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MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court and Circuit Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. *The Informer* is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding *The Informer* can be directed to the Editor at (912) 267-3429 or FLETC-LegalTrainingDivision@dhs.gov. You can join *The Informer* Mailing List, have *The Informer* delivered directly to you via e-mail, and view copies of the current and past editions and articles in *The Quarterly Review* and *The Informer* by visiting the Legal Division web page http://www.fletc.gov/legal.

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CASE SUMMARIES

Circuit Courts of Appeals

1st Circuit

U.S. v. Chaney, 2011 U.S. App. LEXIS 15500, July 27, 2011

While detained and handcuffed, Chaney consented to a search of his pants pocket for his identification. The officer placed his hand in Chaney's pocket and first removed a plastic bag containing crack cocaine. Then he reentered Chaney's pocket and removed a social security card.

Chaney argued that the expressed object of the consent search was the retrieval of his identification, and that the removal of the plastic bags fell outside the scope of his consent. The court disagreed, holding that it was objectively reasonable for the officer to believe that the scope of consent extended to the removal of the plastic bag from Chaney's pocket in the course of searching for his identification.

The court also held that Chaney's consent was obtained voluntarily although he was handcuffed when he provided it.

Finally, the officers' entry into the motel room with guns drawn and their handcuffing of Chaney was reasonable. Neither the use of handcuffs nor the drawing of weapons automatically transforms a valid *Terry* stop into a de facto arrest. The circumstances of the raid gave rise to a reasonable concern for officer safety that justified the use of handcuffs and drawn handguns. The unexpected presence of Chaney, in a darkened motel room with two suspected drug dealers who ignored repeated orders to drop to the ground, justified the officers' use of handcuffs during the investigative detention.

Click **HERE** for the court's opinion.

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2nd Circuit

U.S. v. Bailey, 2011 U.S. App. LEXIS 13706, July 6, 2011

Officers had a search warrant for Bailey's apartment. While they were conducting surveillance prior to the execution of the search warrant, the officers saw Bailey come out of the apartment, get into a car and drive away. The officers followed Bailey's car for approximately one mile and conducted a traffic stop. The officers handcuffed Bailey, told him that he was being detained incident to the execution of the search warrant, and drove him back to the apartment. Bailey denied living in the apartment. After the officers found guns and drugs in the apartment, they arrested Bailey and found a key to the apartment in his pocket during the search incident to arrest. Bailey argued that the key should be suppressed because the officers had detained him in violation of the *Fourth Amendment*.

In a case of first impression, the court held that the officers' authority under *Michigan v. Summers* to detain Bailey incident to a search of the apartment was not strictly confined to the physical premises of the apartment so long as the detention occurred as soon as practicable after Bailey left the apartment. The officers' decision to wait until Bailey had driven out of view of the apartment to detain him out of concern for their own safety and to prevent alerting others possible occupants was reasonable and prudent. His detention during the valid search of the apartment did not violate the *Fourth Amendment*.

The Fifth, Sixth and Seventh Circuits agree. The Eighth and Tenth Circuits have declined to extend *Summers* to allow officers to detain occupants, who have been seen leaving a residence subject to a search warrant, at a location away from that residence.

Click **HERE** for the court's opinion.

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4th Circuit

Henry v. Purnell, 2011 U.S. App. LEXIS 14391, July 14, 2011

Purnell attempted to arrest Henry on an outstanding misdemeanor failure-to-pay-child-support warrant. Henry fled on foot and Purnell chased him. Purnell mistakenly drew his firearm instead of his taser and shot Henry in the elbow. A divided panel of the court held that Purnell was entitled to qualified immunity on Henry's *§ 1983* claim. (See 10 Informer 10)

However, after a rehearing in front of the full panel, the court reversed the earlier decision, holding that Purnell was not entitled to qualified immunity and remanded the case for trial. Although both parties agree that Purnell mistakenly fired his pistol instead of his taser, it is not the honesty of his actions that determine whether his conduct was constitutional, but rather the objective reasonableness of his actions. There were several facts that Purnell knew or should have known that would have alerted any reasonable officer to the fact that he was holding his Glock and not his taser. (1) Purnell knew he carried his Taser in the holster on his right thigh, which was about a foot lower that the holster on his hip that held his Glock, (2) Purnell could feel the weight of the Glock in his hand which was nearly twice the weight of his Taser, and (3) Purnell knew the Taser had a thumb safety catch that had to be flipped to arm the weapon, while the Glock had no thumb safety.

Additionally, the court held that it would have been clear to a reasonable officer that shooting a fleeing, non-threatening misdemeant with a firearm was unlawful.

Click **HERE** for the court's opinion.

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U.S. v. Digiovanni, 2011 U.S. App. LEXIS 15286, July 25, 2011

The court held that the officer failed to diligently pursue the purpose of the traffic stop for following another vehicle to closely, and instead embarked on a sustained course of investigation into the presence of drugs in the car. The officer did not have reasonable suspicion to turn this traffic stop into a drug investigation; consequently, the length of Digiovanni's detention was unreasonable.

After the stop, the officer asked Digiovanni for his driver's license and registration, and then asked him to step out of the car. The officer then asked Digiovanni numerous questions concerning his travel history, and travel plans, only a few of which related to the justification for the stop. After this questioning, the officer continued to investigate the presence of drugs in the car instead of either completing the warning ticket or beginning the driver's license check. Ten minutes into the stop the officer radioed for back-up and five minutes after that finally issued a Digiovanni a warning ticket and returned his driver's license.

Additionally, the court held that Digiovanni's written consent to search the vehicle was obtained involuntarily. Although the officer returned his driver's license and told Digiovanni that he was free to go, he immediately returned to the subject of drugs, implying falsely that Digiovanni was bound by his earlier consent to search.

Click **HERE** for the court's opinion.

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U.S. v. Wilks, 2011 U.S. App. LEXIS 15554, July 28, 2011

In 2006, an officer arrested Wilks for driving under suspension, secured him in his patrol car and searched Wilks's car incident to arrest. The officer found an unlawful firearm under the front seat. In 2006 it was lawful to search Wilks's vehicle incident to his arrest under these circumstances.

Wilks moved to suppress the firearm seized from his vehicle, relying on *Arizona v. Gant*, decided in 2009. *Gant*, held in part, that a vehicle search incident to a lawful arrest is not valid where the defendant is stopped for a traffic violation, arrested, handcuffed, and placed in the back of the patrol car prior to the time of the search. The district court granted to motion to suppress, deciding to apply *Gant* retroactively.

The court, citing the recent United States Supreme Court decision *Davis v. U.S.*, held that because the officer's search of Wilks's vehicle was permissible under binding circuit precedent at the time it occurred, the lower court improperly granted Wilks's motion to suppress.

Click **HERE** for the court's opinion.

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5th Circuit

U.S. v. Hernandez, 2011 U.S. App. LEXIS 14659, July 18, 2011

The court held that Hernandez lacked standing to challenge the placement of the GPS device on his brother's truck. The truck was registered to the brother and Hernandez was not a regular driver. Even if Hernandez had standing, there was no *Fourth Amendment* violation because no search or seizure occurred. The officer attached the device to the trucks undercarriage with a magnet while it was parked on a public street. Additionally, the device did not affect the truck's driving qualities or draw power from the truck's engine or battery.

The court further held that the government's use of the hidden GPS device to track the truck's movements as it drove across the country was not a search within the meaning of the *Fourth Amendment*.

Click **HERE** for the court's opinion.

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7th Circuit

U.S. v. Littledale, 2011 U.S. App. LEXIS 14254, July 12, 2011

The court held that Littledale was not in custody when he confessed; therefore, the agents were not required to read him his *Miranda* rights. Although the interview took place in the campus police station, the officers took Littledale to a private office, not an interrogation room. Littledale consented to the interview twice, and the officers did not touch, threaten to touch or handcuff him. While the officers did not explicitly tell Littledale that he was free to leave, they did tell him that he was not under arrest.

Click **HERE** for the court's opinion.

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U.S. v. States, 2011 U.S. App. LEXIS 14702, July 19, 2011

The filing of a criminal complaint under *Rule 3 of the Federal Rules of Criminal Procedure* does not constitute the initiation of adversary judicial proceedings. A criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the *Sixth Amendment* right to counsel.

In the federal system, the initial appearance, under *Rule 5 of the Federal Rules of Criminal Procedure,* marks the point at which interrogations by law enforcement cease to be controlled by the *Fifth Amendment* and begin to be governed by the *Sixth Amendment*. States did not enjoy the *Sixth Amendment's* protections at the time of his interrogation since it occurred before his initial appearance.

Click **HERE** for the court's opinion.

*****

U.S. v. Griffin, 2011 U.S. App. LEXIS 5009, July 22, 2011

The court held that Griffin was not "seized" for *Fourth Amendment* purposes when he discarded the crack cocaine in the parking lot during the low-speed police vehicle chase, therefore, the drug evidence was properly admitted at trial.

Submission to a show of authority is a necessary element of a *Fourth Amendment* seizure, and while a suspect is still fleeing, as Griffin was when he discarded the drugs, he is not seized. A seizure by a show of authority does not occur unless and until the suspect submits.

Click **HERE** for the court's opinion.

*****

8th Circuit

U.S. v. Drapeau, 2011 U.S. App. LEXIS 13900, July 8, 2011

A person is not justified in using force for the purpose of resisting arrest or impeding a law enforcement officer who is acting within the scope of his official duties. However, an individual may be justified in using force to resist excessive force used by a law enforcement officer. In this case, there was substantial evidence that the officer did not use excessive force against Drapeau. As result, it was reasonable for the jury to conclude that Drapeau was not acting in self-defense when he closed the window on the officer's arm as he tried to enter the home.

Click **HERE** for the court's opinion.

*****

U.S. v. Smith, 2011 U.S. App. LEXIS 14340, July 14, 2011

The court held that the officer had an objectively reasonable concern for her safety that justified handcuffing Smith and placing him in a squad car while awaiting the arrival of the drug- sniffing dog. Additionally, the officer was justified in searching the section of the passenger compartment where a recent occupant of the vehicle said a gun would be found.

The initial contact between the officer and Smith was a consensual encounter where Smith cooperated and voluntarily answered non-accusatory questions. During this encounter, the officer acquired reasonable suspicion when a known but unproven informant, a recent passenger in the vehicle, stated that there were drugs and a gun in Smith's car. This was partially corroborated after Smith admitted to being on parole for a drug offense.

After the officer acquired reasonable suspicion, she asked Smith for consent to search his person, which he granted, and for his car, which he refused. After the officer told Smith that she was going to request a drug-sniffing dog, he became agitated to the extent that the officer thought he might start a fight with her. At this point, the officer was justified in handcuffing and placing Smith in the squad car for the duration of the *Terry* stop in order to ensure officer safety and to maintain the status quo.

After securing Smith, the officer was permitted to conduct a protective sweep of the vehicle's passenger compartment to search for weapons that the suspect or other occupants might later access. It was during this search that the officer located a loaded pistol in the vehicle.

Click **HERE** for the court's opinion.

*****

U.S. v. Brooks, 2011 U.S. App. LEXIS 14388, July 14, 2011

The court held that the officers lawfully seized the discarded firearm under the plain-view doctrine. When Brooks saw the officers, he threw a bag containing a long object into a crawl space and ran down a staircase into the apartment building. The officers retrieved the bag, which contained a shotgun.

First, the officers lawfully arrived at the place where they saw Brooks discard the bag. Neither the staircase nor any part of the backyard could be considered curtilage of the apartment building. The staircase led to the basement of the multi-family dwelling, in which there was a common area shared by all tenants. There is no expectation of privacy in the common areas of an apartment building. Additionally, the gates to the backyard were open and unlocked, the backyard and staircase were visible from public areas and there we no "no trespassing" signs on the property. Because the staircase was not within the curtilage of the residence, the officers did not violate the *Fourth Amendment* in arriving at the place from which the bag containing the shotgun could be seen.

The incriminating nature of the gun was immediately apparent to the officers because Brooks's behavior corroborated a previously reliable confidential informant's information that Brooks was selling guns from his basement apartment.

Finally, the officer had a lawful right of access to the object because the bag containing the shotgun was on the ground in front of the officer who retrieved it.

Click **HERE** for the court's opinion.

*****

U.S. v. Schwarte, 2011 U.S. App. LEXIS 14534, July 15, 2011

Schwarte argued that the anticipatory search warrant used to search his house was not valid because the triggering condition, the proper delivery of the package, never occurred. The court disagreed, holding that the anticipatory search warrant defined the triggering condition as the controlled delivery of the package containing the child pornography "to Steven Schwarte or any other occupant" at that address. When the undercover officer, posing as a mail carrier, handed the package to Schwarte's adult niece, and she accepted the package, delivery occurred and the triggering condition was satisfied.

Schwarte claimed that he did not knowingly receive the child pornography because he was asleep and completely unaware of the delivery of the package to his residence. Again the court disagreed, holding that that the crime of knowingly receiving child pornography does not require proof that the defendant be present and awake when the child pornography is delivered to his residence. It is sufficient that Schwarte knowingly set into motion the events, which resulted in his possession of the child pornography.

Here, Schwarte knowingly and repeatedly asked the undercover officer, posing as a minor, to send him various items of child pornography. He provided the undercover officer his address so she could mail those items to him. After his arrest, he told the officers that the items in package matched the items he requested from the undercover officer. The court found that Schwarte knew exactly what he ordered and affirmatively acted to have the materials delivered to his residence. Although he was asleep when the package arrived, Schwarte came into constructive possession of it once it was accepted by his niece.

Click **HERE** for the court's opinion.

*****

U.S. v. Maldonado, 2011 U.S. App. LEXIS 14992, July 22, 2011

During a *Terry* stop of a vehicle, the officer asked Maldonado for his cell phone number, which was instrumental in establishing at trial that he had talked to a co-conspirator over the phone 279 times. Maldonado argued that by asking for his phone number, the officer exceeded the permissible scope of the investigative detention.

The court held that the request for Maldonado's phone number was within the scope of the investigative detention. The task force members had observed the involvement of the two occupants of the vehicle in two drug transactions earlier that day. The transactions had been arranged by phone, so the officers conducting the stop could reasonably conclude that learning the phone numbers of the occupants of the vehicle might establish or negate their involvement with the crime.

Additionally, the statements that Maldonado gave to the officers during the investigative detention were not obtained in violation of *Miranda*. The officers asked Maldonado for his name and phone number in the context of a brief investigative stop. Generally, the temporary and relatively non-threatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody. Because Maldonado never was subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with a formal arrest, he was not in custody for *Miranda* purposes when he gave the officers his phone number.

Click **HERE** for the court's opinion.

*****

U.S. v. Riesselman, 2011 U.S. App. LEXIS 14993, July 22, 2011

Officers drafted an affidavit and application for a search warrant for the defendant's residence. The items sought in the search warrant were indicated by reference to Attachment 1, which included a list of documents, drug paraphernalia, weapons and other items.

The court held that a clear incorporation of Attachment 1, including a full list of items subject to seizure, and the presence of Attachment 1 with the search warrant at the search scene satisfied the *Fourth Amendment's* particularity requirement. Although a copy of Attachment 1 was not provided to Riesselman after the search concluded, this was of no consequence. A complete copy of the search warrant, including Attachment 1, was present at the time of the search, limiting the items the officers could seize and it was available for Riesselman to review.

The court also held there was no connection between the illegal search of Riesselman's person and the incriminating statements he subsequently made to the officers. The officers *Mirandized* Reisselman twice before they questioned him. After the officers found drugs in Riesselman's pockets, they moved him into the house to talk to him. There was no evidence to indicate that the illegal search was conducted in bad faith. While the officers had a search warrant for the house, it did not authorize a search of Riesselman's person. However, the focus of the officers' questioning was not the drugs found on Riesselman, but other drug transactions and weapons in general. Riesselman's statements were obtained voluntarily under circumstances that demonstrated they were not a result of the illegal search.

Click **HERE** for the court's opinion.

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10th Circuit

U.S. v. Soza, 2011 U.S. App. LEXIS 13884, July 7, 2011

In 2007, during a traffic stop, an officer arrested Soza because he had an outstanding felony warrant. The officer secured Soza in his patrol car and searched Soza's vehicle incident to arrest where he found an illegal firearm and drugs.

Soza moved to suppress the evidence seized from his vehicle, relying on *Arizona v. Gant*, decided in 2009, which held in part that an officer may not search a vehicle incident to a recent occupant's arrest after the arrestee has been secured and is unable to access the interior of the vehicle.

The court, citing the recent United States Supreme Court decision *Davis v. U.S.*, held that because the officer's search of Soza's vehicle was permissible under binding circuit precedent at the time it occurred, the lower court correctly denied Soza's motion to suppress.

Click **HERE** for the court's opinion.

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U.S. v. Martinez, 2011 U.S. App. LEXIS 14220, July 12, 2011

An emergency services dispatcher received a 911 call from Mr. Martinez's residence. However, the dispatcher only heard static on the line, and when she placed a return call there was no answer, but only static on the line. The dispatchers contacted an officer who knew that line problems or bad weather sometimes caused static-only telephone calls but sent officers to check Martinez's residence as a precaution.

The responding officers walked around the residence and saw no signs of forced entry or evidence that anyone was home. The officers entered the residence through a closed but unlocked sliding glass door after announcing their presence and getting no response. The officers conducted a sweep of the residence to ensure no one was injured, unconscious or in need of assistance. During their search, the officers saw drugs and child pornography in plain view. The officers exited the residence after they were convinced that no one inside the residence needed emergency assistance. They spent approximately five minutes inside. After the search was complete, but before the officers left the property, Martinez returned home and was arrested.

The court held that the warrantless search of Martinez's home was not justified by exigent circumstances because the officers did not have an objectively reasonable basis to believe there was a person inside his home in need of immediate aid.

A static 911 call, by itself, is insufficient to create an objectively reasonable belief that someone inside a home is in need of aid. With a static 911 call, there is no assurance that a person initiated the call. It was common knowledge among officers and 911 dispatchers that electrical or weather anomalies can cause such calls.

Additionally, once at Martinez's residence, the officers did not hear or see anyone near the house, they saw no signs of forced entry, they saw no cars near the house and the gate to the

property was closed. None of the officers' observations created a reasonable belief that there was an emergency inside the home.

Click **HERE** for the court's opinion.

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