The California Legal Update

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

Vol. 25 January 27, 2020 No. 2

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THIS EDITION'S WORDS OF WISDOM:

"*I contend that for a nation to try to tax itself into prosperity is like a man standing in a bucket and trying to lift himself up by the handle*." (Winston Churchill)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Gov't. Code § 7284.6 (***California Values Act***)*; Constitutionality as to Charter Cities*: **Gov't. Code § 7284.6***,* part of the "***California Values Act***" (**Gov't. Code §§ 7284-7284.12**)—effective as of January 1, 2018—was recently upheld by the Fourth District Court of Appeal (Div. 3; Orange County) as being constitutional as it applies to "*Charter Cities*." The case is ***City of Huntington Beach v. Becerra*** (Jan. 10, 2020) __ Cal.App.5th __ [2020 Cal.App. LEXIS 23]. The "**California Values Act**" (better known as California's "***Sanctuary State Law***,") prohibits state and local law enforcement agencies from engaging in certain specifically identified acts related to immigration enforcement. Specifically, ***Huntington Beach*** held that **Section 7284.6** of the **Act** is constitutionally applied to "Charter Cities" under the rationale that it addresses matters of statewide concern (including public safety and health, effective policing, and protection of constitutional rights), is reasonably related to the resolution of those statewide concerns, and is narrowly tailored to avoid unnecessary interference in local government.

In a nutshell, this case holds that law enforcement agencies in California's chartered municipalities, just as they are in "*General Law Cities*," are, in accordance with **Gov't. Code § 7284.6**, prohibited from providing information to federal agencies (e.g., but not limited to, ICE) regarding a non-citizen's incarceration release date and/or to respond to any requests for notification of a pending release (see **Gov't. Code § 7284.6(a)(1)(C)**), or from transferring a non-citizen to immigration authorities without a judicial warrant or a judicial probable cause determination (**Gov't. Code § 7284.6(a)(4)**). There are multiple exceptions, as contained in **Gov't. Code § 7284.5(a) and (b)**, but these are generally related to *felony offenses* and *after conviction*, or after a preliminary examination has resulted in a finding of probable cause. The existence of an outstanding federal felony arrest warrant is another exception. (**Gov't. Code § 7284.5(a)(5)**) If you're wondering what it means to be a "Charter City" (as I did), here's the basic poop on that: California law classifies cities as either "*Charter Cities*" (See **Cal. Const., Art. XI, §5**), which are organized under a charter (**Gov't. Code § 34101**), or "*General Law Cities*," which are organized under the general laws of the State of California (**Gov't. Code § 34102**). A "Charter City" (sometimes referred to as a "Home Rule City") is any municipality that adopts (apparently at its own discretion) a charter which outlines how that city is to be governed. A municipal charter is the basic document that defines the organization, powers, functions, and essential procedures of the city government. If not a Charter City, then a municipality is, by default, a "General Law City," which still has authority to act locally, but only so long as consistent with the California Constitution, state statutes, and state administrative regulations.

The major distinction between the two is that a General Law City can *only* do what the legislature, through law, allows it to do. A Charter City, on the other hand, can pass any regulations or laws it deems necessary unless the state law specifically prohibits it. Of California's 482 municipalities, 121 are Charter Cities (per "Google"). The City of Huntington Beach happens to be a Charter City. The ***Huntington Beach*** case assumed that **California Values Act** is constitutional as applied to General Law Cities, the issue of the case being whether the restrictions listed in the **California Values Act** (or at least

in **Gov't. Code § 7284.6**) can constitutionally be applied to Charter Cities as well. Per ***Huntington Beach v. Becerra***, *it can*, and *it is*. P.S. If you are wondering what *your* city is, I have a list of California's 121 Charter Cities I can send you upon request.

CASE LAW:

***The Danger Doctrine and Civil Liability*:**
***Leaving a DV Victim in More Danger Than He/She was Originally Found*:**
***Qualified Immunity from Civil Liability*:**

Martinez v. City of Clovis **(9th Cir. Dec. 4, 2019) 943 F.3rd 1260**

Rule: (1) Pursuant to the "Danger Doctrine," a law enforcement officer may be civilly liable where the officer's affirmative actions create or expose a plaintiff to an actual, particularized danger that he or she would not otherwise have faced, the resulting injury was foreseeable; *and* the officers were deliberately indifferent to the known danger; a "due process" issue.
(2) Although a due process violation did in fact occur, law enforcement officers will not be held civilly liable unless the rights violated are so sufficiently well-defined that any reasonable officer in the involved officer's shoes would have known that his or her conduct violated the plaintiff's right to due process.

Facts: From April through September, 2013, Desiree Martinez (and her daughter) lived with a City of Clovis police officer by the name of Kyle Pennington in a tumultuous, abusive, live-in relationship. Specifically, on May 2, 2013, Pennington abused Martinez while the two of them were at Martinez's cousin's home. Other than Martinez being pushed down a flight of stairs, the details of the incident were left unexplained by the Court. Martinez fled her cousin's house, hiding outside while calling the police, sending Clovis P.D. officers to the residence she shared with Pennington. Pennington returned home by himself as Martinez sought the assistance of a taxicab. Clovis Police Officers and Pennington were all waiting for her when she got home shortly thereafter.

Upon her arrival in the taxi, Pennington approached her and warned her not to say anything to the officers about what had happened at her cousin's house. What happened next is subject to some differences of opinion. Officer Kristina Hershberger described in later testimony a "*highly intoxicated*" and somewhat uncooperative Martinez who only wished to talk about a prior act of abuse between Pennington and herself, but then refused to repeat the story on a tape recorder. When pressed for details, Martinez would only say that she was fine, and asked to be allowed to go inside. Apparently, there were no visible physical indications that Martinez had been injured in any way. Martinez, on the other hand, testified about her fear of talking to the officer "within eye and earshot" of Pennington. She claimed in her testimony that she only pretended to be intoxicated because she was afraid of Pennington and did not want him to know that she was complaining to the officers about his abuse.

Martinez also testified that she refused to talk to a least one of the officers at the scene because she knew him to be personal friends with Pennington. Martinez also testified that Pennington, standing nearby, was staring at her in a manner she perceived as intimidating. At one point,

Martinez heard Pennington clear his throat, noting that he would do this when angry. Martinez admitted to eventually walking up to Pennington and standing next to him, but only "because (she) didn't want him to think that (she) was talking to the officer." Because Officer Hershberger insisted on interviewing her in front of Pennington, Martinez testified that it was only out of fear that she finally told the officer that nothing had happened. Later evidence introduced in the federal district court showed that Officer Hershberger had received domestic violence training. Based upon this training, she believed that Martinez faced a potential risk of further abuse if she stayed with Pennington that night. She was also well aware that domestic violence victims "might tend to recant accusations of violence" out of fear of reprisal.

Nevertheless, Officer Hershberger did not arrest Pennington. Nor did she advise Martinez of her right to make a citizen's arrest (in violation of P.C. § 836(b)), obtain a restraining order, or of the availability of shelters at which she could stay the night. She also did not provide Martinez with an available Clovis P.D. pamphlet for victims of domestic violence. Officer Hershberger later testified that her failure to follow through with any of these basic procedures was because Martinez had not indicated that any violence had occurred that evening (a claim contested by Martinez), and because she was responding to a "check the welfare" call; not a domestic violence call. Instead, she merely recommended in her report of the incident that Martinez be contacted later and interviewed again. There was addition testimony to the effect that they did not socialize and that Officer Hershberger had only a "neutral" opinion of Pennington, having both having worked on the Clovis Police Department for some nine years. Pennington himself also testified that after Martinez had retreated into the house, Officer Hershberger approached Pennington, telling him about Martinez's complaint that he had abused her once before, and asked him why he was dating a girl like Desiree Martinez, commenting that "she didn't think that she was necessarily a good fit for (him)."

After the officers left, Pennington physically beat Martinez again as he demanded to know what she had told the officers. Despite this continued abuse, Martinez spoke with a detective over the phone the next day, telling him in a statement—one she later claimed in testimony to have been scripted by Pennington—that anything she might have said to Officer Hershberger to the effect that she had been abused was in fact false. At some point within the next month, Martinez and Pennington moved to the nearby City of Sanger, apparently because Pennington was on administrative leave from the Clovis Police Department due to a separate domestic violence incident involving an ex-girlfriend, and he no doubt wished to avoid any further Martinez-generated contacts with his own department. The abuse, however, continued. On the night of June 4th, Pennington physically abused Martinez, choking, beating, suffocating, and sexually assaulting her. Upon a neighbor calling 911, Sanger Police Officer Angela Yambupah and Sgt. Fred Sanders, along with two other officers, arrived at their residence. This time the officers noticed that Martinez had visible injuries consistent with those of a victim of physical abuse, including redness on one cheek, scrapes on her knees, a broken and bleeding fingernail, a torn shirt, and bruising on her arms.

Martinez told Officer Yambupah that her injuries were the result of Pennington trying to smother her with a pillow and choking her. Officer Yambupah, who interview Martinez, had received domestic violence training. She knew Martinez's injuries were consistent with those of a domestic violence victim and believed she had probable cause to arrest Pennington as the

"dominant aggressor," and intended to do so. Upon Martinez telling Officer Yambupah that Pennington was a police officer, she discovered that he was on administrative leave from his own police department, and why. Officer Yambupah "huddled" with the other officers to discuss the situation and the pending arrest. Sgt. Sanders, who was acting as the on-scene supervisor, overruled her, ordering her to simply refer the matter to the District Attorney's Office instead. Although Pennington and Sgt. Sanders were personally unacquainted, there was later evidence that he was friends with Pennington's father—himself a retired cop—they having known each other for at least 25 years. Upon leaving the scene, Sgt. Sanders commented out loud, in Pennington's presence, that the Penningtons were "good people." So no arrest was made.

Leaving Martinez and Pennington to their own devices, the officers also failed to provide Martinez with their own department's domestic violence information handout. Nor did they inform her of her right to make a citizen's arrest, offer her transportation to a shelter, or discuss with her the availability of an emergency protective order. When testifying later, Officer Yambupah claimed to have asked Martinez to let her help her, but Martinez refused. She also claimed to not have sought a protective order because Martinez "was not willing to pursue any assistance from [her] at all." And although foreseeing a risk of continued violence, she attempted—unsuccessfully, as it turned out—to address this problem by merely verifying that Pennington intended to leave the scene of his own accord. But Pennington did not leave the scene. In fact, after the officers all left, he again—not surprisingly—beat and sexually assaulted Martinez. Pennington was finally arrested the next day and a criminal protective order was issued. Despite this, however, Martinez and Pennington continued to live together, the abuse unabated, with Martinez suffering continued physical and sexual abuse "multiple times" until September, 2013, after which Martinez finally left him. Pennington was eventually charged and convicted of multiple counts of violating the criminal protective order. He also pled guilty to one domestic violence charge.

Desiree Martinez filed a civil suit in federal court pursuant to 42 U.S.C § 1983, suing both the Clovis and the Sanger Police Departments along with the officers involved in the two incidents described above. The gist of her complaint was that by failing to take steps to protect her, the officers violated her Fourteenth Amendment right to due process. Among the allegations was Martinez's contention that the civil defendant officers violated her right to substantive due process under the so-called "danger doctrine." Specifically, she argued that "when a state actor becomes involved and through her (or his) intentional actions worsens the citizen's situation and creates a danger worse or in addition to those (already) faced by the citizen, that state actor has violated the citizen's substantive due process rights." The federal district (trial) court, however, was not persuaded, and granted the civil defendants' summary judgment motion (i.e., dismissing the case) on all claims. Martinez appealed.

Held: The Ninth Circuit Court of Appeal affirmed the district court's ruling, but *not* because Martinez's constitutional rights had not been violated. Rather, the Court ruled that the defendant officers and agencies were entitled to qualified immunity in that the constitutional violations committed in this case were yet to be firmly established in the law. Law enforcement officers and their respective agencies are entitled to immunity from civil liability under either (or both) of two theories; i.e., either there was no constitutional violation in what the officers did, *or*, even if there was, the legal theory defining the violation has yet to be clearly established in the law. The

courts have held that which of these two prongs is to be discussed first is up to the appellate court. In this case, the Ninth Circuit found the underlying legal concepts to be important enough that the Court felt obliged to discuss first whether Martinez's constitutional rights were in fact violated. On this issue, the Court ruled that Martinez has a legitimate gripe.

(1) *The Danger Doctrine*: Although the Due Process Clause places a limitation on state action, it has been recognized that due process protection does *not* "guarantee . . . certain minimal levels of safety and security." "As a general rule, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties." Put more succinctly: A police officer's failure "to prevent acts of a private party is insufficient to establish liability. . . . The general rule is that a state is not liable for its omissions' and the Due Process Clause does not impose a duty on the state to protect individuals from third parties." But there are exceptions. (*Aren't there always*?): *First*, a "*special relationship*" between the plaintiff and the state may give rise to a constitutional duty to protect. *Second*, the state may be constitutionally required to protect a plaintiff that it "affirmatively places . . . in danger by acting with 'deliberate indifference' to a known or obvious danger, thus worsening the position the plaintiff was in before law enforcement got involved." Martinez did not argue that the possible applicability of the "special relationship" exception to her situation. Rather, she argued only that the officers' (and their agencies') were civilly liability based upon the second exception, sometimes referred to by the courts as the so-called "*danger doctrine*." Specially, Martinez claimed that the state-created danger doctrine applies to her situation because Officers Hershberger and Yambupah, and Sgt. Sanders, all affirmatively exposed her to a greater risk of a known danger by their actions. To succeed on this claim, however, the Court held that Martinez had the legal obligation to establish three elements: 1. The officers' affirmative actions created or exposed her to an "*actual*, *particularized danger*" that she would not otherwise have faced; 2. The injury she suffered as a result was *foreseeable*; *and* 3. The officers were *deliberately indifferent to the known danger*.

Actual, Particularized Danger: In order for Martinez to show that the "danger doctrine" applied to her situation, she first had to provide proof that the officers affirmatively exposed her to "*an actual, particularized danger*." The fact that there already existed some danger is not dispositive. The issue is whether the officers' actions created or exposed Martinez to an additional danger which she "would not have otherwise faced" but for the officers' intervention. On this issue, and in discussing the May 2nd incident, the Ninth Circuit ruled that Officer Hershberger's failure to inform Martinez of her rights and options, failing to provide her with a police department's handout for domestic violence victims, failing to make an arrest, and failing to separate Pennington from Martinez so that Martinez could tell her story without fear of Pennington overhearing her, even though maybe "a dereliction of (Officer) Hershberger's duties," did not worsen Martinez's position any more than it already was. Under the law, these oversights by the officer did not constitute "affirmative act(s) [that] create[d] an actual, particularized danger," at least above and beyond that danger to which Martinez was already exposed before the officers' intervention. However, there was evidence in the record indicating that Officer Hershberger told Pennington about what Martinez had told her as it related to a prior abuse incident, and also commented that Martinez was not "the right girl" for him. The Court held that relaying such thoughts to Pennington might well have provoked Pennington to retaliate, and "embolden" him into believing that he could further abuse Martinez with impunity.

Such a "causal link" between Officer Hershberger's affirmative conduct and the abuse Martinez later suffered that same evening, supported by Martinez's testimony that Pennington asked Martinez while he was hitting her what she had told the officer, all supported Martinez's claim that Officer Hershberger's intervention only worsened her situation. As to the June 4th incident, Sanger Police Officer Angela Yambupah made many of the same mistakes; i.e., interviewing Martinez within close proximity of Pennington, failing to arrest Pennington, failing to provide Martinez with information that may have allowed her to escape further abuse, and not issuing an emergency protective order. Again, the Court ruled that none of these were "affirmative acts[s] [that] create[d] an actual, particularized danger." These occurrences only served to leave Martinez in the same position she would have been had Officer Yambupah done nothing, and thus did not violate Martinez's due process rights. Sgt. Sanders' contributions to the situation, however, dictate a different result. Not only did he commit many of the same errors as did Officer Yambupah, but he also ordered Yambupah not to arrest Pennington. While the decision not to arrest, by itself, did not violate Martinez's constitutional rights (leaving her in exactly the same position she had been in before any decision on whether or not to arrest Pennington had been made), the evidence shows that Sgt. Sanders also volunteered the opinion that the Penningtons were "good people," voiced within Pennington's presence and with the backdrop of knowing that Pennington and his father were police officers.

This combination of circumstances, as ruled by the Ninth Circuit Court of Appeal, was enough for a jury to reasonably find that Sgt. Sanders' positive remarks about the Penningtons placed Martinez in greater danger than she had been previously. With Pennington now being aware that his position as a police officer, particularly when combined with the on-site police supervisor's apparent friendship with his law enforcement father, and that he and his father were thought of as being "good people," Pennington would arguably feel "emboldened to continue his abuse with impunity;" a conclusion strengthened by evidence that Pennington did in fact continue abusing Martinez the next day. Based upon this evidence, The Court found that in addition to the situation involving Officer Hershberger, as discussed above, the circumstances of this later contact satisfied the first requirement of the danger doctrine.

Foreseeability: Martinez must also be able to show that her "ultimate injury" was "foreseeable" under the circumstances. This, per the Court, "does not mean that the exact injury must be foreseeable." Rather, a complainant must only show that the state actor is liable for creating the foreseeable danger of (some) injury given the particular circumstances." Without supplying any discussion that might be labeled as a legal analysis, but rather merely citing a couple of similar cases as examples of it being a matter of common sense that it is a bad idea to leave vulnerable victims in dangerous circumstances, the Ninth Circuit found the "foreseeability" of Martinez being subjected to additional harm from Pennington, under the circumstances of both of the above described contacts, to also be a matter of common sense.

Deliberate Indifference to a Known Danger: Lastly, Martinez carried the burden of proof on the issue of whether or not the officers acted "with '*deliberate indifference*' to a '*known or obvious danger*'" when they aggravated the circumstances by "emboldening" Pennington to think he was immune from arrest, and leaving him at the scene to beat and abuse her once again. This, the Court held, "is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. . . . The standard is higher than gross negligence,

because it requires a culpable mental state. . . . The state actor must recognize an unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff." The Ninth Circuit concluded here that a reasonable jury could find that by telling Pennington about Martinez's accusations of abuse, and then "engaging in disparaging small talk (about Martinez) with Pennington," as occurred in the April 2nd incident, and with a supervisor ordering other officers not to arrest him despite the presence of probable cause, and then remarking that the Penningtons were "good people," as occurred in the June 4th incident, all served to embolden Pennington, motivating him to continue with his abusive acts. The Court thus held that the officers' actions at both the May 2nd and June 4th incidents constituted a deliberate indifference to a known or obvious danger. Additionally, knowing that Pennington was already subject to an internal investigation by his own department for having allegedly abused a former girlfriend only added weight the Court's conclusion on this issue.

(2) *Clearly Established Constitutional Right*; *I.e.*, *Qualified Immunity*: Having found an actual constitutional violation, the next step is to determine whether the rules as set out above are something that were sufficiently well defined so that any reasonable officer in these officers' shoes would have known that their conduct violated Martinez's right to due process. The Ninth Circuit held that they *did not*, thus shielding the officers from civil liability under the theory of "*qualified immunity*." The theory of qualified immunity has been around for a long time and the rules are well established. In determining the applicability of the qualified immunity rules to a given situation, a Court must balance two important interests; i.e., the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they otherwise perform their duties reasonably. Qualified immunity, as it is defined here, is justified under the belief that it is just not fair to hold police officers accountable when they have no notice as to what the rules really are. "This doctrine gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Recognizing that whether or not a constitutional principle is "clearly established" should not be defined "at a high level of generality," as dictated by the U.S. Supreme Court (see *Ashcroft v. al-Kidd* (2011) 563 U. S. 731, 742), the Ninth Circuit Court held here that the rules as discussed above were not yet sufficiently clear to the point where it would be fair to hold these officers responsible for not following them. After reviewing a pile of similar cases, showing the inconsistencies of the various courts' findings in discussing the danger doctrine and similar situations, the Court concluded that; "(i)n light of this muddled legal terrain, we cannot hold that every reasonable official would have understood . . . beyond debate, that the officers' conduct here violated Martinez's right to due process." These officers, therefore, are off the hook.

Note: But the next time a similar situation occurs, officers are duly forewarned that this rule is now clearly established and they will not be so lucky: Per the Court: "We hold today that the state-created danger doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity. Similarly, we hold that the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity. (fn. omitted) Going forward, the law in this circuit will be clearly established that such

conduct is unconstitutional." Domestic abuse, whether physical, sexual, or mental, is never excusable. Rather than cutting a suspect-law enforcement officer some professional slack—which is certainly what appears to have happened in this case—he or she, if anything, should be held to an even higher standard. It is not an excuse to say that "she asked for it," or that she should have sought to protect herself by merely moving out (which we all know is seldom that easy). Presumably, and hopefully, Kyle Pennington is no longer employed in the law enforcement field, but rather gainfully employed as a Wal-Mart greeter, or perhaps working off his pent-up sexual and abusive frustrations digging ditches somewhere.

***Search Warrants and the Seizure of Electronic Devices*:**
***Delays in Searching Seized Electronic Devices*:**
***Good Faith Exception to the Exclusionary Rule*:**

United States v. Jobe **(9th Cir. Aug. 9, 2019) 933 F.3rd 1074**

Rule: (1) An officer's objective and reasonable (i.e., in "*good faith*") reliance upon a subsequently invalidated search warrant, unless the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable, precludes the suppression of the resulting evidence. (2) An unreasonable delay in searching a defendant's impounded property may result in the suppression of evidence recovered as a result of the search, but only if the delay was result law enforcement's deliberate, or at least negligent, misconduct.

Facts: On October 26, 2016, a "tipster" reported to the Department of Homeland Security ("DHS") that Royce Jobe (defendant) was growing marijuana at his residence in Van Nuys, California. The tipster (apparently a neighbor) reached this conclusion from his or her observation of a new "privacy fence" that was built on the property, blocking the view of the detached garage, the strong smell of marijuana emanating from the garage, and increased activity late into the evening, with multiple vehicles and individuals coming and going. DHS Special Agent Paul Cotcher was assigned to the case on around November 3rd. Investigating, he determined that the electrical power (registered in someone else's name) for the house had recently "spiked." Surveilling the property, he noted that "PVC piping, planters, and cooling fans" were attached to and around the garage. Agent Cotcher also discovered that defendant had a marijuana business ("420 Boutique") registered in his name. He also had prior convictions for possession of a firearm and marijuana.

Agent Cotcher obtained a state-issued search warrant authorizing a search of defendant's residence and garage, with permission to seize certain property including "[a]rticles of personal property tending to establish and document sales of [marijuana]." Without any explanation in the warrant as to why he thought computers might be involved, Agent Cotcher included a request for permission to seize any "hard drives" found at the residence. The warrant was executed on November 22nd. Among the items seized were drugs, a pistol, and defendant's laptop, along with other electronic devices. The laptop was not searched at that time. After execution of the warrant, Agent Cotcher contacted the U.S. Attorney's Office asking if the case could be prosecuted federally. He did not receive an affirmative answer until December 1st. During that intervening time period, the investigation continued with Agent Cotcher collecting more

evidence of defendant's sale of marijuana from him home. Upon hearing back from the U.S. Attorney, Agent Cotcher began drafting an affidavit in support of a criminal complaint and a federal search warrant for the laptop, not completing this work until December 7th. On December 12th—twenty days after the laptop was seized—the complaint was filed and the warrant was signed. Agents immediately searched defendant's laptop, finding stolen credit card and bank account information. He was subsequently charged in federal court with identity theft, accessing devices without authorization, mail fraud, and being a felon in possession of a firearm. Defendant moved to suppress the evidence found on his laptop. The district court judge granted the motion, ruling that although the laptop had been lawfully seized (i.e., with sufficient probable cause), the government's delay of 20 days before obtaining the federal warrant to search it was constitutionally unreasonable; a Fourth Amendment violation. The government appealed.

Held: Then Ninth Circuit Court of Appeal reversed.
(1) *Seizure of the Laptop*. The district court judge had held that seizure of the laptop from defendant's house upon executing the state-issued search warrant was lawful. The Ninth Circuit disagreed, but ruled that suppression of the laptop itself was not appropriate under the circumstances. In reviewing Agent Cotcher's affidavit to the state warrant, it was noted that although asking for permission to seize "hard drives," the affidavit failed to mention a computer or other electronic devices, much less state any facts suggesting that defendant's laptop would likely contain evidence of a marijuana growing operation. However, it is now well established that "(t)he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies." (*Herring v. United States* (2009) 555 U.S. 135, 140.) For instance, a court should not apply the exclusionary rule in any case where an officer objectively and reasonably (i.e., in "*good faith*") relies on a subsequently invalidated search warrant, unless the warrant was "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" (*United States v. Leon* (1984) 468 U.S. 897, 922-923.)

In this case, Cotcher's affidavit supporting the state warrant contained sufficient information to render his reliance on the warrant objectively reasonable. It laid out facts indicative of a large-scale marijuana growing operation, including information from a tipster that was corroborated by Cotcher's own observations, investigation, and experience. Given the apparent scale of defendant's operation, as indicated by him having a registered marijuana business and the substantial, consistent foot traffic to his residence late at night, the affidavit provided "a colorable argument for probable cause" to seize items, including documents, tending to help prove the sales of marijuana. Although not specifically listed in the warrant, Agent Cotcher reasonably relied on the warrant's authorization to seize anything that might contain such documents, including computers such as defendant's laptop.

(2) *The Search of the Laptop*: Overruling the trial court's determination that the contents of the laptop must be suppressed due to the "unreasonable" 20-day delay between its seizure and the eventual search, the Ninth Circuit *again* noted that the existence of a Fourth Amendment violation (assuming the 20-day delay was "unreasonable") does not always dictate that the resulting evidence should be suppressed. The purpose of excluding evidence under the exclusionary rule is "to deter deliberate, reckless, or grossly negligent conduct." (*Herring*, *supra*, at p. 144.) In this case, the Court found no evidence of any such conduct on Agent

Cotcher's part, noting that there was no indication that he deliberately delayed the process. Rather, immediately after seizing the laptop, Agent Cotcher contacted the U.S. Attorney's Office about prosecuting the case federally. During the ten days between that initial contact and being told that the U.S. Attorney would in fact handle the case—a period which included the Thanksgiving holiday—Agent Cotcher continued with his investigation, gathering even more evidence of defendant's illegal marijuana growing operation. Once the U.S. Attorney responded to his inquiry, he began drafting a detailed and lengthy affidavit in support of a federal search warrant, a project which he finished within less than a week, and then transmitted it to an Assistant U.S. Attorney for review (in accordance with the U.S. Attorney's policy).

Although Agent Cotcher could have been more efficient in preparing his paperwork, his delay in doing so does not evince negligence, let alone deliberate and culpable misconduct. Defendant cited the case of *United States v Cha* (9th Cir. 2010) 597 F.3rd 995, for the proposition that an unreasonable delay mandated the suppression of the resulting evidence. The Court, however, rejected this argument as applied to this case, noting the factual differences between *Cha* and the instant case. Where Agent Cotcher did not engage in any purposeful, time-delaying screwing around, the officers in *Cha* inexcusably delayed for 26½ hours in obtaining a search warrant for Cha's residence while Mr. Cha was forced wait outside—even into the early morning hours—with officers refusing even to allow him to retrieve his diabetes medication. In *Cha*, it was noted that "none of this delay was 'unavoidable'" . . . The officers . . . had a 'nonchalant attitude' and proceeded in a 'relaxed fashion.'" (pp. 1005-1006.) As noted by the Court, when determining whether to employ the exclusionary rule, "[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus." (*United States v. Leon*, *supra*, at p. 911.) The Court further noted that the evidence obtained from the laptop was not the product of the delay itself. "Unreasonable delays" fall into the "category of cases" where the alleged "police misconduct effectively bears no 'fruit.'" The Court ruled, therefore, that the 20-day delay between the seizure of defendant's laptop and its eventual search did not warrant the suppression of the resulting evidence.

Note: Lessons learned from this case include: (1) Be sure to include in your search warrants a specific request to seize and search all computers and other computer-related devices, with justifications for why you believe such electronic devices will contain evidence relevant to the crime(s) being investigated, even if it is based solely on your own training and experience (which, of course, you will also describe in disgustingly intimate and immodest detail in your affidavit). (2) Pursue the search of any seized electronic devices with dispatch, being ready to justify the time it took to accomplish the search. Also, on the issue of delays in searching a seized laptop computer, see *United States v. Sullivan* (9th Cir. 2015) 797 F.3rd 623, 633 (*California Legal Update*, Vol. 20, #3, Feb. 25, 2015); finding 21 days to be reasonable when during this time the Feds held onto defendant's laptop while defendant himself was in custody, so he couldn't use it anyway, he was subject to a Fourth waiver, where defendant gave consent to the laptop's seizure, and where the computer had to be transferred to a different agency to conduct the necessary forensic search.

***P.C. § 148(a)(1) and Refusing to Identify Oneself*:**
***Refusing to Identify Oneself Upon Being Cited for an Infraction*:**

***People v. Knoedler* (Dec. 26, 2019) __ Cal.App.5th Supp. __ [2019 Cal.App. LEXIS 1319]**

Rule: Refusing to identify oneself to an officer who intends to write a citation to that person for an infraction offense violates P.C. § 148(a)(1): Resisting, obstructing, or delaying an officer in the performance of his or her duties.

Facts: On a warm and beautiful August 19, 2018, defendant Brent Knoedler was enjoying a cool one (can of beer) while standing on the sidewalk near Beach and Main Streets in the City of Santa Cruz, and minding his own business. The only problem is that Santa Cruz has a city ordinance (Santa Cruz Municipal Code, §§ 9.12.030, 9.12.060.) prohibiting the possession of an open container of an alcoholic beverage in a public place; an infraction offense. Upon observing defendant with his open container, Ranger Sarai Jimenez approached him and informed him of his violation. A repentant defendant offered to toss his beer into the garbage. But Ranger Jimenez declined his offer and asked him for his identification. No longer repentant, an increasingly defiant defendant refused to provide any identification, or even give his name. despite repeated requests. Officer Denise Cockrum, responding to Ranger Jimenez's call for backup, was equally unsuccessful in getting defendant to identify himself despite her polite explanation as to why they needed his identification. Defendant contested that unless he intended to drive a vehicle—which he did not—he had no reason to cooperate. Intending to physically arrest him, Officer Cockrum grabbed defendant's arm. Defendant broke free, hitting the officer with sufficient force to cause her body camera to be knocked off her person. A chase and struggle ensued ending in defendant being physically arrested with the help of other responding officers. A jury convicted defendant of a misdemeanor violation of resisting, obstructing, or delaying a peace officer (P.C. § 148(a)(1)), acquitting him of battery on a peace officer (P.C. § 243(b)). He was sentenced to 60 days in county jail and a $573 fine (pretty expensive beer). Defendant appealed.

Held: The Appellate Division of the Santa Cruz County Superior Court affirmed. The issue on appeal was whether a person's refusal to identify himself when he is about to be cited for an infraction constitutes a violation of P.C. § 148(a)(1). Defendant argued that instructing the jury that it may in fact be, is an incorrect statement of the law, violating his right to due process and a fair trial under the Fourteenth and Sixth Amendments to the U.S. Constitution, respectively. The Court disagreed, differentiating the facts of this case from the authority cited by defendant. Specifically, defendant cited a federal district court opinion; *Belay v. City of Gardena* (C.D. Cal., 2017) 2017 U.S. Dist. LEXIS 66017. In *Belay*, it was held that a person cannot be arrested for a violation of P.C. § 148(a)(1) when he is merely detained. In contrast, the officers in the instant case had not only a "*reasonable suspicion*" justifying the initial detention, but also the "*probable cause*" necessary to cite defendant for a violation of the Municipal Code, having observed him in possession of an open container of alcohol in a public area. Defendant also cited *People v. Quiroga* (1993) 16 Cal.App.4th 961, noting that the Court there had specifically held that "a refusal to disclose personal identification following arrest for a misdemeanor or infraction cannot constitute a violation of Penal Code section 148." (p. 970.) The Court differentiated *Quiroga* by the fact that the officers in the instant case had not "arrested" defendant at the specific time he

refused to identify himself, but rather were attempting to write him a citation for a municipal code infraction. Also, in *Quiroga*, it was held that the defendant's refusal to identify himself upon being arrested did not violate P.C. § 148(a)(1) in that the officers were not impeded in the performance of their duties by the defendant's lack of cooperation. However, defendant Quiroga *did* violate section 148(a)(1) later, when being booked, because his lack of cooperation at that point in time did in fact slow the officers down (i.e., "*impede*") in the performance of their duties. (pp. 971-972.) In the instant case, the same "public interest" in being able to identify defendant during his booking (as noted in *Quiroga*) applies to when an officer is attempting to cite him in the field. They have to know who he is in order to effectively accomplish these tasks. Lastly, the Court differentiated the case of *In re Gregory S.* **(**1980) 112 Cal.App.3rd 764, where it was held that P.C. § 148(a)(1) did not apply when based on a minor's failure to provide his first name during a detention. In that case, the court made it clear that its holding was fact-specific. (p. 779.) More importantly, the Court explained that because the officer already knew the minor's address and his surname, the minor's failure to provide further identifying information could not have "delayed the officer (in the performance of his duties) to a degree justifying an arrest." (p. 780.) In the instant case, defendant's refusal to identify himself to officers who were attempting to write him a citation did in fact impede them in the performance of their duties. He therefore was properly held to answer to a charge of P.C. § 148(a)(1).

Note: I've read a lot of cases trying to find some consistency on the issue of whether a person who refuses to identify himself in a "detention" situation is in violation of P.C. § 148(a)(1). There's a lot of case law on the issue (more than I have room to cite here), but *not* a lot of consistency in the holdings. We do know that a person who is only "consensually encountered" cannot be forced to identify himself. (*Kolender v. Lawson* (1983) 461 U.S. 352.) And we know that a statute that specifically requires a detained person to identify himself is constitutional. (*Hiibel v. Sixth Judicial District Court of Nevada* (2004) 542 U.S. 177.) But California has no such statute. So as I see it, the best way to analyze the applicability of P.C. § 148(a)(1) is to look at the specific circumstances of each case and determine whether a detained (or arrested) person's refusal to identify himself has in some significant way, "delayed or obstructed" (i.e., "impeded") the officer in the performance of his or her duties. This may be hard to prove in a "detention" situation. But until we get a Supreme Court (California *or* U.S.) decision telling us whether a detained person is impeding an officer by refusing to identify himself, all we can do is throw some cases up there and see if anything sticks. Win or lose, this important element (i.e., "impeding") must be clearly documented in your arrest report if you expect P.C. § 148(a)(1) to get charged.