The California Legal Update

Remember 9/11/2001; Support Our Troops

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill808@AOL.com

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This Edition is dedicated to the memories of Officers Alyn Beck and Igor Soldo, Las Vegas Police Department; Murdered in the Line of Duty June 9, 2014

THIS EDITION'S WORDS OF WISDOM:

"*We must reject the idea that every time a law's broken, society is guilty rather than the lawbreaker. It is time to restore the American precept that each individual is accountable for his actions*." (Ronald Reagan)

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ADMINISTRATIVE NOTES:

***Officers' Safety and OIS Incidents*:** The California Supreme Court has just ruled that when you are involved in an "*officer involved shooting*" incident, your identity is not immune from being publicized. (*Long Beach Police Officers Association v. City of Long Beach* (May 29, 2014) 59 Cal.4th 59].) The public's right to know is to be balanced with the officer's right to be free from retaliation, with the presumption being that your identity will be publicized. It is not just assumed without some supportive evidence that

someone in the community might be angry enough to constitute a danger to you, or that releasing your identity might lead to harassment directed towards you or your family. "Vague safety concerns that apply to all officers involved in shootings are insufficient . . . ." In order to prevent the public disclosure of an officer's identity in such a case, there must be a "particularized showing" of necessity that outweighs the public's interest. Even in a gang case, where retaliation might be the order of the day, it is not presumed, absent specific evidence to the contrary, that the officer or his family is in danger. An example where non-disclosure is to be permitted is when the officer is working undercover. The Court further intimated that evidence of a specific threat made towards an officer should also allow for non-disclosure.

CASES:

Searches of Cellphones Incident to Arrest

Riley v. California **(June 25, 2014) 573 U.S. __ [2014 U.S. LEXIS 4497]**

Rule: Searching a cellphone, absent a showing of exigent circumstances, requires a search warrant to be lawful.

Facts: Two cases combined for decision: (1) Defendant One, David Riley, was stopped by a California law enforcement officer for driving with expired registration tags. Upon contacting him, it was determined that his driver's license had been suspended. Pursuant to department policy, the officer prepared to impound defendant's vehicle, doing an inventory search. This resulted in the recovery of two loaded handguns from under the car's hood. Defendant was arrested for possession of the concealed firearms and searched incident to arrest. Along with items associated with the "Bloods" street gang, a cellphone was recovered from his pants pocket. The phone—a "smart phone"—was one with a broad range of functions including an advanced computing capability, large storage capacity, and Internet connectivity. The officer went into the phone's contact list and discovered certain names marked with the letters "CK," meaning "Crip Killers;" a slang term for members of the Bloods gang. Two hours after defendant's arrest, a detective inspected the cellphone in more detail and found videos of young men sparring while someone was yelling encouragement, including the moniker "Blood." There was also a photo of defendant standing in front of a car that was suspected of being involved in a gang-related shooting a few weeks earlier. Defendant was ultimately charged in state court with various offenses, including attempted murder, stemming from that shooting. It was also alleged that these crimes were committed for the benefit of a criminal street gang, per P.C. § 186.22. Defendant's motion to suppress everything obtained from his cellphone was denied. At trial, officers testified to the existence and significance of the photos and videos found on the phone. Upon conviction, with a true finding as to the gang allegation, he was sentenced to 15 years to life in prison. The Fourth District Court of Appeal affirmed in an unpublished decision, ruling that *People v. Diaz* (2011) 51 Cal.4th 84, allowed for the warrantless search of his cellphone because it was recovered from his person upon his arrest. The California Supreme Court denied review. The United States Supreme Court granted certiorari. (2) Defendant Two, Brima Wurie, was arrested after having been observed by officers selling drugs from his car. Upon being transported to the police station, two cellphones were recovered from his person. One of the

phones was a "flip phone," that flipped open for use. Such a phone has a smaller range of features than a "smart phone." Within 5 to 10 minutes after arriving at the station, the officers noticed that defendant's flip phone was repeatedly receiving calls from a source listed as "my house" on the phone's external screen. Opening the phone, a photograph of a woman holding a baby appeared as the phone's "wallpaper." Pressing a couple of buttons on the phone lead to its "call log." Finding the "my house" entry, the officers were able to determine that the phone number was from a particular apartment building. They went to that address and found defendant's name on a mailbox and observed through a window a woman who appeared to be the person depicted on the phone's wallpaper. A search warrant was obtained and executed at that apartment, resulting in the recovery of 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm, ammunition, and cash. Defendant was charged in federal court with various drug-related offenses and with being a felon in possession of a firearm and ammunition. His motion to suppress everything recovered from his apartment was denied by the trial court. Upon conviction, he was sentenced to 262 months in prison. However, a divided panel of the First Circuit Court of Appeal reversed the denial of his motion to suppress (728 F.3rd 1), ruling that the warrantless search of his cell phone was illegal. His conviction on the counts related to contraband found in his apartment was reversed. The United States Supreme Court granted the Government's petition for certiorari.

Held: A unanimous Supreme Court reversed defendant Riley's conviction and upheld the circuit court's reversal of defendant Wurie's conviction, ruling in both cases that the warrantless searches of the respective defendants' cellphones were illegal. "(T)he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" "Reasonableness" requires that in order for a search to be upheld, a search warrant is generally required. No one contested an officer's right to seize a suspect's cellphone incident to his lawful arrest. The issue here was the reasonableness of a warrantless search of an arrested suspect's cellphone once seized. Generally speaking, when a suspect is subjected to a custodial arrest, his person and any containers found on his person are subject to an immediate warrantless search. The justifications for finding an exception to the warrant requirement in the "incident to arrest" situation are to remove any weapons that may be used to resist arrest or effect an escape, and to seize any evidence on the arrestee's person in order to prevent its concealment or destruction. To accomplish these goals, the arresting officer may search the arrestee and the area immediately surrounding him when arrested. (*Chimel v. California* (1969) 395 U. S. 752.) This includes any closed containers (*United States v. Robinson* (1973) 414 U. S. 218; a cigarette pack.), at least when the container constituted "personal property . . . immediately associated with the person of the arrestee." (*United States v. Chadwick* (1977) 433 U. S. 1.) The Supreme Court eventually limited such searches, at least when the subject is arrested in his vehicle, to when the arrestee has not yet been secured, or when it can be shown that the container searched is reasonably believed to constitute evidence relevant to the crime of arrest. (*Arizona v. Gant* (2009) 556 U. S. 332.) California and a number of other jurisdictions included in the list of possible containers the arrestee's cellphone, declining to differentiate a cellphone from any other type of container, and interpreting the phrase "immediately associated with the person" as meaning on the person of the arrestee. (*People v. Diaz* (2011) 51 Cal.4th 84.) Under the *Diaz* theory, both the cellphones taken off of Riley's and Wurie's person, respectively, were subject to a warrantless search. In invalidating the *Diaz* rule, the Supreme Court here recognized that cellphones are like no other type of container that an officer is likely to find on an arrestee's person. In determining the need to conduct a warrantless

search of containers recovered from an arrestee's person, a balancing test is used. Specifically, a court must balance "on the one hand, the degree to which it (the search) intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." A cigarette pack, for instance, as found in Robinson's pocket (*U.S. v. Robinson*, *supra*.) bears little resemblance to the degree of privacy one reasonably expects in the contents of his cellphone. Cellphones today, whether a "smart phone" as possessed by Riley, or the older, simpler "flip phone" as possessed by Wurie, are really nothing less than mini-computers that happen to also have the capacity to be used as a telephone. They typically contain "an immense storage capacity" with any number of personal photographs, text messages, Internet browsing history, e-mails, a calendar, a "thousand-entry phone book," and other types of personal information. Additionally, through "cloud computing" (the capacity of Internet-connected devices to display data stored on remote servers rather than the device itself), information stored elsewhere may be accessible through an arrestee's cellphone. Balance this with the fact that the historical justifications for searching containers found on the person (i.e., to discover potential weapons and prevent the loss of evidence) simply don't apply to cellphones, at least after they have been removed from the arrestee's control, and it is obvious that there is no legal justification for searching them without first obtaining judicial approval in the form of a search warrant. The Court recognized that while rarely a problem, there are methods available for an arrestee or a third party to destroy the potentially relevant criminal information in one's cellphone (e.g., remote wiping and data encryption) even after it is taken into custody by police. However, there are procedures available to prevent such occurrences (e.g.; disconnecting the phone from the network, turning it off, removing its battery, and/or placing it into an enclosure that isolates it from radio waves; i.e., an aluminum foil sandwich-type bag known as a "Faraday bag."). And if not, when it can be shown that such a destruction or encryption capability is likely to be used, "exigent circumstances" may allow for an immediate search without the necessity of a warrant. Although traditional exigent circumstance rules continue to apply to cellphones, no such exigent circumstances were shown in either of these two cases. After rejecting various compromises suggested by the Government and the California Attorney General, all of which would have limited what an officer was allowed to search for and under what circumstances, as impractical to apply and still too broad, the Court concluded with the following: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."

Note: I've been known to describe California's *Diaz* decision, which upheld the warrantless search of cellphones found on an arrestee's person, as an exception to the rule of *Arizona v. Gant* which generally restricts the warrantless searches of containers found in a vehicle after the arrestee has been secured. But with *Gant*, which shot down the long-standing belief that *Chimel* (the rule that anything within an arrestee's "lunging area" was subject to a warrantless search) applied to vehicle searches, you had to know that *Diaz* was not long for this world. With *Gant*, you can sense in the Supreme Court's decisions a tendency to do away with various "bright-line" search and seizure rules that while easier to apply, gave a searching police officer perhaps too much leeway in sidestepping the warrant requirement of the Fourth Amendment. So this case is really no surprise. The bottom line here is that you just can't compare a cellphone to a cigarette pack when you're talking about privacy interests. As aptly noted by the Court: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together."

***High Speed Chases and the Use of Deadly Force*:**

Plumhoff v. Rickard **(May 27, 2014) 572 U.S. ___ [134 S. Ct. 2012; 188 L. Ed. 2nd 1056]**

Rule: The use of deadly force in a dangerous high-speed chase situation is lawful so long as the danger continues to exist.

Facts: Around midnight on July 18, 2007, Lt. Joseph Forthman of the West Memphis, Arkansas, Police Department made a traffic stop on Donald Rickard, driving a Honda Accord, for a headlight out. Kelly Allen was a passenger in Rickard's car. An uncooperative Rickard, while declining to provide a driver's license, appeared to be nervous but denied having had anything to drink. Noticing a significant indentation in the windshield, Lt. Forthman asked Rickard to step out of his car. Rickard instead hit the gas and sped away. So the chase was on. Lt. Forthman was joined by five other police units, including one driven by Sgt. Vance Plumhoff. The officers chased Rickard and Allen eastbound towards Memphis, Tennessee, on Interstate 40, at speeds of over 100 mph while swerving through traffic and passing more than two dozen vehicles. Exiting I-40 in Memphis, Rickard's car made physical contact with one of the patrol cars, causing him to spin out into a parking lot. As he did so, he collided with Sgt. Plumhoff's car. Sgt. Plumhoff and another officer got out of their cars and, with guns drawn, pounded on the passenger-side window of Rickard's car. But Rickard refused to give up, hitting another police car as he attempted to extricate himself from being blocked in. Despite his bumper being flush up against a police car, Rickard accelerated, causing his tires to spin and his car to rock back and forth. At that point, Sgt. Plumhoff fired three shots into Rickard's car. But Rickard "reversed in a 180 degree arc," maneuvering onto another street and forcing an officer to step aside to avoid being hit. As Rickard began to flee down that street, two other officers fired another 12 shots into his car. Rickard lost control and crashed into a building. Both Rickard and Allen died from a combination of gunshot wounds and injuries suffered in the crash. Rickard's daughter sued the officers in federal court for having used excessive force under the Fourth Amendment. The officers' pre-trial motion for summary judgment was denied. The Sixth Circuit Court of Appeal affirmed and the United States Supreme Court granted certiorari.

Held: The United States Supreme Court unanimously reversed. Plaintiff (Rickard's daughter) argued that the use of deadly force in a high speed failure-to-yield situation is a violation of the Fourth Amendment, and that even if lawful, then the force used was excessive because the officers shot into Rickard's car 15 times. The officers argued that using deadly force in such a circumstance is lawful, and that under the circumstances of this case, using 15 shots to stop Rickard's car was not unreasonable. The Supreme Court agreed with the officers. Whether or not police officers may lawfully use deadly force in order to effect a "seizure" of a fleeing suspect is governed by the Fourth Amendment's "reasonableness" standard. A court's analysis in such a circumstance "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." The "totality of the circumstances" must be considered. The question is analyzed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The courts are also to "allo[w] for the fact that police officers are often forced to

make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." In *Scott v. Harris* (2007) 550 U.S. 372, the Supreme Court has already held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment." Rickard's driving, where it exceeded 100 mph for over five minutes, weaving in and out around other cars, clearly met this standard. Such driving posed a "grave public safety risk" and needed to be stopped. And even though Rickard was temporarily blocked in, he was able to escape and was ready to start his reckless driving once again. Using deadly force to stop him was reasonable under these circumstances. It was also reasonable to fire a total of 15 shots (between three officers) to stop him. Where lethal force is justified, officers may continue to use that force until the threat is over. Here, all 15 shots were within a 10-second time span, and all during a time when Rickard was showing no signs of abandoning his dangerous conduct. Also, the fact that a third person (Kelly Allen) was in the car does not change anything. The question in this case was whether the officers violated Rickard's rights; not Allen's. Allen's presence in the car cannot be used to enhance or expand Rickard's Fourth Amendment rights. Lastly, the Court held that even if the force the officers used was unreasonable, the legal standards applicable to this type of situation were not clearly established at the time (July 18, 2007). Therefore, the officers would have been entitled to qualified immunity from civil suit anyway.

Note: I read a story not long ago about a sheriff somewhere in the Deep South who, when questioned about why his officers had shot a fleeing cop-killer some 86 (or something similar) times, he responded simply that that was because his officers had run out of ammunition. While humorous, in a morbid sort of way, this is not an issue that can be ignored. It was stressed by the Supreme Court here that once the threat is eliminated, the shooting must stop. Specifically, the Court noted that "(t)his would be a different case if (the officers) had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up." So while you've been taught that when you shoot, you shoot to kill (as opposed to warn, wound, or merely incapacitate), the legal justification for killing a suspect ends when it is clear that the danger has ended. We should also compare the circumstances of this case with the Ninth Circuit case briefed in *The California Legal Update*, Vol. 19, #6 (May 23, 2014); i.e., *A.D. v. State of California Highway Patrol* (9th Cir. 2013) 712 F.3rd 446. In *A.D.*, it was held that shooting and killing a suspect in a high-speed-chase situation was unjustified even though the driver had not yet surrendered, but where she was successfully blocked in and no one was shown to be in any immediate danger. There's a vague thin line somewhere in between *A.D.* and this new case, but one which, with more and more cases discussing the parameters of the legal use of lethal force, you are going to be expected to know.

***Consensual Residential Entries and Apparent Authority*:**

United States v. Arreguin **(9th Cir. Nov. 22, 2013) 735 F.3rd 1168**

Rule: Answering the door is not necessarily enough for officers to assume that the person who does so is lawfully authorized to give consent to enter or to search private areas.

Facts: DEA Agents John Rubio, Chad Corbin, and Paul McQuay, and six other agents, went to defendant's Riverside home at 11:00 a.m. intending to conduct a "knock and talk." They targeted defendant's home because local law enforcement had searched the residence several months earlier suspecting drug-related activity there. Present in the house at the time were defendant, his wife (Maria Ledesma-Olivares), their baby, and a houseguest by the name of Elias Valencia, Jr. The agents, however, were unaware of the identities of the residents. Agent Rubio knocked on the front door until a "sleepy-looking Valencia" opened the door. When he did so, the agents could see Ledesma-Olivares standing just beyond the foyer holding her baby, and defendant "several feet inside" the residence, holding a shoebox. While talking to Valencia, defendant disappeared briefly to the right side, returning moments later without the shoebox. Agent Rubio told Valencia that they were from the DEA, that they knew that there had been drug activity there before, and that they would like to come in and look around. "*Can we come in*?" Valencia said yes, and stepped back towards the rear of the foyer. Neither defendant nor Ledesma-Olivares objected. At least three agents made entry into the residence. Defendant, again moving to the right, quickly walked down a hallway and out of sight towards what was later determined to be the master bedroom. Agents McQuay and Corbin followed and called him back. As Agent Rubio talked to defendant, Agents McQuay and Corbin headed further into the residence to do a "cursory safety sweep." Agent McQuay headed in the direction where he'd seen defendant disappear earlier with the shoebox, down the same hallway from which he'd just been called back, and found himself in the master bedroom. From there, he could see the shoebox in plain sight in an open cabinet in the adjoining master bathroom. With no top on the shoebox, Agent McQuay could see a white powdery substance inside. The shoebox and its contents were seized. Agent McQuay then opened another door from the master bedroom which was found to lead into the garage where a Toyota Corolla was parked. In plain sight in the Toyota were multiple bundles of cash, later determined to be in the amount of $176,990, in a Gucci bag. The bag and cash were seized. Meanwhile, Agent Rubio was still talking with defendant near the front entrance of the house. Defendant informed Agent Rubio that he and Ledesma-Olivares, with the baby, lived there. Agent McQuay returned from his search, showing Agent Rubio what he'd found. Defendant thereafter signed a "consent to search" form and led the agents back to the Toyota where he showed them five individual duct tape-wrapped bricks of methamphetamine hidden in a secret compartment. It was subsequently determined that Valencia was a mere guest in the house. Charged in federal court with various narcotics-related offenses, defendant's motion to suppress was denied by the trial court. He therefore pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal reversed. As a general rule, searches of a residence require a search warrant. One of the recognized exceptions to this rule is when the officers have a consent obtained from someone with "shared use and joint access to, or control over, a searched area." When dealing with a non-resident "third party," the government has the burden of proving that the third party had either "actual" or "apparent authority" to give consent. Although "the existence of consent to a search is not lightly to be inferred," it is only necessary to prove that the officers "reasonably believed" that the third party, under the circumstances, had the authority to give consent. In this case, Elias Valencia was the person who consented to the agents' entry and search of the residence. With Valencia being a non-resident third party, and there being no evidence that he had actual authority to allow others into the house, it was necessary for the government to prove that the agents reasonably believed that he had "apparent

authority." On this issue, the Court started from the general premise that it cannot be assumed that by merely by answering the door, a person has the authority to allow others into the house. Similarly, merely inviting officers to enter a residence "is not itself adequate for apparent-authority purposes" to believe that he had the authority to allow a search of specific private areas, such as the master bedroom. The Court further rejected the argument that defendant's and Ledesma-Olivares's lack of objection was legally sufficient to show their consent. Under the circumstances as were present in this case, the agents should have made further inquiry into Valencia's status. "The police are not allowed to proceed on the theory that ignorance is bliss." In this case, the agents observed defendant (and defendant only) disappear in the direction of the master bedroom with the box, and then attempt to head in that direction again when they first made entry. These occurrences were indicators that defendant, and not Valencia, was the only one (along with his wife, perhaps) with access and control of that bedroom. It was from the master bedroom that Agent McQuay observed the powdery substance in a box which he'd seen in defendant's possession earlier. And then entering the garage from master bedroom was also held to be without a valid consent in that at that point it should have been even more evident to Agent McQuay that he was searching defendant's private areas, and not Valencia's. As such, all the evidence, being the product of the illegal entry into the house, the master bedroom, and the garage, should have been suppressed.

Note: The Court further rejected the argument that Agent McQuay was making a lawful "protective sweep" in that the issue was not brought up at the trial court level. You can't argue on appeal a theory that was not raised in the court below. The argument probably would have failed anyway in that such a "search" is not lawful absent some reason to believe that there is someone else in the house who might be a danger. While we often get away with just assuming that the person answering the door when we knock has the authority to let us in, this case highlights the fact that that's not the general rule. If you don't know who lives there, and you don't recognize the person who answers your knock, it's best to feel him out first for his status before acting. Acting in purposeful ignorance will not be excused by the Courts. In this case, with three adults standing at or near the door, inquiry should have been made as to who the owners of the house were, or have gotten consent from all of them. That was not done here.

***Warrantless Blood Draws and Implied Consent*:**

People v. Harris **(Apr. 11, 2014) 225 Cal. App. 4th Supp. 1**

Rule: The "implied consent law," V.C. § 23612, is sufficient to allow for a warrantless blood withdrawal absent a withdrawal of that consent (e.g., a "refusal") by an arrested DUI suspect.

Facts: Riverside County Sheriff's Motorcycle Deputy Eric Robinson observed defendant driving on I-215 near the 60 Freeway interchange as he cut across four lanes of traffic without signaling and then speed up to about 90 miles per hour. Following defendant, Deputy Robinson observed him as he drifted onto and over the left, and then right, lane lines. Deputy Robinson pulled him over and made contact. As a drug recognition expert, Deputy Robinson noted signs and symptoms indicating that defendant was under the influence of a stimulant. After performing poorly on a field sobriety test, defendant was arrested. He was advised pursuant to the implied consent law that he was required to take a blood test. Defendant acknowledged this

requirement by responding "Okay." He thereafter submitted to having a blood sample withdrawn by a nurse/phlebotomist without objection. Charged with driving while under the influence of a controlled substance, defendant filed a motion to suppress, arguing that there was no legal justification for failing to obtain a search warrant prior to the withdrawal of a blood sample. The trial court denied defendant's motion and he appealed.

Held: The Appellate Department of the Riverside Superior Court affirmed. Defendant's argument on appeal, as it was in the trial court, was that because there were no exigent circumstances allowing for a warrantless search, taking blood without a search warrant violated the Fourth Amendment. The United States Supreme Court ruled some 48 years ago that a warrantless forced blood draw done in the course of a DUI investigation, when the officer is confronted with an exigency necessitating an immediate blood draw, is lawful so long as it is performed according to accepted medical practices. (*Schmerber v. California* (1966) 384 U.S. 757.) Recently, however, it was ruled that the normal dissipation of the alcohol in a DUI suspect's blood is not an exigency in itself. (*Missouri v. McNeely* (2013) 133 S.Ct. 1552.) Whether or not an exigency exists, allowing for a warrantless blood draw, is determined on a case-by-case basis. In this case, it was not argued that there was an exigency allowing for a warrantless blood draw over the defendant's objection. However, a suspect's consent to a warrantless withdrawal of blood is another exception to the general rule that a search warrant is required. The People argued in this case that defendant's lack of a refusal to submit to a blood draw, when coupled with his "*implied consent*" everyone impliedly agrees to "upon driving a motor vehicle" (see V.C. § 23612) is sufficient to excuse the lack of a search warrant. The Court agreed. And while any consent must be obtained "*freely and voluntarily*," the fact that we all impliedly consent to a blood or breath test upon being arrested for DUI by the mere fact that we are driving a motor vehicle, does not mean that such a consent is not voluntary. Unless withdrawn, such as by specifically refusing to submit to a blood or breath test, the implied consent described in section 23612 is sufficient to overcome the need for a search warrant. Defendant did not attempt to withdraw his consent when asked to submit to a blood test. The results of his blood test, therefore, are admissible against him.

Note: I'm often asked about what the parameters of *Missouri v. McNeely* might be. This case resolves one of those areas where people have conflicting opinions. So now we know that unless you have a specific objection to submitting to a blood or breath test, consent is implied.

***Billy Clubs, per Former P.C. 12020(a)*:**

People v. Davis **(Mar. 28, 2013) 214 Cal.App.4th 1322**

Rule: Possession of a baseball bat modified to be used as a weapon qualifies as an "instrument or weapon of the kind commonly known as a . . . billy," and is illegal.

Facts: Defendant was stopped by Deputy Sheriff Osvaldo Hernandez for making an unsafe lane change. When asked for his registration, defendant told Deputy Hernandez that it was expired even though the registration sticker on his car was current. A call to dispatch confirmed this fact. When asked if he had any weapons with him, defendant said that he had a bat on the backseat. Recovering the bat, Deputy Hernandez found that the bat, which was 29 inches long, had holes

drilled partially through the handle and had a leather wrist strap. The holes appeared to be for the purpose of making the bat lighter and easier to grip. It was also painted black with red lightning bolts drawn on it in two places. When asked why he had the bat, defendant responded that he repossessed vehicles late at night and needed the bat for protection. Defendant also had tools in his truck with lightning bolts painted on them. Defendant said that he was an electrician and that the lightning bolts were to mark his tools. Deputy Hernandez knew that double lightning bolt markings were used by neo-Nazi White supremacist groups. Defendant was charged in state court with possession of a billy club, per former P.C. § 12020(a)(1) (now, P.C. § 22210.), along with displaying false evidence of registration, per V.C. § 4462.5. At trial, while admitted to falsifying his registration sticker. As for the baseball bat, defendant claimed that he "primarily" used the bat to play with dogs and that the lightning bolts were nothing more than his "trademark," used to identify and prevent the theft of his tools. Witnesses testified that he was not a member of any neo-Nazi groups or a skinhead. Defendant testified that he supplemented his income by repossessing vehicles for a finance company and that the bat was used to protect himself in case of assault. He said he'd never hit anyone with the bat or pulled it out, but that it was a "security blanket" that he wanted to have available in case he was threatened during a repossession. When he drilled the holes in the bat and painted the lightning bolts on them he was just "screwing around." He also said that he mentioned the bat to Deputy Hernandez when the deputy asked about weapons only as a "common courtesy." He was convicted and appealed.

Held: The First District Court of Appeal (Div. 4) affirmed. Defendant's argument on appeal was that a modified baseball bat does not qualify as a billy for purposes of P.C. § 12020(a)(1) (now P.C. § 22210). Defendant argued that because P.C. § 12020 does not physically describe a billy, noting only that the section prohibits the possession of an "instrument or weapon of the kind commonly known as a . . . billy," the Court is bound by earlier case law (pre-1923) that described such an instrument as a small metal bludgeon, defining "bludgeon" as "a short stick with one end loaded" and which could easily be concealed upon the person. The Court ruled, however, that the definition of a "billy" is not so restricted. Per more recent case law, a baseball bat may qualify as a "billy" whenever "the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose." Thus an ordinarily harmless object, such as a baseball bat or even a table leg, may qualify as a "billy" under the right circumstances. In this case, the bat had been modified in such a way that the jury could reasonably conclude that the bat was more useful as a weapon. The length of the bat is but one factor to consider. Holes in its handle could reasonably be seen to make it easier to grip, and the strap could make it easier to carry and to swing. Moreover, defendant admitted to both Deputy Hernandez and in his own testimony that he needed the bat for protection; i.e., as a weapon. With this evidence, therefore, defendant was properly convicted.

Note: Defendant also made the interesting argument that he had a constitutional right to possess a billy under the Second Amendment's "right to bear arms." While we typically think of "arms" to be firearms only, the Court did not say anything here to indicate that a billy club couldn't also be included within the broad category of what constitutes "arms." But the Court did rule that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." It has been determined that the Legislature's purpose in enacting former section 12020 (now 22210) was to outlaw the possession of instruments which are

"ordinarily used for criminal and unlawful purposes." While a firearm has many recognized lawful purposes, a billy is typically intended to be used for one purpose; i.e., to do damage to another's person. Per this Court, therefore, the Second Amendment does not give a person the right to possess those weapons described in section 12020.