substance and placed him under arrest.

Complying with California's "Implied Consent" law (V.C. § 23612), the deputy told defendant that he was required to submit to a chemical blood test. Deputy Robinson advised him that he did not have the right to talk to a lawyer when deciding whether to submit to the chemical test, that refusal to submit to the test would result in the suspension of his driver's license "for two to three years," and that if he refused, that refusal could be used against him in court. Defendant was told this twice over the course of the evening. Defendant's only response was, "*okay*." At no time did he appear unwilling to provide a blood sample. He was therefore transported by another deputy to the Moreno Valley sheriff's station where a phlebotomist with whom Deputy Robinson had previously worked drew defendant's blood.

Deputy Robinson observed the phlebotomist swab the inside of defendant's right elbow with what appeared to be a disinfectant. The phlebotomist then obtained a blood sample from defendant using a standard hypodermic syringe. Although no warrant for the withdrawal of blood was obtained, Deputy Robinson testified that at no time did defendant resist the blood draw or indicate in any way that he wasn't willing to cooperate. Defendant was charged in state court with one count each of driving a motor vehicle while under the influence of a drug or alcohol (V.C. § 23152(a)) and being under the influence of a controlled substance (H&S Code § 11550(a)). Prior to trial, defendant filed a motion to suppress the results of his blood test, which was denied. He then pled guilty to both charges and appealed. The Appellate Department of the Superior Court upheld defendant's conviction. He appealed to the District Court of Appeal.

Held: The Fourth District Court of Appeal (Div. 2) affirmed defendant's conviction. On appeal defendant first argued that Deputy Robinson violated his Fourth Amendment constitutional rights by taking his blood without a warrant or exigent circumstances. Some 49 years ago, the U.S. Supreme Court held in *Schmerber v. California* (1966) 384 U.S. 7574, that extracting a blood sample from a person arrested for DUI was lawful despite the lack of a search warrant. The Supreme Court, however, later ruled in *Missouri v. McNeely* (2013) 569 U.S. ___ [185 L. Ed.2nd 696, 133 S.Ct. 1552], limiting *Schmerber* to its facts (where the officer had to conduct a traffic collision investigation and the injured defendant had been taken to the hospital), held that warrantless blood draws in DUI cases were unconstitutional absent a proven exigency.

The *McNeely* Court held as well that the natural metabolization of alcohol in the bloodstream did not, by itself, constitute a "per se exigency" justifying an exception to the warrant requirement. The People in this new case, however, argued that defendant had consented to having his blood taken. *McNeely* did not decide whether consent excused the lack of a warrant in such a case. The Court here ruled, however, that, as with any other search issue, a free and voluntary consent will excuse the lack of a search warrant.

Defendant's counter argument was that if he did consent, he did so only because he was coerced into it when the officer threatened him with the suspension of his driver's license and other consequences, pursuant to the "implied consent" warning. The Court held that the concept of "implied consent," at least in this context, "is confusing and somewhat unhelpful in determining whether a motorist's voluntary submission to a chemical test constitutes valid Fourth Amendment consent." As such, an implied consent statute, rather than supplying the necessary consent to having one's blood drawn in a DUI case, merely notifies the arrestee that he has a choice to make between giving his actual consent or to suffer automatic sanctions. "Choosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the 'no' option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent."

The Court rejected defendant's argument that just because there are sanctions to choosing the "no" option necessarily means that his consent was not free and voluntary. Supreme Court authority makes it clear that the fact that a motorist is told he will face consequences if he refuses to submit to a blood test does not, in itself, mean that his submission was coerced. Whether or not a consent is freely and voluntarily given depends upon the totality of the circumstances. Ultimately, the Court here held here that just because a motorist is forced to choose between submitting to the chemical test or facing serious consequences for refusing to submit does not in itself render his consent invalid for purposes of the Fourth Amendment. In this case, defendant responded with "*okay*" when told of the sanctions for refusing to provide a blood sample. At no time did he resist the giving of a blood sample, or object in any way.

Under these circumstances, the Court found that defendant provided "actual consent," allowing for the lawful extraction of a blood sample. In so ruling, the Court further found irrelevant Deputy Robinson's mistake in citing how long his license would be suspended (telling him two to three years instead of one) and whether or not he had the option of a breath as well as a blood test, absent any evidence that the deputy intended to purposely deceive him. The Court also ruled that a phlebotomist taking the defendant's blood in a police station, under the circumstances as described, is sufficient to meet the requirement that the taking of blood be done in a constitutionally permissible manner, rejecting the defendant's argument that it should have been done by a doctor in a hospital. Lastly, the Court noted that defendant's arrest in this case occurred prior to the decision in *McNeely*. Even if Deputy Robinson should have obtained a warrant, he acted according to what was accepted as the rule, under *Schmerber*, prior to *McNeely* being decided. His good faith in acting according to the rule as it exited at the time excuses the deputy's failure to get a search warrant.

Note: This case answers the question of whether California's "implied consent" statute provides the necessary consent to excuse the lack of a search warrant in a DUI case. The answer is "no,"

if you didn't catch it from the above. It depends upon an evaluation of all the circumstances involved in the case. What this case does not answer is what it takes to constitute an "*exigency*," which will also excuse the lack of a warrant. In *Schmerber*, it was the fact that the arrestee had to receive medical treatment for his injuries, *plus* the fact that the officer had a traffic collision to also investigate, *plus* the natural dissipation of the blood in the defendant's system, that excused the lack of a warrant. From this we can at least discern that a simple DUI arrest alone, without any other delaying duties for the officer to perform, isn't going to be enough.