The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

Vol. 23 September 28, 2018 No. 11

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THIS EDITION'S WORDS OF WISDOM:

"*For the first half of your life, people tell you what you should do; for the second half, they tell you what you should have done.*" (Richard J. Needham)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Constitutionality of P.C. § 647(b); Prohibiting Prostitution*:** If this issue interests you, the Ninth Circuit Court of Appeal recently upheld the constitutionality of California's prostitution statute—P.C. § 647(b)—in ***Erotic Service Provider Legal Education & Research Project v. Gascon (9th Cir. Jan. 17, 2018) 880 F.3rd 450. In so doing, the Court ruled that the federal district (i.e., trial) court did not err when it dismissed a lawsuit filed by the plaintiffs challenging the constitutionality of P.C. § 647(b). In its decision, the Court noted that there is no merit to plaintiffs' arguments that P.C. § 647(b) violated the 14th Amendment's Due Process Clause, plaintiffs alleging that the statute infringes on their right to engage in private sexual activity and outlawed commercial activity related to that liberty interest, or that it infringes on their right to freedom of association and freedom of speech, or that it infringes on their 14th Amendment right to earn a living. The Court further ruled that the State has a rational basis for regulating prostitution, including discouraging human trafficking and violence against women, discouraging illegal drug use, and preventing the spread of contagious and infectious diseases. Beyond that, I have no comment.

CASE LAW:

***Patdowns for Weapons*:**
***Odor or Marijuana in a Vehicle*:**
***Probable Cause Searches of Vehicles*:**

People v. Fews **(Sept. 24, 2018) __ Cal.App.5th __ [2018 Cal. App. LEXIS 848]**

Rule: A patdown for weapons is lawful when based upon a reasonable suspicion that a detained individual is armed and dangerous. The warrantless search of a motor vehicle verifying compliance with California's marijuana regulations is lawful when based upon probable cause to believe that the vehicle may contain evidence of additional marijuana. Possession of a limited amount of marijuana plus the odor of marijuana emanating from the vehicle constitutes sufficient probable cause.

Facts: San Francisco Police Department Officers Dominic Vannucchi and John Vidulich (try saying *that* three times real fast) were patrolling on Turk Street in the Tenderloin District of the City of San Francisco in a marked patrol car on February 8, 2017. That particular area is known for narcotics sales and use, as well as numerous shootings and stabbings in the area related to narcotics. Active hot spots for drug markets are known to be within two to five blocks of the area. At about 4:00 p.m., the officers saw a white Saturn SUV in front of their patrol car suddenly speed up and then "abruptly" pull over and stop in a red zone at the corner of Turk and Larkin. Officer Vidulich felt that this odd maneuver was done to avoid a traffic stop. A quick

check of the vehicle's license plate showed that its registration was expired. Officer Vidulich turned on his forward-facing red lights and siren. The driver, soon to be identified as Lindell Mims, immediately got out of the Saturn. Officer Vannucchi later testified that this increased his suspicions because some drivers believe that they cannot be detained if they're out of the vehicle. Mims was told "multiple" times to get back into his car, but he failed to comply. Instead, he stood facing the open driver's side door with his hands in the passenger compartment, "reaching back into the vehicle." At the same time, the Saturn's passenger, identified as Calvin Bernard Fews (i.e., defendant), was observed making "furtive movements around the passenger compartment particularly low on his body." The officers could not see defendant's hands, however, or what he was doing, due to the vehicle's tinted windows. Defendant "continuously reached around the compartment" with his hands never rising above the window level, moving "his upper body back and forth multiple times." Meanwhile, Officer Vidulich made contact with Mims at the driver's side door. Mims turned towards the officer, holding a set of keys, a plastic cup, a package of Swisher Sweets Cigars, and a half-burnt, flattened, and rerolled cigar. Officer Vidulich smelled the odor of "recently burned marijuana emanating from Mr. Mims and the (car)." He believed the cigar contained marijuana based upon how it was rolled. Officer Vannucchi, watching his partner confront Mims, later testified that he recognized the half-burnt cigar as what is known as a "blunt," which is a factory-rolled cigar that is flattened and split to remove the tobacco and add marijuana, and then rerolled. Officer Vannucchi asked Mims if there was marijuana in the cigar, and he admitted that there was. Mims then reached back into the passenger compartment of the Saturn a second time despite being told not to do so by Officer Vidulich. All the while, defendant continued to make "furtive" movements within the passenger compartment. Based upon the officers' training and experience, and given the area where they were, it was believed that defendant could have been reaching for a weapon. So he was asked to step out of the car. At that point, it was Officer Vidulich's intent to search the vehicle "to check the vehicle and make sure that both the occupants were in compliance with laws regarding marijuana in California" regarding possession and use, to find documentation for the marijuana, and "to see if there was . . . [any more] marijuana in the vehicle and, if so, if that was within compliance of state law." But first he wanted to pat both Mims and defendant down for weapons knowing that while searching the vehicle, his back would be turned with Officer Vannucchi alone guarding both subjects; an unsafe situation. As defendant got out of the Saturn, it was noticed that he was wearing multiple layers of baggy clothing, including a large puffy coat. A patdown of his outer clothing resulted in Officer Vidulich feeling a hard metal object which, when removed, was discovered to be a loaded .32-caliber Beretta semiautomatic pistol. Both subjects were arrested. (It was not indicated in the written decision whether the car was in fact searched, although we can presume that it was but that nothing illegal was found.) Defendant was later charged in state court with a number of offenses related to the illegal possession of the firearm, plus a bunch of enhancements (i.e., five prior prison terms (per. P.C § 667.5(b)), three prior strikes (per P.C. § 667(d), (e)), and an out-on-bail enhancement (P.C. § 12022.1(b)). (It is unknown if any charges were filed against Mims.) Defendant's motion to suppress the firearm was denied. He later pled guilty to being a felon in possession of a firearm (P.C. § 29800(a)(1)), with all other charges and enhancements being dismissed. (*Talk about your sweet deals*.) The trial court suspended imposition of sentence, placing defendant on three years' probation with a time-served jail condition. Despite walking out a free man from what should have been a 25-years-plus to life third strike sentence (Per P.C. § 667(d), (e); see "Note," below.), defendant appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. On appeal, defendant argued that the "patsearch" that resulted in the recovery of the firearm violated the Fourth Amendment. The basis for this argument was that the circumstances did not support the conclusion that there was a reasonable suspicion that he might be armed and dangerous. Therefore, the only possible justification for the patdown of his person was for "officer safety" during an intended search of the Saturn, but that such a vehicle search would have been illegal given the fact that marijuana is no longer considered "contraband" after enactment of the Control, Regulate and Tax Adult Use of Marijuana Act (Proposition 64), adopted by voters on November 8, 2016, which made the possession of recreational marijuana (or, more correctly, "cannabis"), legal. Per defendant, "(b)ecause the vehicle search was invalid, . . . the patsearch was likewise invalid." The Court rejected both arguments.

(1) *The Patdown for Weapons*: The U.S. Supreme Court in *Terry v. Ohio* (1968) 392 U.S. 1, dictated the long-standing standards for justifying a patdown (or a "patsearch") of a detained individual for weapons: "A police officer may temporarily detain and patsearch an individual if he believes that criminal activity is afoot, that the individual is connected with it, and that the person is presently armed." A "reasonable suspicion" (as opposed to "probable cause") that the person may be armed, based upon an evaluation of the "*totality of the circumstances*," is all that is needed to legally justify both the detention of an individual and the limited (i.e., patdown) search for weapons. In this case, the officers had more than enough reasonable suspicion to believe that defendant may be armed. First, they had cause to believe that defendant might be in the possession of, and transporting, drugs, based upon both the smell and the observation of marijuana (see below). Secondly, defendant was observed to be "fidgeting and constantly moving" while inside the vehicle, keeping his hands outside of the officers' view, while his companion, Mims, who had initially engaged in what the officers perceived as evasive driving, ignored the officers' orders to get back into his car and then reached through the driver's side door despite being ordered not to do so. Although acknowledging that nervousness and furtive gestures are not sufficient by themselves to support a patsearch, the Court held that "[n]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." In this case, in addition to the above, the contact was in an area of San Francisco that the officers knew from experience to involve violent crime related to drugs. Drug crimes have been recognized as offenses in which the perpetrators are likely to be armed with guns. Whether or not a reasonable suspicion exists is based on an evaluation of the "*totality of the circumstances*," precluding the practice of "picking each factor apart separately." (Referred to as a "*divide and conquer*" tactic.) Here, the totality of the circumstances clearly show that the officers had sufficient reasonable suspicion that defendant (and/or Mims) might be armed. "Taken together, Mims's evasive and uncooperative conduct, combined with the high-crime area in which the traffic stop took place, the odor and presence of marijuana, and (defendant's) continuous and furtive movements inside the (Saturn), were sufficiently unusual to raise the officers' suspicions that Mims and defendant were involved in criminal activity related to drugs and could be armed." The patdown resulting in the recovery of a firearm from defendant's person was therefore lawful.

(2) *The Legality of the Search of Defendant's Vehicle*: First off, the Court disagreed with defendant's argument that the validity of the patdown of defendant's person was dependent on a finding of probable cause to conduct a search of their vehicle, finding sufficient reasonable suspicion to justify the patdown as noted above. But even if it was, the Court found that the officers had sufficient probable cause to justify searching the car. The rule is well-established:

"[A] warrantless search of an automobile is permissible so long as the police have probable cause to believe the car contains evidence or contraband." (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1225.) The issue here was whether the officers' knowledge that defendant and/or Mims possessed what, on its face, appeared to be a lawful amount of recreational marijuana (i.e., now referred to as "cannabis") justified a search of the vehicle for possible violations of the statutes regulating such possession. Proposition 64, effective as of November 8, 2016 (three months before defendant's arrest), enacting H&S Code § 11362.1, made lawful the possession of limited amounts of cannabis. It is now legal for anyone, 21 years of age or older, to "possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis. (Subd. (a)(1)) Section 11362.1 further provides that "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section *are not contraband* nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." (Subd. (c); italics added.) Pointing out that since passage of Proposition 64, with its enactment of H&S § 11362.1 specifically taking marijuana off the list of what can be considered "contraband," its possession can no longer be used as a justification for searching his car. However, passage of Proposition 64 did not eliminate all criminal sanctions for marijuana possession. It is still unlawful to possess, transport, or give away cannabis in excess of the statutorily permitted limits, to cultivate cannabis plants in excess of statutory limits and in violation of local ordinances, to engage in unlicensed "commercial cannabis activity," and to possess, smoke or ingest cannabis in various designated places, including in a motor vehicle while driving. (See B&P Code §§ 26001(k), 26037, and 26038(c); and H&S Code §§ 11362.1(a), 11362.2(a), 11362.3(a), and 11362.45(a).) Driving a motor vehicle on public highways under the influence of any drug (V.C. § 23152(f)) or while in possession of an open container of marijuana (V.C. § 23222(b)(1), are not acts "deemed lawful" by H&S § 11362.1. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." (*Illinois v. Gates* (1983) 462 U.S. 213, 243, fn. 13.) The fact that there may also be an innocent explanation does not detract from the finding of probable cause. It has previously been held that a police officer has probable cause to search a vehicle based on the odor of marijuana despite the defendant's presentation of a medical marijuana prescription. (*People v. Strasburg* (2007) 148 Cal.App.4th 105.) It has also been held that a police officer is entitled to investigate to determine whether a person possesses marijuana for personal medical needs and to determine whether he adhered to the Compassionate Use Act of 1996's (dealing with medical marijuana) limits on possession. "It is well settled that even if a defendant makes only personal use of marijuana found in the passenger compartment of a car, a police officer may reasonably suspect additional quantities of marijuana might be found in the car." (*People v. Waxler* (2014) 224 Cal.App.4th 712, 723-724.) Other states where marijuana use has been legalized are in accord, finding that "the odor of marijuana is still suggestive of criminal activity." (See *People v. Zuniga* (Colo. 2016) 372 P.3rd 1052, 1059 [2016 CO 52]; and *Robinson v. State* (Md.Ct.App. 2017) 451 Md. 94 [152 A.3rd 661, 664–665].) The Court here, therefore, held that "(d)ue to the odor of marijuana emanating from the (Saturn) SUV and Mims, as well as Mims's admission that there was marijuana in his half-burnt cigar, there was a fair probability that a search of the SUV might yield additional contraband or evidence." The search of defendant's vehicle, therefore, was lawful.

Note: While recognizing that this case, being "hot off the press," is not yet final and may very well be taken up to the California Supreme Court for consideration, there are at least two important aspects of this decision that should be of interest to all cops and any lawyer practicing criminal law. First, the ruling that a vehicle may be searched to verify compliance with the marijuana (excuse me, "cannabis") laws is extremely important. Until now, there was a serious debate among "experts" as to what the rule would be when decided. We now know. Such a search is lawful. But also of importance, and something all cops and prosecutors should find disturbing, is the fact that this defendant was sentenced to a measly three years' probation and time served in a case where there is no excuse, under factually strong circumstances, and with *three prior strikes* and *five prior prison terms*, why he is not currently serving, at a minimum, 25-years-to-life in state prison. What the hell is going on in San Francisco? If you're interested, I have a published article dealing with the general state of affairs in California, including its courts, combined with an insider's view of what is happening to the criminal justice system in San Francisco's courts itself. Recognizing that both might be considered "political" in nature, don't ask me to send it to you if you are offended by such information. But if you're concerned with what's going on in California right now, including what's happening to California's criminal justice system, it's available to you upon request.

***Second Degree DUI Implied Malice Murder*:**
***Involuntary and/or Vehicular Manslaughter as Lesser Included or Lesser Related Offenses*:**
***Voluntary Intoxication in Implied Malice Murders*:**

People v. Wolfe **(Feb. 21, 2018) 20 Cal.App.5th 673**

Rule: Driving with a .08% blood alcohol level or higher, in a dangerous manner, knowing it to be unsafe to do so, and killing a pedestrian in the process, may be charged as a second degree implied malice murder. Involuntary and vehicular manslaughter are not lesser included offenses of a second degree DUI implied malice murder. Voluntary intoxication is not a defense to a second degree DUI implied malice murder.

Facts: Defendant Kelly Michele Wolfe had a bit of a drinking problem. On July 4, 2013, between a birthday party in Mission Viejo and later at a bar in San Clemente called "Knuckleheads," she managed to consume what was later estimated to be some 14 to 16 standard alcoholic drinks, bringing her blood/alcohol level up to somewhere between an estimated whopping .34% to .35%. As a regular patron of Knuckleheads, she and her also alcoholic drinking buddy husband usually had the good sense to call a local taxi—Thomas "Tommy Taxi" Meadows—to take them home when they felt they could not drive safely, something they did two or three times a month. Defendant knew it wasn't safe to drive while intoxicated, having been arrested once before for DUI (1994, in Nevada), after which she was required to attend a 90-minute victim impact panel where offenders learned about the consequences of drinking and driving. And then in 2008, upon renewing her California driver's license, she signed a Department of Motor Vehicles (DMV) renewal form which included the following statement: "*I am hereby advised that being under the influence of alcohol or drugs, or both, impairs the ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If I drive while under the influence of alcohol or drugs, or both, and as a result, a person is killed, I can be charged with murder*."

Despite all this knowledge, defendant decided to forego Tommy Taxi and drive herself home on this day. Unfortunately, while attempting to do so, she crossed paths with 12-year-old Mason and his grandmother, Marthann. Mason and Marthann were walking to the beach from their family's beachside vacation home at about 8:33 p.m., planning on watching the 4th of July fireworks. Mason was blind; a condition he'd lived with since birth. It was anticipated that Marthann would be describing the Fourth of July fireworks for him. As they were about to cross Pacific Coast Highway, standing in the street's gutter near the bike lane with Mason holding his white cane in his right hand and his grandmother's arm with his left, defendant, driving northbound towards them in her Volkswagen van, failed to negotiate a bend in the road. Seeing defendant's vehicle coming towards them, Marthann was able to push Mason out of the way before she was struck head-on. Mason heard a loud "thud" as he lost his grip on his grandmother's arm. Mason sustained injuries to his face and right leg as he fell. Marthann died at the scene. Defendant apparently never saw them, there being no skid marks at the site of the collision. Despite pieces of hair and scalp in her shattered windshield, with "broken glass particles across the dashboard, the passenger seat, and the floorboard," and with her horn blaring, one or both headlights out, and her front grill being crumpled and severely damaged, defendant was able to continue driving. Making a right turn onto a side street, her van stalled. With the horn still blaring intermittingly, she was eventually able to restart the car, driving it to the front of her apartment which was right up the hill. She clipped a parked car before parking the van askew on the street. After sitting in her car for a few minutes, with (as witnesses reported) "a very shocked look on her face," defendant eventually left her car and went into her home. She was soon arrested by officers who tracked her down. Defendant was charged in state court with (among other charges) second degree "implied malice" murder, the prosecutor electing not to allege either involuntary or vehicular manslaughter. At trial, the court declined defendant's request to instruct the jury on the elements of involuntary or vehicle manslaughter. Nor would the trial judge allow defendant to present evidence of "voluntary intoxication" as a defense. Convicted of second degree murder (and other charges), and sentenced to state prison for 18 years to life, defendant appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. On appeal, defendant argued that (1) the evidence was insufficient to sustain a second degree murder conviction, (2) it was error to *not* instruct the jury on involuntary or vehicular manslaughter as "lesser included offenses" of second degree murder, and (3) it was error to *not* allow voluntary intoxication as a defense to an implied malice murder charge.

(1) *Sufficiency of the Evidence*: Defendant argued that there was insufficient evidence that "she was subjectively aware that her actions were dangerous to human life and that she deliberately acted with conscious disregard for human life. As already noted, defendant was charged with second degree murder. Looking at the elements of this offense, the Court noted that it was necessary for the People to prove that defendant committed an "unlawful killing of a human being . . . with malice aforethought." (P.C. § 187(a)) A murder *without* premeditation and deliberation is second degree murder (P.C. § 189) In second degree murder, malice is a necessary element, but it may be "express or implied." (P.C. § 188.) Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with a conscious disregard for that danger. Implied malice may be found when a person willfully drives while under the influence of alcohol. If the facts surrounding the offense support a finding of "implied malice," second degree murder may be

charged. The California Supreme Court has held that evidence of a driver's awareness of the hazards of driving while intoxicated, but despite this knowledge, choosing to drive while intoxicated and then committing a homicide (the killing of a human being by another human being) while doing so, can support a finding of implied malice. (*People v. Watson* (1981) 30 Cal.3rd 290.) Generally, the courts look to four factors in determining whether the evidence supports an implied malice finding, not all of which need to be present: (1) blood-alcohol level above the .08% legal limit; (2) a pre-drinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving. In this case, defendant's blood-alcohol level was about 4 times the necessary .08 percent. Also, defendant not only had previously (after her 1994 DUI arrest) attended a class dealing with the dangers of driving while intoxicated, but also signed an acknowledgement of the dangers of driving while intoxicated in 2008 upon renewing her California driver's license. Lastly, her driving, by swerving from the traffic lane, was "highly dangerous." This evidence was certainly sufficient for a reasonable jury to find the necessary implied malice element supporting a second degree murder charge.

(2) *Involuntary and/or Vehicular Manslaughter Charges*: Defendant next argued that the trial court was required to offer the jury the option of convicting her of either involuntary or vehicular manslaughter, contending that these two offenses are "*lesser included offenses*" of second degree murder. Under the law, however, a lesser offense is necessarily included in a greater offense only if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. Second degree murder, however, as noted above, may be proved by showing an implied malice. In contrast, involuntary manslaughter is "the unlawful killing of a human being *without* malice." (P.C. § 192(b).) Vehicular manslaughter is a specific type of manslaughter. (P.C. § 192(b).) "Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being *without* malice . . . where the driving was in violation of [DUI laws] . . . ." (P.C. § 191.5(a).) Because the elements don't match up, none of these offenses are legally lesser included offenses of a second degree implied malice murder. As previously held by the California Supreme Court; "a vehicular manslaughter charge may be related to, but it is not necessarily included within, the murder charge. (*People v. Sanchez* (2001) 24 Cal.4th 983, 990.) While involuntary or vehicular manslaughter may be a "*lesser related*" offenses (i.e., based upon the same set of facts even though without matching elements), the prosecutor is not required to charge them (see P.C. § 192(e)), and the trial court is not required to offer the jury the option of convicting the defendant of these lesser forms of homicide. "(T)here is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions." (*People v. Rundle* (2008) 43 Cal.4th 76, 148.) The fact that involuntary or vehicular manslaughter is often charged in such circumstances (see the dissenting opinion by Justice Joyce Kennard, in *Sanchez, supra*, 24 Cal.4th at pp. 1001–1002.) does not mean that defendant's Fourteenth Amendment "equal protection" rights are being violated. In sum, there's nothing improper with the prosecutor's decision to limit the jury to an "all-or-nothing" choice, nor the trial court's refusal to override the prosecutor's decision on this issue.

(3) *Voluntary Intoxication*: Over Defendant's objection, the trial court instructed the jury that: "Voluntary intoxication is not a defense to implied malice [murder]." Although conceding that this instruction accurately reflects California law (see P.C. § 29.4(b); i.e., "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."), defendant argued that such an

instruction nevertheless violated his Fourteenth Amendment (and Cal. Const., art. I, § 7) due process rights "because it barred the jury from considering exculpatory evidence . . . relevant to negating the mental state required for the crime of implied-malice second degree murder." The Court disagreed. Basically, defendant challenged the constitutionality of the limiting provisions of Penal Code § 29.4(b). The U.S. Supreme Court has already upheld the constitutionality of limiting the use of "voluntary intoxication" as a defense in a similar Montana statute. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 58.) California's section 29.4(b) limits the admissibility of evidence of voluntary intoxication, making such evidence inadmissible in general intent crimes and implied malice murders. Per *Egelhoff*, it is constitutional for California's Legislature to do so. Defendant's due process rights, therefore, were not violated by the trial court's instructions to the jury on this issue.

Note: The prosecutor's decision to charge defendant with second degree murder only, and not also the "*lesser related*" offenses of involuntary and/or vehicular manslaughter, is an interesting tactic, if not a dangerous gamble. The up-side to charging murder only is that it has the tactical advantage of eliminating the possibility that a jury will compromise (which juries are prone to do) and convict on the lesser offense only. The down-side, of course, is that if the jury is not satisfied that defendant's driving was dangerous enough, despite the alcohol, it might completely acquit him or her. Note also, however, that charging second degree murder in such cases might not always be appropriate. Even the U.S. Supreme court in *Watson* noted that the decision to charge second degree murder can be abused. "(W)e neither contemplate nor encourage the routine charging of second degree murder in vehicular homicide cases," pointing out merely that it is legal to do so if all the elements are there. (p. 301.) So it should really be limited to the more aggravated cases. Another important part of this decision is in noting that "*lesser related*" (as opposed to "*lesser included*") offenses need not be offered to a jury as an alternate choice. I prosecuted cases for 30 years under the misconception that a defendant was entitled, upon his request, to have a jury consider any lesser related offenses along with whatever was charged on the information. I find out now that this is not the case. I continue to learn something new every day.

***Warrantless Entry of a Residence*:**
***Tasers and the Use of Force*:**

Bonivert v. City of Clarkston **(9th Cir. WA Feb. 26, 2018) 883 F.3rd 865**

Rule: When two co-occupants of a house are present—one giving the police consent to enter but the other expressly objecting—a forced warrantless entry of the home is illegal. Such an "express" objection may be inferred from the circumstances. Neither the "emergency aid exception" nor the "exigency exception" to the warrant requirement allows entry into a home absent some evidence to believe that (1) someone inside needs help or protection, or (2) there exists probable cause to believe a crime has been or is being committed and a reasonable belief that entry is necessary to prevent the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. In a civil case, whether the amount of force used by officers in subduing an uncooperative suspect is reasonable or not, when the evidence is conflicting, is an issue that must be decided by a jury.

Facts: In the early morning hours of January 8, 2012, Sergeant Danny Combs and Officer Paul Purcell of the City of Clarkston, Washington, Police Department, received a "physical domestic" call at Plaintiff Ryan Bonivert's home. The officers were told via dispatch that an argument between a man and a woman had become "physical at one point," but that the victim (later determined to be Bonivert's girlfriend, Jessie Ausman) was outside in a car with her child, and that the man (Bonivert) was being restrained by others. Upon arrival, the officers found everyone (five people) outside, except for Bonivert who was reportedly alone in the house. Upon interviewing the people, it was determined that during a party, at which everyone had been drinking, Bonivert and Ausman got into an argument during which Ausman decided she was going to leave with the couple's nine-month old daughter. Ausman was a resident of the house, having lived there with Bonivert for the past two years. According to one version of the facts, Bonivert reportedly became angry and grabbed Ausman, throwing her to the ground. Another version, as related by others at the party, indicated that when Bonivert became angry, he "rush(ed)" Ausman but was tackled before he could get to her, allowing her to escape with the baby. Upon noting the discrepancies in the witness' stories, the officers decided that they needed to talk to Bonivert himself. The officers therefore went to the front door, knocked, identified themselves as police officers, and instructed Bonivert to come to the door. They received no response. Looking for a way to get it, it was discovered that the front and rear doors were locked. However, Bonivert was heard locking the deadbolt to a side door, indicating to the officers that he was aware of their presence but did not want to have any contact with them. Sgt. Combs again announced his presence, yelling loudly; "Come out or we are coming in," or words to that effect. Contacting Ausman again, she told the officers that there were no weapons in the house. She also told police that she did not believe Bonivert was a danger to himself. When the officers inquired how Bonivert would respond to having his home broken into, Ausman warned them that he had a problem with authority and recounted Bonivert's angry—but not violent—behavior towards officers during a recent drunk driving arrest. At this point, Sgt. Combs decided he needed to assess Bonivert's condition; to "find out what was going on, to assess (Bonivert)" and "see what his state of mind were (sic)." (Why he felt he needed to determine all this was not explained.) Ausman gave Sgt. Combs permission to enter the house. It was not indicated in the record whether Ausman intended to reenter the house herself, or whether she asked the officers for assistance to do so. (It was also not indicated whether Ausman wished to have Bonivert arrested for battering her, if he in fact did.) Asotin County Deputy Sheriffs Gary Snyder and Joseph Snyder arrived at the scene to assist. Attempting to make entry, Sgt. Combs used his flashlight to shatter a window pane on the back door and reached through to unlock it. But Bonivert opened the door at that point and began shouting at the officers. Bonivert ignored orders to stay back, calm down, and get on the ground. Whether or not Bonivert began to charge the officers was disputed. At any rate, both Sgt. Combs and Deputy Gary Snyder deployed their Tasers in dart mode, only to have Bonivert brush off the darts, swear at the officers, and attempt to shut the door. But the officers forced their way in and the fight was on. While attempting to subdue Bonivert, Sgt. Combs drive-stunned him with his Taser three times in his upper right shoulder. A resisting Bonivert was eventually handcuffed, after which Sgt. Combs drive-stunned him one more time for good measure. Bonivert was placed under arrest for assaulting an officer, resisting arrest, and "domestic violence assault in the fourth degree." (The case decision does not say whether criminal charges were ever filed.) Bonivert later sued the City of Clarkston and all four officers in federal court, alleging a warrantless entry into his home and for using

excessive force. The federal district court judge granted summary judgment for the civil defendants on the basis of qualified immunity. Bonivert appealed.

Held: The Ninth Circuit Court of Appeal reversed. When a court is considering an appeal in a civil suit, it must look at the allegations in the light most favorable to the plaintiff. In so doing, the court is tasked with determining (1) whether the civil defendants violated the plaintiff's constitutional rights, and if so, (2) whether those rights were "clearly established" at the time of the violation; i.e., "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation (with which) he (was) confronted." In attempting to answer the above questions, summary judgment for one party or the other (thus ending the lawsuit) is appropriate only if there no genuine issue of material fact that must be determined by a jury. The Court here found that such a "genuine issue of material fact" did exist. Specifically, a jury must evaluate the facts of this case to determine whether the officers did in fact violate the Fourth Amendment by making a warrantless, non-consensual entry into the plaintiff's home; i.e. were the officers acting "reasonably" under the circumstances then present by forcing entry? A civil jury must also determine whether the force used in subduing Bonivert was reasonable under the circumstances, based upon whose story they believed; i.e., the officers' or Bonivert's.

(1) *Entry of the Home*: Recognizing that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," the Court noted that "warrantless searches of the home or the curtilage surrounding the home 'are presumptively unreasonable.'" It is the police officers' burden of proof to rebut this presumption and show that their warrantless entry into plaintiff's home was justified by an exception to this rule.

(1)(a): *Consent of a Co-Occupant*: The officers and the City of Clarkston first argued that they had a co-occupant's (i.e., Jessie Ausman's) consent to enter. However, it is a clearly established rule of law that when a physically present inhabitant expressly refuses consent for the police to enter, the fact that another co-occupant has consented is irrelevant. (*Georgia v. Randolph* (2006) 547 U.S. 103.) This rule is well-established, and something the officers should have known. The officers argued, however, that an "express refusal" must be made verbally. The Court disagreed and found that such a refusal may be inferred from the circumstances. Whether or not Bonivert's refusal to comply with the officers' demands that he come out, or allow the officers in, constituted an express rejection of the officers' attempt to enter is something a civil jury should be allowed to determine. If the circumstances are found to be as the plaintiff alleges, the Court opined that Bonivert's actions were sufficient to constitute an express refusal, and a violation of the Fourth Amendment. As such, the Court held that the officers and the city were not entitled to qualified immunity under the consent exception to the Fourth Amendment's warrant requirement.

(1)(b) *The Emergency Aid Exception*: The officers next argued that the warrantless entry was lawful under the "*emergency aid exception*" to the warrant requirement. Under this exception, police officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. (*Brigham City v. Stuart* (2006) 547 U.S. 398.) The Court found this exception to be inapplicable in this case. Ausman was already out of the house, and in no danger. She also told the officers that there were no weapons in the house and expressed the opinion that Bonivert did not pose a danger to himself. And there was no one else in the house at the time. Holding that domestic abuse situations, as dangerous as they might be, do not create a "per se" emergency justifying a warrantless entry, the Court found absolutely no facts that would have justified the officers' conclusion that they had to make entry

to protect Bonivert's, or anyone else's, safety. The emergency aid exception did not apply to this case.

(1)(c) *The Exigency Exception*: The officers next argued that the "*exigency exception*" to the warrant requirement justified their entry into the house. Under the exigency exception, a warrantless entry is lawful where officers "have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752.) The Court found none of these circumstances existed in this case. Ausman was safely out of the house before the officers even arrived. And there was no evidence supporting a belief that the house contained any contraband or evidence of a crime.

(2) *Use of Force in Subduing the Plaintiff*: Physically subduing a person is a Fourth Amendment seizure. The use of excessive force in effecting a seizure thus violates the Fourth Amendment. (*Graham v. Connor* (1989) 490 U.S. 386.) The issue here is the reasonableness of the force used, as considered from the perspective of a reasonable officer at the scene rather than in hindsight. In denying that he physically resisted the officers in any way, Plaintiff Bonivert alleged in his lawsuit that Sgt. Comb's use of his Taser in "drive-stun" mode was unreasonable under the circumstances. The officers argued that Bonivert did in fact resist arrest—that the officers' safety was at risk—making the use of the Taser necessary under the circumstances. A Taser has been held to be a form of "non-lethal force" which constitutes an "intermediate or medium, though not insignificant, quantum of force." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3rd 805.) The lawfulness of using a Taser to subdue non-threatening, although uncooperative, suspects, depends upon the circumstances. Absent a threat to the safety of the officers or others, use of a Taser may constitute excessive force and a Fourth Amendment violation. (*Mattos v. Agarano* (9th Cir. 2011) 661 F.3rd 433.) Overruling the trial court's conclusion that "no reasonable jury could find the (officers') use of force within the home excessive," the Court found that given the differences between Bonivert's version of what happened and what officers claimed happened, a "genuine issue of fact" exists that must be resolved by a jury. Qualified immunity, therefore, should not have been granted to the officers by the trial court.

Note: The conclusion might have been different had Jessie Ausman wanted to have Bonivert arrested for battery on her person. (See *People v. Higgins* (1994) 26 Cal.App.4th 247, 252-255.) The Court never mentions whether Ausman expressed a desire to have Bonivert arrested, or whether the officers even asked. And on the issue of whether there was probable cause to effect an arrest; i.e., whether or not Bonivert had committed a battery on Ausman, was never resolved, some participants in this ill-fated drinking party saying he did; others saying he did not. These are all issues the officers on the scene should have resolved before deciding whether it was necessary to force entry into the house. Short of a need to arrest Bonivert, or to collect evidence of a battery, forcing entry just to see what the uncooperative occupant might have to say about the events of the night, or to check his welfare when there was no reason to believe that it needed checking, it is tough to justify the forced entry of his home. I can see a civil jury coming down on Bonivert's side of this issue when it goes to trial.

***Firearms and the Use of Force*:**
***Qualified Immunity from Civil Liability*:**

Thompson v. Rahr **(9th Cir. WA Mar. 13, 2018) 885 F.3rd 582**

Rule: Pointing a gun at the head of a calm, compliant, and already controlled felony suspect during a traffic stop, even though not yet handcuffed, is an excessive use of force and a Fourth Amendment violation.

Facts: In December, 2011, Pete Copeland, a deputy in the King County Sheriff's Office, while on patrol in the City of Burien, Washington, observed Plaintiff Lawrence Thompson commit "multiple traffic violations." Upon making a routine traffic stop, it was discovered that Thompson was driving on a suspended license and that he was a convicted felon with his most recent felony conviction being for possessing a firearm. Officer Copeland decided to arrest Thompson for driving with a suspended license, and to impound Thompson's car as required by a City of Burien ordinance. (The lawfulness of impounding the car under these circumstances was not discussed and was thus not at issue here.) Thompson was removed from the car, patted down for weapons (with negative results), and directed to sit on the bumper of the patrol car. Another officer watched Thompson—who stood six feet tall and weighed two hundred and sixty-five pounds and was taller and heavier than Copeland, and who was also unhandcuffed—as Officer Copeland searched his vehicle in a pre-impound inventory search. A loaded revolver was found in an open garbage bag on the rear-side floorboard. Deciding to arrest Thompson for violating Washington's "Uniform Firearms Act," a felony offense (Wash. Rev. Code § 9.41.040), Officer Copeland drew his gun and approached Thompson. Per later testimony, Officer Copeland claimed that he held his firearm in a "low-ready position." Thompson, on the other hand, claimed that Officer Copeland pointed his (Copeland's) gun at his (Thompson's) head, demanded that he surrender, and threatened to kill him if he did not. Per Thompson's testimony, Officer Copeland directed him to get on the ground, facedown, so that he could be handcuffed. Thompson complied and was cuffed without incident. Copeland arrested Thompson for being a felon in possession of a firearm. (Charges were later dismissed by a Washington court under the theory that Officer Copeland's stop of Thompson was a "pretext stop," and the search of his vehicle a "pretext search," both of which, under Washington's State Constitution, are illegal and require the suppression of any resulting evidence. See fn. 2 of the case decision.) Thompson subsequently sued Officer Copeland and King County ("civil defendants") in federal court under 42 U.S.C. § 1983, alleging that Officer Copeland used excessive force by pointing his gun at his head and threatening to kill him; a violation of his Fourth Amendment rights. A magistrate judge granted the civil defendants' motion for summary judgement, holding that the force used was reasonable under the circumstances, and even if it was not, the civil defendants were entitled to qualified immunity. Thompson appealed.

Held: In a split (2-to-1) decision, the Ninth Circuit Court of Appeal affirmed, but only on the theory that Officer Copeland was entitled to qualified immunity. Police officers are entitled to qualified immunity if (1) the facts taken in the light most favorable to the party asserting the injury (Thompson, in this case) *fail to show* that the officers conduct violated a constitutional right, *or* even it does, (2) that the right was *not* clearly established at the time of the alleged violation. The violation of Thompson's constitutional rights alleged here was the officer's act of pointing his gun at the plaintiff's head, while threatening to kill him. This, per Thompson, was an excessive use of force (a Fourth Amendment violation) under the circumstances. In determining whether pointing a gun at someone's head constitutes excessive force, a court

considers three factors: (1) The severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted. (2) The government's interests by assessing the severity of the crime; whether the suspect posed an immediate threat to the officers' or public's safety; and whether the suspect was resisting arrest or attempting to escape. (3) The gravity of the intrusion on the individual when balanced with the government's need for that intrusion. In accessing the above, the Court must assume the plaintiff's version of the facts is true. While noting that Thompson's crimes (i.e., traffic violations and gun possession) were "potential crimes of low and moderate severity, respectively," the Court found Officer Copeland's act of pointing a gun at his head while threatening to kill him if he didn't surrender when, arguably, he had already surrendered, or was at least complaint and cooperative, to be "hardly . . . minor." The Court found the government's argument that Thompson "could have charged past Deputy Copeland and grabbed the revolver [in the back of the car] in a matter of seconds" to be "weak," particularly since Thompson, who, although unhandcuffed and who was an unusually large man, was being guarded by another officer some ten to fifteen feet away and had not shown any signs of resistance. At least under such non-volatile circumstances, the Court found that "pointing guns at persons who are compliant and present no danger is a constitutional violation" as a matter of law. In the Court's words: "(T)he force used against Thompson was excessive when balanced against the government's need for such force." However, the Court also ruled that based upon the status of the law at the time of this incident, and upon considering the particular circumstances of this case, the rules giving officers guidance were not yet clearly established. Officer Copeland, therefore, was entitled to qualified immunity from civil liability. Based upon this conclusion, therefore, the Court affirmed the trial court's granting of summary judgment.

Note: The dissent disagreed with the majority's conclusion that Officer Copeland didn't have fair notice that putting a gun to a non-resisting suspect's head constituted excessive force, and a Fourth Amendment violation, noting that this issue has already, and clearly, been decided in *Robinson v. Solano County* (9th Cir. 2002) 278 F.3rd 1007. The majority countered this argument by noting that *Robinson* did not involve a felony traffic stop, gun-related arrest situation, at night, with an unusually large, unhandcuffed, suspect. Nor did *Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3rd 752, another gun-pointing case. Either way, it cannot be said that officers are no longer on notice that putting a gun to the head of a non-resisting suspect violates the Fourth Amendment. Be forewarned.