The California Legal Update

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

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This Edition of the *California Legal Update* is dedicated to the memory of those lost in the 10/1/17 Las Vegas Massacre, and in honor of the many heroes, in and out of uniform, who risked all, and in some cases *gave* all, to save others.

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THIS EDITION'S WORDS OF WISDOM:

"*Tact is the ability to tell someone to go to hell in such a way that they look forward to the trip.*" (Winston Churchill)

IN THIS ISSUE: **pg.**

ADMINISTRATIVE NOTES:

***Booking Questions re Gang Affiliation*:** Just two years ago, the California Supreme Court decided that a defendant's un-*Mirandized* responses to booking questions concerning his gang affiliation (typically asked for purposes of jail classification and safety) are *inadmissible* in the prosecution's case-in-chief if those questions were asked under circumstances where the booking officer should have known that such questions are reasonably likely to result in incriminating statements. (*People v. Elizalde et al.* (2015) 61 Cal.4th 523: See *Legal Update*, Vol. 20, #7, July 5, 2015.) Since then, a number of new lower appellate court case decisions, not all of which are consistent in their conclusions, have come down on this issue. Rather than briefing each in redundant detail, I'm simply summarizing them for you all right here:

(1) *People v. Leon* (Jan. 13, 2016) 243 Cal.App.4th 1003, at pages 1010-1017: The Fifth District Court of Appeal applied *Elizalde* in ruling that the individual defendants' (there were four of them in this case) admissions concerning his respective gang affiliation were *not* admissible (although harmless error in this case) when obtained during routine booking interviews done for the purpose of figuring out where to house the inmate and to determine his job classification. The *Leon* court, however, also held that (a) the individual defendants did not have standing to challenge the admissibility of the booking interview admissions made by the other three defendants (a Fifth and Fourteenth Amendment "due process" issue), and (b) that each defendant's admissions, not being "*testimonial*" in nature (a Sixth Amendment, confrontation issue), could be used by gang experts in rendering a legal opinion that the defendant was in fact a member of a criminal street gang.

(2) *People v. Lara* (Mar. 6, 2017) 9 Cal.App.5th 296, at pages 335-337: The Third Appellate District held that routine gang affiliation questions asked during the process of booking a defendant into jail amounted to an interrogation for purposes of triggering his or her *Miranda* rights, as dictated by *Elizalde*. This is because such questions are reasonably likely to elicit an incriminating response in light of California's comprehensive scheme of penal statutes aimed at eradicating criminal activity by street gangs. The Court here, however, also held that aside from the booking interview issue, a defendant's on-the-street admissions to his gang affiliation contained in response to a "*Step notice*" (California Street Terrorism Enforcement and Prevention Act; "STEP Act;" P.C. § 186.20 et seq.), informing him he was associating with a known gang, was both inadmissible hearsay and, when used by a gang expert as a basis for his opinion that defendant was indeed a gang member, a violation of the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36. (See "*Legal*

Update: *Sixth Amendment Right to an Attorney and to Confrontation*," available on request.) *Crawford* held that a person's out-of-court hearsay statements, at least when "*testimonial*" in nature (which includes those obtained in preparation of a contemplated criminal prosecution), are inadmissible in court.

(3) *People v. Villa-Gomez* (Mar. 9, 2017) 9 Cal.App.5th 527, at pages 536-538: Three days after *Lara*, the Third District Court of Appeal decided that there was *no* Fifth Amendment/*Miranda* error in admitting defendant's statements concerning his gang affiliation in response to jail classification questions while defendant was in custody on an immigration hold where his responses were to be used later in a case not yet filed. The Court reasoned that because the questions, under the circumstances of this case, were not reasonably likely to elicit an incriminating response, *Miranda* did not prevent the admission of defendant's statements into evidence. The circumstances the Court was talking about was the fact that the crime for which defendant was prosecuted in which his admissions were used had not yet been committed at the time he answered the classification deputy's questions. To cover its bases, however, the Court also held that even if it was error to admit the gang affiliation statements, such error was harmless in light of other uncontradicted evidence of his gang membership.

(4) *People v. Roberts* (July 18, 2017) 13 Cal.App.5th 565 at pages 572-579: Close on the heels of *People v. Villa-Gomez*, the Fourth District Court of Appeal ruled that *Villa-Gomez* should be limited to its facts. Under circumstances that are hard to differentiate, despite the Court's attempt to do so, the Court held that *Elizalde* precludes the admission of certain un-*Mirandized* statements defendant made during custodial booking interviews that took place years before the charged crimes. In reversing the jury's finding as to the gang enhancement, the *Roberts* Court noted: "[W]e conclude that a *Miranda* violation does not evaporate with the passage of time such that the statements become cleansed and admissible as to future misdeeds."

(5) *United States v. Williams* (9th Cir. Dec. 5, 2016) 842 F.3rd 1143, 1146-1150: The Ninth Circuit Court of Appeal appears to be in accord with *Roberts* on this issue, holding even before *Roberts* was decided that booking questions about a defendant's gang affiliation, asked in the general interest of inmate safety (i.e., for jail classification purposes), are reasonably likely to elicit an incriminating response even if federal RICO charges, where his admissions were to be used, had not yet been filed. On a side issue, the Court also held that the so-called "*public safety exception*" to the *Miranda* rule did not serve to save the defendant's responses.

(6) *United States v. Zapien* (9th Cir. July 3, 2017) 861 F.3rd 971: In this case, defendant invoked his *Miranda* right to counsel mid-interrogation, at which time all questioning concerning the cause of defendant's arrest ceased. However, telling defendant that he was not going to ask anything "about the case, about the evidence," but that he needed some information to "fill out the form," the detective then began to ask defendant

questions concerning biographical information such as his name, birth date, and residence, and the names of his wife, parents, and children. As he was doing so, defendant changed his mind about having invoked, waived his rights anew, and made certain admissions that were used against him at trial. Noting that the "routine gathering of background biographical information, such as identity, age, and address, usually does not constitute interrogation," the Court, in upholding the admissibility of defendant's subsequent incriminating responses, invoked the "booking exception," describing it as "an exemption from *Miranda's* coverage for questions posed to secure the biographical data necessary to complete booking or pretrial services." (Internal quotes deleted.) No gang affiliation questions were asked in this case.

Conclusion: If I were to summarize these cases, I'd have to say that looking at the central issue—i.e., *were the circumstances such that a booking officer should have reasonably believed that his questions would lead to incriminating responses*?—we find two general rules: (1) A defendant's responses to booking questions related to gang affiliation *are not* admissible into evidence, absent an exception. (E.g., see the pre- *Elizalde* case of *People v. Williams* (2013) 56 Cal.4th 165, 183-186 (See *Legal Update*, Vol. #19, No. 5; May 2, 2014), where defendant himself initiated the discussion of his gang-related affiliation by asking prison guards for protection from another inmate whose relatives he had murdered, and the incriminating gang-affiliation statement coming in response to the officer's question about why he was being threatened.) (2) An inmate's incriminating responses to booking questions on any other topic, such as in gathering general biographical information, *are* admissible into evidence, absent an exception. At least as of this date, there is no case yet extending the *Elizalde* theory to general booking question responses other than those related to a defendant's gang affiliation, leaving us with the general rule that such booking question responses *are* admissible in evidence. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582; *United States v. Washington* (9th Cir. 2006) 462 F.3rd 1124; *People v. Hall* (1988) 199 Cal.App.3rd 914, 920-921; *United States v. Zapien*, *supra*.) An exception to either rule will depend upon an analysis of the above question concerning whether the officer should have reasonably believed, under the circumstances, that his questions would lead to an incriminating response.

CASES:

***Carjacking, per P.C. § 215(a); Force*:**

People v. Lopez **(Feb. 24, 2017) 8 Cal.App.5th 1230**

Rule: Even if there is no evidence that the illegal taking of a motor vehicle was accomplished by means of fear, a carjacking still occurs when the force applied is that which is sufficient to overcome the victim's resistance.

Facts: Sixty-five-year old Aurora Prado drove her Toyota Highlander to the El Super market in La Puente and started to park it in a parking space when she noticed it being blocked by two shopping carts. Getting out of her car to move the carts, she left the door open and the engine running. Unable to pass up such an open invitation, defendant (also a female) climbed into the driver's seat and shut the door. Prado grabbed onto to the door handle and pleaded with defendant not to take her car. Holding the door shut, defendant began to back up the car up with Prodo still holding the door handle. Prado later testified that defendant backed the car fast enough to screech the tires, almost causing her to lose her balance. She finally had to let go of the door handle as defendant "sped off." The whole incident was recorded on a parking lot surveillance camera. Two days later, defendant was contacted by the police still in possession of the car. When later interviewed by a Los Angeles County Sheriff's detective, defendant admitted to stealing the car from the victim. Prado also identified defendant at trial as the car thief. Convicted by a jury of carjacking (P.C. § 215(a)) and sentenced to prison, defendant appealed.

Held: The Second District Court of Appeal (Div. 8) affirmed. To convict a person of carjacking, it is required that the prosecution prove that defendant committed the following: "(t)he felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, *accomplished by means of force or fear*." (Italics added.) The only issue on appeal was the sufficiency of the evidence to prove this final element; "*force or fear*." Not arguing that there was any "fear" involved (so not decided by the Court), the People submitted that what defendant did constituted sufficient "*force*" to meet this element. To date, there is no case authority as to what constitutes "*force*" for purposes of the carjacking statute, and the statute itself does not tell us. But there is such authority under the general robbery (P.C. § 211) statute, "(g)iven that both crimes are 'accomplished by means of force or fear.'" If anything, the carjacking statute reflects a heightened concern for safety given the nature of the offense. With these principles in mind, the Court cited the general rule that in any robbery, the force necessary to make it a robbery need not be great. All that is needed is that the force used is such force as is actually sufficient to overcome the victim's resistance. Here, defendant argued that she didn't use any more force than was necessary to just drive the vehicle away. The prosecutor, on the other hand, argued that the speed at which the car was driven constituted sufficient force to make it a robbery. The Appellate Court agreed with the prosecutor, but held that even that was not needed. It is the victim's physical resistance to the taking of the car that converted what otherwise would have been a simple theft into a robbery, regardless of the amount of force defendant herself used. It is the "potential for harm (that) makes it appropriate to treat the taking of a vehicle more severely when the victim physically tries to stop the vehicle, even if the only force the perpetrator applies is the force necessary to move the vehicle." Here, Aurora Prado held onto the outside door handle until to continue to do so would have knocked her down. Given that circumstance, the taking of her car constituted a theft by force, and a carjacking.

Note: This decision seems like a "give me," but leave it to the attorneys to argue any esoteric theory they can come up with. Even so, we have to be able to satisfy those nitpicking concerns if

we are to enforce the statutes as they were intended. Here, Aurora Prado obviously resisted the taking of her car by holding onto the door handle and pleading with defendant not to take her car. Defendant overcame that resistance by driving away anyway, almost knocking Prado down in the process. Applying a little common sense, this is obviously enough "force" to satisfy any robbery or carjacking concerns. But we needed a case to dig through the nitpicking to get there. This is that case.

***Search Warrants and Material Omissions*:**
***Child Pornography*:**

United States v. Perkins **(9th Cir. Mar. 13, 2017) 850 F.3rd 1109**

Rule: Intentionally or recklessly leaving out material facts in a search warrant affidavit will require the reevaluation of probable cause after those omissions are included. The nudity alone of a child in a photograph does not necessarily, by itself, constitute "lasciviousness" for purpose of the federal pornography statutes.

Facts: On December 29, 2012, the 52-year-old defendant, his wife and his mother-in-law, were traveling through the Toronto International Airport on their way to their home in Washington State, following a trip to Chile. Officers of the Canadian Border Services Agency (CBSA) stopped defendant upon learning that he was a U.S. registered sex offender with a 1987 first-degree incest conviction and a 1990 first-degree child molest conviction. Upon checking defendant's laptop computer that he had with him, two images of partially or totally nude young girls (13 to 15 years old) were found. One picture showed the minor's breasts while the other showed a "small portion" of her vaginal area and her breasts. Defendant was arrested for possession of child pornography. A CBSA Constable later obtained a Canadian search warrant for defendant's computer and other items he had with him, finding nothing other than the two photos. He determined that in his opinion, there was no clear and obvious sexual purpose to the pictures, which means they did not meet the child pornography requirements of the Criminal Code of Canada. The charges were dropped and defendant was released. However, the case, along with the two photos in question, was forwarded to Special Agent Tim Ensley of the United States Department of Homeland Security. Prior to viewing the images, Agent Ensley drafted a search warrant affidavit using the information contained in the Canadian reports, asking the court for a warrant to search all the digital devices in defendant's Washington State home. However, the warrant affidavit failed to include the fact that defendant had been un-arrested in Canada and that all charges were dropped based upon a determination by the Canadian authorities that the images were not pornographic. Agent Ensley later testified that he left this information out of the affidavit because he didn't believe that Canadian standards were relevant to a determination of what is pornographic under U.S. law. Agent Ensley eventually viewed the photos himself, subsequently adding to his draft affidavit a verbal description of both, concluding that in his opinion at least the second image (i.e., the one that showed a portion of the young girl's vaginal area) met the federal definition of child pornography. He did not include copies of the photos themselves. The magistrate issued the warrant. The subsequent search of defendant's computers

found in his home resulted in the discovery of more than 600 images and 10 videos of child pornography. He was therefore charged in federal court with one count of the receipt of child pornography and one count of possession of child pornography. Defendant filed a motion to suppress, arguing that the warrant affidavit lacked probable cause (an issue not decided). In the alternative, defendant argued that he was entitled to a "*Franks hearing*" (*Franks v. Delaware* (1978) 438 U.S. 154; see below.) on the issue of whether Agent Ensley had deliberately or recklessly omitted material facts from the affidavit. The trial court denied defendant's motion and upon a plea of guilty, sentenced him to 15 years in prison. Defendant appealed. In an unpublished decision, the Ninth Circuit reversed (*United States v. Perkins* (9th Cir. 2014) 583 F. App'x 796.), ruling that defendant was entitled to an evidentiary *Franks* hearing on the issue of whether Agent Ensley had intentionally or recklessly failed to include certain facts in his affidavit. The case was remanded to the trial court for a *Franks* hearing. Upon holding the *Franks* hearing, where Agent Ensley testified that it was the "general practice" in the Western District of Washington not to provide copies of the images at issue to the search warrant magistrate, and that he omitted the fact that Canadian authorities had dropped the charges against defendant because he believed this fact was "irrelevant to [his] development of probable cause in the U.S., based on U.S. laws," the trial court again denied defendant's motion to suppress. Defendant once again appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed the trial court a second time, ruling that defendant's motion to suppress should have been granted. In Agent Ensley's affidavit, he opined that the second image met the federal definition of child pornography, as that phrase is described in 18 U.S.C. § 2256(2)(A)(v). This section contains a requirement that to be pornographic, the image depicted must include a "lascivious exhibition of the genitals or public area of any person." Whether or not a photograph is "lascivious" is a very subjective determination. Generally, the magistrate himself should be allowed to see the offending image in order to make such a determination. In this case, Agent Ensley included in his affidavit a description of the photos only, along with his personal (subjective) opinion that at least one of the photos was "lascivious." The magistrate never saw the photos himself. The purpose of a *Franks* hearing is to allow a defendant to challenge, and the trial court to evaluate, the veracity of statements made in support of an application for a search warrant. In order to prevail on a *Franks* challenge, the defendant must establish two things by a preponderance of the evidence; (1) that the affiant officer intentionally or recklessly made false or misleading statements *or omissions* in support of the warrant. (A negligent or innocent mistake does not justify the suppression of the warrant), and (2) that the false or misleading statement *or omission* was "material," i.e., necessary to the finding of probable cause. This means that if after correcting an intentional or reckless statement or omission there is still sufficient probable cause to support the issuance of the warrant, then the defendant's motion must be denied. If both requirements are met, however, the search warrant must be voided and the fruits of the search excluded. The majority of the Court here held that defendant, as a matter of law, met both of these requirements. (The dissenting opinion disagreed on all points.) (1) *Intentional or Reckless Omission*: An officer presenting a search warrant application to a judge for approval has a duty to provide, in good faith, all relevant information to the magistrate. Agent Ensley omitted from

the search warrant application the fact that Canadian authorities had dropped the child pornography possession charge because the images, under Canadian law, at least, were not considered to be pornographic. Also, Ensley left out important portions of the Canadian Constable's description of the picture in question. And perhaps most importantly, the affidavit did not contain copies of the images for the magistrate himself to consider. As a result, the magistrate was misled, per the majority opinion, leaving him with the impression that at least the one picture was unequivocally "lascivious," and thus child pornography. The fact that Agent Ensley felt that the legal opinions of the Canadian authorities were not relevant to the question of probable cause under U.S. law was held to be irrelevant. The magistrate should have been accorded the opportunity to evaluate all this information himself. He was not. The majority opinion found this all to constitute at the very least a reckless disregard for the truth, specifically holding that Agent Ensley "selectively included information bolstering probable cause, while omitting information that did not." (2) *Materiality*: Under the second step of *Franks*, the question is whether the omitted fact is "material;" i.e., whether it was "necessary to the finding of probable cause." The key inquiry is "whether probable cause remains once the evidence presented to the magistrate judge is supplemented with the challenged omissions." The majority opinion here held that had the actual photograph in question been given to the magistrate, and had Agent Ensley included the other omitted facts—the dropping of charges by the Canadian officials and the Canadian Constable's own comments about the case—there would not have been sufficient probable cause to justify the issuance of the warrant. The most important omission was that of the photographs themselves. Prior case law establishes the factors to consider when determining whether a photograph constitutes child pornography. Those factors include (but are not limited to): (1) Whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. Only one of the pictures in this case was argued as being pornographic. And even in that one, the image lacked any traits that would make it sexually suggestive other than the fact that the child was completely nude, as the Canadian Constable had concluded. Nudity, by itself, even of a child, does not necessarily make it pornographic. Again, the search warrant magistrate should have been given the opportunity to make this determination. The Court concluded that after looking at the photo in question, as the magistrate should have been allowed to do, and adding the other omitted facts, the warrant affidavit failed to establish sufficient probable cause.

Note: I've always considered it a good rule of thumb that it is better to include too much in a warrant affidavit than not enough. When in doubt, stick it in there. Although Agent Ensley's opinion that the photo in question here was "lascivious," and thus pornographic, is definitely relevant, at least upon a proper showing of his expertise, it's of less weight than that of the magistrate's own opinion. There was absolutely no reason not to attach the photos (both to them) in this case to the affidavit as exhibits. Also, for those of you who have to deal with issues

involving alleged pornography (an issue of less and less importance in this era of "let's just take it all off"), reading the portion of this case dealing with what is, and what is not, pornography (pages 1121-1123), might be enlightening for you. I also left out the Court's discussion of the relative insignificance on the issue of probable cause that the defendant had two prior sex-related convictions, even though both were related to children, primarily because of how old they (the convictions) are; i.e., 1987 and 1990. Although it's a good idea to include them in the warrant affidavit, they were held here to not be worth much by themselves in evaluating the existence of probable cause. If that topic intrigues you, check pages 1119 to 1121 of the opinion.

***Consensual Encounters vs. Detentions*:**
***Patdowns for Weapons*:**

People v. Parrott **(Apr. 4, 2017) 10 Cal.App.5th 485**

Rule: Asking a person (1) to keep his hands away from a suspicious bulge in the person's sweatshirt, (2) for his identity, and (3) to move to a sidewalk, do not necessary, absent a "show of authority," convert a consensual encounter into a detention. A patdown for weapons is supported by sufficient reasonable suspicion when the person nervously and continually touches a heavy bulge in his sweatshirt pocket and then physically resists handcuffing during a detention.

Facts: Defendant had a thing for carrying guns. Unfortunately for him, a prior felony conviction prevented him from lawfully doing so. Not to be deterred by such a minor problem, defendant took his pistol with him on February 9, 2015, while driving around Eureka, California, only to have his car stall at the intersection of Pine St. and Wabash Ave. Two Eureka police officers—Officers Harkness and Slotow—observed defendant's stalled car, without rear or brake lights, roll backwards into the intersection. The officers watched defendant get out of the driver's side of his car, push it to the side of the road, and open the hood. Upon contacting defendant, he told the officers he didn't need any help. Defendant was wearing a hooded sweatshirt, the front pocket of which noticeably bulged from some apparently heavy object. As defendant repeatedly touched the bulge in his sweatshirt pocket, the officers suspected that it might be a firearm. Eventually, Officer Harkness asked defendant to step onto the sidewalk. Asked for his name and birthdate, defendant readily but nervously provided both, volunteering that he was not on probation or parole. As they waited for a records check to come back, the officers asked defendant to refrain from touching the pocket of his sweatshirt. During this time period, defendant asked for, and received, permission to smoke a cigarette. Dispatch eventually came back with the information that defendant's driver's license had been suspended. At this point, Officer Harkness "took hold of" defendant's right arm and told him to put his hands behind his back. When appellant resisted, the officers took a firm grip on him to prevent him from moving or reaching into his front pocket. He was told a second time to place his hands behind his back. After again refusing to cooperate, the officers subdued defendant by placing him on his stomach and handcuffing him. Officer Soltow pat-searched defendant. Feeling what he believed to be a gun, Officer Slottow reached into appellant's front sweatshirt pocket and retrieved a loaded handgun. Defendant was arrested for being a felon in possession of a firearm

(P.C. § 29800(a)) as well as driving without a valid license (V.C. § 12500(a)) and booked into jail. On July 17, 2015, while out on bail (and on a case not contested on appeal), defendant was contacted by another Eureka police officer while sitting in a vehicle in the parking lot at a local mall. Upon discovering that defendant had an outstanding warrant, the officer arrested him. A subsequent search of the vehicle incident to arrest resulted in a loaded firearm being found under the driver's seat. Defendant was again arrested for being a felon in possession of a firearm. With both cases consolidated for trial, defendant filed a motion to suppress the handgun from the first case. Upon denial of his motion, he pled guilty in both cases, admitted to various allegations, and was sentenced to 5 years in prison. Defendant appealed.

Held: The First District Court of Appeal (Div. 4) affirmed. On appeal, defendant argued that the recovery of the firearm in the first case was the product of (1) an illegal detention and (2) an illegal patdown for weapons. The Court disagreed with him on both issues.

(1) *The Detention*: Contrary to defendant's arguments, defendant in this case was held not have been detained until the officers attempted to handcuff him after discovering that he was in violation of V.C. § 12500(a); driving without a valid driver's license. Up until that point, he was only being "*consensually encountered*." In so ruling it was noted that an individual is detained only at that point in a contact when police officers restrain his or her liberty by means of physical force or a show of authority. "A consensual encounter between a police officer and an individual does not amount to a detainment under the Fourth Amendment." The contact in this case began as an offer of assistance by the officers when they saw that defendant was having some car problems. Even though defendant indicated that he did not need any assistance, there was no legal reason why the officers were required to walk away. It is well settled that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Such a contact remains a "consensual encounter" at least up until that point that a reasonable person no longer feels that he is free to walk away. That typically requires some sort of "*show of authority*," to the extent that a reasonable person no longer feels free to leave. Also, the officers asking defendant to keep his hands away from his sweatshirt pocket (an "officer safety" issue), to verbally identify himself, and to walk to the sidewalk (also a safety issue), did not, in this case, convert the contact into a detention. His request to smoke a cigarette, which was granted, illustrates the fact that he was still only the subject of a consensual encounter. It was not until the officers attempted to handcuff him, which did not occur until it was determined that he was in violation of V.C. § 12500(a), was he detained (the Court apparently considering this a detention, and not an arrest, although the issue was not discussed. See Note, below.). On this issue, the Court also rejected defendant's argument that there was insufficient evidence of a V.C. § 12500 violation in that they never saw him driving. It was clear, under the circumstances, that he had been driving the vehicle when he was observed getting out of the driver's side of the car right after the car had been seen rolling backwards into the intersection.

(2) *The Patdown*: The Court further rejected defendant's argument that patting him down for weapons under these circumstances was illegal. Assuming that defendant had only been detained

(again, an issue not discussed) when handcuffed, the law requires that the officers had a reasonable suspicion to believe that he might be armed in order to conduct a patdown of his outer clothing for weapons. Noting that "a police officer has a strong need to practice caution and self-protection when on patrol," the Court found that under the circumstances of this case, the officers had the necessary reasonable suspicion when they observed him nervously touching the heavy bulge in his sweatshirt pocket a number of times, and then he physically resisted the attempt to detain him. "Given these circumstances (including) the struggle that ensued, the officers justifiably feared that appellant was armed, and thus the patdown search was a lawful search under the Fourth Amendment."

Note: As noted above, the Court considered the attempt to handcuff defendant as a detention only, and not an arrest. I'm not sure why defendant didn't argue that he had been arrested without probable cause and that the recovery of the gun was the product of that illegal arrest. But that issue—if it is an issue—was never discussed. It is true that handcuffing a detained suspect does not necessarily convert the detention into an arrest, but it is an issue that is normally discussed. Here, it was not even mentioned. Had it been, then we would have gotten into the discussion of whether the officers intended to book defendant for the V.C. § 12500(a) violation; a misdemeanor offense. Or, did they intend to cite and release him, in which case a "search incident to arrest" would not have been lawful? The fact that Officer Soltow "pat-searched" him only, which is justified by a reasonable suspicion that he might be armed, and which the Court had no problem finding, eliminated that issue. But the important point discussed here includes the fact that consensual encounters are good. Staying sealed up in your patrol car is not. When I was a rookie cop (way back in the '70's), my first lieutenant (Lt. Chuck Shielder) insisted that we get out of our respective patrol cars and talk to people. This was in era before consensual encounters were being discussed. A very enlightened approach, I now recognize. The point of this case, however, is that asking (without demanding) for a person's identity does not convert a contact into a detention. More importantly, insisting that a person keep his hands out of (or away from) his pockets and to move out of the street to a safer location, both done for safety reasons, also is not a detention absent some other more intrusive "show of force." This is a great case illustrating these rules.