The California Legal Update

(COPY - - DISTRIBUTE - - POST)

Vol. 18 November 25, 2013 No. 12

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

www.legalupdateonline.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

Remember 9/11/01; Support Our Troops

THIS EDITION'S WORDS OF WISDOM:

"*Too often we enjoy the comfort of opinion without the discomfort of thought.*" (John F. Kennedy)

IN THIS ISSUE: Pg.

***ADMINISTRTIVE NOTES*:**

***Note to San Diego District Attorney Employees*:** To paraphrase the words of a famous American (Mark Twain); "*Rumors of my demise have been greatly exaggerated*." In other words, I am still writing and publishing these *Legal Updates*. I say this because it seems that ever since my endorsement of Bob Brewer to become the next San Diego District Attorney, published in the *Legal Update* edition dated April 12, 2013 (Vol. 18, #4), the San Diego District Attorney's Office has decided not to distribute subsequent editions of the *Legal*

Updates to its own personnel. And no one ever bothered to tell me, at least until just recently. Until May, the *Legal Update* was distributed throughout the San Diego District Attorney's Office via its own internal network. However, for reasons yet to be explained (although it seems obvious), this internal distribution was unilaterally terminated beginning with the 5th edition of the *Update* (dated May 4, 2013), ironically making the San Diego District Attorney's Office the only public agency in the state that was not receiving its own publication. Between this apparent punitive action and the Office's later termination of my access to its research sources (see *The California Legal Update*, Vol. 18, #11, Admin. Note) shortly after I supplemented my earlier endorsement of Bob Brewer with a second endorsement, this time for retired DDA and long-time friend, Terri Wyatt, for the office of D.A., the San Diego D.A. Administration has completely disassociated itself from both me and this publication. So if you are an employee of the San Diego District Attorney's Office and you happen to see a copy of this *Update* lying around that somehow managed to pierce the San Diego DA's self-imposed embargo, I have some *seven* back issues for you that you've been denied the right to receive. At your request, I will add your e-mail address to the state-wide *Legal Update* e-mail list so that you can again start receiving this publication, but via the Internet instead of through Office channels. I would suggest, however, that you use your personal/home e-mail address in that I cannot guarantee that Internet deliveries won't also be blocked.

***CASE LAW*:**

***Standing*: *Possession of a Searched Cellphone While Denying Ownership*: *Scope of One's Consent to Search a Cellphone*:**

***United States v. Lopez-Cruz* (9th Cir. Sep. 12, 2013) 730 F.3rd 803**

Rule: (1) Merely declining ownership of a cellphone being searched, while a factor to consider, is not enough by itself to show a lack of standing, at least where there is nothing to indicate that the person wasn't in permissive possession of the cellphone. (2) Giving law enforcement permission to search a cell phone does not, without more, include the right to answer in-coming calls.

Facts: Border Patrol Agent Soto and his partner were patrolling Highway 80, near Jacumba; an area near the U.S./Mexican border known for the smuggling of illegal aliens. While so doing, they noticed defendant driving a car that they did not recognize as belonging to anyone living in the area. They also noticed that defendant was "brake tapping;" a behavior that is consistent with people being guided in to pick up somebody or something. When defendant slowed to make a U-turn, the agents stopped behind him and turned on their emergency lights to indicate that they were law enforcement. Agent Soto made contact with defendant and asked him where he was going and what he was doing. Defendant told him that he was going to pick up a friend at a nearby casino. Defendant also indicated that the car he was driving belonged to another friend. While talking with defendant, Agent Soto noticed two cell phones on the car's center console.

When asked about them, defendant said that they also belonged to a friend. Agent Soto asked; "*Can I look in the phones*? *Can I search the phones*?" Defendant answered; "*Yes*." When Agent Soto took the phones to behind the car, out of defendant's presence where he could neither see nor hear what the agent was doing, one of the phones rang. Agent Soto answered it and initiated a conversation with the caller. The caller asked; "*How many did you pick up*?" Agent Soto responded; "*None*." The caller hung up. Two minutes later, the phone rang again and a different (female) caller asked: "*How did it go*?" Agent Soto responded in Spanish; "*I didn't pick up anybody. There was too many Border Parol in the area*." The caller told him to return to San Diego. But then the phone rang a third time and the woman told Agent Soto to pick two people up at a particular residence. Following the caller's instructions, two illegal aliens were picked up and arrested. Defendant was also arrested and charged in federal court with conspiracy to transport illegal aliens, per 8 U.S.C. §§ 1324(a)(1)(A)(ii) and (v)(I). Before trial, he filed a motion to suppress the evidence obtained by Agent Soto answering the incoming cellphone calls. The federal district court judge granted defendant's motion. The Government appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The "search" at issue was the agent's act of answering the in-coming phone calls. (1) *Standing*: The Government first argued that defendant did not have standing to challenge the search of the cellphone. It is the defendant's burden to prove that he had standing. To do this, defendant must show that he personally had a "property interest" that is protected by the Fourth Amendment with which was interfered, and a "reasonable expectation of privacy" that was invaded by the search. The Court ruled that defendant prevailed as to both elements. A "reasonable expectation of privacy" turns on (1) whether the person had an actual (i.e., "*subjective*") expectation of privacy, and (2) whether the defendant's subjective expectation of privacy is one that society is prepared to recognize as reasonable (i.e., "*objectively reasonable*"). A non-exhaustive list of factors to consider are whether the defendant had a property or possessory interest in the thing seized or the place searched, whether he had a right to exclude others from that place [or the thing seized], whether he exhibited a subjective expectation of privacy that it would remain free from governmental intrusion, whether he took normal precautions to maintain privacy, and whether he was legitimately on the premises or legitimately in possession of the thing seized. In this case, defendant had possession of the phones and was using them. Under the circumstances, he had the right to exclude others from using them. Defendant also had a reasonable expectation of privacy in the calls coming in on the phones, as well as a reasonable expectation that the contents of those calls would remain free form governmental intrusion. Lawful possession and use of the phones suffices to make defendant's expectation of privacy objectively reasonable. Also, by disclaiming ownership, defendant did not abandon the phones or lose his expectation of privacy. Absent some evidence to support the Government's argument that defendant did not have permission to be using the phones, he did not lose his expectation of privacy in them simply by renouncing ownership. (2) *Scope*: The Government also argued that when defendant gave his consent to search the phones, the agent reasonably believed that this included permission to answer in-coming calls. The issue is whether answering in-coming calls exceeds the scope of the consent given. The scope of one's consent is determined by asking: "*What would the typical*

reasonable person have understood by the exchange between the officer and the suspect?" In this case, where the suspect is asked only for permission to "*look in the phones . . .* (*and*) *to search* (*them*)," no reasonable person would have believed that such a consent included permission to start answering the phone and to impersonate the person giving consent. The Government argued, however, that answering calls is no different than pushing buttons and reading e-mails. The Court disagreed, noting that in reading e-mails (assuming, says the Court, that doing so was within the scope of the permission given) is a more limited than answering calls and, while pretending to be the defendant, talking to the callers. The Government also pointed out that case law allows officers to answer telephones while executing search warrants. Again, the Court found this argument to be unconvincing, noting that evidence seized pursuant to a search warrant is lawful so long as "reasonably related to the . . . probable cause supporting the issuance of the warrant." As already stated, evidence seized pursuant to a consent is dependent upon what a reasonable person would have understood by the exchange between the officer and the suspect. Based upon this reasoning, the Court upheld the trial court's determination that answering in-coming phone calls was not included in the scope of the consent given by the defendant.

Note: Both rulings in this decision are consistent with California case law. A person in possession of another's belongings, so long as such possession is lawful (e.g., it wasn't stolen), does not deprive the possessor of his standing to contest the item's search. (See *United States v. Portillo* (9th Cir. 1980) 633 F.2nd 1313, 1317.) And a simple consent to search, without more, does not also include the right to answer in-coming phone calls. (*People v. Harwood* (1977) 74 Cal.App.3rd 460, 468.) As indicated above in the Court's decision, while answering a telephone during the execution of a warrant will most likely be upheld, the rules on verbal consents, not expressly including the right to answer the phone, are a lot more restrictive. It's important to recognize the difference.

***Warrantless Container Searches*:**

***Robey v. Supeior Court* (June 27, 2013) 56 Cal.4th 1218**

Rule: While the distinctive odor of marijuana coming from a package in transit may provide the necessary probable cause needed to seize the container, it does not, by itself, constitute an exigent circumstance sufficient to justify a warrantless opening of that container.

Facts: On July 23, 2010, FedEx employee Nancy Her called the Santa Maria Police Department to report that a person had dropped off a package for shipment to Illinois that smelled of marijuana. Santa Maria Police Department Officer Nathan Totorica responded. Shown the package, he too could smell a strong odor of marijuana emanating from it. He seized it and took it to the police station where, after consultation with his supervisors and some narcotics officers, they opened it up. Four hundred and forty four grams of marijuana were recovered. No warrant had been obtained. Three days later, defendant Robey came back to the FedEx office to ask why his package had never been delivered to the intended address. Nancy Her recognized defendant as the person who had dropped the package off for shipment and called police. Officer Totorica returned to

the store and arrested defendant. Defendant was found to have in his possession the packing slip for the seized marijuana, but listing a false name and return address. Defendant was charged in state court with possession of marijuana for sale and with the sale or transportation of marijuana, per H&S §§ 11359 and 11360(a). After defendant's motion to suppress the marijuana was denied, he filed a petition with the Court of Appeal for a writ of mandate seeking to overturn the trial court's ruling. The Sixth District Court of Appeal reversed, ordering that the evidence be suppressed. The California Supreme Court granted review.

Held: The California Supreme Court unanimously affirmed the Appellate Court's ruling. With defendant conceding the lawfulness of the warrantless *seizure* of his package (". . . *and for good reason*," said the Court), the only issue on appeal was whether officers lawfully opened it (i.e., "*searched*" it) without a search warrant. The California Supreme Court, agreeing with the Court of Appeal, ruled that under the circumstances of this case, a search warrant was necessary. "Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; (therefore,) warrantless searches of such effects are presumptively unreasonable." (Citing *United States v. Place* (1983) 462 U.S. 696.) In reaching its conclusion that this rule applied to defendant's package, the Court first reviewed U.S. Supreme Court rulings concerning the searches of containers found in vehicles. The net result of a long and strained analysis of such searches is that whenever a police officer has probable cause to search a vehicle found out on the street, such a search may be conducted without a search warrant even if the vehicle has already been impounded. Such a search also includes any containers found in that vehicle. (*California v. Acevedo* (1991) 500 U.S. 565.) The lawfulness of this type of search is justified by the problems involved in attempting to impound and safeguard a vehicle, given its potential mobility, pending the obtaining of a search warrant. Containers found in the vehicle are included in this rule because to rule otherwise would encourage even more intrusive searches of the vehicle, looking for suspected contraband, etc., while its containers would be set aside pending the obtaining of a warrant. But this rule is limited to vehicles. Overruling prior case law to the contrary (see *People v. McKinnon* (1972) 7 Cal.3rd 899.), the Court in this case held that containers found in other contexts may usually be secured in police custody pending the obtaining of a search warrant. But doing so eliminates any argument that an exigency exists. "(A)lthough the mobility of a package in shipment may constitute an exigent circumstance permitting officers to seize it without a warrant, such mobility cannot alone justify a warrantless search of the package after it has been seized." The Court noted a line of cases where packages, such as the one in this case, are first opened by someone other than law enforcement. In such a case, typically involving a UPS or FedEx employee opening a package entrusted to them for shipping, the defendant's expectation of privacy has already been intruded upon to the extent of the private search. When law enforcement responds and makes the same observations, not exceeding the scope of the earlier private search, there is no constitutional violation. Contraband found under such circumstances may lawfully be seized and even taken to a police lab for further testing without the need for a search warrant. (*United States v. Jacobsen* (1984) 466 U.S. 109.) In this case, however, the FedEx employee did not open the package, but merely reported the odor of marijuana coming from it. While the odor alone likely

provides the necessary probable cause justifying the seizure of the package (an issue not contested by defendant, but discussed extensively in a concurring opinion), it does not mean that there is an exigency sufficient to allow the opening of the package. The Court also rejected the People's argument that by using a false name and return address when he shipped the package, he, in effect, abandoned it, eliminating any expectation of privacy he might have had. Where, as here, a person shows an interest in ensuring that the package is delivered by coming back and asking about it, no such abandonment has occurred. The case was therefore remanded to the courts below for "further proceedings."

Note: There is an argument that can be made, not decided here due to an incomplete record being established at the trial court level, that the odor alone, making it obvious as to what is in a container, negates any reasonable expectation of privacy in the container's contents thus eliminating the need for a search warrant. Justice Liu, in an extensive concurring opinion, talks about this issue. This argument employs the so-called "*Single Purpose Container*" theory. Under this theory, as an extension of the "plain view" doctrine, some containers (e.g., a gun case; *United States v. Gust* (9th Cir. 2005) 405 F.3rd 797.) are so suggestive as to their contents that it is readily apparent what is inside. Per U.S. Supreme Court: "(I)f the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from the searching officer's (plain) view," just as "if the container were transparent." (*Robbins v. California* (1981) 453 U.S. 420.) Although Justice Liu did not reach a conclusion as to whether this rule might apply to strong odors, you could tell by the tone of his written opinion that he was not sold by the idea. So my advice is that if you have a container in your custody in anything other than a car search context, even though common sense tells you what's in it, get a warrant.

***Search Warrants*; *Seizing Evidence Outside the Warrant*:**

United States v. Sedaghaty **(9th Cir. Aug. 23, 2013) 728 F.3rd 885**

Rule: The affidavit to a search warrant cannot be used to expand on the list of items subject to search and seizure as listed in the warrant itself, even though incorporated into the warrant.

Facts: Defendant Pirouz Sedaghaty, more simply known in the United States as Pete Seda, moved from his native Iran to Ashland, Oregon, in the 1970's. Upon obtaining a college education in Oregon, defendant co-founded the "Qur'an Foundation," which promoted the understanding of Islam while sponsoring related activities. The Qur'an Foundation eventually joined forces with an organization known as "Al-Haramain," which was one of Saudi Arabia's largest non-governmental organizations with offices world-wide. Al-Haramain was known for distributing humanitarian aid and funding religious education. Defendant became an officer (i.e., its secretary) of the only U.S. branch of Al-Haramain, opening up a bank account for the organization while applying for, and receiving, tax-exempt status. It was also believed, however, that Al-Haramain helped fund terrorist activities. In late 1999, both Al–Haramain and its U.S. branch solicited funds for aid to the people of Chechnya. There were some indications that this

was actually done for the purpose of funding the violent mujahideen, operating in Chechnya against Russian interests there. In 2004, the Saudi government dissolved Al-Haramain altogether and the United States designated its U.S. chapter as "Specially Designated Global Terrorists," subject to financial sanctions. Due to his association with Al-Haramain, defendant came under investigation by the FBI and the IRS. The target of this investigation was several transfers of monies through Al-Haramain into and out of the United States, with some of the monies possibly going to help fund terrorist activities in Chechnya. The principal person involved in these transfers was a man named Soliman Al-Buthe (who has since disappeared, and is presently a fugitive abroad); an associate of defendant's. But defendant, as the organization's secretary, had some direct involvement as well. In 2004, the Government obtained a search warrant for financial records and communications pertaining to some of the financial transactions in issue. Under the authority of this warrant, the Government searched defendant's house, which doubled as the Al–Haramain office and prayer hall. They seized nine computers together with books, videos, and religious materials. Defendant (along with Al-Buthe and Al-Haramain) was subsequently indicted in federal court in a three-count indictment alleging a conspiracy to defraud the United States and the filing of a false tax-related form (Form 990, relevant to Al-Haramain's tax exempt status). (The third count related to Al-Buthe only.) Before trial, defendant challenged the seizures as going beyond the scope of the warrant. The district court denied his motion to suppress. The central issue at trial was whether the errors on the tax forms (Form 990) were willful. The prosecution's theory was that defendant wanted to fund the Chechen mujahideen and intentionally reported false information to his accountant in an effort to cover up the diversion of funds. Defendant was convicted and appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed in part, and affirmed in part, returning the case to the federal district court for a new trial. The Court first found a significant "*Brady* violation" (i.e., failing to provide certain reports and notes concerning witness/informant interviews to the defense in discovery; *Brady v. Maryland* (1963) 3737 U.S. 83.), and determined that a reversal was warranted on that issue alone. However the case was also remanded for a redetermination of what evidence, seized as a result of the execution of the search warrant at defendant's home and office, is admissible. The search warrant in issue here authorized the seizure of a limited set of documents related to certain financial transactions and communications relevant to the preparation and filing of a tax-related form. In executing the warrant, however, the Government seized much more: i.e. news articles, records of visits to various websites about Chechnya, photographs of Chechen war scenes, and other documents relative to defendant's alleged desire to fund the Chechen mujahideen. Per the Court, the warrant was intended to be used for the searching for, and seizure of, tax fraud-related evidence, but was used instead to seize evidence of defendant's alleged financial support for terrorist activities. The issue, therefore, was whether items outside the authority of the warrant (i.e., "*beyond the scope of the warrant*") were illegally seized. The warrant itself had two attachments ("A" and "B") and an affidavit describing the probable cause for the search. The affidavit and attachments were properly incorporated into the warrant. Between the affidavit and attachments A and B, the significance of the items unrelated to the tax fraud (i.e., information related to

defendant's alleged financial support for terrorist activities) was detailed. However, the warrant itself was limited to a search for tax fraud information. The trial court had found that the seizure of the non-tax fraud related information was lawful in that (1) it was relevant to defendant's intent or motive in committing a tax fraud, and (2) using an affidavit to cure any defects in the warrant itself has been upheld by prior case law. The Ninth Circuit disagreed with the trial court on both issues. As a general rule, only those items listed in the warrant itself may be seized. While evidence of intent or motive may be included in a warrant, and thus lawfully seized pursuant to the execution of the warrant, the agent/affiant failed to list such evidence in this warrant. The Court further recognized the authority for seizing observed items "relevant" to the alleged violations, even if not specifically listed in the warrant, but "not (to) the far flung scope of the agents' search" in this case. "The warrant was expressly limited in scope and did not include items such as the records of visits to websites about Chechnya, the communications unrelated to the preparation of the tax return with individuals never named or referenced in the affidavit, or the general background information about the Chechen mujahideen that were seized." As for the "curative effect" of an affidavit, this theory allows for seizing items not specifically listed in the warrant when there has been some "clerical" or "typographical" error in the warrant and where the incorporated affidavit more correctly describes what was intended. In other cases, this "curative" theory has been used only when the warrant itself is overbroad but can be cured by a particularized affidavit. It is error, however, to use a "broad ranging" probable cause affidavit to serve to expand the express limitations imposed by a magistrate in issuing the warrant itself. To put it another way, "a kitchen sink probable cause affidavit (cannot be used to) overrule the express scope limitations of the warrant itself." By purposely seizing items beyond what was listed in the warrant the agents violated the Fourth Amendment. Also, the act of incorporating the affidavit and attachments into the warrant does not cure this defect. However, because this was not an intentional "flagrant violation," suppression of the whole warrant was not called for; only those items seized that are beyond the scope of the warrant as written. The Court therefore remanded the case back to the trial court for a determination of what items seized in the execution of the warrant are admissible and what are not, based upon the above ruling.

Note: This, as I see it, is really nothing more than poor draftsmanship in writing the warrant. Having taken all the time and effort to justify the seizure of "motive and intent evidence" in an affidavit and other attachments, it wouldn't have required much more effort to list those items in the warrant itself. The Court here never said that the items seized weren't relevant to the Government's case (although the Court did criticize, to some extent, the escalation of a tax fraud case into a terrorism case); only that if they had wanted it, they should have listed it in the warrant and not just the attachments. Also, you might be asking yourself whether when executing a search warrant you see other important evidence in plain sight you didn't contemplate when you wrote the warrant, do you have to ignore it? The answer is "no." The case law is clear that such evidence, even though not listed in the warrant, is subject to seizure. (*Skelton v. Superior Court* (1969) 1 Cal.3rd 144, 157: Items reasonably identified as contraband or evidence of a crime, observed in plain sight during the execution of a search warrant but not listed in the warrant, are subject to seizure.) The difference here is that the agents' appeared to be

using the lists contained in the affidavit and the other attachments as their guide for what to look for and seize, rather than using the warrant itself. The warrant, not the affidavit, is your authorization for what you can search for and seize.

***Miranda*: *Interrogations*:**

People v. Andreasen **(Mar. 5, 2013) 214 Cal.App.4th 70**

Rule: A casual conversation with an in-custody suspect, done for the purpose of keeping the potentially explosive suspect calm and cooperative, does not constitute an interrogation. The resulting statements by the suspect are admissible in evidence despite an earlier invocation of the right to remain silent.

Facts: Witnesses in a shopping center parking lot observed defendant assaulting Katherine Parker. Defendant was observed by witnesses as he repeatedly and frantically stabbed her with a knife while she tried to prevent him from stealing her purse. As a result, she suffered stab and slash wounds to her face, neck, chest, abdomen and hands, resulting in her death. Defendant was arrested at the scene. He was taken to the police station and placed in a holding cell where he awaited the arrival of detectives. As he waited, a videotape showed him acting in a highly agitated, angry, and delusional manner. After some time, however, he calmed down. He was eventually interviewed by a detective who admonished him of his *Miranda* rights. Defendant stated that he understood his rights and that he might answer "two or three simple questions." Apparently seeing the potential for a mental defense, the detective started by asking him if he knew the difference between right and wrong. After a short exchange on this subject, defendant invoked his right to silence by saying that he didn't want to answer any more questions. The questioning was ended and the detective left. On the way out of the room, the detective told defendant that while he was gone, he should "stay cooperative" with the detective's partner. Defendant was watched by officers for the next hour and a half as they awaited a change of clothing and for blood to be drawn. During this time, the two officers asked defendant innocuous questions, making small talk about off-the-wall stuff unrelated to the case, such as "neutral topics about defendant's interests and life." While the officers talked with him, defendant remained cooperative, not resisting the changing of his clothes or the taking of a blood sample despite his stated fear of needles. The detective later testified that the purpose of this procedure was to keep him calm and cooperative which apparently worked because towards the end, his restraints were no longer needed. Charged with first degree murder with the special circumstance that it occurred during the commission of an attempted robbery, defendant pled not guilty and not guilty by reason of insanity. Convicted of the first degree murder and the special circumstance, the prosecutor proposed to introduce as evidence of defendant's sanity at the sanity phase of his trial the videotape showing defendant's demeanor during the hour and a half between his invocation and the taking of a blood sample. The defense argued that because defendant had already invoked his right to silence, use of this video recording was a *Miranda* violation. The trial court judge agreed with the prosecution, however, ruling that the post-invocation conversation with defendant was not the product of an interrogation, but rather arose from a "casual

conversation" unrelated to the crime and designed to diffuse any tension, ensure officer safety, and provide for defendant's comfort. Therefore, the videotape was allowed into evidence during defendant's sanity trial. Defendant was found by the jury to be sane. He appealed from his sentence of life without the possibility of parole.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. *Miranda*, of course, requires that a person be advised of his right to silence and to an attorney before he can be subjected to a custodial interrogation. An invocation of those rights, as a general rule, cuts off any questioning. But these protections under *Miranda* are triggered only if a defendant is subjected to a custodial interrogation. Not all questioning involves an interrogation. "Interrogation" is legally defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Among the types of questioning held *not* to constitute an interrogation are casual conversations or "small talk" unrelated to the offense, and also when police ask questions related to safety concerns. The fact that information gathered from these routine questions or casual conversations turns out to be incriminating does not alone render the statements inadmissible. It is also irrelevant whether the conversations in issue occur before or after a *Miranda* invocation. Relevant factors to consider in determining whether a conversation with a suspect is an interrogation include (1) the nature of the questions, (2) the context of the questioning, (3) the knowledge and intent of the officer asking the questions, (4) the relationship between the questions and the crime, (5) the administrative need for the questions, and (6) any other indications that the questions were designed to elicit incriminating evidence. In this case, defendant had been extremely agitated and exhibited signs of mental illness when first brought into the police station. Although defendant had cooled off considerably, the officers were justifiably concerned that anything might set him off again. They were therefore treating him in a "soft-spoken, solicitous" manner calculated to keep him calm. After defendant invoked, they had to wait for an hour and a half before blood could be taken and an exchange of clothing arranged. Under these circumstances, "(t)he use of conversation to calm a potentially explosive situation with a suspect is well within the parameters of an officer's routine performance of safety-related duties and is distinct from an officer's investigative duties." The trial court therefore did not err in finding that no interrogation had occurred and that the videotape of defendant was admissible.

Note: The Court further noted that this rule cannot be used as an excuse to sort of sneak an interrogation in by the back door. One of the considerations a trial court will be thinking about is whether this "casual conversation" rule is used as a ploy to purposely trick a defendant into making incriminating statements. So don't abuse this rule by cleverly trying to trick a suspect into incriminating himself under the guise of a casual conversation. It will come back to bite you.