

# San Diego District Attorney

## *LEGAL UPDATE*

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Vol. 14

April 1, 2009

No. 4

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### ***Remember 9/11/01: Support Our Troops***

*This edition is dedicated to, and in memory of, Sgts. Mark Dunakin, Ervin Romans, and Daniel Sakai, and Officer John Hege, Oakland Police Department, killed in the line of duty and in the service of the People; 3/21/09.*

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#### **THIS EDITION'S WORDS OF WISDOM:**

*"The truth is that parents are not really interested in justice. They just want quiet."* (Bill Cosby)

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**ADMINISTRATIVE NOTES:**

*Follow-up to V.C. § 23154: Probationers Driving While Under the Influence:* In the prior Legal Update (#3, March 6, 2009), I briefed new V.C. § 23154. I've been reminded since then that this new violation is in fact an infraction only (See V.C. §§ 40000.1 et seq.; any section not designated a misdemeanor is deemed to be an infraction.) So what do you do with such a violation? That depends on your own department's policies. However, in San Diego, I'm told that officers are being (or will be) told to consider arresting and booking the subject for a violation of probation (P.C. § 1203.2), to be released with a date to appear at an "order to show cause" hearing in the court where probation was ordered. Make sure your prosecutorial agency is on board with this procedure. The California District Attorney's Association is in apparent agreement with this procedure.

**CASE LAW:**

***Consent; Voluntariness in the Face of an Assertion of Authority;  
Terminating a Voluntary Interview as Evidence of Guilt;  
Assertion of the Right to Silence Before Custody:***

**People v. Garcia (Mar. 11, 2009) \_\_ Cal.App.4<sup>th</sup> \_\_ [90 Cal.Rptr.3<sup>rd</sup> 440]**

**Rule:** (1) Where a suspect is otherwise cooperative, an officer's assertion of authority will not likely invalidate a consent to the seizure of the suspect's property. (2) A suspect's termination of a consensual interview is a Fourth Amendment ("seizure") right and cannot be used as evidence of guilt. (3) A pre-custody refusal to answer questions is a Fifth Amendment right and cannot be used as evidence of consciousness of guilt.

**Facts:** Defendant met Christie Wilson on the evening of October 4, 2005, at the Thunder Valley Casino in Placer County. Wilson was a woman who knew how to aggressively defend herself. After losing money at the blackjack tables, both of them got drunk and caused a disturbance. Defendant and Wilson then left the casino together at 1:13 a.m. Casino surveillance cameras showed the inebriated couple walking towards defendant's car, parked out of sight of the cameras. Three minutes and 41 seconds later, the cameras showed defendant driving out of the parking lot alone. Wilson's car was found abandoned in the parking lot the next day. Wilson herself was never seen or heard from again. Defendant was later identified as the man with Wilson through his casino player's card. Defendant showed up late to work that morning with scratches on his face and a blood blister in his eye, none of which had been seen the day before, and sought medical treated for his injuries on the 6<sup>th</sup>. Over the next several days, defendant gave inconsistent explanations for his injuries. A doctor later opined that his injuries were consistent with clawing from fingernails and a punch in the eye. The investigation of Wilson's disappearance was assumed by Sgt. Robert McDonald of the Placer County Sheriff's Department. Contacting a nervous defendant at his home, he admitted that he'd met Wilson at the casino but denied having sex with her. He also claimed that although they had "just happened to leave at the same time," Wilson returned to the casino to look for

her cell phone that she'd dropped at the blackjack tables. However, the parking lot video tapes failed to show Wilson going back into the casino. When asked which of his cars he'd driven that night, defendant was reluctant to say, asking instead if he could call a friend who was a civil attorney. After the attorney/friend arrived (who naively commented to defendant that it "looks like somebody smacked you under your eye"), he told McDonald that defendant had nothing to hide and wanted to cooperate fully. McDonald told defendant that if he would identify which car he'd used, it would eliminate the need to seize all his cars. Defendant therefore told McDonald which car he'd used and, at the sergeant's request, agreed to drive it to the station for forensic testing. At the station, still in the company of his attorney/friend, defendant agreed to submit to an interview. He was told that he was not under arrest, even though "under suspicion," and that he was free to leave. Although admitting that he'd gambled and drank with Wilson at the casino, defendant continued to deny having anything to do with her disappearance. When Sgt. McDonald asked to take a photograph of his injured eye, defendant's attorney (who still had no clue) readily agreed. Defendant, however, commented that he needed the assistance of a criminal (i.e., *real*) attorney and, after confirming that he was not under arrest, refused. When Sgt. McDonald attempted to take his picture anyway, defendant held his hand over the camera lens and left the interview room. A search warrant was subsequently obtained for defendant's home, car and person. Varying amounts of forensic and other circumstantial evidence were eventually recovered connecting Wilson with defendant and his car. Defendant's computer also showed that defendant had been researching his crime over the Internet. Although Wilson's body was never recovered, defendant was eventually arrested and charged with her murder. After defendant's various motions to suppress evidence were denied, he was convicted and sentenced to 59 years to life (as a second striker). Defendant appealed.

**Held:** The Third District Court of Appeal (Placer County) affirmed. Among the issues on appeal was (1) the legality of the initial consensual seizure of defendant's car. Defendant argued that he allowed Sgt. McDonald to take his vehicle for testing as the result of a "false claim of lawful authority" to seize all of his cars. For a consent to be valid, it must be freely and voluntarily obtained. In evaluating the surrounding circumstances in this case, including the participation of defendant's attorney, and his voluntarily going with the detective to the station to give a statement, the Court sustained the trial court's determination that defendant had voluntarily consented to the seizure of his car despite the detective's threat to take all of his cars. (2) At trial, defendant's refusal to submit to having his facial injuries photographed by Sgt. McDonald, and then leaving the interview room, was used by the prosecutor in argument as evidence of a "consciousness of guilt." Defendant, in response, argued that it was improper to use at trial his assertion of a Fourth Amendment right not to be seized for the purpose of having his photograph taken. Although defendant did not have the right to prevent the detective from taking a picture of his face, there being no expectation of privacy in one's facial features and thus no search, defendant *did* have the right to "withdraw his consent to the voluntary detention." Doing this was an assertion of a Fourth Amendment right not to be seized. It is improper to comment to the jury on an assertion of any constitutional right, including those protected under the Fourth Amendment. (3) Defendant lastly argued that telling the jury that he himself terminated the interview when he walked out while

commenting on his need for a criminal attorney was a violation of his Fifth Amendment right against self-incrimination and to the assistance of an attorney. Whether or not a criminal suspect asserts a right to silence protected by the Fifth Amendment by declining to talk in the pre-arrest context, is an issue never ruled upon by the U.S. Supreme Court. Among the lower courts there is a split of authority whether one's pre-arrest silence can be used against a defendant at trial. The Court here sided with those cases that say it cannot be used against him. It was improper, therefore, to tell the jury they could use this fact as evidence of guilt. However, given the overwhelming evidence of defendant's guilt in this case, the Court found these errors to be harmless beyond a reasonable doubt. Defendant's conviction, therefore, was affirmed.

**Note:** While we can only be pleased with the result, I have to take issue with some of the Court's conclusions. (1) As for getting defendant's consent to take his car, Sgt. McDonald testified that he believed he had probable cause to take *all* his cars. The Court never discussed this issue. If he did have probable cause to seize all of defendant's cars, then making the threat *could not* have affected the validity of defendant's consent. It's not coercion to threaten to do something an officer has the right to do. (E.g., *People v. Williams* (2007) 156 Cal.App.4th 949, 961.) (2) The Court noted that defendant had the right to "withdraw his consent to the voluntary detention." But it appears to me that Sgt. McDonald had the right to temporarily detain defendant had he chosen to do so. So I have to question the Court's conclusion that defendant had a Fourth Amendment right to just walk away. (3) Most importantly, finding that a suspect who is *not* in custody has a Fifth Amendment right to decline to answer questions without that refusal being used against him is in fact a minority opinion. (See *People v. Preston* (1973) 9 Cal.3<sup>rd</sup> 308, 313-314; and *United States v. Giese* (9<sup>th</sup> Cir. 1979) 597 F.3<sup>rd</sup> 1170, 1197; "Neither due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior.") The Court's finding here can also be used to answer the often asked question: "*Is an officer required to cease asking questions when an out-of-custody suspect gratuitously (i.e., with no advisal of rights) invokes his Miranda rights?*" Under this case, because such a pre-custody invocation is apparently protected by the Fifth Amendment, the answer has to be "yes." Your questioning must cease.

### ***Barricaded Suspects and the Need for Arrest Warrants:***

***Fisher v. City of San Jose* (Mar. 11, 2009) \_\_ F.3<sup>rd</sup> \_\_ [2009 WL 606132]**

**Rule:** Surrounding a barricaded suspect is a lawful warrantless arrest, justified by the exigent circumstances. The passage of time during the ensuing standoff does not dissipate that exigency to where officers are later expected to seek an arrest warrant.

**Facts:** Steven Fisher, plaintiff in this civil law suit, bought two 12-packs of beer and went home intending to drink them while cleaning his World War II-era, 18-gun, firearms collection. Around midnight that evening, a security guard at plaintiff's apartment complex observed plaintiff through a sliding glass door leading out to an enclosed patio. Intending to ask him about the noise coming from another apartment, the

guard motioned to plaintiff to come out and talk to him. The now-drunk plaintiff obediently came out, carrying a rifle he was cleaning. Plaintiff was unresponsive to the guard's inquiries, quickly changing the subject to his Second Amendment (right to bear arms) rights. The guard reported the incident to his supervisor who called the San Jose Police Department. A police sergeant arrived at the apartment at about 2:00 a.m. and tried to get plaintiff to come out onto the porch and talk to him. The still-drunk plaintiff only came out as far as the door where he rambled on about his Second Amendment rights, threatening to shoot the sergeant. More officers (eventually over 60, in total) arrived at the scene and a standoff resulted. Calling the apartment on the telephone, plaintiff's wife answered and came out of the apartment as instructed. A police "tactical negotiator" tried to talk to plaintiff, but only got another Second Amendment lecture in response. Plaintiff invited the negotiator into the apartment, but said that he'd shoot her if she came in. Officers who could see plaintiff through the windows reported that plaintiff was pointing a rifle in the direction of officers taking refuge behind a tree. Defendant was last seen with a firearm at about 6:30 a.m. A "Mobile Emergency Response Group and Equipment" (or "MERGE") team was called to the scene, taking charge of the situation at around 7:00 a.m. Tossed into the apartment at various points was a "throw phone" (to establish better communication), a "flashbang" device, and a couple of CS gas canisters, all to no avail. Finally at around 2:15 p.m., after more than 12 hours, plaintiff came out on his own although he had to be shot with a less-than-lethal rubber bullet in order to get him to comply with the officers' commands. Charged with brandishing a firearm (P.C. §§ 417, 417.8), a criminal trial resulted in a hung jury. He eventually pled "no contest" to a misdemeanor count of "brandishing." He and his wife then sued the San Jose Police Department (and everyone involved) in federal court for violating his civil rights. The jury returned a verdict for the defendant police department and law enforcement officers. Plaintiff filed a motion for "judgment as a matter of law" (in effect, asking to reverse the jury's verdict) on the issue of the warrantless arrest. The federal trial court granted plaintiff's motion, finding the arrest to be illegal as a matter of law, but awarding plaintiff only \$1.00 in damages. The City of San Jose appealed. In January, 2007, a three-judge panel of the Ninth Circuit Court of Appeals affirmed, ruling that because the police officers failed to obtain an arrest warrant during the 12-hour standoff, defendant's arrest was illegal. (See *Legal Update* Vol. 12, #4, p. 6; Mar. 29, 2007; 475 F.3<sup>rd</sup> 1049) However, an en banc (11-judge panel) rehearing was granted.

**Held:** The en banc panel reversed with a 7-to-4 majority overruling their prior decision and upholding the civil trial jury's finding in favor of the police department. On appeal, all parties agreed that defendant was, "for legal purposes," "seized" (i.e., arrested) inside his home at that point when he was first surrounded during the initial minutes of the confrontation. After the 12-hour standoff was over, defendant's arrest was merely completed by taking him into physical custody. It was also conceded that there was probable cause to arrest him. Also, plaintiff agreed that exigent circumstances existed, justifying his warrantless arrest, during the initial stages of the confrontation. The issue contested by the parties was whether those exigent circumstances continued beyond 6:30 a.m. (when defendant was last seen carrying a firearm), and whether, after that point, taking him into custody without an arrest warrant was lawful. Defendant's argument was that at some point during the passage of time, the exigent circumstances dissipated,

“rekindling” the arrest warrant requirement. The majority of the justices disagreed, ruling that once probable cause and exigent circumstances exists, and the suspect is in fact “arrested,” the police are not required to stop and obtain an arrest warrant despite the fact that the suspect is not actually taken into full physical custody until hours later. It is unreasonable, per the court, to expect the officers to continually and periodically reevaluate the circumstances in an attempt to determine whether their earlier right to make a warrantless entry and arrest of the suspect has somehow dissipated to the extent that an arrest warrant has become necessary. Such a rule would pressure officers to attempt an earlier, perhaps more hazardous, warrantless arrest before the exigency dissipates, rather than take the time to move cautiously. Also, because defendant was in fact arrested at that point in time when the officers first surrounded his apartment, thus depriving him of any right to leave, requiring the officers to belatedly go to a judge and ask him or her to retroactively approve the arrest makes no sense. “In sum, no event of Fourth Amendment significance occurred (after arrest but before custody) that would retrigger the warrant requirement and compel the police to inquire as to whether exigent circumstances still existed.”

**Note:** The justices go on and on, reiterating the ridiculousness of the dissenting justices’ argument that the warrant requirement is somehow “rekindled” with the passage of time during a prolonged and continuing standoff, despite the fact that a warrantless arrest could have lawfully been made earlier. When the first three-judge decision was published in his case way back in January, 2007, finding that the police should have sent someone to town for a judicial evaluation of the circumstances that were already well beyond the point of no return, we all knew it was just wrong. Common sense, even without all the legal mumbo-jumbo, just told us it was wrong. So I won’t even waste your time trying to explain the totally irrational analysis written in dissent by Justice Stephen Reinhardt; a man who never met a cop he didn’t distrust, nor a defense argument he couldn’t stretch and elaborate upon to the breaking point.

***Using a Ruse to Enter a Residence:***

**People v. Lucatero (Sept. 15, 2008) 166 Cal.App.4<sup>th</sup> 1110**

**Rule:** Pretending to be a buyer of real estate and making a warrantless entry into a residence with the realtor, seeking probable cause for a search warrant, is lawful.

**Facts:** Porterville police officers arrested a doper in possession of methamphetamine. The doper agreed, under the circumstances, to act as an informant and rat on other dopers. In such a capacity, he told the officers that he obtained his meth at a house on Larson Street. He described the house and told them that there was a green Nissan Altima in the garage. The doper/informant also told the officers that he observed four pounds of meth in the trunk of the Nissan, and that a Hispanic male was living in the garage, using a sleeping bag on a wooden shelf. Detective Michael Benas located the described house and noted a “for sale” sign on the property. Detective Benas called the realtor listed on the sign, pretending to be an interested buyer. Believing the detective’s ruse, the realtor showed Benas the house. In the garage, Detective Benas found the

Nissan described by the informant and the sleeping bag on the shelf. With this corroboration of the informant's information, Detective Benas obtained a search warrant for the house. Execution of the search warrant resulted in the recovery of methamphetamine from the attic, in a hidden compartment in the Nissan, and from a duffle bag in the house. Defendant was in the house, "staying there to protect against break-ins." His identification was found in the duffle bag and a gram of meth was on his person. Charged with various narcotics-related offenses, defendant's motion to suppress the evidence found in the search was denied. He pled no contest and appealed.

**Held:** The Fifth District Court of Appeal affirmed. Defendant's argument on appeal was that Detective Benas' initial entry into the house, pretending to be a potential buyer, was illegal; i.e., a residential entry done without probable cause and a search warrant. Per the defendant, the resulting information used in the subsequently obtained search warrant, being illegally obtained, can not be used as a part of the probable cause described in the warrant's affidavit. Defendant's argument is supported by prior case law on this issue; i.e., *People v. De Caro* (1981) 123 Cal.App.3<sup>rd</sup> 454. The People agreed that *De Caro* is controlling, but argued that the detective's good faith belief in the legality of his entry provides an exception. In upholding the search warrant, the Court disagreed with both sides. The Court noted that the *De Caro* court's decision (that an officer's entry of a residence while pretending to be a buyer is illegal) was "*dicta*" only (i.e., not necessary to the court's eventual decision), and wrong anyway. (The search in *De Caro* was upheld despite the entry because there was other independent evidence in the warrant affidavit supporting a finding of probable cause.) Per this Court, the rule on this issue is this: Had the realtor allowed the police into the residence, knowing that they were police, the entry would be illegal. (See *People v. Jaquez* (1985) 163 Cal.App.3<sup>rd</sup> 918.) This is because a real estate agent only has the permission of the owner of the residence to allow in potential buyers; not the police. However, an entry by an undercover police officer, allowed by a real estate agent who believes the officer to be a potential buyer, is lawful. This is because the realtor is only doing what she has permission from the owners to do; i.e., let potential buyers see the interior of the house, (See *Lewis v. United States* (1966) 385 U.S. 206.) In this case, Detective Benas pretended to be a potential buyer. Because the realtor had the authority to allow potential buyers into the house, Detective Benas' entry was lawful. Differentiating this case from others where ruses were held to be illegal, the Court noted that "(t)his is not a ruse in which the officer is invited in under the ruse that he is a meter reader and then does not read the meter, or that he is a friend of the repairman, but then engages in investigatory behavior inconsistent with a friend's visit." (Citing *State v. Nedergard* (Wash. Ct.App. 1988) 753 P.2<sup>nd</sup> 526.) Detective Benas didn't do anything that wasn't open to any potential buyer. The observations made while in the house, therefore, were properly used in the subsequent search warrant.

**Note:** There is indeed a thin line between the ruse used in this case and one where the officer goes in pretending to be, for instance, a meter reader or the friend of a repairman. And, quite frankly, I'm not sure I can tell you where that line is. There are other cases floating around that condemn the use of any ruse that causes the resident to even open the door, allowing an officer the opportunity to make plain sight observations without probable cause. (E.g., see *People v. Reeves* (1964) 61 Cal.2<sup>nd</sup> 268; and *Alexander v. City*

and County of San Francisco (1994) 29 F.3<sup>rd</sup> 1355; officers using an administrative, or “inspection” warrant, issued by a court for the purpose of regulating building code violations, in an attempt to justify a concurrent entry with the inspectors to make an arrest.) *Lewis v. United States*, cited above, is a situation where an undercover officer makes a warrantless entry as a part of a covert investigation. That type of warrantless entry has always been upheld. But the issue is confusing enough that I *strongly* suggest you sit down with a prosecutor to discuss what you want to do and get his or her blessing before you try to use any type of ruse to make a warrantless residential entry.

### ***Mental Patients and Residential Searches:***

#### **People v. Sweig (Oct. 27, 2008) 167 Cal.App.4<sup>th</sup> 1145**

**Rule:** A warrantless entry into a residence to seize firearms owned or possessed by a mental patient taken into custody pursuant to W&I Code § 5150 is unlawful. *But*, there is no statutory authority for obtaining a search warrant for this purpose.

**Facts:** Officers responding to a 9-1-1 hang-up call made from defendant’s trailer in Shasta County found him on his front porch holding a rifle. Defendant had told his mother that the community, his family, and law enforcement had “done him wrong,” and that he “was going to take them out.” When told by the officers to put the gun down, defendant instead walked around the side of the trailer, but soon returned without the rifle. When the officers attempted to pat him down for weapons, defendant tried to run. He was taken into custody and put into a police car. Defendant told the officers that people were harassing him by banging on his trailer and aiming laser lights at him which emitted radiation that burned his skin. While talking to the officers, he claimed to see someone on the property with a flashlight although no one was there. The officers knew defendant from prior contacts, exhibiting similar bizarre behavior. They concluded that defendant’s mental state was deteriorating and that he was a danger to himself and others. They therefore took him into custody pursuant to W&I Code § 5150 and transported him to a mental facility for 72-hour treatment and evaluation. Before leaving, however, the officers entered his trailer to secure the rifle they’d seen him with, pursuant to W&I Code § 8102(a). Numerous firearms were found, including an unregistered semi-automatic assault rifle. Defendant was later charged with possessing an unlawful assault weapon, per P.C. § 12280. However, in a motion to suppress, the trial court suppressed the firearm as the product of an illegal search. The People appealed.

**Held:** The Third District Court of Appeal affirmed. On appeal, the People argued that the warrantless entry into defendant’s trailer to seize his weapons was mandated under W&I Code §8102(a) and that, alternatively, the warrantless entry into defendant’s trailer should be lawful under the “community caretaking exception” to the search warrant requirement. The Court rejected both these arguments. W&I Code § 8102(a) does in fact command law enforcement officers to confiscate and retain custody of any firearm or other deadly weapons possessed by a mental patient taken into custody pursuant to W&I Code § 5150. However, this section does not provide authority for a warrantless entry into a residence. “Nothing in the language of section 8102 can be read to authorize the

warrantless entry into a residence to comply with the statute’s mandate.” Also rejecting the People’s argument that the “community caretaking function” applied, the Court noted that the community caretaking function required that there be some “necessity” justifying a warrantless entry. In this case, with defendant living alone in a sparsely populated area, and with him being held for observation for at least 72 hours, there was no necessity for an immediate entry into his trailer to seize his weapons. Obtaining a search warrant would have been the proper thing to do in this situation. However, P.C. § 1524, listing the grounds for obtaining search warrants, does not authorize the issuance of a search warrant for the purpose of searching for and seizing weapons from a mental patient’s home. This, per the Court, is an oversight that must be remedied by the Legislature and not the courts. As the law stands today, there was no lawful way for the officers to enter defendant’s trailer (absent his consent) for the purpose of seizing his firearms.

**Note:** In teaching classes on the handling of mental patients per W&I Code §§ 5150 et seq. and 8100 et. seq, I used to suggest to police officers that W&I Code § 8102 “*impliedly*” authorizes the issuance of a search warrant under circumstances such as this. And I don’t see anything in P.C. § 1524 suggesting that the grounds listed there are the only types of search warrants authorized. With my assistance, we’ve obtained numerous search warrants over the years for this purpose in San Diego County. This theory, however, was soundly shot down by the Court in this case. I also used to argue that because mental patients taken to a mental health facility are often released well before the expiration of the 72-hour evaluation period (W&I § 5151), the situation constitutes a built-in exigent circumstance justifying the immediate warrantless searching for, and seizure of, the person’s guns and other deadly weapons. *Rupf v. Yan* (2000) 85 Cal.App.4<sup>th</sup> 411, at pages 421-422, supports this argument. But the Court here, by rejecting the argument that this situation constitutes a “necessity” for immediately seizing firearms, is telling you that I don’t know what I’m talking about. So all we can do now is hope that our California state legislators, if they can take a break for a few minutes from giving away our tax dollars, respond to the Court’s suggestion and write the necessary legislation to remedy this oversight.

### ***Handcuffs & Detentions:***

#### ***People v. Stier* (Oct. 24, 2008) 168 Cal.App.4<sup>th</sup> 21**

**Rule:** Using handcuffs on a detained person will elevate the contact into a de facto arrest in the absence of articulable, reasonable reasons for doing so.

**Facts:** San Diego police officers were told by federal Drug Enforcement Administration (DEA) agents that the occupants of a GMC pickup truck had just participated in a narcotics transaction. The officers were asked to follow the truck and, if they developed probable cause, make a traffic stop. While following the truck, it was noted that the mud flaps on the truck were smaller than allowed under the Vehicle Code and that a backseat passenger did not appear to be wearing his seatbelt. Upon making the stop, the right-front seat passenger attempted to walk away but was stopped. She was asked for consent to search her person, prompting an admission to possessing narcotics. This information

was relayed to the other officer who contacted the driver; defendant. Defendant was asked to step out of the truck. When he did so, it was quickly noted that he was 6 foot-6 inches tall. Although defendant was “very cooperative, . . . very easy going, . . . very docile, . . . very polite, . . . very mellow, . . . (and) did not appear to be nervous as all,” the officer decided to handcuff him. The stated purpose for handcuffing defendant was because the officer “felt uncomfortable” with defendant’s height and because he knew narcotics users and dealers sometimes carry firearms. Defendant, however, was not patted down for weapons. Defendant denied having any weapons or contraband and told the officer to go ahead and check. A search of defendant’s person resulted in the recovery of methamphetamine. After defendant’s motion to suppress was denied, a jury convicted him of the possession and transportation of methamphetamine. He appealed.

**Held:** The Fourth District Court of Appeal (Div. 1) reversed, ruling that defendant’s consent to be searched was the product of an illegal arrest. In so ruling, the Court noted that an officer may lawfully detain a person when there exists an objective, reasonable, articulable suspicion that the suspect has committed a crime or is about to do so. But that detention must be accomplished using the least intrusive means available under the circumstances. Handcuffing the suspect substantially increases the intrusiveness of a detention, but does not necessarily convert a detention into an arrest. If, however, handcuffing the suspect is found to be unnecessary, the detention becomes a “de facto arrest.” If in such a circumstance there is insufficient evidence of guilt to establish “probable cause,” that arrest is unlawful. Generally, handcuffing a suspect without converting a detention into an arrest is justified only where there is a reasonable basis for believing the suspect poses a present physical threat or might flee. Circumstances that might cause an officer to reasonably believe this include when (1) the suspect is uncooperative, (2) the officer has information the suspect is currently armed, (3) the officer has information the suspect is about to commit a violent crime, (4) the detention closely follows a violent crime by a person matching the suspect’s description and/or vehicle, (5) the suspect acts in a manner raising a reasonable possibility of danger or flight, or (6) the suspects outnumber the officers. In this case, the officer only testified to feeling uncomfortable with defendant’s height. He also indicated that he knew that narcotics suspects are sometimes armed, but then failed to pat him down for weapons. Based upon this, handcuffing defendant was unjustified. Handcuffing him therefore converted the detention into a de facto arrest without probable cause. Defendant’s consent to be searched, occurring immediately after the arrest, was the product of the illegal arrest. As such, the evidence found on his person should have been suppressed.

**Note:** Narcotics suspects are not “*sometimes*” armed; they are *quite often* (or even “*most often*”) armed, in my humble opinion. Had the officer patted defendant down for weapons, which would have been reasonable under these circumstances (see *United States v. Davis* (9<sup>th</sup> Cir. 2008) 530 F.3<sup>rd</sup> 1069, 1082-1083; *People v. Collier* (2008) 166 Cal.App.4<sup>th</sup> 1374.), and testified accordingly (more an issue of the prosecutor not asking the right questions), there would likely have been a different result despite the handcuffing. Be that as it may, just know that handcuffs are always indicative of an arrest. If you only intend a detention, be ready to explain why (other than just feeling “uncomfortable”) you felt it was necessary to use handcuffs.