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Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*There is a stubbornness about me that never can bear to be frightened at the will of others. My courage always rises at every attempt to intimidate me.*" (Jane Austen)

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ADMINISTRATIVE NOTES:

Legal Updates in the News: In case you missed the articles in the UT-San Diego, the California Legal Update has been mentioned in the news lately. Read the articles here: January 2, 2014 | January 5, 2014

CASES:

***Jailhouse Informants*:**
***Witnesses; Coercive Questioning Tactics*:**

People v. Quiroz **(Apr. 3, 2013) 215 Cal.App.4th 65**

Rule: (1) Purposely placing an unrepresented criminal suspect near a jailhouse informant, even while using a deceptive excuse, is lawful. The informant's own deceptions, when not of the type reasonably likely to elicit an untrue statement, are also proper. (2) Informing a witness of the advantages to telling the truth does not constitute coercion.

Facts: Defendant and Brian Szostek had been childhood friends. Around June, 2005, Szostek called defendant and asked him for the telephone numbers of two drug dealers, which defendant gave him. Unbeknownst to defendant, Szostek was working with law enforcement as a confidential informant. After participating in a couple of drug-buys arranged by Szostek, both drug dealers were subsequently arrested. One of the drug dealers, Hector Flores, later discussed with defendant his suspicions that Szostek was a CI. It was inferred that defendant was to kill him. Two months later, on the evening of August 26, 2005, defendant picked up Szostek and drove him to Oxnard where, after picking up several other people, Szostek was shot four times and dumped in an alley. Defendant was later arrested for this murder. (*Issue #1*) After defendant's arrest, but *presumably* before he was appointed an attorney (see Note, below), jail officials moved defendant into a cell beside a subject named Ismael Cano. Defendant was told that the move was done for security reasons; i.e., that the Mexican Mafia had ordered a "hit" on him. In truth, defendant had been moved near Cano because Cano was a jailhouse informant. Cano told defendant that he was part of Hector Flores's drug organization (which was true) and was Flores's cousin (which was untrue). Cano explained that Flores's drug operation had been dismantled by the Drug Enforcement Administration due in large part to a few snitches. At that point, apparently thinking that it was Flores who had put out the "hit" on him and hoping to curry favor with Flores, defendant confessed to Cano that he was the one who had shot Szostek in retaliation for informing on Flores. Cano testified to this statement at defendant's murder trial. (*Issue #2*) When first arrested, defendant denied shooting Szostek, claiming that he was not even in the car at the time of the murder. Several witnesses, including a subject by the name of Ruben Gonzales, told police that defendant was in fact in the car when Szostek was murdered. At trial, however, Gonzales recanted his earlier statement about defendant being in the car, testifying instead that he was not there at all. Gonzales testified that he lied to the police because they had told him that he could either cooperate or face 50 years to life in prison. In rebuttal, one of the detectives who had interviewed Gonzales testified that Gonzales had told them that defendant was in the vehicle when Szostek was murdered. This detective also testified that during a two-hour interview, Gonzales was not under arrest. Per the detective, although Gonzales provided a story they believed to be true, he was told that they knew he was not the shooter but that as an aider and abettor, he could still potentially be liable for the murder. They explained to him that he faced 50 or more

years in prison, but that if he provided them with accurate information, the district attorney might view his cooperation favorably. The officers also told Gonzales that defendant and others were talking to the police; a fact that was *not* true. Defendant was convicted and sentenced to 28 years to life in prison. He appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Among the issues raised on appeal were the following: (1) First, defendant contested the admission into evidence of his incriminating statements to Ismael Cano; the jailhouse informant. He argued that his incriminating statement to Cano was involuntary because under the circumstances: (a) He faced a credible threat of physical violence when he was told that he was being moved to a different cell for safety reasons; (b) the jail officials lied about why he was moved and Cano lied about being Flore's cousin; and (c) Cano made an indirect, or inferred, offer to call Flores and stop the threatened "hit" if defendant confessed to killing Szostek. The Court didn't buy any of this. First, the factors cited by defendant do not amount to coercion. Although the jail officials moved defendant because of an alleged threat of a hit, there was no evidence that defendant had any reason to believe those threats, if they existed at all, originated with Flores. Also, the two deceptions involved (i.e., the reasons for why he was being moved into another cell and Cano's relationship with Flores) were not of the type that are "*reasonably likely to produce an untrue statement*," and therefore were not improper whether false or not. Lastly, there is no evidence supporting defendant's contention that Cano made any suggestion that he would call off the alleged Mexican Mafia hit if defendant would admit to killing Szostek. (2) The Court also rejected defendant's argument that Gonzales's original statement to the effect that defendant was in the car when Szostek was killed was coerced and should have been suppressed. The Court found that Gonzales's interrogation did *not* "*transgress the guidelines that govern police interrogations*." Law enforcement may lawfully confront a witness or suspect with what they (the police) already know. They may discuss the advantages that "*naturally accrue*" from making a truthful statement. They may also explain the possible consequences of the failure to cooperate as long as their explanation does not amount to a threat contingent upon the witness changing his or her story. And lastly, they may even engage in deception as long as it is not the type of deception that is "*reasonably likely to produce an untrue statement*." The Court also rejected as irrelevant defendant's argument that Gonzales may have been unlawfully "*seized*" (a Fourth Amendment issue) or "*in custody*" (A Fifth Amendment/*Miranda* issue) during his questioning. "They add nothing to the *subjective* inquiry (i.e., what a reasonable person in the person's shoes would have believed) that defines coercion under due process." Lastly, the Court found that telling Gonzales that he was potentially liable for murder as an aider and abettor, with a potential life sentence, and that his cooperation might help with the District Attorney, was not an untrue statement. Pointing this out to him was lawful, not being intended to "*produce evidence to support a version of events the police had already decided upon*," but rather intended only to get to the truth. The police, therefore, did nothing improper. .

Note: The Court doesn't discuss the glaring Sixth Amendment issue, which is why I noted above that putting defendant in a jail cell next to a jailhouse informant was "*presumably*" before he was appointed an attorney (i.e., defendant had not yet been

arraigned). Had defendant been represented by an attorney at that point in time, there would have been some serious Sixth Amendment issues with which to deal. When a criminal suspect already has an attorney, it is a *Sixth Amendment* violation for an informant, acting as a police agent, to do anything that is likely to induce the suspect to make incriminating statements, such as by having an undercover agent purposely engage him in conversation. (*United States v. Henry* (1980) 447 U.S. 264 [65 L.Ed.2nd 115].) The only way around this rule is to have the informant do no more than sit there and act as a "*listening post*," refraining from doing anything intended to get the defendant talking. (*People v. Hovey* (1988) 44 Cal.3rd 543; *United States v. Birbal* (2nd Cir. 1997) 113 F.3rd 342.) But otherwise, this case is good guide on what is lawful in using jailhouse informants to question a suspect, and in questioning potential co-defendants who we'd prefer to use as a witness only.

***Unlawful Use of Personal Identification Information, per P.C. § 530.5(a)*:**

People v. Barba et al. **(Nov. 20, 2012) 211 Cal.App.4th 214**

Rule: The Unlawful Use of "Personal Identification Information," per P.C. § 530.5(a), does not require that the perpetrator portray himself as another person.

Facts: On the evening of April 18, 2011, Aaron Ashby, owner of "Ashby Remodeling & Services," parked and left his unlocked car out on the street with the windows rolled down. The next morning, he discovered that someone had stolen a company checkbook and files from his car. The checks had printed on them the name and telephone number of the business along with the checking account number, bank name, and bank routing number. Ashby did not know the defendants and did not give anyone permission to be using his checks. On April 21, defendant Saul Barba cashed one of Ashby's checks at the Lakeside Discount Market. The check was made payable to Saul Hinojosa in the amount of $250. It being so easy the first time, defendant Barba returned to the store later with his wife, Claudia Lizethe Aguilera, presenting another of Ashby's checks. This one was made out to Aguilera and was for $600. This time the clerk attempted to verify its validity by calling the number listed on the check, but no one answered. Using a cellphone number provided by Barba, the clerk eventually talked to an unknown woman who verified that the check was good. So it too was cashed. On April 21, defendant Barba entered "The Check Cashing Place" with another stolen check made out to Saul Hinojosa for $600. Defendant also showed an identification card to the clerk in the name of "Saul Barba Hinojosa." While attempting to verify the validity of this check, the clerk eventually looked up the Ashby Remodeling & Services phone number in a phone book and contacted Ashby himself. Being told that the check had been stolen, the police were called. Officer Roberto Bonilla responded and detained defendant Barba. Officer Anthony Kolombatovic also responded and found Aguilera, co-defendant Jessica Jean Lofgreen, and a female juvenile, sitting in a van in a nearby parking lot. Co-defendant Lofgreen told Officer Kolombatovix that she and an individual named "Jeff" had stolen the checks from the victim's car. Co-defendant Lofgreen admitted that she had written out the checks and had signed the signature lines on many of them. When questioned by Officer Bonilla, defendant Barba admitted to knowing the checks were stolen and to

cashing them as described above. The People filed a complaint charging defendants Barba and Lofgreen with, among other things, the unlawful use of personal identification information, per P.C. § 530.5(a). Following a preliminary examination, the magistrate bound over the defendants on all the charges except the section 530.5(a) charge, which he dismissed for insufficient evidence. The People, however, in filing a six-count Information two weeks later, realleged the section 530.5(a) charge. (Aguilera, although not a party to this appeal, was eventually added to the charging document, apparently having been prelim'd separately.) Defendants filed a motion to dismiss the section 530.5(a) charge in the Superior Court. The motion was granted and the People appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. The preliminary hearing magistrate's reasoning for the dismissal of the section 530.5(a) charge was that the evidence presented at the prelim did not demonstrate that the defendants had portrayed themselves to be anyone other than themselves. The Superior Court trial judge apparently agreed that this was a necessary element, dismissing the section 530.5(a) charge a second time. The People disagreed, arguing on appeal that the section does not require a defendant to have personated another individual in using someone else's personal identifying information. The Appellate Court agreed with the People. Penal Code section 530.5(a) provides that: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information, without the consent of that person, is guilty of a public offense, ..." The "personal identifying information," as described in section 530.55(b), includes a whole smorgasbord of items, including, but not limited to, one's name, address, and checking account number. The elements of this offense are as follows: (1) That the person willfully obtains personal identifying information belonging to someone else; (2) that the person uses that information for any unlawful purpose; and (3) that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being used. The first step in the art of statutory interpretation is to consider the ordinary meaning of the words used. Doing that here, the Court determined that nothing in section 530.5(a) suggests a requirement that a perpetrator have falsely personated another person. Neither the phrase "identity theft" nor anything similar is used in this section. The section, by its terms, was intended to deal with a much wider range of conduct than merely personating another person. The statute clearly and simply provides that anyone who *obtains* personal identifying information and *uses* it for an unlawful purpose without the victim's consent has violated section 530.5(a). The Court also found that this interpretation of section 530.5(a) is consistent with the legislative intent. In so finding, and in looking at the section's legislative history, the Court rejected the defendants' argument that the section was intended to prohibit "identity theft," and that to give it any other interpretation in effect duplicated the forgery statutes (i.e., P.C. §§ 470, 475), thus serving no purpose. The Court noted that there's nothing unusual about more than one statute being violated by a single act. Also, it was pointed out that section 530.5(a) has a different purpose than the forgery statutes. The forgery statutes are intended to protect the *recipient* of the forged document from being defrauded, while section 530.5(a), on the other hand, is intended to protect the person or entity whose personal information has

been misappropriated and is used for an unlawful purpose. In this case, based upon the evidence as presented at the preliminary examination, defendants willfully obtained personal identifying information, in the form of victim's checks, that they used that information for an unlawful purpose, and that they did so without the victim's consent. As such, the case should not have been dismissed.

Note: Good case. Using section 530.5(a) in this situation is probably something that wouldn't have occurred to me, had I been the issuing deputy, in that forgery seems like the obvious offense to use. Forgery-related counts were also filed, which the Court says is also okay. But kudos to the perceptive Deputy District Attorney who took a chance by trying something a little different, and to whoever determined that he or she wasn't going to let a Superior Court judge get the last word on it when he was so obviously wrong. Too often, I have to admit, prosecutors tend to be a little reluctant to take a chance when the results aren't certain. We can't make good case law, as was done here, unless we're willing to push the envelope a little once in a while.

***Threatened Illegal Arrests and Discarded Evidence*:**

United States v. McClendon **(9th Cir. Apr. 19, 2013) 713 F.3rd 1211**

Rule: An arrest or detention does not occur until the suspect is either physically subdued or he submits to a police officer's authority. Evidence discarded prior to an arrest or detention does not implicate the Fourth Amendment. An illegal search does not poison a later arrest or detention so long as probable cause or a reasonable suspicion (respectively) continues to exist after ignoring evidence recovered in the illegal search.

Facts: Defendant and a woman named Rosemary Johnson parked their car in a driveway belonging to an elderly, disabled man. When defendant knocked on the man's front door, the man called the police. Defendant was gone when the officers arrived. But Johnson was still sitting in the driver's seat of the car. Appearing nervous and possibly under the influence of methamphetamine, Johnson told the officers that they'd run out of gas and that defendant, who she said had "been in a lot of trouble before," was off looking for more gas (or, perhaps, more "trouble"). When the ignition was turned on, however, the car started without a problem. A consent search of the car resulted in the recovery of a machete, drugs and drug paraphernalia. Johnson was arrested. A backpack, which Johnson said belonged to defendant, was found behind the front passenger's seat. A search of the backpack resulted in the recovery of a sawed-off shotgun with a filed-off serial number, ammunition for the gun, a black wig, walkie-talkies, binoculars, a zippered case containing two prescription pills, and a Safeway receipt with defendant's name on it. A records check on defendant revealed that he had a prior felony conviction for "riot with a deadly weapon." The officers went looking for defendant, intending to arrest him. He was soon spotted walking down the street about 50 to 60 yards away. As the officers approached, they asked him if he was "Eddie." Defendant said that he was, but then turned and started to walk away. With guns drawn, defendant was told that he was under arrest and to show his hands. Defendant instead continued to walk away, "pushed (his hands) down towards his waistband," and tossed what was soon determined to be a

loaded handgun. Defendant was forcibly taken into custody. When arrested, defendant was wearing a black knit cap which was found to be a rolled-up ski mask with holes for the eyes and mouth. As noted by the Court, defendant "had no skis. And there was no snow." Charged in federal court with two counts of being a felon in possession of a firearm and related charges, defendant filed a motion to suppress the handgun and the shotgun. The trial court granted the motion as to the shotgun only. Defendant then pled guilty to possessing the handgun and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Defendant's argument on appeal was that the illegal search of his backpack (as held by the trial court judge, but see Note, below) was what prompted his illegal detention, which in turn was what led to the discovery of the pistol. As the fruit of the prior illegal search of his backpack, the pistol should have been suppressed along with the shotgun, per the defendant. The Government, on the other hand, while admitting that it was in fact the illegal discovery of the shotgun in his backpack that was the primary reason why they were looking for him, defendant abandoned the handgun before he was ever physically taken into custody. The gun was discarded before defendant was ever seized. Pursuant to U.S. Supreme Court authority (*California v. Hodari D.* (1991) 499 U.S. 621.), the tossing of the pistol was not the product of an illegal seizure. The rule, under *Hodari D.*, is that the Fourth Amendment is not implicated (i.e., the suspect is not "*seized*"), until he's either physically taken into custody or he otherwise submits to the officer's authority. While the general rule is that a person is not seized until that point where a reasonable person would have believed that he was not free to leave, *Hodari D.* held that there must also be some "*touching or submission*." Here, defendant argued that when he first stopped and identified himself, he submitted. The Court, however, held that "*no*," a temporary hesitation and direct eye contact is insufficient to show submission. Also, the Court rejected defendant's argument that he was in custody when the officers drew their guns and told him he was under arrest. Under the "totality of the circumstances," where the defendant continued to walk away, this was also insufficient to show that defendant was subdued by the police at the time he tossed the gun. While defendant may have reasonably believed that he was not free to leave at that point, there still was no submission or touching. The Court also rejected defendant's argument that *Hodari D.* didn't apply because in that case, the suspect ran from the officers where defendant only walked away. Whether walking or running, this is still not submission. And lastly, even assuming the officers did not have probable cause to arrest him without the illegal search of the backpack (an issue the Ninth Circuit declined to decide), the defendant still had a duty to submit. *Hodari D.* is no less applicable even where the attempted detention or arrest is illegal. On a slightly different vein, the Court also held that under the circumstances, the recovery of the pistol was not the product of an illegal search of the backpack (assuming, without deciding, that the search of the backpack was illegal). "(T)he search of (defendant's) backpack was not the *but-for cause* of the discovery of the handgun." (Italics added) Even had the backpack never been searched, the officers had sufficient reasonable suspicion to justify a detention and would have wanted to talk to him. With defendant parking his car in a stranger's driveway in the middle of the night, and when a machete and dope is found in that car, the officers were going to go looking for defendant anyway. Also, defendant's act of walking away from the officers when

they tried to contact him was an "intervening act" between the illegal search of the backpack and his eventual arrest, dissipating the taint of that search. The discarded firearm, therefore, was admissible in evidence against him.

Note: There is a good argument that the search of the backpack was not illegal, despite the trial court's ruling. The Ninth Circuit specifically declined to decide this issue. With what the officers had already found in the car, it's certainly arguable that they had probable cause to search the entire vehicle, including containers found in the vehicle such as defendant's backpack. (See *Wyoming v. Houghton* (1999) 526 US. 295; with probable cause to search a vehicle, the entire vehicle, including its containers, is subject to a warrantless search.) The Government should have made an issue out of this on appeal, but, for whatever reason, declined to do so.

***Probation Violations and P.C. § 1203.2(a)*:**

People v. Leiva **(Apr. 8, 2013) 56 Cal.4th 498**

Rule: Potential probation violations occurring after the expiration of a defendant's probationary period are not punishable despite an earlier summary revocation of probation which was imposed by a court prior to the expiration of the probationary period.

Facts: Defendant was convicted of three counts of vehicle burglary in 2000. On April 11, 2000, the trial court suspended imposition of sentence and placed defendant on formal probation for a period of three years. This meant that probation would expire on April 11, *2003*. Included in the terms and conditions of probation were that defendant was to report to his probation officer within one business day of his release from custody and not reenter the United States illegally if deported. Being an illegal alien, defendant was deported to El Salvador on the day he was released from jail, causing him to fail to report to his probation officer. Being out of the country, he also failed to appear at a scheduled probation violation hearing, scheduled for September 21, 2001, which was based upon an allegation that he didn't report to his probation officer. So on September 21, the trial court "summarily revoked" defendant's probation and issued a warrant for his arrest. Seven years later, on November 10, 2008, five and a half years after his probation had originally been scheduled to expire, defendant was back in court after being arrested during a traffic stop on the still-outstanding probation violation warrant. The trial court recalled the warrant and ordered that his probation remain revoked, holding him in custody until a formal probation violation hearing, scheduled for February 13, 2009, could be held. Pending this hearing, the court received a supplemental probation report noting that defendant had been involuntarily deported in 2000 after being released from custody, and that he claimed to have returned to the United States on February 7, 2007. At the February 13, 2009, formal probation violation hearing, it was agreed that the court could not find defendant in violation of probation for failing to report to probation because the violation was not willful. Defense counsel also argued that probation must be terminated because the court didn't have the authority to reinstate defendant's probation absent evidence of a willful probation violation which must have

occurred prior to the termination of the natural period of probation (i.e., April 11, 2003). The trial court rejected defense counsel's argument, ruling that defendant violated his probation in February, 2007, when he failed to report to his probation officer upon his admitted return to the United States. Probation was reinstated and extended to June 6, 2011. Defendant appealed this probationary order, arguing that the court had lost the power to impose a new term of probation for something that occurred after April 11, 2003. While this issue was on appeal, defendant violated this new probation order as well when he was again deported, thus failing once more to report to his probation officer. On May 14, 2009, while defendant was in El Salvador and the probationary order was on appeal, the trial court calendared another violation hearing based upon a supplemental probation report stating that defendant had not reported to his probationary officer and was deported. On June 9, 2009, probation was summarily revoked and a bench warrant issued. Defendant returned to California again and was arrested on the outstanding warrant, appearing in court on September 17, 2009. The trial court kept defendant in custody and scheduled a formal probation hearing for October 9, 2009. At this hearing, the court found defendant in violation of probation, this time for having re-entered the country illegally in 2009. On November 9, 2009, the court ordered that probation remain revoked and sentenced him to prison for two years based upon the original three counts of burglary from 2000. Defendant again appealed. Consolidating the two appeals, the appellate court affirmed in a split 2-to-1 decision. The California Supreme Court granted review.

Held: The California Supreme Court unanimously reversed. Penal Code § 1203.3(a) describes a court's power to "revoke, modify, or change its order of suspension of imposition or execution of sentence." Under P.C. § 1203.2(a), a court may "summarily" revoke a defendant's probation, giving the court jurisdiction over and physical custody of the defendant, so long as he is later accorded a formal hearing where the prosecution is required to offer proof of a violation. Also under P.C. § 1203.2(a) (as the section read in 2001), "the revocation, summary or otherwise, shall serve to toll the running of the probationary period." The debate in this case was what the word "toll" means. In both appeals, defendant's argument was that the trial court had erred in finding a violation of probation based upon conduct that had occurred *after* the expiration of the original court-imposed three-year probationary period. The Attorney General, on the other hand, insisted that to "toll," means to extend all the terms and conditions of probation until defendant is accorded his formal probation revocation hearing. The Court here expends a pile of pages discussing the meaning of the word "toll," only to determine that the "plain meaning" of the word (i.e., to "abate," or in the alternative, to "extend") would lead to absurd results. It was therefore necessary to consider the legislative history of section 1203.2(a). In so doing, the Court found no indication that the Legislature intended section 1203.2(a)'s tolling provision to subject a probationer to possible revocation for conduct that occurred *after* the conclusion of the court-imposed probationary period. To the contrary, based upon the relevant case law and the legislative amendments enacted to counter the effects of that case law, the Court held that the tolling provisions of section 1203.2(a) were intended to do no more than preserve the authority of a court to hold a formal probation violation hearing at a time after probation would have expired with regard to an alleged violation that had occurred *during* the probationary period. Lastly,

the Court noted that this interpretation of the legislative intent is consistent with the "ostensible objects to be achieved (by the statutes) . . . as well as the relevant public policy considerations." Therefore, in this case, while the trial court, in a formal probation violation hearing held after the expiration of the three-year probationary period, could have punished defendant, or extended his probation, for any violations of probation that might have occurred *during* his three year probationary period, the court did not have the authority to punish him for violations that occurred *after* that same three years. This defendant, therefore, was improperly punished (by imposing the suspended two-year prison term) for a violation that occurred after the initial three-year period.

Note: So, as the court further explains, this is how it works: A defendant (such as the one in this case) is put on formal probation for three years. During this three-year period, he commits a probation violation. Also before defendant's probation expires, the sentencing court "summarily" (i.e., without an evidentiary hearing) revokes the absent defendant's probation and, because he's not present, issues a warrant for his arrest. Because the defendant is not there, an evidentiary, contested, probation violation hearing is never held. Sometime later (and this could be years), after the expiration of the original three-year probationary period, defendant is arrested on the warrant and brought back to court. Despite the three-year probationary period having expired, the "tolling" provisions of section 1203.2(a) allow for punishment to be imposed for the probation violation which had occurred before the three-year probationary period had ended. However, if it is determined that no such violation is provable, but that defendant committed new probation violations *after* expiration of the original three-year period, those new violations *are not* punishable as a probation violation. *Simple*, *right*?