The California Legal Update

Remember 9/11/2001; Support Our Troops

Vol. 19 October 10, 2014 No. 11

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

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

THIS EDITION'S WORDS OF WISDOM:

"*Nearly all men* (*and women*) *can stand adversity, but if you want to test a man's* (*or woman's*) *character, give him* (*or her*) *power*." (Abraham Lincoln)

IN THIS ISSUE: Page:

***Cases*:**

CASES:

***Arrests and Probable Cause*:**
***Hot Pursuit Misdemeanor Arrests in a Residence*:**
***Overbroad Search Warrants*:**

United States v. Nora (9th Cir. Aug. 28, 2014) __ F.3rd __ [2014 U.S. App. LEXIS 16677]

Rule: Observation of a suspect on private property in illegal possession of a firearm within seconds after seeing him in a public place is probable cause to arrest him for the illegal

possession in public. Ordering a subject out of his home in order to effect an arrest is in fact an arrest within the home itself. A warrantless arrest of a misdemeanor suspect after he fled into his home is an illegal arrest.

Facts: Two uniformed Los Angeles Police Department officers in an unmarked car were patrolling a residential neighborhood in South Central Los Angeles on an evening in January, 2008, when they observed three men standing on the sidewalk in front of a particular residence. Losing sight of the men momentarily ("for a few seconds"), they were next seen standing in front of the residence; defendant and another on the porch with the third male in the front yard that was enclosed by a metal fence. The officers approached the three and, from outside the yard, attempted to engage them in a consensual encounter. Defendant, however, who was visibly nervous and "stood stiffly" with his right side obscured from the officers' view, abruptly spun around and pushed past the other male while heading towards the front door. As he did so, the officers observed a blue-steel semi-automatic handgun in his right hand. One of the officers shouted "*Stop*; *police*!" Defendant and the second male both ignored the command, rushing into the house, shutting the door behind them. With the third male detained, responding backup officers surrounded the house with weapons drawn. A police helicopter also responded and lit the area up "like the daytime." Twenty to thirty minutes later, through the use of a public address system, all the occupants were ordered out of the house. Defendant, the second male, and defendant's wife and children all came out. Defendant was immediately handcuffed and searched, resulting in the recovery of a small amount of marijuana and over $1,000 in cash from his person. Defendant was read his *Miranda* rights and questioned. In a brief interrogation, he admitted to living in the house and that he had illegal drugs inside. He also admitted to being a gang member. A criminal background check revealed various firearm-related prior convictions, including for being a felon in possession of a firearm. A search warrant was obtained for his house, the execution of which resulted in the recovery of cocaine, cocaine base, marijuana, heroin, a number of firearms, ammunition, and over $9,000 in cash. Charged in federal court with drug and firearm-related offenses, defendant's motion to suppress all the evidence was denied. He thereafter pled guilty in a plea bargain to possession of cocaine base with the intent to distribute. He appealed from his 122 month prison sentence.

Held: The Ninth Circuit Court of Appeal reversed, ruling that defendant had been illegally arrested. The Court further found that that the search warrant was overbroad and invalid. The Court first ruled, however, that the officers, upon observing the gun in defendant's hand, had probable cause to arrest him for possession of a loaded firearm in a public place, per P.C. § 25850(a) (formerly § 12031(a)). Recognizing that we are only "deal(ing) in probabilities, not certainties," and that probable cause only requires that there be a "fair probability" that criminal activity is afoot, the officers had enough information to justify the arrest. Although defendant was not observed in possession of the gun while on the sidewalk (where, as a public place, § 25850(a) applies), he was seen with it seconds later while on his porch (which, not being a public place, possession of a loaded firearm is lawful). Without any evidence that he'd somehow come into possession of the gun after leaving the sidewalk, it was reasonable to conclude that he possessed it seconds before they actually saw it in his hand. Also, because such a firearm is typically used for self-protection or in defense of one's habitation, it was reasonable to assume that it was loaded under these circumstances. Defendant's sudden action of disappearing into the house (i.e., "flight") supports such a conclusion. However, because the officers were unaware of

defendant's prior criminal history at that time, they only had probable cause to believe that he was committing a misdemeanor by carrying the gun, § 25850 being a felony only under limited circumstances. The location of defendant's arrest was also an issue. Although the officers physically took defendant into custody outside his home in the front yard, they actually affected the arrest when they surrounded his house and ordered him at gunpoint to come out. He was therefore, in effect, arrested while in his home. The Ninth Circuit rule is that with probable cause to believe that a suspect is guilty of a misdemeanor only, the warrantless arrest of that suspect while he is in his own home is illegal absent an exception to the general rule. The U.S. Attorney argued that having just fled into his home while armed constituted an exigency. The Court disagreed. Rather, the Court held that there is no exigency absent evidence that defendant constituted an immediate threat to the safety of the officers or others. Defendant never threatened to use the gun. There was no reason to believe that there were other illegal weapons in his home or that he posed a danger to anyone else inside. He also wasn't about to escape, given the fact that house was surrounded. There being no exigency, therefore, a warrant was necessary in order to lawfully effect an arrest of his person while inside his home. Defendant's arrest being illegal, the Court determined that the evidence found on his person and his incriminating statements, as the direct products of his illegal arrest, must all also be suppressed. It was further noted that certain items listed in the search warrant (e.g.; "marijuana, heroin, and methamphetamine, or for evidence of gang membership," as well as "'[f]irearms, assault rifles, handguns of any caliber and shotguns of any caliber,' as well as ammunition for such firearms.") were not supported by what the officers knew at the time; i.e., that defendant had a small amount of marijuana in his pocket and that he was seen carrying a single, semi-automatic pistol. Even discovery of his criminal history; i.e., that he'd been convicted of the illegal possession of a firearm and for being a felon in possession of a firearm, did not support a belief that multiple firearms might be found in his home. After excising these "overbroad" portions of the warrant, the remaining known facts were held to be insufficient to support a finding of probable cause. So the warrant itself was also held to be invalid. Defendant's motion to suppress, therefore, should have been granted.

Note: First; warrantless arrests within the home are not per se illegal. It's making a warrantless *entry* into a home for the purpose of making an arrest, absent an exigency, that's illegal. But conceding (as the U.S. Attorney did in this case) the issue of whether ordering at gunpoint a suspect out of his home is the equivalent of entering a home to make a warrantless arrest, the real problem with this case is the Court's conclusion that exigent circumstances don't exist when an officer has ordered a known misdemeanant, particularly one who is armed, to stop as he is in the act of fleeing into his home. "*Hot pursuit*" is the phrase skillfully avoided by the Ninth Circuit. The Court instead uses the Supreme Court case of *Welsh v Wisconsin* (1984) 466 U.S. 740, as its authority for holding that you can't chase a fleeing misdemeanant into his home. In *Welsh*, it was held that the warrantless entry into a residence to arrest a suspect for a *non-bookable first time DUI offense* was illegal. *Welsh* is *not* a hot pursuit case. Not even mentioned by the Ninth Circuit was the recent reversal of another of their decisions where the U.S. Supreme Court specifically ruled that "nothing in the (*Welsh*) opinion establishes that the seriousness of the crime (e.g., felony vs. misdemeanor) is equally important *in cases of hot pursuit*." (Emphasis in original; *Stanton v. Sims* (Nov. 4, 2013) 134 S.Ct. 3, at p. 6.) In this current case, after defendant fled into his home in order to avoid an imminent arrest on his front porch, the officers sought to use the less intrusive tactic of ordering defendant out of the house rather than chasing him inside.

Yet they are being faulted for doing so even though the Ninth Circuit was told in *Stanton* that the hot pursuit of a misdemeanor suspect into his home is not prohibited by the *Welsh* decision, and at best is the subject of some conflicting lower court decisions. California's rule is that the warrantless hot pursuit of a fleeing misdemeanant into a home is lawful. (*People v. Lloyd* (1989) 216 Cal.App.3rd 1425, 1428-1430; and *In re Lavoyne M.* (1990) 221 Cal.App.3rd 154. 159.) I'm hoping someone in L.A.'s U.S. Attorney's Office is already aware of this contradiction. The foundation for another Ninth Circuit reversal was laid in *Stanton*.

***Body Cavity Searches*:**
***Warrantless Securing of a Residence*:**
***Pretextual Traffic Stops*:**
***Warrantless Vehicle Searches Based Upon Probable Cause*:**

United States v. Fowlkes **(9th Cir. Aug. 25, 2014) __ F.3rd __ [2014 U.S. App. LEXIS 16387]**

Rule: (1) Physical body cavity searches in the jail, particularly without the assistance of properly trained medical personnel, are per se illegal. (2) Securing a residence with reason to believe that evidence is about to be destroyed pending the obtaining of a search warrant is lawful. (3) Pretext traffic stops are lawful. (4) The warrantless search of a vehicle with probable cause to believe it contains contraband is lawful.

Facts: Long Beach Police Department officers were monitoring defendant's telephone calls pursuant to a court authorized wiretap. An intercepted phone call led to the surveillance of a drug buy on September 3rd, 2006, between defendant and two other people. One of the participants was stopped afterwards and found to be in possession of .61 grams of crack cocaine. The next day (Sept. 4), another intercepted phone call led officers to believe that defendant was planning to destroy or remove contraband from his apartment. Within an hour of this phone call, officers went to defendant's apartment, made a warrantless entry, and secured the apartment pending the obtaining of a search warrant. Execution of the warrant resulted in the recovery of 2.6 grams of crack cocaine, a digital scale, and a loaded 9 mm handgun. On September 13 (after defendant was apparently released from custody from the September 3rd incident), upon observing another apparent narcotics transaction, defendant's car was stopped by a marked patrol car in a "pretextual stop" (expired registration). Although defendant denied a request to allow his car to be searched, officers observed in plain sight marijuana in an open side panel of the car and what appeared to be cocaine on the driver and passenger seats. Defendant was arrested and transported to the Long Beach City Jail for processing. At the jail, defendant was strip searched in the jail's "strip search room." Five officers observed the search, one armed with a Taser and plastic gloves. Defendant was told to remove his clothing, face the wall, bend over, spread his buttocks, and cough. As he started to comply, he made a quick movement with one hand towards his buttocks, apparently "forcing or forcibly pushing an item inward" in what appeared to be an attempt "to push something into his anus." To prevent defendant from completing this, the officer with the Taser delivered a "drive stun tase" to the center portion of defendant's back. He was immediately handcuffed as he began to "squirm" and "struggle." The officers "leane(d) him against the wall" and "brace(d) his body," resulting in him being bent over. With defendant in this position, the officers could see what appeared to be a plastic bag partially protruding from his rectum. While being held against the wall, one officer forcibly pulled the baggie from

defendant's rectum, removing it by using his gloved thumb and index finger without penetrating the anal cavity; a "difficult, abrasive procedure." A near golf ball sized plastic baggie was removed which looked to be covered in feces and blood. The baggie was later determined to contain cocaine. Charged in federal court with three counts of drug possession and distribution and two related firearm counts, defendant's motion to suppress all the evidence obtained in the case pursuant to the wiretap, the evidence seized from the searches of his apartment and car, and the drugs found on his person during the body cavity search at the jail, was denied. Convicted of the drug-related counts, defendant appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed the conviction related to the drugs removed from defendant's rectum, but otherwise affirmed. (1) Discussing first the strip search, the Court noted that "(a) warrantless search of the human body implicates an individual's "most personal and deep-rooted expectations of privacy." Generally, a search warrant is necessary. In this case, the Government argued that exigent circumstances justified the warrantless search of defendant's body. The Court disagreed, finding that no exigency applied to these circumstances. Exigent circumstances exist "only where 'there is [a] compelling need for official action and no time to secure a warrant." Under the circumstances, with defendant in handcuffs and surrounded by five police officers, there was no evidence to support the argument that defendant could have destroyed the contents of the baggie in his rectum or that a medical emergency existed. Per the Court, "there was ample time . . . to secure a warrant." The Court further rejected the applicability of the so-called "*special needs*" doctrine to this situation. "Special needs" allows for a warrantless search (with or without probable cause) when there is an important non-law enforcement purpose and adherence to the warrant and probable cause requirements of the Fourth Amendment is impracticable under the circumstances. For instance, routine suspicionless "*visual body cavity searches*" during the jail intake procedure have been upheld under this theory. (See *Bull v. City & County of San Francisco* (9th Cir. 2010) 595 F.3rd 964.) But under the circumstances of this case, adherence to the warrant-and-probable cause requirements was not shown to be impracticable. The officers had probable cause sufficient to obtain a warrant (which they don't have during a routine booking, visual body cavity inspection). Also, as noted above, defendant was not likely to have destroyed the evidence while a warrant was obtained and there was no medical emergency necessitating immediate action. The Court further ruled that even if a warrant was not required, a search must be reasonable "in its scope and manner of execution." "Urgent government interests are not a license for indiscriminate police behavior." Here, the officers came to the strip search room armed with protective gloves, a Taser, and additional officers, "everything . . . needed to conduct a cavity search, except a warrant." This, the Court found, evidenced an intent to do whatever was necessary to extract contraband from defendant's body. Officers protruding below the skin level without a warrant and without properly trained medical personnel and in potentially unsanitary conditions, implicating the "most personal and deep-rooted expectations of privacy," is per se unreasonable absent exigent circumstances. (2) The Court ruled against defendant, however, on the issue of the warrantless entry and securing of his residence that occurred on September 4th. Based upon information gained from the wiretap of defendant's cellphone, the officers had probable cause to believe that there was in fact contraband in his apartment. The officers further heard defendant say that he was about to destroy or remove contraband from his apartment, justifying an immediate warrantless entry done for the purposes of securing the premises pending a search warrant. The fact that it took about an hour to coordinate the officers needed to make

the warrantless entry and securing of defendant's apartment was irrelevant; the exigency still existed. (3) Lastly, the Court upheld the trial court's ruling when it declined to suppress the evidence retrieved from defendant's vehicle when it was stopped on September 13. Although the cause for the stop of defendant's vehicle was an expired registration sticker, such a pretextual stop has long since been held to be lawful so long as officers have sufficient evidence of some violation. It is legally irrelevant that the officers were more interested in investigating some other offense. (4) Then, upon seeing what appeared to be marijuana and cocaine chips in plain view, particularly in light of other evidence of defendant's trafficking in narcotics, the subsequent warrantless search of his vehicle was lawful under the so-called "automobile exception" to the warrant requirement; i.e., a search based upon probable cause. Therefore, except for the evidence retrieved from his rectum in the unlawful jail body cavity search, defendant's motion to suppress was properly denied by the trail court.

Note: Despite a very vehement and well-reasoned dissent, I can't say that the majority's conclusions on the body cavity search issue are out of line with prior case authority, although one might reasonably dispute whether exigent circumstances (i.e., the likelihood that the stuff in defendant's rectum wouldn't last long enough to get a search warrant) existed. It's hard to imagine how physically sitting on him for the couple of hours it would take to get legally ready to extract the baggie could be more humane than just pulling it out while it was so prominently displayed. But what you should get out of this case is the reluctance courts display in authorizing any warrantless bodily intrusions, particularly when done by non-medical personnel. Such searches are going to have to have some strong justifications for a court to uphold them if attempted without a warrant. Also, don't confuse the so-called "automobile exception" justification for a warrantless search of a vehicle (i.e., with probable cause to believe the vehicle contains contraband or evidence of a crime) with searches of a vehicle incident to the arrest of a passenger. They're two whole different legal theories with the latter being extremely limited by *Arizona v. Gant* (2009) 556 U.S. 332. The former remains largely untouched.

***Failure to Preserve Potentially Exculpatory Evidence*:**

People v. Alvarez et al. **(Sep. 10, 2014) 229 Cal.App.4th 761**

Rule: Failure to retain and make available to the defense "potentially useful" evidence, when such failure is in bad faith, is a constitutional due process violation.

Facts: Jose C. was walking through a parking lot behind the "Back Alley Bar" in Fullerton at about 1:30 in the morning on October 14, 2012, when he was confronted by five "gang type" males. During a confrontation, defendant Juan Renteria snatched a $3,200 gold chain from around Jose's neck. Renteria and co-defendants Daniel Alvarez and Michael Cisneros all made threatening statements to Jose C., challenging him to do something about it. Jose C. felt that he'd be physically assaulted if he tried to retrieve his property. But he followed the gangsters until he saw a marked police car. Flagging down Officers MacShane and Haynes of the Fullerton Police Department, Jose C. pointed out the three defendants, telling the officers what had happened. Detective Chris Wren of the Fullerton P.D. gang unit also responded to the call. Defendants were detained. The gold chain was found discarded some 50 feet away. Defendant Cisneros, protesting his innocence, asked Detective Wren to check any video cameras in the

area. Wren responded (on tape) that, "If I had video cameras of what took place, that's part of my job. My job is not to arrest people that aren't guilty of something." However the detective later admitted that he never reviewed any videos himself, nor asked anyone else to do it, asserting that it was not his responsibility to do so. All three defendants were arrested and charged in state court with robbery. At the subsequent preliminary hearing, it was noted that subpoenas had been served on two nearby private establishments for videos which allegedly were recording the area on the night of the robbery. When neither establishment responded, defense counsel specifically requested that any videos be preserved. The prosecution assured the court that such recordings would be preserved, telling the court that, "At this point in time, there's no possibility that they are going to be destroyed." Despite the absence of any videos, all three defendants were held to answer following the preliminary hearing. Two months later, prior to trial, defendant Cisneros filed a motion to dismiss, arguing that the police had possessed evidence (i.e., two videotapes) that would have exonerated him and defendant Alvarez, but that they allowed them to be destroyed. Defendant Cisneros alleged that he had not been involved in the robbery and they he and defendant Alvarez had been identified by the victim only because he was pressured to do so by Officer MacShane. It was further alleged that defendant Cisneros had asked Detective Wren to retrieve the videos and that the detective had responded that he would. Defendants Alvarez and Renteria later joined in the motion. At a subsequent hearing on the issue, evidence was presented to the effect that Fullerton P.D. (as opposed to any local businesses) maintained two video cameras at the parking lot behind the Back Alley Bar. The cameras were generally pointed towards where they were most likely to record criminal activity. Although it was acknowledged that detective Wren and the other officers were aware of these cameras, and that the cameras could have possibly recorded the robbery, no one had reviewed the videos or even submitted a request that the tapes be retained. Such videotapes are routinely destroyed after two to three weeks unless ordered to be preserved. Detective Wren testified that despite what he had told Cisneros at the scene, it would have been the case investigator who should have reviewed and held onto the videos. In resisting the motion, the prosecutor argued that defendants failed to prove that such evidence actually existed, that the cameras had in fact recorded the robbery itself, or that if they did exist, that the tapes had not been lost or destroyed in bad faith. The trial court discounted the prosecution's argument and dismissed the case as to all three defendants. The People appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed the dismissal as to Alvarez and Cisneros, but reversed as to Renteria, reinstating Renteria's conviction. The Court identified three landmark U.S. Supreme Court case decisions which address the protection of a criminal defendant's "*due process*" fair trial rights; *Brady v. Maryland* (1963) 373 U.S. 83, *California v. Trombetta* (1984) 467 U.S. 479, and *Arizona v. Youngblood* (1988) 488 U.S. 51. *Brady* deals with the prosecution's duty to disclose to the defense any exculpatory evidence in the possession of either law enforcement or the prosecution, irrespective of the good or bad faith of the prosecution. (*Brady* was not in issue in this case.) *Trombetta*, on the other hand, deals with law enforcement's duty to simply retain, rather than disclose, apparent exculpatory evidence. To constitute *Trombetta* error, it must be proved that the evidence in issue both (1) possesses an exculpatory value that was apparent before the evidence was destroyed, and (2) that the evidence be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Under the third case—*Youngblood*—the due process clause is violated when law enforcement violates the seemingly looser standard of failing to retain

evidence that is merely "*potentially useful*" to the defense. However, under *Youngblood*, as opposed to *Trombetta*, it must also be proved that law enforcement acted in "*bad faith*" in disposing of the evidence. Thus, if the higher standard of "*apparent exculpatory value*" is met (per *Trombetta*), the issue will be resolved in the defendant's favor. But if the evidence is no more than "*potentially useful*" (per *Youngblood*), the defendant must then also establish "*bad faith*" on the part of the police or prosecution. In this case, defendants Cisneros and Alvarez claimed that they took no part in the alleged robbery and argued that had the videotapes been retained, they might have proven their innocence. Numerous request for those tapes were made, from Cisneros' asking Detective Wren at the scene to inspect the tapes, to in-court motions by Cisneros' attorney. Each request was met by assurances that those tapes would in fact be obtained and/or made available to the defense. Yet it appeared that no one ever made the effort to follow up on those assurances, resulting in the tapes eventually being destroyed. While it cannot be said with any certainty that the tapes would have in fact exculpated Cisneros or Alvarez, and thus failed to meet the "*apparent exculpatory value*" test of *Trombetta*, they were at least of some "*potential useful*(*ness*)" to the defense. If not showing their innocence, the tapes might at least have diminished their degree of culpability and been relevant to their ultimate punishment. The Court further found that Detective Wren's failure to check the tapes as promised, and the prosecution's failure to obtain the tapes and provide them to the defense, also as promised, constituted the necessary "*bad faith*" under *Youngblood*. Cisneros' and Alvarez's "due process" rights were therefore violated. Dismissal is the proper remedy. As for defendant Renteria, however, it was never alleged that he would be exonerated by whatever the tapes might show. Failure to retain the videotapes, therefore, did not deprive him of a fair trial. The case should not have been dismissed as to him.

Note: "*Bad facts make for bad case law*." This case reflects not just bad facts, but extremely poor judgment by both law enforcement and the prosecution. Someone (obviously), whether it be the arresting officers, the investigating officer (who, if he even exists, is never identified), or the prosecutor, should have taken responsibility for obtaining the videotapes and making sure they were made available to the defense. And why the Fullerton Police Department sets up and maintains video cameras and then ignores their existence when we are lucky enough to have them actually set up and functioning at the scene of a street robbery is beyond comprehension.

***Automated License Plate Readers and Traffic Stops*:**
***Detentions and De Facto Arrests*:**
***Use of Force*:**

Green v. City & County of San Francisco **(9th Cir. Feb. 12, 2014) 751 F.3rd 1039**

Rule: (1) An unverified hit on an automated license plate reader does not necessarily provide sufficient reasonable suspicion to make an investigative traffic stop. (2) The use of firearms and handcuffs may convert an otherwise lawful detention into a de facto arrest. (3) The use of firearms and handcuffs may constitute excessive force when dealing with a questionable traffic stop and a compliant, non-resisting suspect.

Facts: San Francisco Police Officer Alberto Esparza, working on the evening of March 30, 2009, was in a police vehicle equipped with an "automated license plate reader." (ALPR) At

about 11:l5 p.m., a 1992 burgundy Lexus ES 300 with license plate number 5SOW350 passed Officer Esparza's car, triggering the ALPR which identified the car as a stolen gray GMC truck. Unbeknownst to Officer Esparza, the ALPR misread the vehicle's license as 5SOW750. Because it was dark out, Esparza couldn't visually verify the license plate number. Also, although an ALPR takes a picture of the license and projects that photo onto a screen in the patrol car, the number shown by the ALPR's camera was blurred and illegible. Officer Esparza radioed in and received verification that 5SOW750 belonged to a stolen GMC truck. Because Officer Esparza already had a prisoner in his vehicle, he radioed the vehicle's description and the license number of 5SOW750 to other units in the area. In so doing, however, Officer Esparza failed to inform the other units that he was unable to make a visual confirmation of the license number on the suspect vehicle. Sgt. Kim heard the call and observed the described Lexus drive by him. However, he only noted the first three numbers of the plate. After backup got close, during which time Sgt. Kim was able to get immediately behind the Lexus but still failed to note the discrepancy in the license number, and believing that he was stopping a stolen vehicle, he affected a "high risk" traffic (or "felony") stop. This involved at least four (and maybe up to six) officers pointing guns (including a shotgun) at the vehicle's occupant, ordering her out of the car, having her get to her knees, and handcuffing her. Forty-seven year old Denise Green, an African-American female with no criminal history, was the driver and sole occupant of the Lexus. Because she was 5'6" tall, weighed 250 pounds, and had knee problems, getting to her knees and getting up again was a bit of a chore for her. Officers performed a pat-down search of Green's person and searched her car. After neither search uncovered anything, the correct license number was noted and discovered not to be stolen. The handcuffs were removed and Green was released. She had been handcuffed for about 10 minutes before the error was noted, with the entire "detention" lasting about 18 to 20 minutes, according to Green's allegations. Green sued in federal court alleging violations of her Fourth Amendment rights on the grounds that (1) she'd been stopped without sufficient reasonable suspicion, (2) subjected to a de facto arrest and search without probable cause, and (3) had been subjected to unreasonable force. During pretrial proceedings, it was noted that San Francisco PD's ALPRs were known to occasionally make false "hits" by misreading license plate numbers and mismatching a passing license plate number with those listed as wanted in the database. Knowing this, although SFPD had no formal policy on it, officers are trained that an ALPR hit does not automatically justify a vehicle stop. Officers are instructed to first verify the validity of the hit before executing a stop by (1) visually confirming that the license plate number on the vehicle is as read by the ALPR, and (2) confirming via radio that the license number on the car has in fact been reported as stolen or is wanted. Despite not having followed this protocol in this instance, the civil defendants' motion for summary judgment (i.e., dismissal of the lawsuit without trial) was granted. Green appealed.

Held: The Ninth Circuit Court of Appeal reversed the trial court's granting of summary judgment as to all three of plaintiff's allegations. (1) *Unlawful Seizure*: Plaintiff alleged that Sgt. Kim lacked sufficient reasonable suspicion to make an investigative stop, thus making an "unlawful seizure" under the Fourth Amendment. The Court ruled that "(i)t is well established by the record that an unconfirmed hit on the ALPR does not, alone, form the reasonable suspicion necessary to support an investigative detention, . . ." SFPD's own training requires that an officer first confirm that the ALPR correctly read the license number by doing a radio check on the car's confirmed license number before making a stop. Officer Esparza failed to do this. And while this fact was not relayed to Sgt. Kim, the sergeant also failed to do the same

when he had the opportunity to do so as he followed the Plaintiff's Lexus. The fact that the officers all knew that the reported license number came back registered to a completely different vehicle should have put Sgt. Kim on notice that there might be a mistake. At the very least, the issue of whether Sgt. Kim had a reasonable suspicion sufficient to justify an investigative stop under these circumstances is a question that must be left to a jury. (2) *De Facto Arrest*: Plaintiff alleged that given the circumstances of the stop (i.e., at gunpoint, using handcuffs, and forcing her to her knees), she was subjected to a "de facto arrest." As such, full probable cause was necessary to justify such a contact which, per the plaintiff, the officers lacked. Whether or not a person has been arrested, as opposed to merely detained, depends upon an analysis of the "totality of the circumstances." The use of guns and handcuffs "substantially aggravates the intrusiveness of an otherwise routine investigatory detention." But it was also recognized that the use of firearms and handcuffs don't necessarily convert a detention into a de facto arrest. It may still only be a detention under "special circumstances, such as 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur." None of these "special circumstances," however, fit the facts of this case. A rational jury, therefore, could very well find that plaintiff had been subjected to a de facto arrest and that such an arrest was not supported by the necessary probable cause. (3) *Excessive Force*: Lastly, it is an issue whether the use of firearms and handcuffs, while making plaintiff get on her knees, constituted excessive force. In evaluating the lawfulness of any force used, a court must balance the "nature and quality of the intrusion" against the "countervailing governmental interests at stake." In assessing the gravity of the government interests, a court will consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether she is actively resisting arrest or attempting to evade arrest by flight. In this case, while auto theft is indeed a serious offense, there was nothing to indicate that plaintiff was going to be anything other than totally compliant. And as noted above, it was even an issue whether there was sufficient cause to believe that any crime at all had been committed. As such, whether the force used here was excessive under the circumstances is an issue that must be left for a civil jury to determine. With all these issues to be determined by a jury, summary judgment in the defendants' favor, therefore, should not have been granted.

Note: The Court further rejected Sgt. Kim's argument that he was entitled to qualified immunity, noting that he should have been aware of the rules pertaining to the above issues. But one has to question the Ninth Circuit's ruling, as quoted above, that "(i)t is well established by the record that an unconfirmed hit on the ALPR does not, alone, form the reasonable suspicion necessary to support an investigative detention, . . ." I don't see this as a correct statement of the law, let alone "well established." While the Court seems to back off from this conclusion later, finding this to be a jury question in a civil case, it seems more reasonable that even with its flaws, a hit on an ALPR is enough to give an officer reasonable suspicion to believe that the car is stolen or otherwise wanted. "Reasonable suspicion" doesn't mean that an officer's belief is necessarily correct; only, as the term implies, that there is a reasonable suspicion for believing so. Departmental training (or even a policy) requiring that the information from an ALPR be verified before a stop is made does not mean that as a matter of law, an ALPR doesn't supply the necessary reasonable suspicion required before a detention can be effected.