The California Legal Update

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

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

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THIS EDITION'S WORDS OF WISDOM:

"*Light travels faster than sound. This is why some people appear bright until you hear them speak*." (Alan Dundes)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

"*Chalking*" *Tires Preparatory to Issuing a Parking Citation*: The federal Sixth Circuit Court of Appeal (in the State of Michigan) ruled in a recent case that for a parking enforcement officer to apply a chalk mark to the tire of a parked car, and then return later and find that the vehicle had not been moved in some specified time period (as determined by the continued presence of the chalk mark), constitutes a warrantless search and, without a search warrant, is illegal under the Fourth Amendment. (*Taylor v. City Saginaw* (6th Cir. Apr. 22, 2019) __ F.3rd __ [2019 U.S. App. LEXIS 12412].) The Court's primary authority for its conclusions on this issue is the U.S. Supreme Court cases of *United States v. Jones* (2012) 565 U.S. 400, where it was held that placing a GPS device to a suspect's vehicle does in fact constitute a Fourth Amendment search. But there are a number of significant factual and legal distinctions between the *Jones* and *Taylor* cases, rendering the two distinguishable. *Jones*, most obviously, involved the installation on a vehicle and the continuous monitoring of a GPS device, following a suspect around for some 28 days. *Taylor*, on the other hand, involved the significantly less intrusive act of marking a tire with chalk and coming back a couple of hours later to see if it had been moved. The Court in *Taylor* also found the placing of such a chalk mark on a person's vehicle's tires without a warrant to be "*unreasonable*" under Fourth Amendment, and thus illegal. *Jones* did not consider the "*reasonableness*" argument due to the failure of the government to raise the issue in the lower court. *Taylor* held that the "community caretaking" theory did not apply, nor was the lack of a warrant excused under the "administrative search" exception to the search warrant requirement; two legal theories not at issue in *Jones*. Also, the *Taylor* Court did not discuss the issue of "*exigent circumstances*" (i.e., is it even possible to obtain a search warrant for the purpose of chalking a parked car's tires, given statutory restrictions, the time constraints, and the lack of probable cause to suspect a particular vehicle is, or will be, in violation of a parking time limitation?), an important exception to the search warrant requirement that was totally inapplicable to the situation in *Jones*. Also, no one in *Taylor* considered whether the "*minimal intrusion*" doctrine might apply. (See *People v. Robinson* (2012) 208 Cal.App.4th 232, 246-255; the insertion and turning of a key in a door lock held not to be grounds for the suppression of evidence, being, at best, "minimally intrusive;" and *Illinois v. McArthur* (2001) 531 U.S. 326, 330, noting that "minimal intrusions . . . may render a warrantless search or seizure reasonable.") It is arguable that nothing could be more minimally intrusive than the simple act of making a chalk mark on a person's tire on a car parked in a public place. Lastly, while the Court in *Taylor* did discuss the lesser expectation of privacy typically applicable to motor vehicles, it rejected this theory as an excuse for not obtaining a search warrant; a questionable conclusion. All-in-all, the ruling in *Taylor* is subject to attack on a number of fronts. In fact, it appears that the 6th Circuit justices themselves are already catching heat over this ridiculous ruling in that they subsequently filed an amended version of their decision, completely contradicting themselves by adding to the "Conclusion," and I quote: "*This does not mean, however, that chalking violates the Fourth Amendmen*t." Rather, they say that no one has yet shown them an applicable exception to the search warrant requirement, remanding the case to the trial court for that purpose. So we're not done with this issue yet. In the meantime, it should be also be noted that federal circuit opinions are not binding on

California state courts, particularly when from outside the Ninth Circuit, having at best a "persuasive" value only. So the question has come up: "Should California parking enforcement officers change their chalking and ticketing policies based upon *Taylor v. City of Saginaw*? I should think not! But that's easy for me so say, and it's your choice; not mine.

***Lost Requests for Information or to be Added to the Update E-mail List*:** If in the last few weeks (or anytime, for that matter) you sent me an e-mail asking a legal question, for information in general, or to be added to the California Legal Update e-mail list, and did not get a response, please try again. My wife and I recently took a short (one week) trip, and I, in my old age, neglected to take the cord to my computer. So I was basically cut off after the battery in my laptop died. And while I can get most e-mails on my cellphone, some attempts to reach me are syphoned off by my computer and put into its spam file where they pile up until I either answer or delete them. But I noticed when I got home that my spam file did not save all of its contents. So what I'm saying is that if you did not get a response from me, it is possible that your e-mail got swallowed up into cyber-space somewhere, never to be heard from again. So if you have not gotten a response to your inquiry, please e-mail me again and I will answer you.

CASE LAW:

***Search Warrants*:**
***State-Issued Warrants and Federal Law Enforcement Officers*:**

United States v. Artis **(9th Cir. Mar. 27, 2019) __ F.2nd __ [2019 U.S. App. LEXIS 9137]**

Rule: Federal law enforcement officers are not "peace officers," for purposes of executing a state-issued search warrants. Being a violation of state law only, however, and not implicating the Fourth Amendment, any resulting evidence is not subject to suppression.

Facts: Federal FBI Special Agent Stonie Carlson was a member of a law enforcement task force, headed by the U.S. Marshals Service, and comprised of federal, state, and local law enforcement officers. In this capacity, Agent Carlson was assigned to investigate co-defendants Donnell Artis and Chanta Hopkins, who were suspected of engaging in credit card fraud crimes. Both subjects also had outstanding state arrest warrants. Information from the Oakland Police Department lead Agent Carlson and his partner to a particular street corner in Oakland where they found defendant Artis. Upon seeing the agents approach, Artis ran, dropping his cellphone in the process. Over the next several days, Agent Carlson sought two search warrants, obtaining them from different Alameda County Superior Court judges. Agent Carlson reasons for seeking state-issued (as opposed to federal) search warrants was that Artis' (and Hopkins') outstanding arrest warrants were for state law offenses. Also, at the time, it was not contemplated that federal charges would be filed. Warrant #1 asked for permission to conduct a forensic search of defendant's cellphone. The affidavit included the following language: "It is requested that any federal, state, and/or local law enforcement officers be allowed to conduct the search of Artis' cellular telephone." Agent Carlson *did not* base the warrant application on Artis' status as a known fugitive (which, if it had been, would have provided a basis to search his phone for

information useful in finding him). Instead, Agent Carlson's affidavit recounted facts establishing probable cause to believe that Artis was engaged (with Hopkins) in a conspiracy to commit credit card fraud under state law. He requested permission to search Artis' cell phone for evidence of that offense. The Alameda County Superior Court judge issued warrant #1, directing it to "any peace officer (deleting the reference to "federal" officers) in Alameda County," and authorizing a search of Artis' cellphone for "evidence of a crime" such as stored email and text messages "[c]ontaining any references to fraud or related criminal activity." Search warrant #2, again submitted to a local Alameda County Superior Court judge, sought permission to use a "cell-site simulator" to determine the location of co-defendant Hopkins' cell phone, hoping to determine the location of Hopkins himself. (A cell-site simulator is a device that simulates a cell tower, thus "tricking" nearby cellphones into thinking that it's a cell tower, thereby causing nearby cellphones to send signals to the device. This allows the operator of the device to locate the phone being sought.) The affidavit to warrant #2 specified that Agent Carlson was seeking authority to use the cell-site simulator on behalf of the United States Marshals Service and the Oakland Police Department, as a member of the task force. This warrant was predicated solely on Hopkins' status as a fugitive with an outstanding warrant for his arrest. The judge issued this search warrant, again directing it to "any peace officer in the County of Alameda," and authorizing use of a cell-site simulator for a period of 30 days to track the location of the targeted cellphone. The warrant stated that federal agents "employed by the United States Marshals Service are authorized to assist in the service of this search warrant." Warrant #1 was executed by one of Agent Carlson's federal law enforcement colleagues and resulted in the recovery of evidence of criminal activity from Artis' phone. Warrant #2 was executed with a federal officer operating the cell-site simulator. The simulator resulted in finding Hopkins at his apartment in San Francisco. Hopkins was arrested outside his apartment and evidence of credit card fraud was seized from him. That evidence formed the basis for a third search warrant (not at issue here) issued by a San Francisco County Superior Court judge, and authorizing a search of Hopkins' apartment. The apartment search yielded much of the evidence underlying the federal drug-trafficking and identity-theft charges filed against Hopkins in this case. Both defendants were subsequently charged in federal court with various (unspecified) federal crimes. Both defendants filed concurrent motions to suppress. A federal district (trial) court judge granted both defendants' motions to suppress as to each of the Alameda-issued warrants (search warrants #1 and #2). In the published portion of this trial court ruling (see *United States v. Artis et al.* (July 3, 2018) 215 F.Supp.3rd 1142.), the federal court judge ruled that under California law, federal law enforcement officers are not permitted to execute state-issued search warrants, and that the results of a search pursuant to such a warrant are subject to suppression. The Government appealed.

Held: The Ninth Circuit affirmed in part and reserved in part. First, it was stipulated that it was legally necessary to use a search warrant to access the contents of Artis' cellphone. (*Riley v. California* (2014) 573 U.S. 373.) It was *assumed* that the warrant authorizing the use of a cell-site simulator to track the location of Hopkins' cellphone also required a warrant. (Probably a correct assumption: See *Carpenter v. United States* (2018) 138 S.Ct. 2206.) The defendants' only complaint was that these two state-issued search warrants, authorizing their execution by "peace officers," were executed by *federal agents* instead. Only a "*peace officer*" (with limited exceptions not relevant here), as listed on the face of the warrant (i.e., "*any peace officer*"), may lawfully serve (or "execute") a state-issued search warrant. (P.C. §§ 1529, 1530) Under state

law, federal law enforcement officers are *not* "peace officers." (See P.C. § 830.8(a)) The district court judge found this issue to be fatal to the validity of both warrants; requiring the suppression of the resulting evidence as a result. Recognizing that Agent Carlson is a federal FBI agent, the Ninth Circuit disagreed as to the legal consequences of this agent's involvement (or that of another federal officer, at Agent Carlson's request) with both warrants. While a federal officer may certainly assist a state law enforcement officer in executing a state-issued search warrant, it is an undecided issue whether he or she, as a federal member of a joint task force that includes both state and federal law enforcement officers, may be the one who actually executes the warrant. But that issue was not decided here because even assuming that Agent Carlson (or, at his request, another federal agent) was the one who executed the warrants at issue, this fact does not require the suppression of the resulting evidence. Specifically, the Court held here that "the identity of the executing officers—federal agents versus (California) peace officers—does not implicate any interest protected by the Fourth Amendment." Evidence is suppressed only when the Fourth Amendment is violated, and not merely state statutory law. Upon execution of state warrants #1 and #2 in this case, the resulting evidence will *not* be suppressed absent a "heightened intrusion upon privacy interests." There was no such "heightened intrusion" under the facts of this case merely because someone other than a California peace officer executed the warrants. The only issue, then, is whether warrants #1 and #2 pass constitutional muster under the Fourth Amendment; i.e., whether they were supported by probable cause. The federal district court trial judge granted both defendants' motions as to both warrants for reasons contained in an unpublished portion of his decision, merely concluding (as noted in the published half of his decision) that the warrants were "plagued by various problems."

Warrant #1: As to warrant #1, the Ninth Circuit agreed with the lower district court judge. Agent Carlson's application for the Artis warrant requested authorization to search his cellphone for evidence of his involvement in a conspiracy to commit credit card fraud, with the supporting affidavit accordingly seeking to establish probable cause to believe that Artis was engaged in such an offense. The affidavit to warrant #1, as a major portion of its probable cause, describes an earlier search that occurred where officers attempted to execute an arrest warrant for Artis at his girlfriend's apartment. In entering that apartment, in what the agents described as a "safety sweep" (i.e.,"protective sweep," under state authority), evidence of Artis' involvement in credit card forgery activity was allegedly found in plain sight. As an overnight guest, Artis was able to establish sufficient standing to challenge the legality of that entry. (*Minnesota v. Olson* (1990) 495 U.S. 91.) As an entry made without a search warrant or probable cause to believe that Artis was there at the time, the Government now concedes that that entry was unlawful (see *Steagald v. United States* (981) 451 U.S. 204.), and not justifiable as a "protective sweep," there being no reason to believe anyone was inside and who might constitute a danger to the agents or others. (See *Maryland v. Buie* (1990) 494 U.S. 325; *United States v. Lundin* (9th Cir. 2016) 817 F.3rd 1151.) The evidence in that case should have been suppressed. As such, using that evidence as a part of the probable cause in the affidavit to warrant #1 in this case was improper. Redacting that evidence left only the fact that Artis had outstanding arrest warrants, that he fled from Agent Carlson, and that he was a close associate of Hopkins who also had an outstanding warrant for his arrest. This, the Court held, was insufficient to establish probable cause that Artis was engaged in credit card fraud. There was also a statement in the affidavit to the effect that a "cooperating witness" told Agent Carlson that both Artis and Hopkins were involved in credit card forgery. But there was nothing there to help establish that informant's credibility or that his information was reliable. So that information contributed nothing to the necessary probable

cause. After rejecting that Government's argument that "*good faith*" saved this warrant, the Court ruled that the evidence resulting from warrant #1 was properly suppressed by the district court judge.

Warrant #2: In contrast, warrant #2 (authorizing the use of the cell-site simulator to locate Hopkins) was predicated on his status as a fugitive from justice and the Government's legitimate interest in apprehending him. To be valid, the affidavit to this warrant needed only to show that Hopkins was in fact a fugitive, and that he was currently using the targeted cell phone. In accomplishing this goal, Agent Carlson's affidavit describes the fact that Artis' recovered cellphone received several incoming calls from a specific phone number. A search of a law enforcement database revealed that that number was issued to an unknown subscriber with Verizon Wireless. A cooperating witness, who was a known associate of Hopkins, told Agent Carlson that that number belonged to Hopkins. The informant's information was corroborated by the fact that someone using that number attempted to contact Artis, one of Hopkins' associates. The Court found this information to be sufficient to establish the necessary probable cause. The Court, therefore, reversed the district court on this issue and found warrant #2 to be valid.

Note: I previously briefed this case as reported by the federal district (trial) court in *California Legal Update*, Vol 23, #9 (July 28, 2018). You can now ignore that lower court decision except to note that it is still a violation of state statutory law for federal officers to be executing state search warrants, except to the extent where the federal officers are only assisting state peace officers. The only difference is that if the federal officer is determined to be the one actually executing the warrant, that fact alone will *not* result in the suppression of any evidence absent evidence to show that the Fourth Amendment was somehow affected. The Court here does not speculate as to how the Fourth Amendment might come into play. Also note that this case did not decide whether the rule changes if federal and state officers are acting as members of a joint taskforce of some sort. I think an argument could be made that in such a case, a federal officer, in executing a taskforce-obtained state search warrant, can execute that warrant as the lawful agent of a state peace officer who is also a member of that taskforce. But we don't have a case that says that. So you're acting at your peril if you use that argument. Lastly, note that if Agent Carlson had used the need to locate Artis as a fugitive as his probable cause, like he did in the Hopkins warrant #2, instead of trying to justify the warrant solely under the theory that Artis was engaged in credit card fraud, the Court would have upheld warrant #1. Agent Carlson's reasons for not writing up the Artis warrant affidavit using the same probable cause as he did in the Hopkins warrant are not explained in the decision. My theory has always been to simply shotgun it, describing *all* your reasons for wanting to conduct a search, and see what sticks. You only have to be right under one theory to get your warrant approved and later upheld.

***Parole Searches; The Trunk of a Vehicle*:**
***GPS Trackers and Parolees*:**
***Good Faith and Obtaining CSLI Information*:**

United States v. Korte **(9th Cir. Mar. 15, 2019) 918 F.3rd 750**

Rule: (1) The warrantless parole search of the trunk of a robbery suspect's rented car is lawful where the evidence shows that the parolee exercised control over the trunk. (2) The warrantless

placing and monitoring of a GPS device on a parolee's car is lawful. (3) A law enforcement officer's good faith reliance upon the constitutionality of the federal "Stored Communications Act," prior to a contrary U.S. Supreme Court case striking the Act's less-than-probable cause provisions, was reasonable.

Facts: Defendant was a bank robber, even if not real successful. It's what he did. Shortly after being paroled from state prison in August, 2016, having served time in a California prison for bank robbery, defendant went to work again. As a condition of his release from prison, defendant was subject to the standard search and seizure conditions (i.e., a "*Fourth waiver*") as listed in P.C. § 3067(a) and (b)(3), making him "subject to search or seizure by a parole officer or other peace officer any time of the day or night, with or without a search warrant or with or without cause, (of) (y)our your residence, and any property under your control." Despite these conditions hanging over his head, in October, 2016, defendant committed an attempted robbery and three completed robberies of different banks—all in the Los Angeles County area—with a total take of less than $11,000. Despite wearing a mask, the FBI and the Los Angeles County Sheriff's Office (LASD) suspected defendant as being the culprit. Therefore, on November 4, LASD officers surreptitiously, and without a warrant, placed a GPS (Global Positioning System) device on defendant's car (a car he had rented), periodically monitoring the vehicle's movement over the next six days. That same day, the FBI obtained a "court order" (not a search warrant) under the federal "Stored Communications Act" ("SCA;" 18 U.S.C. § 2703(d)), to acquire defendant's historical cell site location information (i.e., "CSLI"). The information gleaned from the CSLI placed defendant's cellphone near three of the four banks at the time of the respective robberies. Based upon this (and other) information identifying defendant as their suspect, the FBI obtained a warrant for his arrest. On November 10, LASD followed defendant from his home to a bank which he appeared to surveil as his next target. After watching him place something in the trunk of his car, defendant was contacted and arrested. A warrantless search of his car was conducted. A toy gun which had been used in each of the robberies and the shirt he had just been wearing while casing the bank, were found in the trunk of his car. Defendant was indicted in federal court for the robberies and attempted robbery, in violation 18 U.S.C. § 2113(a) & (d). Defendant's motion to suppress was denied. Convicted of all counts and sentenced to 17½ years in federal prison, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Defendant raised three issues on appeal:
(1) *Search of the Vehicle's Trunk*: California's statutory warrantless, suspicionless, search condition for parolees (i.e., P.C. § 3067(b)(3)) has been held to be constitutional by the United State Supreme Court. (*Samson v. California* (2006) 547 U.S. 843.) Although defendant rented the car that was searched, he did not argue that it was not "property under (his) control," making it subject to such a search. Defendant questioned, however, whether his search conditions included the trunk of his car. The Court declined to accept such a "narrow interpretation" of his search and seizure conditions. The Ninth Circuit has previously held that property is subject to a parolee's search conditions when the parolee "exhibit(s) a sufficiently strong connection to (the property in question) to demonstrate 'control' over it." (*United States v. Grandberry* (9th Cir. 2013) 730 F.3rd 968, 980.) The California Supreme Court has noted that a parolee controls property based on "the nexus between the parolee and the area or items searched," which includes a consideration of the "nature of that area or item" and "how close and accessible the area or item is to the parolee." (*People v. Schmitz* (2012) 55 Cal.4th 909.) Finding the trunk of

defendant's rented car to be consistent with the Fourth Amendment's "broader . . . precedent," particularly in light of the officers' observation of defendant putting items into the truck, the Court upheld the legality of the recovery of defendant's toy pistol and shirt from the trunk of his car.

(2) *Placement and Use of the GPS Tracker*: To monitor defendant's activities, LASD placed a GPS tracking device on defendant's car which they periodically monitored. They did so without a search warrant despite the fact that the U.S. Supreme Court has held that the act of placing a GPS device on someone's car constitutes a search and ("typically") requires a warrant. (*United States v. Jones* (2012) 565 U.S. 400.) The issue here is whether defendant's search and seizure conditions excused the lack of a search warrant. A California Appellate Court has already held that the warrantless placing of a "beeper" on a parolee's car was lawful. (*People v. Zichwic* (2001) 94 Cal.App.4th 944.) Taking this state-court precedent into consideration (despite noting that the use of a GPS tracking device is more intrusive than using a simple "beeper"), along with the U.S. Supreme Court's "strong pronouncement" that parolees in California have very limited Fourth Amendment rights (*Samson v. California*, *supra*.), the Court here upheld the trial court's decision that defendant's parole search and seizure conditions excused the lack of a search warrant. (But see "Note," below.)

(3) *Warrantless CSLI Acquisition*: As a part of their investigation, FBI agents obtained a "court order" under authority of the federal "Stored Communications Act" ("SCA;" 18 U.S.C. § 2703(d)), authorizing them to acquire defendant's historical cell site location information (i.e., "CSLI"). With the information so obtained, the FBI was able to place defendant's cellphone near three of the four banks at the time of each respective robbery. Under the SCA, no search warrant is required; merely a "court order." Also, a showing of less than probable cause is acceptable. Defendant argued that seeking and obtaining CLSI information without a search warrant violates the Fourth Amendment despite his status as a parolee subject to search and seizure conditions. Subsequent to defendant's arrest in this case, the U.S. Supreme Court held that the SCA's authorization to seek and obtain CLSI information with anything less than a search warrant, supported by probable cause (absent an exigency), violates the Fourth Amendment. (*Carpenter v. United States* (June 22, 2018) 138 S.Ct. 2206. Whether or not a parolee's Fourth waiver excuses the lack of a warrant has yet to be decided. The Court here, however, declined to decide the issue, holding instead (as did the trial court) that the officers' "good faith" reliance upon the more lenient standard under the SCA was reasonable. Specifically, the SCA explicitly authorized retrieval of CSLI records by court order so long as the Government "offer[ed] specific and articulable facts showing that there are reasonable grounds to believe that . . . the records or other information sought, are relevant and material to an ongoing criminal investigation." This is a much more lenient standard than a finding of probable cause as required for a search warrant. Without any Supreme Court or Ninth Circuit case authority on the constitutionality of the SCA, and with other federal circuits (as listed in the Court's decision) upholding the SCA's constitutionality, the agents' good faith reliance upon the validity of the SCA, at least prior to the *Carpenter* holding, was reasonable.

Note: Despite the Court's ruling here on the issue of placing a GPS device on defendant's vehicle and then tracking it, holding that defendant's search and seizure conditions (i.e., a "Fourth waiver") excused the lack of a search warrant, we can't always assume that such a Fourth waiver (whether the suspect is a parolee or a probationer) will be enough. The Ninth Circuit, for instance, found two years ago that a Fourth waiver was not enough to justify the

warrantless search of a suspect's cellphone, at least where cellphones were not specifically listed in the suspect's search conditions. (See *United States v. Lara* (9th Cir. Mar. 3, 2016) 815 F.3rd 605; briefed at *California Legal Update*, Vol. 21, No. 5; April 24, 2016) In *Lara*, the Court held that because the Fourth waiver listed only "*containers*" and "*property*," along with the defendant's residence, premises, or vehicles under his control, cellphones didn't fall into any of these general categories. Also, while on the topic of cellphones, note that California's Electronic Communications Privacy Act (P.C. §§ 1546 et seq.), effective January 1, 2016, specifically at P.C. § 1546.1(c)(10), requires that in order to search any "electronic device," which presumably includes cellphones, a Fourth waiver will get you into that device only if the wording in the suspect's Fourth waiver is "*clear and unambiguous*." See also *People v. Sandee* (Sep. 13, 2017) 15 Cal.App.5th 294; briefed at *California Legal Update*, Vol 22, #13, Sept. 13, 2017, where a Fourth waiver listing "*property* (and) *personal effects*" was held to be enough to justify the warrantless search of the defendant's cellphone, but indicating that after enactment of the Electronic Communications Privacy Act, the description will likely have to be more specific. (See *In re. I.V.* (2017) 11 Cal.App.5th 249.) And lastly, the concurring opinion in this new case (i.e., *Korte*, at p. 760.) expressed some concern "with the ever 'diminishing' reasonable expectation of privacy afforded to probationers and parolees, especially as it relates to their digital privacy," suggesting that it is time to reconsider how much of his privacy rights a Fourth waiver suspect gives up when on parole or searchable probation.. The bottom line is that the trend is to require Fourth waiver conditions to be very specific in order to justify the lack of a search warrant. If not specific, obtaining a search warrant might be the better idea.

***Traffic Stops, Dog Sniffs, and Prolonged Detentions*:**

People v. Vera **(Nov. 5, 2018) 28 Cal.App.5th 1081**

Rule: Prolongation of a traffic stop beyond the time it reasonably takes to write a traffic citation without first discovering new evidence justifying a continued detention or arrest is unlawful. Dog sniffs of the exterior of a car stopped for a traffic violation, so long as done during the time it reasonably takes to accomplish the mission of the traffic stop, are lawful.

Facts: City of Rialto Police Department Detective Joseph Maltese, driving a marked patrol car and accompanied by his narcotics-certified dog, observed defendant driving with illegally tinted windows (V.C. § 26708(a)). Detective Maltese lit up his emergency lights, stopping defendant in a parking lot. As he approached defendant's car on foot, Detective Maltese's view into defendant's car was completely obscured by the darkened windows. When defendant refused to lower his rear passenger window, Detective Maltese had him step out of the car. A patdown resulted in the recovery of what appeared to be an illegal switchblade knife. Asked to sit on the curb, defendant complied. With defendant's permission, Detective Maltese retrieved his driver's license and registration from the vehicle's glove compartment. Officer Garcia arrived to cover the stop as Detective Maltese performed a records check on defendant. Finding no warrants, Detective Maltese took a few minutes to inspect defendant's knife, ultimately determining that it was not a switchblade. Returning to the issue of the tinted windows, Detective Maltese asked Officer Garcia to write defendant a citation. Maltese took 32 seconds (as recorded by video on his body camera) to retrieve both his ticket book and his dog from his patrol car, giving the ticket book to Officer Garcia. The next 40 seconds were taken up by Garcia beginning to write up the

ticket while Maltese asked defendant for consent to search his car. Defendant declined to allow a search. After repeated rejected requests (as Garcia continue to write), Detective Maltese had his dog examine the exterior of the car. The dog alerted on the trunk, and then again on the interior dashboard. Opening the trunk of the car, Detective Maltese found a blue duffle bag on which the dog again alerted. A search of the bag resulted in the recovery of over 4.5 kilograms of what was quickly determined to be methamphetamine. Additional drugs were found in the center console of the car behind the air vents. Charged in state court with felony possession for sale of a controlled substance, defendant filed a motion to suppress. After denial of his motion, defendant pled no contest. Sentenced to five years in custody (with two years suspended), defendant appealed.

Held: The Fourth District Court of Appeal (Div. 2) affirmed. The only issue on appeal was whether the traffic stop had been unreasonably prolonged by either the time it took to examine defendant's knife, or to conduct a dog-sniff around his car. The guiding principles are dictated by the U.S. Supreme Court in the cases of *Rodriguez v. United States* (2015) 575 U.S. ___ [135 S.Ct. 1609] and *Illinois v. Caballes* (2005) 543 U.S. 405. *Rodriguez* and *Caballes* tell us that a detention that is justified solely by a governmental interest in issuing a traffic ticket to a vehicle's driver can become unlawful if it is prolonged beyond the time period that is reasonably required to complete the mission of the traffic stop. Traffic stops, of course, are lawful, so long as the officer involved has at the very least a reasonable suspicion to believe the driver of the vehicle is in violation of a traffic offense. Unlawfully tinted windows, per V.C. § 26708(a), fits the bill in this case; an issue not contested by defendant. A traffic stop is considered to be a detention. Such a detention becomes unlawful if the officer prolongs it beyond that time period it reasonably takes to write the detained driver a ticket and to cut him loose; i.e., to accomplish the "mission" of the traffic stop. The "mission" of a traffic stop includes the officer addressing the traffic violation that warranted the stop while also attending to any related safety concerns that an officer might reasonably have under the circumstances. The mission includes determining whether to issue a traffic citation and to make ordinary inquiries incident to the stop, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. In sum, the mission of a traffic stop involves activities that serve the purpose of enforcement of the traffic code, while including any safety precautions that officers may reasonably need to take under the circumstances. A dog sniff is outside the mission of a traffic stop. Although a dog sniff is not considered to be search (*Illinois v. Caballes, supra*, at p. 409; and *People v. Mayberry* (1982) 31 Cal.3rd 335, 337.), and is lawful without any need to show probable cause, it is still "a measure aimed at detecting evidence of ordinary criminal wrongdoing." Conducting a dog sniff during a traffic stop is lawful so long as it can be accomplished during the time period that it reasonably takes to accomplish the mission of the traffic stop. Should the traffic stop be prolonged in order to conduct the dog sniff, however, such prolongation is a violation of the Fourth Amendment and unlawful. Any evidence discovered during that unlawful prolongation of the traffic stop is subject to suppression. Discovery of illegal criminal activity during that time it takes to accomplish the mission of the traffic stop, however, will allow for the detention to be extended for as long as it reasonably takes to determine whether there is probable cause justifying an arrest. In this case, the Court found that Detective Maltese did not unlawfully prolong the detention by either taking the time to inspect the knife to see if it was an illegal switchblade, or by running his drug-sniffing dog around defendant's vehicle. Finding the knife provided

Detective Maltese with a reasonable suspicion that defendant unlawfully possessed a switchblade knife. Inspecting it did in fact prolong the traffic stop, but such prolongation was lawful based upon Maltese's reasonable suspicion to believe that defendant was engaged in a criminal offense other than just the tinted windows. As for the dog sniff, Detective Maltese's act of running the dog around the car occurred within the time period necessary to accomplish the mission of the original stop; i.e., while Officer Garcia was still writing up the traffic citation. The dog's alert on the trunk of defendant's vehicle, therefore, did not cause the traffic stop detention to be prolonged. The subsequent prolongation of the detention, after finding defendant's dope, was lawful due to the additional probable cause of a criminal violation other than just the tinted windows. Based upon this, the Court failed to find any evidence in the record that defendant's detention had been unlawfully prolonged.

Note: The Court also made the interesting comment (at pg. 1087) that the permissible duration of a traffic stop is not to be measured by the reasonable duration of traffic stops in general, but rather by the amount of time actually necessary to perform the stop at issue, in an expeditious manner. (Citing *Rodriguez, supra*, 135 S.Ct. at p. 1616].) In other words, a police officer does not earn "bonus time to pursue an unrelated criminal investigation" by writing the ticket as fast as he can, thinking that he can used the time saved to look for other evidence of criminal wronging. "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.'" Thus, the "critical question (in a dog sniff case) . . . is not whether the dog sniff occurs before or after the officer issues a ticket … but whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop'" at issue. In other words, the courts are not going to let you play games with the rules. This case serves as kind of an extension of the case I just briefed in the *California Legal Update*, Vol. 24, #4, Apr. 6, 2019; *People v. Arebalos-Cabrera* (Sept. 14, 2018) 27 Cal.App.5th 179. In *Arebalos-Cabrera*, the officer ended the detention by giving defendant back his paperwork and telling him he was free to go. As defendant started to walk away, the officer then sought and received permission to search the cab of defendant's tractor-trailer. Since the traffic stop had ended, and defendant was no longer detained, the Court rejected defendant's argument that the traffic stop had been unlawfully prolonged. This tactic also works. Knowing the law on prolonged detentions, as you can see, will help you in justifying vehicle searches conducted during traffic stops.