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The Federal Law Enforcement -Informer-

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

Welcome to this installment of *The Federal Law Enforcement Informer (The Informer).* The Legal Training Division of the Federal Law Enforcement Training Centers' Office of Chief Counsel is dedicated to providing law enforcement officers with quality, useful and timely United States Supreme Court and federal Circuit Courts of Appeals 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 Centers. *The Informer* is researched and written by members of the Legal Division. You can join *The Informer* Mailing List, and have *The Informer* delivered directly to you via e-mail by clicking on the link below.

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The Informer – July 2024

Circuit Courts of Appeals

Fourth Circuit

Rambert v. City of Greenville, N.C.: In a use of deadly force scenario, does a suspect's aggressive behavior and failure to comply with an officer's commands entitle the officer to Summary Judgement based on Qualified Immunity? The District Court denied the Officer's motion finding there were unresolved material issues of fact and that a jury could determine that the suspect's Fourth Amendment rights barring excessive use of force may have been violated. On appeal, the Fourth Circuit conducted the two prong analysis of Qualified Immunity, reversed the lower court, and granted the officer's motion. **Interesting Quote**: "*This Court has repeatedly told courts... not to define clearly established law at a **high level of generality**"... "To be clearly established, there must be case law finding that conduct similar to Johnson's was unconstitutional."* Pg. 3

Seventh Circuit

United States v. Karmo: Whether officers had sufficient probable cause and exigent circumstances to support the FBI's request for real-time cell site location information (CSLI) from AT&T. Does "false information" on the "exigent circumstances form" undercut the government's contention of a valid search? **Interesting Quote**: "*The AT&T exigency form was not a search warrant,*"... "*in other words, there is no search warrant to invalidate, and that the AT&T exigency form contained a misrepresentation is irrelevant because law enforcement had authority under the Fourth Amendment (exigent circumstances supported by probable cause) to collect Karmo's CSLI regardless.*" Pg. 6

United States v. Mendez: While returning from international travel, does a routine, manual search of Mendez's cell phone at O'Hare Airport require probable cause and a warrant? **Interesting Concept**: *Digital Contraband* Pg. 8

United States v. Jackson: In a state where marijuana is "legal" is the smell of unburnt marijuana sufficient to establish probable cause to search a vehicle? **Interesting Quote**: "*law enforcement does not need to rule out every innocent explanation for probable cause to be established*" Pg. 9

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FLETC Informer Webinar Schedule: September 2024

September 24, 2024, 2:30 EDT – FLETC OCC Informer Webcast Series "Government Workplace Searches" presented by James Stack, Attorney Advisor/Senior Instructor, Federal Law Enforcement Training Center, Charleston, South Carolina. The class will examine the balance of government worker's reasonable expectations of privacy with the legitimate need to ensure an efficient and effective workplace. Three categories of reasonable intrusions and their bases will be reviewed: Work-Related Purposes, Employee Discipline, and Criminal Evidence.

Link: Click Here

CASE SUMMARIES

Circuit Courts of Appeals

Fourth Circuit

Rambert v. City of Greenville, N.C., No. 22-1428 (4th Cir. 2024)

An elderly couple in Greenville, North Carolina, reported a breaking-and-entering at their residence around 4:00 a.m., hearing glass break and a male voice yelling. Officer David Johnson responded to the call. Upon arrival, Johnson heard loud yelling and saw Sean Rambert running towards him while yelling. Johnson ordered Rambert to get on the ground eight times, but Rambert did not comply and continued to charge at Johnson. Johnson fired multiple shots at Rambert, who continued to advance even after being hit. Rambert eventually fell and later died from his injuries.

The United States District Court for the Eastern District of North Carolina denied Johnson's motion for summary judgment based on qualified immunity. The court found genuine disputes of material fact regarding the reasonableness of Johnson's conduct and concluded that a jury could determine that Johnson violated Rambert's Fourth Amendment rights by using excessive force.

The United States Court of Appeals for the Fourth Circuit reviewed the case. The court held that Johnson was entitled to qualified immunity on the Fourth Amendment claim. The court found that Johnson's use of deadly force was not objectively unreasonable given the circumstances, including Rambert's aggressive behavior and failure to comply with commands. The court also determined that the law did not clearly establish that Johnson's conduct was unconstitutional at the time of the incident. Consequently, the court reversed the district court's denial of summary judgment on the § 1983 claim against Johnson.

Court's Analysis:

In reviewing the district court's denial of qualified immunity, The Fourth Circuit conducted a two-pronged analysis. First, it analyze whether the plaintiff had established that "a constitutional violation occurred." The plaintiff bears the burden of proof on this question.

Second, it considered whether the right at issue was "clearly established" at the time of the events in question. The officer bears the burden on this second prong.

Here, the undisputed facts as cataloged by the district court, as well as the audio and video from Johnson's body camera provide historical facts that bear on the objective reasonableness of Johnson's conduct in several ways. First, Johnson was alone in the dark, responding to a reported in-progress breaking-and-entering after the homeowner reported hearing glass break and a male voice. A reasonable officer approaching the scene would have known that a potentially dangerous crime was in process with imminent threat to the people in the home. Such an officer would also know that a glass break during a breaking-and-entering could result from the use of some sort of weapon to gain entry. Second, as he approached the home, Johnson heard a male voice yelling. Remember that he also knew from the dispatch report that the residents who reported the breaking-and-entering had also mentioned hearing a man yelling. A reasonable officer may not have known if the yelling was from the suspect, a victim or someone else but could have viewed the yelling as additional evidence of danger. Third, after seeing Rambert running towards him continuing to yell, Johnson ordered Rambert to get on the ground. Although Johnson repeated this command eight times, Rambert never complied. Instead, he kept running directly at Johnson while yelling. A reasonable officer could have viewed this noncompliant and charging potential suspect as an imminent threat. Fourth, Johnson retreated from the sidewalk into the street. But as Johnson backed away, Rambert continued to charge. Johnson did not shoot until Rambert ignored his eight commands to get on the ground and had moved close to Johnson. A reasonable officer could have believed that a man running at him from the site of a suspected breaking-and-entering who ignored commands to get on the ground and had closed to within a few feet posed an imminent threat to the officer. Fifth, after the initial shots, Johnson tripped and fell backwards. Johnson was on the ground with Rambert in close proximity. Despite falling to the ground after Johnson's initial shots, Rambert rose to a

standing position and moved toward Johnson, who remained on the ground. At that point, a reasonable officer could have believed the threat posed by Rambert had not passed. To the contrary, a reasonable officer could have thought that his shots either missed Rambert or did not abate the threat he posed. Sixth, after Johnson's initial shots, Rambert continued to move toward Johnson. While Johnson claims Rambert grabbed his leg, the video does not confirm or refute physical contact. But it shows that Rambert was very close to Johnson, at one point over him, with Johnson still on the ground. And the audio contains sounds of body movements and groans and gasps. Again, based on Rambert's continued advancement, a reasonable officer could have believed that the threat Rambert posed had not subsided. Seventh, before Johnson's final shots, the video reveals that Johnson achieved some separation from Rambert. But they remained within a few feet of each other and on the ground. Both tried to get up. Johnson rose from his back but had not managed to get to his feet. Rambert tried to use his elbow to rise up. At this point, a reasonable officer could have thought that Rambert continued to pose a threat. And only about 25 seconds elapsed from Johnson's first shot until the last. During that time, Johnson was either on the ground or trying to get up, and Rambert was also on the ground in close proximity either moving towards Johnson or trying to raise up. Eighth, once Johnson managed to get on his feet, he backed away from Rambert. Even then, Rambert continued to try to get up and move toward him. Yet Johnson did not fire his weapon again. With those historical facts and their impact on what a reasonable officer in Johnson's shoes would have done, the court reviewed the Graham factors. "[T]he severity of the crime at issue" was high. Johnson encountered Rambert in responding to a 911 call about a breaking-and-entering with a glass break, which, to a reasonable officer could suggest the possible use of a weapon. And Rambert's highly aggressive pursuit of Johnson, both before and after Rambert was shot, placed Johnson in imminent danger. Also, for the reasons already stated, Rambert posed an immediate threat to the safety of the officer. Last, Rambert was "actively resisting arrest or attempting to evade arrest." He ignored eight commands to get on the ground and charged at the lone officer on the scene instead.

With regard to the second prong, whether the law was clearly established at the time of the alleged constitutional violation, The Fourth Circuit found that the plaintiff's assertion was too general in nature and not closely tied to any specific case. It held that an officer is entitled to qualified immunity from a claim that

his use of deadly force violated the Fourth Amendment when he fired at a suspect of a potentially violent crime who, despite repeated commands, charged the officer at full speed and advanced to close proximity to the officer. Such conduct was not objectively unreasonable and, even if it was, did not violate clearly established law

For the Court's Opinion: Rambert v. City of Greenville, No. 22-1428 (4th Cir. 2024) :: Justia

Seventh Circuit

United States v. Karmo, No.23-1082 (7th Cir. 2024)

On September 1, 2020, Michael Karmo told a friend that he was traveling with firearms (including two machine guns) to Kenosha, Wisconsin, during a period of severe civil unrest and that people there were shooting others. The friend mistakenly informed local police, who in turn notified the FBI that Karmo was traveling to Kenosha to shoot people and loot. The FBI submitted an exigent circumstances form to AT&T pursuant to the Stored Communications Act conveying this information and requesting real-time cell site location information (CSLI) on Karmo's phone. Specifically, the FBI requested updated CSLI every 15 minutes for a period of 48 hours. In support of the request the FBI noted that Karmo was traveling to Kenosha with firearms to "pick people off and loot." AT&T complied with the FBI's request and started sharing Karmo's real-time CSLI in the early evening. After collecting Karmo's CSLI for around an hour and a half, law enforcement located Karmo in the parking lot of a hotel near Kenosha. The FBI obtained search warrants for Karmo's residence and hotel room and a criminal complaint charging him with possessing a firearm as a felon. In support of the warrants and complaint, the FBI submitted affidavits incorrectly stating that it had learned on September 1 (rather than September 2) that Karmo himself did not say that he intended to shoot people and loot. Following Karmo's indictment, he moved to suppress the evidence resulting from the real-time CSLI collection and requested a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). He principally challenged the inaccurate statement in the AT&T exigency form that he intended to shoot people and loot. The district court denied his motion. Karmo later pleaded guilty and was sentenced reserving his right to appeal.

Court's Analysis:

Assuming (without deciding) that a Fourth Amendment search occurred, the Seventh Circuit affirmed the district court's denial of Karmo's motion to suppress without conducting a Franks hearing. Though law enforcement did not obtain a search warrant before collecting Karmo's real-time CSLI, warrantless searches are permissible if law enforcement has probable cause to believe that illegal activity is occurring and that exigent circumstances are present. Jacobs v. City of Chicago, see also Carpenter v. United States, (noting that law enforcement does not need a warrant to access historical CSLI if exigent circumstances are present).

Karmo principally challenges the inaccurate statement in the AT&T exigency form that he intended to pick people off and loot. But even excluding that misrepresentation, the totality of the other circumstances supports a reasonable belief that there was a threat to public safety and that tracking Karmo's real-time CSLI would reveal criminal activity. Karmo's friend alerted law enforcement that Karmo and Smith said that they were traveling with firearms (including two machine guns) to Kenosha during a period of severe civil unrest when people were "picking people off" and that Karmo wanted to "see what's going on." Karmo's friend also showed law enforcement a photograph of Karmo holding a firearm and a photograph that Karmo had sent her of a rifle that he referred to as "the game changer." Additionally, law enforcement learned that Karmo was a felon and found his Facebook page, which showed multiple photographs of him holding firearms. Thus, considering the totality of the circumstances including the extreme civil unrest in Kenosha at the time and that Karmo, a known felon, said that he was traveling there with machine guns (and had stated that he possessed a firearm he believed to be the "game changer"), law enforcement's tracking of Karmo's real-time CSLI was supported by exigent circumstances. And as discussed, absent a constitutional violation, suppression of evidence is not an available remedy. Further, a Franks hearing—"an evidentiary hearing regarding the veracity of information" provided to a judge to determine the existence of probable cause, is inapplicable here. The purpose of a Franks hearing is to determine whether the information provided to the judge would have still supported probable cause, setting aside any intentional or reckless mis-representations or omissions. But a judge never made a probable cause determination. The AT&T exigency form was not a search warrant, and law

enforcement's collection of Karmo's real-time CSLI was supported by probable cause even absent the inaccurate statement that Karmo intended to pick people off and loot. In other words, there is no search warrant to invalidate, and that the AT&T exigency form contained a misrepresentation is irrelevant because law enforcement had authority under the Fourth Amendment (exigent circumstances supported by probable cause) to collect Karmo's CSLI regardless. Thus, the lower court did not err in denying Karmo's request for a Franks hearing

For the Court's Opinion: United States v. Karmo, No. 23-1082 (7th Cir. 2024) :: Justia

United States v. Mendez, No. 23-1460 (7th Cir. 2024)

Marcos Mendez was stopped for inspection at O'Hare International Airport after returning from a trip abroad. Customs agents, who had been alerted to Mendez due to his arrest record and travel history, searched his cell phone and found child pornography. Mendez was subsequently indicted on multiple counts related to child pornography. He moved to suppress the evidence found on his phone, arguing that the search violated his Fourth Amendment rights as it was conducted without a warrant, probable cause, or reasonable suspicion. The district court denied Mendez's motion to suppress the evidence, ruling that the search did not violate the Fourth Amendment as customs agents had reasonable suspicion to look through Mendez's phone. Mendez pleaded guilty to one count of producing child pornography but preserved his right to appeal the district court's ruling on the suppression motion.
In the United States Court of Appeals for the Seventh Circuit, Mendez argued that the Supreme Court's decisions in Riley v. California and Carpenter v. United States required a warrant, probable cause, or at least reasonable suspicion for the searches of his phone. The Court of Appeals disagreed, noting that searches at borders do not require a warrant or probable cause. *The court held that the routine, manual search of Mendez's phone required no individualized suspicion*. The court affirmed the district court's decision, joining the uniform view of other circuits that searches of electronics at the border do not require a warrant or probable cause. "We therefore agree with the consensus among circuits that brief, manual searches of a traveler's electronic device are 'routine' border

searches requiring no individualized suspicion." They only require some nexus to the border.

Court's Analysis: The Fourth Amendment requires that searches and seizures be reasonable. Ordinarily, in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. One example is the border search exception. Congress has granted the Executive branch authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. The government's authority to search persons and effects at the border is rooted in the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.

Accordingly, border inspections have long been exempted from warrant and probable cause requirements, and ordinarily are reasonable simply by virtue of the fact that they occur at the border. "Routine" searches of people and effects at the border—which have included examining the contents of a person's purse, wallet, or pockets, and disassembling and reassembling a vehicle's fuel tank, are per se reasonable and require no particularized suspicion at all.

However, they do require some nexus to the border in one of three ways: Proximity to the actual border, the extended border (100 miles) or the de facto border such as an international airport. Courts have ruled in the past that some nexus to the border is a Constitutionally sufficient basis for a manual search of a cell phone. Particularized suspicion is not required. A customs officer manually inspecting the contents 'resident' on Mendez's cell phone for digital contraband easily falls within this exception to the warrant requirement.

For the Court's Opinion: United States v. Mendez, No. 23-1460 (7th Cir. 2024) :: Justia

United States v. Jackson, No. 23-1721 (7th Cir. 2024)

An Urbana, Illinois, police officer pulled over a car just after midnight because its head and tail-lights were not lit. During the traffic stop, the officer smelled unburnt marijuana. He asked the driver, Prentiss Jackson, to exit the car and told Jackson he would search him and the vehicle. Soon after leaving the car, Jackson ran. While fleeing, a gun fell from his waistband. Jackson was indicted

for possessing a firearm as a felon. He moved to suppress evidence of the gun, arguing it was the product of an unlawful search. The district court denied Jackson's motion.

Court's Analysis: Warrantless searches are per se unreasonable under the Fourth Amendment, subject to only certain exceptions. Relevant here is the automobile exception, which allows authorities to search a car without a warrant if they have probable cause. Probable cause to search a vehicle exists when, based on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

The district court correctly ruled that evidence of the firearm should not have been suppressed. The officer had probable cause to search Jackson and the vehicle, whether based on the totality of the circumstances or, in the alternative, because of the smell of un-burnt marijuana alone.

With regard to the totality of the circumstances, the officer pulled Jackson over because he had been driving in the dark with unlit head and tail-lights. After pulling over the car, the officer asked for license and registration. But Jackson did not have his license, another state law violation. At any point after this lawful stop, the officer could have ordered Jackson out of the vehicle, even if the officer "ha[d] no reason to suspect foul play." Pennsylvania v. Mimms. But the officer did suspect further issues—he smelled the odor of unburnt marijuana coming from the car. Although possession of marijuana in certain amounts is legal in Illinois, the smell of unburnt marijuana coming from the car signaled that Jackson had marijuana in the car in an improper container, a violation of Illinois's law. The circumstances also could suggest that Jackson was driving while impaired. When questioned about the smell, Jackson admitted to smoking marijuana earlier. And although Jackson responded to questions and did not seem impaired to the officer, that officer knew that failure to follow the simplest of traffic laws—like turning on your lights just after midnight—could indicate driving under the influence. Thus, a search of Jackson and the car was warranted as possibly providing further evidence of criminal conduct. Jackson offered additional scenarios that he claimed might cause a car to emit an odor of unburnt marijuana. Yet, *law enforcement does not need to rule out every innocent explanation for probable cause to be established.* As the Supreme Court has explained, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.

But with regard to Jackson's assertion that the smell of unburnt marijuana alone was insufficient to Constitutionally support the officer's planned search, the reviewing court found while Illinois has legalized marijuana for recreational use in some circumstances, the state retained laws restricting the packaging of and use of marijuana. Specifically Illinois prohibits using marijuana to the point of intoxication before or while driving and also requires transportation of marijuana in airtight containers while in a private vehicle. Jackson did not comply with that requirement, so the smell of unburnt marijuana alone provided a second basis for probable cause for a violation of that state law.

Finally, the court summarized: The central issue in this case is the legality of the officer ordering Jackson out of the car for a search. Pennsylvania v. Mimms informs us that after a lawful stop, an officer can order occupants out of a car and conduct a pat-down search if they reasonably suspect a threat to their safety. Further, the totality of circumstances also supported probable cause for a search. In any event, the smell of unburnt marijuana in itself provided probable cause. After exiting the vehicle, Jackson chose to run, where a firearm fell from his pants. The district court correctly concluded that evidence of the gun need not be suppressed.

For the Court's Opinion: USA v. Jackson, No. 23-1721 (7th Cir. 2024) :: Justia