The California Legal Update

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

Vol. 22 August 19, 2017 No. 8

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THIS EDITION'S WORDS OF WISDOM:

> "*Have you ever listened to someone for a while and wondered, . . . 'Who ties your shoelaces for you*?'" (Unknown)

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ADMINISTRATIVE NOTES:

> ***Internet Blackout*:** If you tried to e-mail me at some point between August 7th and 10th and didn't get a response, that's because I didn't receive your e-mail. If between those dates you asked to be included on the *Legal Update* e-mail list and didn't get an acknowledgement of you being added and a boilerplate explanation on how it all works, it's because I didn't get that e-mail either. For some reason (which is light years beyond my limited computer savvy) my Internet Service Provider simply shut down on me for several days between those dates. It was either because we were traveling at the time, camping at a location with limited e-mail access, or more likely because my computer was just too jammed full of stuff that needed to be deleted. I suspect it was probably the later because after getting home, doing a "disk cleanup" and deleting a bunch of other unnecessary files seemed to resolve the problem. My apologies for any inconvenience my computer ignorance may have caused you.

CASES:

***Searches Incident to a Non-Bookable Offense*:**

In re D.W. **(July 6, 2017) __ Cal.App.5th __ [2017 Cal.App. LEXIS 670]**

Rule: A search of a detainee's person incident to an arrest for a non-bookable (i.e., "non-custodial") offense is unlawful.

Facts: On the afternoon of January 12, 2015, San Francisco police officers responding to a report of someone with a gun in a known gang area found five to eight individuals standing on the corner of Palou and Newhall. The 17-year-old defendant was one of them. The officers recognized most of these individuals as having "gang associations," and knew that they were in an area controlled by a rival gang. Concerned that the individuals might be there for the purpose of provoking violence, the officers contacted them to see what they were up to. ("*Sup*?") Upon one of the officers approaching defendant, it was immediately noted that defendant had the odor of marijuana on his clothes and his breath. Telling defendant; "*Man*, *you smell like marijuana*," defendant responded that he had just smoked some.

The officers decided to search defendant for more marijuana, telling him to put his hands on his head. Defendant, however, "*tried to pull away like . . . he didn't want me to search him*." In the process, the officer felt a revolver under defendant's backpack. Defendant was handcuffed and the revolver was recovered. With a petition filed in Juvenile Court, defendant's motion to suppress the gun was denied by the magistrate. The Juvenile Court magistrate thereafter sustained the petition and declared defendant to be a ward of the court. Defendant appealed. In May of 2016, the First District Court of Appeal affirmed. But the California Supreme Court granted review, holding onto the case pending its consideration and disposition of the case of *People v. Macabeo* (2016) 1 Cal.5th 1206. (See *Legal Update*; Vol. 22, #4; April 29, 2017) Once *Macabeo* was decided, this case was transferred back to the Appellate Court for reconsideration in light of *Macabeo*.

Held: This time, the First District Court of Appeal (Div. 3) reversed the Juvenile Court. After noting that in order for any search to be constitutionally reasonable, the Fourth Amendment requires a search warrant unless there is "a specific exception to the warrant requirement," the Court discussed one such exception; i.e., "*searches incident to arrest*." In this case, as noted by the Court, the officers had probable cause to believe defendant might be in possession of marijuana, given the noticeable odor or marijuana about his person and his admission to having smoked some earlier. Such a violation (as of the date of this offense), pursuant to H&S § 11357(b), was punishable by $100 fine only and was a "non-bookable offense." In other words, defendant was subject to a citation only.

It is well-settled law that a "*search incident to citation*" is *not* one of the recognized exceptions to the search warrant requirement. "Here, the search fails to satisfy the Fourth Amendment because when officers decided to search D.W., they had neither cause to make a custodial arrest nor evidence that he was guilty of anything more than an infraction." Citing *People v. Hua* (2008) 158 Cal.App.4th 1027, 1036-1037, and *People v. Torres* (2012) 205 Cal.App.4th 989, 995-996, the Court further held that it would have been "mere conjecture" for the officers to conclude that defendant might have possessed enough marijuana on his person to constitute a jailable offense. There being no lawful reason allowing for the search of defendant's person (but see Note, below), the firearm recovered from under defendant's backpack should have been suppressed.

Note: In reaching its conclusion in this case, the Court totally ignores another lawful exception to the search warrant requirement; i.e., "*searches with probable cause*." The rule is simple: Whether or not the "search incident to arrest" theory applies, a person may also be searched without a search warrant any time a law enforcement officer has "*probable cause*" to believe the person has possession of contraband or other seizable property. (*People v. Coleman* (1991) 229 Cal.App.3rd 321.) It cannot be argued that the officers (with the odor and defendant's admission that he'd been smoking marijuana) did not have probable cause to believe that he might have more marijuana on him. (E.g., see prior odor cases; *People v. Lovejoy* (1970) 12 Cal.App.3rd 883, 887; *People v. Gale* (1973) 9 Cal.3rd 788, 793, fn. 4; *United States v. Johns* (1985) 469 U.S. 478; *United States v. Smith* (8th Cir. 2015) 789 F.3rd 923; *United States v. Snyder* (10th Cir. 2015) 793 F.3rd 1241.)

The Court impliedly concedes as much, noting only that the officers did not have probable cause to make a "*custodial arrest*;" i.e., for a bookable offense. But whether or not defendant was subject to a custodial arrest, the officers, with probable cause to support their belief that defendant possessed *some* marijuana on his person, had a legal right to search for, and if found, seize, that contraband. (See *People v. Waxler* (2014) 224 Cal.App.4th 712, 722-724; authorizing the warrantless search of defendant's vehicle based upon the odor of burnt marijuana and observation of a marijuana pipe. See also *People v. Strasburg* (2007) 148 Cal.App.4th 1052; *People v. Dey* (2000) 84 Cal.App.4th 1318, and *People v. Hunter* (2005) 133 Cal.App.4th 371.) "A police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief"' that contraband or evidence of a crime is present." (*Florida v. Harris* (Feb. 19, 2013) 568 U.S. __, __ [133 S.Ct. 1050, 1055-1056].) Any marijuana found on defendant's person would constitute evidence of a violation of H&S §

11357(b); simple possession of less than an ounce of marijuana, as this offense was punishable in 2015.

The Court here cites *People v. Hua*, *supra*, and *People v. Torres*, *supra*, as noted above, for the proposition that the officers had no basis for speculating that defendant might have a bookable amount of marijuana on him. But that is not the issue if we are to consider the "*searches with probable cause*" theory for warrantless searches. The issue is whether there was probable cause to believe there would be evidence of the crime of "simple possession" on his person that would support a citation in the field; not whether he was to be taken into physical custody and booked. The bottom line is that this case decision is simply wrong. It is undisputed that the "*incident to arrest*" theory doesn't save this case in that they only had probable cause to believe D.W. was guilty of a non-bookable offense. And it is undisputed that you can't justify a search as "*incident to a citation*." (*Knowles v. Iowa* (1998) 525 U.S. 113.) But the Court totally, and inexcusably, missed the true issue here; the lawfulness of a probable cause search for evidence of the non-bookable offense of the simple possession of less than an ounce of marijuana.

Lastly, it is an open issue how passage of Proposition 64 (H&S § 11362.1(a)(1) & (3)), effective as of 6/27/2016, after the offense described in this new decision), legalizing the possession of less than an ounce of recreational marijuana, might affect a similar case in the future. In other words, can you search for additional marijuana when all you know for sure is that your suspect possesses a less than an ounce, which is now (under normal circumstances) legal? Or, does such knowledge actually give you probable cause to believe that your suspect might possess an *illegal* amount of marijuana? *Hua* and *Torres* (residential search cases) say you can't search further for more marijuana. But *Waxler*, *Strasburg*, *Dey*, and *Hunter* (vehicle search cases) all say you can. Given the differing expectation of privacy levels between the two groups of cases (i.e., residence vs. vehicle), we have a strong argument that D.W.'s situation, as a pedestrian on the street, would more than likely fall into the *Waxler-Strasburg-Dey-Hunter* category. But we'll have to wait and see when that situation arises again in a future case.

***V.C. § 22350; the Basic Speed Law*:**

People v. Farleigh **(June 1, 2017) 13 Cal.App.5th Supp. 12**

Rule: Under the basic speed law (V.C. § 22350), a police officer may stop and cite a person who is driving at a speed which, although less than the posted speed limit and at a speed which is safe for current road and weather conditions, is unsafe when considering the manner in which the person is driving.

Facts: At about 4:35 in the afternoon on September 9, 2015, Officer Cody Bates observed defendant driving at 45 mph in a posted 50 mph speed zone while holding a cigarette with one hand out the window and a cellphone with the other; leaving no hands on the steering wheel. Upon being stopped, defendant claimed to be using her cellphone for GPS navigation. The officer later testified that the weather was dry and clear, with no water on the roadway. The traffic was heavy. He also testified that when considering these external conditions only, excluding the fact that both her hands were being used for something other than steering, "45 miles per hour would be appropriate for that roadway." But he cited defendant anyway, noting

on the citation that under the "basic speed law," a safe speed was "zero." Defendant contested her citation in court, but was found guilty. She appealed.

Held: The Appellate Division of the Superior Court of California for Orange County affirmed. The issue on appeal was one of statutory interpretation. Veh. Code § 22350, known as the "*Basic Speed Law*," provides as follows: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Defendant argued that when considering the four factors listed in the section (i.e., weather, visibility, traffic, and the road width and surface), she was driving at a safe speed. The Court ruled, however, that the Legislature intended "the safety of persons or property," which includes other factors such as (but not limited to) "the behavior of the driver," must also be considered.

In this case, the defendant's "behavior" included driving with both hands occupied by activities other than steering the car; a factor the officer was allowed to consider under the Basic Speed Law. Per the Court, he reasonably concluded that because defendant was driving without her hands on the steering wheel, "zero" was the safe speed. "Because the Basic Speed Law is not limited to regulating speed with reference to conditions external to the driver herself," the evidence was held to be sufficient to support a conviction.

Note: I remember being taught in the Police Academy (which, for me, was in 1971) that the Basic Speed Law allows for citing a person for excessive speed even though he or she might have been driving within the posted speed limit, depending upon the conditions then present. But I could never get over the idea that that posted speed limit sign was there for a reason, and that was what I needed to go by in writing a speeding ticket. This case (one of "first impression," per the Court) provides a good explanation of the Basic Speed Law I would have found useful had it been explained to me better while I was still a cop. But you must know that if you're going to do what Officer Bates (who is obviously more astute in traffic law than me) did, just know that you have to be ready to testify to the *five* factors that made the speed being driven unsafe; i.e, (1) weather, (2) visibility, (3) traffic, (4) the road width and surface, *and* (5) anything else that "endangers the safety of persons or property" which includes, but is not limited to, "the behavior of the driver."

***P.C. §§ 664/288(a)*; *Attempted Lewd and Lascivious Act on a Child Under 14*:**

***People v. Villagran* (Nov. 18, 2016) 5 Cal.App.5th 880**

Rule: A violation of attempted lewd and lascivious act on a child under the age of 14 (P.C. §§ 664/288(a)) by may be committed by communicating with the victim, attempting to get the victim to commit a "constructive touching," via text messaging.

Facts: Defendant communicated with four children under the age of 14, and one undercover police officer posing as a child under 14, via text messaging, sending them nude photos of himself and asking that they send him their nude photos in return. As a result, defendant was charged in state court with 25 counts related to these activities. Convicted of 21 counts after a

jury trial, defendant appealed his convictions for P.C. §§ 664 and 288(a) (attempted lewd and lascivious act on a child under 14 year of age) as charged in counts 6, 9, and 22.

Count 6; *Jane Doe I*: Defendant, who was 23 years old at the time, met Jane Doe I, age 11, at a party. Two years later, when she was 13, defendant posted a comment on her Instagram page telling her she had a pretty smile. After she thanked him, he asked her to add him as a contact on "Kik;" a social text messaging application. She did, although she make it clear to him that she was only 13 years old. After some back-and-forth, defendant eventually sent her a close up photograph of his erect penis, asking her to "send me one." After she declined, he asked her twice more for nude photos of herself. She continued to decline, eventually blocking him so he could no longer contact her.

Count 9; *Jane Doe III*: When Jane Doe III was 12 years old, she posted a picture of herself (a "*selfie*") on her Instagram page. Defendant, who Jane Doe III did not know, responded to the photo, telling her that she had a "cute smile." Defendant asked Jane Doe III for her Kik contact information, which she provided. After she told him she was 12 years old, defendant asked for a picture of her. He then asked her to send him pictures of her naked body. Without sending any pictures, Jane Doe III blocked defendant from communicating with her.

Count 22; *Jane Doe V*: Defendant commented on a picture Jane Doe V had posted of herself on Instagram, telling her she was beautiful. She thanked him, but told him that she was only 13. He claimed to be 19. They exchanged Kik contact information and communicated for three days. For two days, they communicated like friends, with defendant sending her non-pornographic pictures of drawings he had made. When Jane Doe V told him he was a good drawer, he asked her if she would like to see more. After telling him she would, defendant responded with two photographs of himself holding his penis, one of which was taken at such an angle that it showed his face as well. Defendant told Jane Doe V that, "I'm hard for you," and asked her for nude pictures of herself showing him her "boobs." When she refused, defendant persisted, volunteering that he had "morning wood" every day. He also told her that he lived close to her school and asked her to come to his house. Annoyed, Jane Doe V eventually blocked defendant from both her Kik and Instagram accounts. Convicted of 21 counts, including three counts of attempted lewd and lascivious act on a child under 14 (and other related charges) stemming from the facts as described above, defendant was sentenced to five years in prison, suspended on condition that he do 364 days in county jail and be on probation for five years. Defendant appealed the verdicts in counts 6, 9, and 22.

Held: The First District Court of Appeal (Div 5) affirmed. Defendant's primary argument made on appeal was that the evidence as presented was insufficient to prove an attempted violation of P.C. § 288(a); i.e., that section 288(a) requires more than "*virtual communications*," even if those communications are obscene. To sustain a conviction under this statute, he argued that "some kind of attempt to make physical contact with the victim is required and here there was none." A violation of attempted 288(a) requires that the prosecution prove (a) that defendant intended to commit a lewd and lascivious act with a child under 14 years of age, and (b) that he made a direct but ineffectual step toward committing a lewd and lascivious act with a child under 14 years of age. Defendant's primary argument was that by simply asking his victims for nude photos, while he may have been violating other offenses (e.g., see P.C. §§ 288.3 [contact or

communication with a minor or an attempt to do so with the specific intent to commit an enumerated sex offense], and/or 311.3 [exploitation of a minor]), he did not commit an attempt to violate P.C. § 288(a). The Court disagreed.

Section 288(a) is violated if there is any touching of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child. The "*touching*" need not be by the defendant himself, but rather may be a "*constructive touching*." This includes a touching of herself by the victim. Prior case law has found such a touching when the victim, at the defendant's instigation, removes her own clothing. Defendant here asked the victims to send him nude photos of themselves which necessarily requires such a touching. Also, defendant need not be present with the touching occurs. No personal contact between defendant and his victims is necessary. Such a touching may be precipitated via social media, as was done here. Also, in addition to an actual or constructive touching, section 288(a) requires proof of a specific intent to arouse, appeal to, or gratify the lust of the child *or* the accused. Such an intent is necessarily to be inferred by the circumstances.

In defendant's opening brief on appeal, he admitted to acting with the intent of arousing or appealing to the girls' "lust, passions, or sexual desires." The Court further held that a jury could also have found from the evidence of him sending photos to the victims of his own private parts that he intended to around his own sexual desires. Lastly, the Court held that that such intent need not occur simultaneously with the act of the victims' constructive touching. The Court therefore found that a reasonable jury could have found defendant guilty beyond a reasonable doubt of an attempt to commit a lewd or lascivious act on a minor as alleged in counts 6, 9, and 22.

Note: There's no real surprises here, except for the fact that he didn't go to prison. You have to expect that such a pedophile is going to offend again, and next time he's likely to take it to the next level instigating some actual physical contact where some real lasting damage occurs. But strong sentencing seems to be a thing of the past in California, at least for now. What was *not* discussed was what it takes to constitute an attempt. So I'll tell you. A criminal attempt occurs whenever there is a specific intent to commit the crime (i.e., the "*target offense*") and a direct but ineffectual act done toward its commission. The overt act element of an attempt requires conduct that goes beyond "mere preparation," and shows that the suspect is putting his or her plan into action. The act that goes beyond mere preparation need not constitute an element of the target offense and it need not be the ultimate step toward its consummation. Instead, it is sufficient if the conduct is the first or some subsequent act directed towards that end after the preparations are made. In this case, defendant did about everything he could have done before the victims actually performed the "constructive touching" defendant had hoped for, despite the fact that he would not be physically present when this occurred. The fact that he went far enough to have committed an attempt was not contested.

***P.C. § 422*; *Criminal Threats*:**

People v. Gonzalez **(June 1, 2017) 2 Cal.5th 1138**

Rule: Non-verbal conduct, such as making threatening gestures, is not a violation of P.C. § 422 in that as the elements are listed in section 422, such threats can only be made verbally, in writing, or by means of an electronic communication device.

Facts: An off-duty Cathedral City police officer, while dining with friends at a restaurant in Indio, spotted a former high school classmate sitting at another nearby table. Making eye contact with her, he smiled. She "smirked" in response. At the same time, the officer noticed that the woman was sitting with several Jackson Terrace gang members; defendant being one of them. The officer recognized them as gang members by their gang tattoos including a "JT" tattooed on the back of defendant's head. The subjects all stared at the officer and his companions in a "confrontational" way, as gangsters tend to do. The subjects eventually left the restaurant while continuing to stare menacingly at the officer and his friends. Sitting in a booth facing the restaurant's front window, the officer watched the gangsters as they got into an SUV and drove up to the window. As they did so, defendant, sitting in the front passenger seat, made what the officer recognized as a "JT" hand sign and manually simulated a pistol pointed upward. The officer considered this to be a threat. The SUV's driver then ran his finger across his neck, made a "JT" hand sign, and simulated a gun with his fingers which he pointed at the officer and his group.

Both the officer and some of his companions reported that they were frightened by these gestures. As a result, defendant was charged in state court with five counts (one for the officer and four for his companions) of making a criminal threat, per P.C. § 422(a), plus some other gang allegations. Held to answer on all five counts after a preliminary examination, defendant filed a motion to dismiss (per P.C. § 995) the criminal threat charges, arguing that hand gestures alone were legally insufficient to constitute a section 422 violation. The trial court agreed and dismissed the P.C. § 422 charges. The People appealed. The Fourth District Court of Appeal (Div. 2; Riverside County) reversed. (See *People v. Gonzalez* (2014) 232 Cal.App.4th 151.) However the California Supreme Court granted review.

Held: The California Supreme Court unanimously reversed the Court of Appeal's decision. The case hinges on an interpretation of P.C. § 422. Subdivision (a) of section 422 reads as follows: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, *made verbally, in writing, or by means of an electronic communication device*, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety," is guilty of a felony. (Italics added) The only element here that was in issue was whether defendant's hand gestures meet the legal requirement that a threat be communicated "*verbally*," "*in writing*," or "*by means of an electronic communication device*."

It is obvious that defendant's threat was not done in writing or by means of an electronic communication device. The People argued, however, that "*made verbally*" does not require an element of sound, and that defendant's gestures were a "clear example of verbal communication" because "a word can be spoken without sound." The Court didn't buy it. Looking at various dictionary definitions of the word "*verbal*," and after reviewing the history behind the development of P.C. § 422 as it stands today, the Court found nothing to indicate a legislative intent to interpret the word "*verbal*," or the "closely related" term "*oral*," to include non-verbal conduct. As evidence of the Legislature's intent *not* in include non-verbal conduct, the Court noted that the L.A. District Attorney in 2000 sponsored a bill to amend section 422 to expressly reference Evid. Code § 225. Evid. Code § 225, in defining the term "*statement*," expressly includes "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."

The Legislature declined to so amend section 422 although it made that very same proposed amendment two years later in the very similar P.C. § 11418.5, former subdivision (a), that criminalized threats "to use a weapon of mass destruction." This failure to similarly add a reference to Evid. Code § 225 to the elements of section 422 makes apparent the Legislature's intent *not* to include non-verbal conduct as a means of communicating a threat. As such, although defendant obviously intended to threaten the officer when he made his admittedly threatening gestures, he did not violate P.C. § 422. The 422 charges were therefore properly dismissed by the Superior Court.

Note: The Supreme Court invited the Legislature to correct this problem. But even if they do, that doesn't serve to hold defendant accountable in this case. It also doesn't explain why the Legislature didn't pass the proposed legislation that would have corrected this oversight back in 2000 when it was put before them. I'm working hard here to avoid using the *Legal Update* as a platform for venting my frustration with the current trend in the Legislature towards softening their moral commitment to keeping Californians safe. So enough said, and forgive me while I go throw up.

***Use of Force and Police Service Dogs*:**

Lowry v. City of San Diego **(9th Cir. June 6, 2017) 858 F.3rd 1248**

Rule: The use of a police service dog in accordance with San Diego Police Department's written policies and procedures is a reasonable use of force, at least under the circumstances of this case.

Facts: Sara Lowry was an employee of the Tenzing Corporation located in the City of San Diego. On February 11, 2010, she went out drinking with a few friends after work. Getting loaded, she decided to call it a night at about 9:30. But rather than attempt to make it home, she wisely walked back to her office to sleep it off on a couch. Around 10:40 p.m., she woke up, having to "visit the mayor" (i.e., void her bladder), which she did. But in the process of going to and from the bathroom, she unknowingly triggered the company's burglar alarm. She went back to sleep on the couch. ADT Security received the alarm and called San Diego Police

Department. SDPD officers, including Sergeant Bill Nulton and his service dog "Bak," responded. Finding the door to the business propped open, the officers could not see inside due to the darkness and therefore couldn't tell if anyone was inside. Before entering, Sergeant Nulton yelled loudly: "*This is the San Diego Police Department*! *Come out now or I'm sending in a police dog*! *You may be bitten*!"

After between 30 to 60 seconds with no response, the same warning was repeated at least once more still with no response. Passed out on the couch, Lowry didn't hear the warnings. So, suspecting that a burglary might be in progress and that the intruder could be lying in wait, and consistent with the department's protocol, Sergeant Nulton released Bak "*off lead*" (i.e., off her leash) into the suite. Going in himself while staying in close proximity to his dog, Sgt. Nulton noticed a person (subsequently determined to be Lowry) under a blanket on the couch. At the same time, Bak jumped on top of Lowry. The two struggled momentarily before Sergeant Nulton called Bak off. Bak, as trained, responded immediately, returning to Sergeant Nulton's side. Lowry emerged from her skirmish with Bak with a "large gash" on her lip that was bleeding profusely. Later treated at a hospital, it was determined that although it only took three stitches to close the wound, Bak had almost completely bitten through Lowry's lip.

Shortly after the incident, Sergeant Nulton told Lowry: "I just can't believe that's the only damage. You're very lucky. She could have ripped your face off." Lowry, of course, was not arrested. Later evidence showed that SDPD trains its police dogs to enter a building, find and bite a person without differentiating who that person might be, and hold that bite until a police officer arrives and removes the dog. The decision whether to conduct a canine search on or off lead is left to the officer's discretion. Lowry later filed suit in federal court against the City (but *not* the officers in their individual capacity) under 42 U.S.C. § 1983, alleging that the City's policy and practice of training police dogs to "*bite and hold*" individuals resulted in a violation of her Fourth Amendment rights.

It was undisputed that SDPD trains police service dogs to "locate and control persons on command" by finding a person, biting him, and holding that bite until a police officer handler commands the dog to release the bite. Police dogs may be left on the bite "until the suspect can be handcuffed by the handler and be safely taken into custody." Prior to using a police service dog to search for a suspect, the City's policy requires a handler to consider (1) the severity of the crime; (2) the immediacy of the threat; and, (3) if the subject is actively resisting arrest. When practical, handlers are expected to issue warnings before releasing a police service dog. Sgt. Nulton followed these procedures in this case. The City filed a motion for summary judgment (motion to dismiss prior to trial), which was granted by the district court judge. Lowry appealed. A three judge panel of the Ninth Circuit Court of Appeal reversed in a split, two-to-one ruling, holding that there were unresolved triable issues of fact that a jury should determine. (*Lowry v. City of San Diego* (9th Cir. 2016) 818 F.3rd 840; see *California Legal Update*; Vol 22, #2; February 1, 2017.) However, a rehearing before an en banc (i.e., eleven justice) panel was granted.

Held: A ten-to-one majority of the en banc Ninth Circuit panel reversed its prior ruling, upholding the trial court's granting of summary judgment in the City's favor. On appeal, plaintiff Lowry made two arguments. First, summary judgment should not have been granted to

the City because there were genuine disputes of material fact that a jury should be allowed to determine. Second, the primary basis of her suit against the City (as opposed to the officers) was under the theory that the officers' training in the use of police dogs, via their undisputed policy, was constitutionally deficient and resulted in her injury. (*Monell v. Dep't of Soc. Servs.* (1978) 436 U.S. 658.) She argued that the force used against her, as a result of the deficient training the officers received, was unreasonable and excessive, and in violation of the Fourth Amendment. The Court rejected both these arguments.

(1) *Disputes as to Material Facts*: Under Rule 56(a) of the Federal Rules of Civil Procedure, the City was entitled to summary judgment if the plaintiff fails to establish that there is a genuine dispute as to any material fact. Plaintiff argued that a jury should determine whether the door to her office was open, the office was dark, and Sgt. Nulton yelled a warning before letting Bak loose, all as testified to by the officers. The Court held that plaintiff's speculation that the door was likely closed, that it wasn't as dark as the officers claimed, and that no warnings were heard, fail to create any issues of fact to be determined by a jury in that plaintiff, having been asleep at the time, didn't know from her own personal knowledge any of the above to be true and there was no other evidence of these allegations. The trial court, therefore, did not abuse its discretion in holding that plaintiff had failed to establish that there was a genuine dispute as to a material fact.

(2) *Use of Force*: The real issue, noted to be a "*pure question of law*" for the appellate court to decide, was the reasonableness of the force used. Under *Monell*, *supra*, an employer (i.e., the City of San Diego in this case) may be held to be "vicariously" liable for the unconstitutional acts of their employees under the Common Law theory of "*respondeat superior*," should such acts be the result of the policies of the department and/or the training the officers received. So the issue here was whether (1) the force used was excessive, and (2) if so, was it the result of SDPD's policies and/or training. In assessing the objective reasonableness of the use of force at issue, a court is to consider: (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 interest in the use of force, and (3) the balance between the gravity of the intrusion on the individual and the government's need for that intrusion.

First, the trial court held that the degree of force used was "moderate." The Ninth Circuit agreed. Sgt. Nulton closely followed Bak and called him off immediately upon contact with plaintiff. The resulting physical damage done to plaintiff was not severe.

Second, in evaluating the government's interest at stake, the Court considered three primary factors: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. As to the first two factors, it is well established that burglaries and considered to be inherently dangerous felonies. "Burglary is dangerous because it can end in confrontation leading to violence." Under the circumstances of this case, a reasonable officer could have concluded that if there was someone committing a burglary in the building, that person might be armed and could pose an immediate threat to the safety of the officers, justifying the use of "all appropriate force."

As to the third factor—plaintiff's lack of resistance or attempt to escape—the Court found that the officers could have reasonably believed that the suspect was purposely ignoring their commands, thereby evading arrest. In addition to the above, the Court held that it was also appropriate to consider whether proper warnings were given and the availability of less intrusive alternatives to the force employed. In this case, Sgt. Nulton did in fact provide a warning before deploying Bak. The fact that plaintiff was asleep and could not hear it, a fact that the officers had no reason to know, is irrelevant to the analysis of whether the force used was reasonable. As for using less intrusive alternatives, the courts have held that given the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation, they are not required to use the least intrusive degree of force possible.

Plaintiff, however, argued that Sgt. Nulton could have kept Bak on her leash. Per the Court, "(i)f that approach had been followed, Sergeant Nulton would have been required to expose himself to what the officers reasonably suspected was a burglar, lurking in the dark office, possibly armed. To the contrary, the whole purpose of allowing dogs to inspect areas such as the office in this case off-lead is to protect the officers' safety. So, balancing the gravity of the intrusion on the plaintiff's Fourth Amendment rights against the City's need for that intrusion, the Court found the use of Bak under these circumstances to be reasonable *as a matter of law*. Having found no Fourth Amendment violation, the Court found it unnecessary to discuss whether the officers' use of force here was a product of San Diego's policies and/or training. The Court therefore affirmed the district court's granting of summary judgment in the City's favor, reversing its own prior decision to the contrary.

Note: This decision is a bit of a surprise, the Ninth Circuit typically leaving the reasonableness of the use of force for a civil jury to decide as a majority of the previous three-judge panel chose to do in this same case as I briefed it in Volume 22, #2, on February 1, 2017. Indeed, the dissenting opinion here argues that the reasonableness of the force used should be left up to a jury while the majority opinion, quoting the U.S. Supreme Court (*Scott v. Harris* (2007) 550 U.S. 372.), states that "where there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law'" for the court to decide. Also, in the previous decision, the Ninth Circuit's three-judge panel described the use of a police dog as a "*severe*" use of force; i.e., "*the most severe force authorized short of deadly force*."

In this new decision, while the dissenting opinion felt that a reasonable jury might very well find the use of a dog under the circumstances of this case as "severe," the majority of the Court described the use of Bak under these circumstances as a "*moderate*" use of force. Period. Not debatable. So how is a police officer to make these decisions off the cuff and without the assistance of a team of research assistants when appellate court justices, in all their wisdom, can't even agree? I don't have an answer for this age-old dilemma. I'm just throwing this out there for those of you who are not cops and feel it necessary to criticize a police officer's every decision made in the field. But at least we know that San Diego P.D.'s policies and procedures for the use of dogs are well written, abiding by the requirements of the Fourth Amendment, and that Sgt. Nulton followed them in this case.