The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM

"*Procrastination is the art of keeping up with yesterday*." (Don Marquis)

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People v. Lazarus **(July 13, 2015) 238 Cal.App.4th 734**

Rule: (1) A 23-year delay in initiating a prosecution does not constitute an unconstitutional delay where the prejudice to the defendant is minimal and the cause for the delay is justifiable. (2) Information in a warrant affidavit is not stale when the items sought are of the type one would reasonably expect a person to hold onto for a lengthy period of time. (3) Facts omitted from a search warrant affidavit are not material absent a substantial possibility they would have altered a reasonable magistrate's probable cause determination and their omission did not make

the affidavit substantially misleading. (4) The protections accorded to a police officer under the Public Safety Officers Procedural Bill of Rights Act are inapplicable when the officer is the target of a criminal investigation and an interrogation is not part of an administrative internal investigation.

Facts: From 1983 to 2009, defendant was an officer with the Los Angeles Police Department. During the 1980's, defendant also briefly dated John Ruetten. Ruetten, however, became engaged to a nurse, Sheri Rasmussen, in May of 1985. Upon discovering this, defendant became enraged and begged Ruetten to reconsider. He refused. So defendant went to Rasmussen's place of work and confronted her, telling her that she (defendant) and Ruetten had had sex after her (Rasmussen's) engagement to Ruetten. Defendant also told Rasmussen that: "If I can't have John, you can't either."

Despite Ruetten's infidelity, he and Rasmussen married and moved in together in a condominium in Van Nuys (a suburb of Los Angeles) in November, 1985. On February 24, 1986, Rasmussen was found dead in her condominium, having suffered three gunshot wounds to the chest. Her car was missing from the garage and stereo equipment had been stacked by the door in an apparent attempt to make it look like Rasmussen had been killed during the commission of a burglary. However, there were no signs of a forced entry. Aside from the gunshot wounds, Rasmussen appeared to have been struck by the muzzle of a gun in the face, leaving marks of the size of a .38-caliber Smith & Wesson revolver. Rasmussen had also been bitten on the arm. Samples from the bite mark were recovered and stored in a freezer. Bullets identified as ".38J Plus-P" ammunition, manufactured by Federal Premium Ammunition, used at the time by all LAPD officers, were left at the scene.

A quilt found at the scene appeared to have been used to muffle the shots, leaving gunshot residue which helped experts determine that the murder weapon was a revolver with a two-inch barrel. A year before the murder, Defendant had purchased a .38-caliber Smith & Wesson Model 49 revolver with a two-inch barrel. Two weeks after the murder, defendant reported that pistol stolen. The case went unsolved for the next 19 years until detectives pulled it from the cold case file. The victim's bite mark tissue sample was retrieved from the coroner's evidence freezer. DNA testing was performed on it, developing a profile of a female. After unsuccessfully attempting to match the DNA with a suspect in some national databases, the investigation turned to specific women who might have had reason to harm Rasmussen, including defendant. Defendant unknowingly provided investigators with a DNA sample when a cup from which she had been drinking was recovered.

Her DNA matched the profile from the bite mark. On June 5, 2009, defendant was questioned by detectives. Although she denied any involvement in Rasmussen's murder, she made a number of statements that the prosecution later used against her at trial. Defendant was arrested shortly after the interview. Two search warrants were issued for her home, vehicles and computers, resulting in the recovery of some incriminating evidence. Convicted of first degree murder and a firearm use allegation, she was sentenced to 25-years-to-life plus two years for the use of the firearm. Defendant appealed.

Held: The Second District Court of Appeal (Div. 4) affirmed. Defendant raised a number of issues on appeal. (1) *Pre-Accusation Delay*: A criminal defendant has a constitutional Sixth (speedy trial) and Fourteenth (due process) Amendment right to have his or her trial commenced before any unreasonable delay prejudices her ability to defendant him or herself. The sanction for a violation of these rights is dismissal of the case. In this case, the information charging defendant with murder wasn't filed until December 18, 2009, over 23 years after the crime. But the fact that there was such a delay, by itself, is not enough to show prejudice. It is a defendant's burden to show how a delay prejudiced his or her ability to defendant him or herself. Only after prejudice is demonstrated must the prosecution present evidence justifying the delay.

Factors to consider in determining whether the delay was justifiable include the reasons for the delay, the length of the delay, the seriousness of the crime involved, and whether the delay was purposeful. Defendant in this case asserted that her ability to prepare her defense had been compromised because the memories of specific witnesses had faded, a witness to her confrontation with Rasmussen had died, chain-of-custody documents had been lost, gunshot residue tests taken of Rasmussen's hands and 911-call records had been destroyed, and records related to LAPD's use of a specific type of ammunition were no longer available.

In justification, the People presented evidence related to the difficulty in getting DNA tests completed, and the time it took to finally match defendant to the DNA. As soon as she was matched to the DNA, she was questioned and arrested. Balancing the prejudice to defendant's ability to defend herself with the reasons for the delay in getting her to trial, the Court ruled that defendant's showing of prejudice was minimal, at best. On the other hand, the Court noted that with the number of DNA test requests made, and the time and expense involved in conducting such tests, the difficulty in allocating scarce prosecutorial resources is a valid justification for a delay. Also, the prosecution is not expected to file on a suspect until they have a provable case. Balancing these factors, the Court found no constitutional violation in the time it took to determine that defendant was the killer and to get her to trial.

(2) *Motion to Quash*: Two warrants were issued authorizing searches of defendant's property. The first allowed for the search of her residence and several vehicles registered to her, seeking evidence connecting defendant with John Ruetten and/or Sheri Rasmussen. Also sought was the missing murder weapon. The second warrant gave permission to search the "computers, storage media, computer hardware and digital evidence" seized pursuant to the first warrant. The affiant, as described in both warrant affidavits, was a veteran investigator with extensive experience and expertise.

The affidavit for the first warrant described the murder and the resulting investigation, as indicated above, but in far more detail (26 pages worth). The two warrants led to the discovery of evidence introduced at trial. Defendant filed a motion in the trial court to quash both warrants, arguing that they were based upon stale information and that they were overbroad. The trial court denied defendant's motion. On appeal, defendant made the same argument. The Court of Appeal upheld the trial court's ruling. In the affidavit, the investigator opined that the items sought were items that it was expected defendant, given her attraction to John Ruetten (i.e., "her romantic obsession"), and would be expected to have been saved over the years. "(T)he

warrants specifically sought photographs, journals and diaries. A person does not normally discard such items, even after several moves."

As for the firearm, the murder weapon was never found, defendant claiming that her personal pistol was stolen. Guns are something that people don't generally discard. The fact that defendant changed residences, vehicles, and computers, since the commission of the murder, was held to be irrelevant. Significantly, the Court held that it was not unreasonable for the affiant to include such items in his warrant despite the passage of so many years. Also, "(t)he magistrate 'is entitled to draw reasonable inferences about where evidence is likely to be kept (i.e., one's home, vehicles and computers), based on the nature of the evidence and the type of offense.'" Therefore, the information in the warrant affidavits was neither stale nor overbroad, given the circumstances of this case and the nature of the items sought. And even if it was, the detective's "good faith" in executing a warrant approved by a neutral magistrate dictates that the defendant's motion to quash was properly denied by the trial court.

(3) *Motion to Traverse*: Defendant also filed a motion to traverse the warrant in the trial court, arguing that the affiant had "misrepresented the nature of the communication between (defendant) and Ruetten after she learned of his engagement," and that he (the affiant) omitted material facts from the affidavit, misleading the magistrate. The trial court denied defendant's motion, declining to allow an evidentiary hearing on the issue. The Appellate Court agreed. Where an affiant alleges that material misstatements were intentionally or recklessly included in a warrant affidavit, or that material omissions were made, the court must hold an evidentiary hearing on the issue. However, the defendant must first make a "substantial preliminary showing" that a knowing and intentional false statement, or one make with a reckless disregard for the truth, was included by the affiant in the warrant affidavit, and that the allegedly false statement is necessary to the finding of probable cause. If it is an omission that is alleged, it must be shown that whatever was omitted was a "material fact;" i.e., something that made the affidavit substantially misleading.

Omitted from the affidavits in this case was the fact that defendant married someone else after Rasmussen's murder, and that she had no further contacts with Ruetten. Nor did the affidavit note that defendant had changed residences since the murder. The Court found such omissions to be irrelevant to the magistrate's determination of probable cause.

(4) *Admissibility of Defendant's Interview*: Defendant was interviewed by detectives on June 5, 2009, after her DNA was matched to that found in the bite mark on the victim's arm. Defendant did not contest that she was not in custody at the time, or that *Miranda* applied. Her argument instead was that the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.; POBRA) was not adhered to, and that the statements she made during that interview were "coerced" and should not have been admitted into evidence against her. Under *Garrity v. New Jersey* (1967) 385 U.S. 493, any statement made by a police officer during an administrative interview, where she is required to answer questions under threat of departmental discipline should she refuse, is considered "coerced," and inadmissible in any later criminal prosecution of that officer. Defendant here argued that under *Garrity*, she should have been advised that her statements were inadmissible in a criminal prosecution. The Court disagreed, holding that under the circumstances it was not "objectively reasonable" for her to believe that she was merely the

subject of an internal investigation or that this was only an administrative interview, as opposed to a part of a criminal investigation. *Garrity* and POBRA are not relevant when a police officer is questioned during a criminal investigation unrelated to the administrative collection of information during an internal investigation. Defendant's statements were provided voluntarily and not "coerced" under threat of being disciplined if she refused. Her statements, obtained in a non-custodial interview, and voluntarily provided, were properly admitted into evidence.

Note: This is a long case decision covering a lot of important issues. Of particular note is the ruling on "staleness" of the information used in the warrant affidavits, including information that was some 23 years old. Basically, what the Court found here was that on not much more than an affiant's expert opinion that because the evidence sought by a warrant consisted of items or information people typically hold onto for years (e.g., guns, photos and information about past lovers, etc.), it is reasonable to expect that these things might still be found in a defendant's car, her home, or her computers, even though she has changed cars, homes, and computers over the years. As it turned out, the affiant was right.

I also skipped a whole section dealing with the admissibility of DNA evidence found under the victim's fingernails, using a DNA test kit known as "MiniFiler." If DNA is your interest, I recommend you read the case decision at pages 777 to 788. There's also a section I skipped on "third party culpability" (pages 788 to 791) where the court disallowed evidence, proffered by the defendant, of a residential burglary occurring weeks after the murder and involving suspects other than defendant, due to the *dissimilarity* of the two crimes.

"Third party culpability" is evidence a defendant will often try to get before the jury in a "who done it" case, arguing that given the similarity between the charged crime and some other incident involving other suspects, we are prosecuting the wrong person. Where allowed such evidence can thoroughly confuse a jury and pull the rug out from underneath a prosecution; an Evidence Code section 352 issue. So it's important for prosecutors to know the standards involved and how to successfully preclude the admission of such evidence.

***Miranda*; *The Non-Custodial Interrogation*:**

People v. Morales **(July 14, 2015) 238 Cal.App.4th 814**

Rule: A *Beheler* admonishment, telling a questioned criminal suspect that he is not in custody, is not always enough to excuse the lack of a *Miranda* admonishment and waiver.

Facts: Victim Jesus Trejo mysteriously disappeared from his apartment in Fontana, California, over the weekend of January 14-16, 2011. His roommate, Nelson Rizo, became concerned when, upon returning from a weekend job, he noticed that both Trejo and Trejo's prized red convertible Mustang were missing. He also smelled a foul odor and noted that Trejo's bedroom door was locked. Calling around to friends, Rizo discovered that defendant had been seen by several people driving Trejo's Mustang and using his cell phone. Defendant told others that he was using Trejo's Mustang with his permission after he (Trejo) had been arrested; an assertion that was soon proven to be false.

With the help of a locksmith, Trejo's room was finally entered, finding Trejo's decomposing and bloodied body. It was subsequently determined that Trejo had died from blunt force trauma to the head. A large bloody stick was found nearby. The resulting investigation led to defendant who, as a "person of interest," was contacted at his work on Thursday, January 20. When informed that defendant had been located, San Bernardino Sheriff's Department Detective Armando Castillo instructed at least five plainclothes officers to "stand with" him until he arrived.

Detective Castillo, when he got there, asked defendant if he'd be willing to go to the police station "to talk real quick." Defendant was told that he was not under arrest, or even detained. He agreed to go with the detective, riding with him in the front seat, unhandcuffed, and without having been searched. They made small talk during the 20-mile drive to the station. Once at the station, Defendant was offered the use of the bathroom and asked if he wanted something to eat or drink. In an interrogation room, with Detective Castillo being assisted by Detective Jose Avila, it was reiterated several times to defendant that he was neither under arrest nor being detained and that "[i]f at any moment [he did] not want to speak with [the detectives, he could] leave." Defendant was not *Mirandized*. The questioning began by seeking general information about defendant, his employment, etc., and his relationship to Trejo. It wasn't until defendant asked why they were asking him about Trejo that they told him that he'd been murdered.

During the ensuing interrogation, defendant repeatedly denied killing Trejo. He also initially denied driving Trejo's car, but soon changed his story to having been given the car by someone named Jorge Rodriguez. When asked about having the victim's cell phone, he claimed to have taken it from Trejo's apartment on Sunday after finding the door open and no one home. Asked if he would take a polygraph test to help eliminate him as a suspect, defendant eventually (after saying that he'd never heard of such a test) agreed to take the test. The test was administered by an examiner identified only as "Heard." Heard told defendant that he was not being forced to take the test, but that it was important for him to tell "the truth, the pure truth."

During the administration of the test, defendant continued to deny having murdered Trejo. Afterwards, Heard, in effect, told defendant that he did not pass the test; that the tests "were not turning out well." As defendant repeatedly denied killing Trejo, Heard told him a number of times that "the truth was missing." At one point, defendant apparently started to get up because the transcript reflects that he was told to "sit down (and) listen." Detective Castillo eventually came into the examination room and, in response to defendant saying that he knew he was going to be going to jail, Castillo told him again that he was not under arrest or being detained. However, defendant was also told that the detective had talked to "ten different people," that he already knew what the truth was, that he knew defendant was lying, and that "the machine does not lie." Defendant was taken back to the interrogation room where Detectives Castillo and Avila renewed the interrogation. With the two detectives sitting between defendant and the door, they told him that they knew he was lying because his story did not jive with what other people had told them and because they had the phone records from the victim's cell phone which defendant had used after Trejo had been murdered.

Finally, after being told; "Listen, the questions that I am asking you, I already know the answer to. I don't have you here just to have you here," defendant began to weaken. He then admitted

to the detectives that he and Trejo had in fact argued over money and that when Trejo wouldn't let defendant make something to eat, the argument "went to blows." Defendant was finally read his rights pursuant to *Miranda v. Arizona* several hours later, which he waived. During the ensuing questioning, he admitted to striking Trejo several times with a heavy stick, but claimed it was in self-defense. Four days later, Detective Castillo contacted defendant again, this time at the courthouse just before he was arraigned. Without a new *Miranda* admonishment, telling defendant only: "(R)egarding the rights that I told you, right? And are we good, willing to talk?", defendant was again questioned. Defendant backed off of his self-defense claims telling Detective Castillo that he "got into it" with the victim after an argument during which he got angry and killed Trejo. Defendant then apologized and expressed regret for the crime. Charged with murder, defendant's motion to suppress his statements was denied by the trial court. He was convicted of second degree murder (P.C. § 187(a)) with a true finding on an allegation that he personally used a deadly and dangerous weapon (P.C. § 12022(b)(1)). Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. At issue on appeal was the admissibility of defendant's statements made to the investigators while being questioned; (1) before he was *Mirandized*, (2) after he was *Mirandized* but when still part of the initial interrogation, and (3) four days later at the courthouse. Whether or not defendant's statements were admissible depends upon whether he was "in custody" at the time in issue. Determining whether a suspect is in custody is based on the "objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."

A person is in custody and must be *Mirandized* if a reasonable person under the circumstances would have felt that he was not free to end the questioning and leave. In this case, defendant was asked if he'd voluntarily come to the police station "to talk real quick." He was repeatedly told that he was not under arrest, or even detained, and that he could end the questioning and leave whenever he wanted. When transported to the station, he was neither searched nor handcuffed, while sitting in the front seat engaging in casual conversation with the detective. He was offered food, water, and a bathroom break. Up until the administration of a polygraph test, the questioning remained for the most part non-confrontational. During this time, any questioning done was in a non-custodial context, thus *Miranda* did not apply. But upon completion of the polygraph, the examiner made no secret of the fact that he didn't believe defendant was telling the truth. At one point, defendant was "commanded" to "sit down (and) listen." He was told to stop lying about not being involved in the murder because "that [didn't] slide" in light of the results of the polygraph test.

The Court concluded that at this point, defendant no longer felt free to leave, as evidenced by his comments immediately thereafter to Detective Castillo that he knew he was going to jail. To the Court, it appeared that defendant had "given up." Despite being told again that he was not under arrest, the continuing interrogation by Detectives Castillo and Avila became very aggressive, confrontational, and accusatory. Per the Court: "We conclude the tone of the questioning post-polygraph, the positioning of the officers in the interview room, the length of the interrogation and Castillo's admission that police already knew the answers to the questions they were asking defendant and that they did not have defendant there 'just to have [him] [t]here,' further support our conclusion that defendant was then in custody for purposes of *Miranda*." No reasonable

person would have believed at this point, after the completion of the polygraph, that he was not in custody for purposes of *Miranda*. Because he was not *Mirandized* until several hours later, all statements after the polygraph examination (including that he and Trejo "went to blows"), but before receiving a *Miranda* admonishment, should have been suppressed. After defendant was read his *Miranda* rights, he further incriminated himself by admitting that he hit Trejo with a "big stick," although claiming to have done so in self-defense.

In *Oregon v. Elstad* (1985) 470 U.S. 298, the United States Supreme Court held that an officer's initial failure to administer a *Miranda* warning does not automatically taint the subsequent statements of the defendant, so long as they were made after he is given a proper advisement and voluntarily waives such rights. Per *Elstad*: "(A)bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" with respect to later statements obtained after a *Miranda* advisement. The Court here, however, held that defendant's initial un-*Mirandized* statements failed to satisfy the requirements of *Elstad*. In other words, they were not obtained in the absence of "deliberately coercive or improper (police interrogative) tactics," but were rather the product of an aggressive, confrontational, and accusatory interrogation.

With the interrogation continuing after defendant was finally *Mirandized*, and after he had made at least one inculpatory admission of guilt (i.e., that he and the victim had "come to blows") obtained through police coercion, the "cat was out of the bag," leaving defendant with no reason, in his mind, to invoke his right to silence. A *Miranda* waiver under such circumstances is not "knowing(ly) and intelligent(ly) made," and is invalid. Defendant's post-*Miranda* admissions, therefore, were also involuntary and should have been suppressed. Lastly, the Court also ruled that defendant's admissions made to Detective Castillo at the courthouse four days later should have been suppressed. With his earlier waiver having been held to be invalid, whether or not the subsequent interrogation was "reasonably contemporaneous" with a prior waiver, and whether he still had his rights in mind (the test for the admissibility of subsequent admissions) four days later, was held to be irrelevant. There having been no prior waiver upon which to base the admissibility of subsequent statements, whether or not the "reasonably contemporaneous" rules applied to this case, was not necessary to decide. Finding the admission into evidence of defendant's inculpatory statements to be prejudicial under the circumstances of this case, defendant's conviction was reversed and remanded for a new trial.

Note: We commonly refer to such attempts to take the custody out of an interrogation as a "*Beheler* admonishment," under principles relative to non-custodial questioning as set out in the U.S. Supreme Court case of *California v. Beheler* (1983) 463 U.S. 1121. The courts generally uphold such efforts, so long as an officer makes it clear to the suspect that he's not under arrest and is free to terminate the questioning whenever he wants. The theory behind this practice is that no reasonable person would believe he's in "*Miranda* custody" after having been specifically told that he's free to go whenever he wants. The problem is that some law enforcement officers, forever seeking "black-or-white" rules that can be easily applied to any situation, have determined on their own that once a subject is given a *Beheler* admonishment, that's the end of the issue. *Not so*, I'm afraid. If life were only so simple.

To the contrary, a *Beheler* admonishment is but one factor to consider in looking at the "totality of the circumstances" when determining whether a reasonable person would have believed, under those particular circumstances, that he is or is not in custody for purposes of *Miranda*. As illustrated by this case, an aggressive, accusatory, and confrontational questioning, such as occurred here, may be enough to overcome a *Beheler* admonishment, thus triggering the need for a *Miranda* advisal despite the suspect having been told he was free to leave. Also important to note here is how easily a non-custodial questioning can morph, before your very eyes, into a situation where a *Miranda* warning and waiver is legally necessary in order to continue on. A police interrogator must remain sensitive to this fact of life and, when in doubt, be ready to stop, take a breath, talk about it with your peers (or call me) if necessary, and consider the need to admonish the suspect before continuing. If that had been done here, we would likely be talking about a different result.

***Resisting Arrest, per P.C. § 148(a)(1)*:**
***Arrests; Use of Excessive force*:**

***Velazquez v. City of Long Beach* (9th Cir, July 15, 2015) 793 F.3rd 1010**

Rule: Verbally offending a police officer is not a violation of P.C. § 148(a)(1). Neither is resisting an unlawful arrest. But the lawfulness of an arrest, where the evidence is conflicting, is a matter for a civil jury to decide. The degree of force an officer may use in effecting an arrest depends upon the circumstances including whether the arrest was lawful.

Facts: Plaintiff Alejandro Velazquez celebrated his birthday on October 24, 2009, drinking alcoholic beverages most of the day. By 3:30 am on the next morning, he was still up and still drinking with eight to ten of his best friends, standing in the street in front of his Long Beach residence where he lived with his mother. Calls from neighbors brought the police out to tell the group to move the party inside and turn off the music. Officers Kalid Abuhadwan and Martin Ron responded to a second call with the same complaint. The officers, at that time, intended only to issue another warning and convince everyone to just quiet it down and move it inside.

Everyone cooperated with the officers except for Velazquez, who, while leaning on a car and appearing to be under the influence of alcohol (but not drunk), responded to Officer Abuhadwan's requests with a sarcastic, "*yeah, sure*." Taking this to mean that Velasquez did not intend to comply, Officer Abuhadwan decided to detain him for being drunk in public. Officer Abuhadwan could smell alcohol on Velasquez from four feet away and noted his watery eyes. He therefore commanded Velazquez to place his hands behind his head (an order Officer Ron and other witnesses all testified that they did not hear) so he could conduct a "cursory" search, telling Velazquez that he was "being detained for [being] drunk in public." Velazquez replied with an expletive (which, again, Officer Ron and other witnesses testified to not having heard), leading the officer to believe that he had no intention of complying. After Officer Abuhadwan repeated the command, Velazquez replied; "*I ain't doing that. We don't got to leave*." So Officer Abuhadwan applied a "twist lock" on Velazquez and started moving him to the patrol car.

As he did so, Velazquez began to "sort of pull away." So Officer Abuhadwan executed an "arm bar takedown," forcing Velazquez to the ground. However, Velazquez was able to roll over onto

his back, facing the officer, with his fists clenched to his chest and his legs up in the air in a bicycle position, indicating to Officer Abuhadwan that Velazquez was ready to "ground fight" him. At this point, Officer Abuhadwan decided to arrest Velazquez for a violation of P.C. § 148(a)(1); resisting arrest.

When Velazquez failed to comply with the officer's orders to roll over onto his stomach and place his hands to his side, Officer Abuhadwan used his baton to force compliance, hitting Velazquez on his shoulder, lower back and buttocks area, left bicep, and hands; a total of eleven times. Velazquez eventually got the idea and complied. He was handcuffed and transported to the police station. Other witnesses to the event testified that no one was drinking by the time the officers arrived. They claimed that Velazquez never displayed an uncooperative attitude, asking the officer only "*what's up*?" or "*what's going on*?", and that Officer Abuhadwan accosted Velazquez, throwing him to the ground and beating him with his baton for no reason. At the station, Velazquez submitted to a breath test, showing a blood-alcohol level of .15%. It was also noted at that time that Velazquez had suffered some injuries requiring hospital treatment, resulting in surgery for injuries to his finger and sutures on his ear. Velazquez also suffered significant bruising on his arms, chest, and shoulder areas, as well as "intense" pain throughout his body.

He was discharged from police custody after he left the hospital and was never criminally charged for any offense in connection with this incident. He later sued the officers and the City of Long Beach in federal court under 42 U.S.C. § 1983, alleging that the officers unlawfully arrested him while using excessive force, in violation of the Fourth Amendment. After a jury trial, the district (trial) court dismissed the unlawful arrest allegations, letting the jury decide the excessive force claim. The jury returned a verdict for the defendant officers on this issue as well. Plaintiff Velazquez appealed.

Held: The Ninth Circuit Court of Appeal reversed. (1) *Unlawful Arrest*: The trial court had granted the civil defendants' (the officers') Federal Rules of Civil Proc., Rule 50(a) motion as to the unlawful arrest allegation, finding the that officers had probable cause to arrest plaintiff for resisting arrest, and that there was *no* credible evidence to support plaintiff's allegation to the contrary. Stated in another way, the trial court held that "a reasonable jury could not have found that Abuhadwan lacked probable cause to arrest Velazquez for resisting a police officer, in violation of California Penal Code Section 148(a)(1)." In granting such a motion, as a "directed verdict" in the defendants' favor, the trial court removed this issue from those to be decided by the civil jury even though they'd already heard all the evidence.

The Ninth Circuit ruled that the trial court was wrong in doing so in that for purposes of such a motion, the court is not supposed to weigh the evidence, but rather assume the truth of the non-moving party's allegations so long as supported by some evidence (whether it is believable or not). In this case, plaintiff (as the non-moving party) alleged that he did nothing to provoke the arrest. Witnesses (including Officer Ron in some respects) supported the plaintiff in this regard. "Velazquez indisputably presented significant evidence at trial tending to show that he did not in fact disobey or impede Abuhadwan in the ways Abuhadwan maintained and the district court found." The trial court improperly discredited this evidence in dismissing the unlawful arrest

allegation. In overruling the trial court, the Ninth Circuit provided an interesting review of the law on California's resisting arrest statute; P.C. § 148(a)(1).

Section 148(a)(1) provides that: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, . . . shall be [guilty of a misdemeanor]." The element at issue here was whether plaintiff "resist(ed), delay(ed), or obstruct(ed)" Officer Abuhadwan in the performance of his "duties." Even if plaintiff had resisted Officer Abuhadwan in some way, this element is missing if the arrest that was resisted was illegal; i.e., effected without probable cause. "The longstanding rule in California . . . is that a defendant cannot be convicted of an offense against a peace officer 'engaged in . . . the performance of . . . [his or her] duties' unless the officer was acting lawfully at the time the offense against the officer was committed." This is because an officer does not have a "duty" to act unlawfully. The Ninth Circuit also noted that swearing at a police officer, or verbally criticizing an officer, does not constitute a violation of P.C. § 148. "(T)he right verbally to challenge the police," and "verbal protests [cannot] support an arrest under § 148."

Also, "Section 148 does not criminalize a person's failure to respond with alacrity to police orders." ("Alacrity" means to act immediately or swiftly; I had to look it up.) It is also the law that using profanity or making obscene gestures at an officer is not illegal, and in fact is protected speech under the First Amendment. In sum, plaintiff's verbal actions in this case, even if they occurred as Officer Abuhadwan claimed, did not, by themselves, constitute a crime justifying his detention or his arrest (ignoring whether or not he might have been drunk in public).

(2) *Excessive Force*: The trial court allowed the excessive force issue to go to the jury. The jury in turn ruled in the defendant officers' favor. The Ninth Circuit also reversed this finding in that because the unlawful arrest issue was removed from the jury's consideration, the jury was prejudiced in its finding that there wasn't any excessive force used in making that arrest. The degree of force used under any particular set of circumstances includes a consideration of the lawfulness of the arrest. "(T)he facts that gave rise to an unlawful detention or arrest can factor into the determination whether the force used to make the arrest was excessive." Although the fact that a particular arrest may have been unlawful (i.e., without probable cause) does not necessarily mean that the amount of force used in making that arrest was excessive, it is still something the jury should have been allowed to consider.

"(T)he facts underlying the seizure are pertinent in judging the overall reasonableness of the seizure (i.e., the arrest) for Fourth Amendment purposes, including the reasonableness of the force used to effectuate the seizure." By removing the unlawful arrest issue from the jury's consideration, "effectively require(ing) the jury to presume the arrest was constitutionally lawful," the trial court precluded the jury from properly considering this issue. That was error, requiring the case to be remanded for a new trial.

Note: I don't often brief these types of Ninth Circuit cases where all they do is find that a civil jury should have been allowed to decide the issue. Given the nature of these "directed verdict" or "summary judgment" rulings, where the crook/plaintiff's version of the facts is presumed to

be true, they seldom really tell us whether a particular arrest was lawful or that the force used was reasonable, saying only that it is an issue for the jury to decide. But I felt that the elements of P.C. § 148, so completely reviewed here, warranted a refresher course for all of us. The inference was that the arrest here may have been an "attitude arrest," although the jury apparently didn't think so as evidenced by their reasonable force verdict, despite the Ninth Circuit's reversal. The new trial should resolve this question. But I suspect, given the fact that it was Velasquez who had been drinking for some 12 hours or more as well as comments the trial judge made concerning Velasquez's lack of credibility and that it appeared that all his witnesses had been prepped in how to testify, the result will be the same.