The California Legal Update

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

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

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THIS EDITION'S WORDS OF WISDOM:

"*The world is a dangerous place. Not because of the people who are evil; but because of the people who don't do anything about it.*" (Albert Einstein)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

DUI Arrestees and the Pre-Blood/Alcohol Test Admonition: In the last Legal Update (Vol. 22, #3, Mar. 24, 2017), I briefed the case of *People v. Mason* (Dec. 29, 2016) 8 Cal.App.5th Supp. 11; a DUI blood-test/consent case. In the "Note" at the end of my brief, I stated that upon arresting a person for DUI, you should read to him or her the admonitions "*in their entirety*" as provided for in V.C. § 23612(a)(1)(D) and (a)(4), and as typically described in various pre-printed forms provided by probably all California's law enforcement agencies (e.g., CHP 202D). What I should have added was that the part of the admonition that talks about potential penal sanctions (i.e., "that the person "*shall* be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in *a fine*, (and) *mandatory imprisonment* if the person is convicted of a violation of (driving while under the influence) . . . ." Italics added), should *not* be read to a DUI arrestee when a blood test is contemplated. Per the U.S. Supreme Court decision of *Birchfield v. North Dakota* (June 23, 2016) __ U.S. __ [136 S.Ct. 2160] (Legal Update, Vol. 21, #8; July 24, 2016), to impose penal sanctions upon a DUI suspect for choosing not to submit to a search (which includes a blood test) where we have no legal entitlement (i.e. a warrant, or it's a legal search "incident to arrest" as in the case of a breath test), is unconstitutional.

California law does not make a DUI arrestee's refusal a new criminal offense, as was the case in *Birchfield*, but it does seek to impose a penal-type enhancement added to one's sentence upon being convicted of a DUI offense, as provided for under V.C. § 23577. *People v. Mason* did not discuss whether the penal sanction portion of section 23612(a)(1)(D) should be read to a DUI arrestee, and I didn't think to address the issue in my Note. However, it is my understanding that most law enforcement agencies (if not all) are modifying their DUI admonishment requirements to reflect this change in the law, as dictated by the *Birchfield* case, at least in the case of a solicited blood test. (Per *Birchfield*, because a breath test is a less intrusive search that does not constitutionally require a search warrant as a lawful "*search incident to arrest*," penal sanctions *may* be imposed for refusing to submit to such a search.) If your agency has not yet done this, you are forewarned that you may be violating a DUI arrestee's constitutional rights, at least where a blood test is contemplated, in telling him that he could be criminally sanctioned, probably requiring the suppression of any blood test results you obtain. (My thanks to Officer Jake Griffith of the California Highway Patrol's Morongo Basin Area Office for pointing out to me this important limitation on the rule of *People v. Mason*.)

***Searches of Cellphones*:**
***Searches Incident to Arrest*:**
***Searches Incident to Citation*:**

CASES: *People v. Macabeo* (Dec. 5, 2016) 1 Cal.5th 1206

Rule: A search of a person incident to a custodial arrest for an infraction, even though in violation of state statutes, does not violate the Fourth Amendment. Any resulting evidence, therefore will not be suppressed. But if a person is not actually arrested, the fact that he could

have been does not justify such a search incident to arrest. Searches incident to a citation violate the Fourth Amendment. A warrantless search of a cellphone incident to arrest is no longer lawful.

Facts: Detective Hayes and Officer Raymond of the Torrance Police Department were on routine patrol early one morning at 1:40 a.m. in a residential neighborhood when they spotted defendant riding along on his bicycle. Observing him roll through a stop sign without stopping, an infraction under Vehicle Code § 22450, the officers decided to stop him. Defendant stopped immediately upon the officers activating their red and blue lights. In a contact that was recorded, Detective Hayes questioned defendant as to his identity, where he was coming from, where he was going, and whether he was on probation and if so, for what offense, when would he be discharged, when he had been last arrested, and the name of his probation officer. The cause of the traffic stop was never discussed. A cooperative defendant answered all the detective's questions. However, while admitting the he had a prior conviction for a drug-related offense, defendant did not know whether he had yet been discharged from probation. He "believed," however, that his case had been dismissed and that he did not have a probation officer. The officers did not check to see if he was actually on probation or whether he was subject to search and seizure conditions. Defendant was told to walk over to the police car and put his hands up and spread his feet in apparent preparation for a patdown search. Detective Hayes then asked defendant if he had "any problem with me taking stuff out of your pockets." Defendant said to "go ahead." Among the items taken from his pockets was a cellphone which Detective Hays handed to Officer Raymond. While Officer Raymond checked the contents of defendant's cellphone, Detective Hays had defendant sit on the curb with his ankles crossed as he continued to ask him questions. He even had defendant remove his shoes and give them to him for inspection. Finally, when Detective Hays had defendant put his hands on his head, defendant asked if he was being arrested. Hayes replied, "I'll explain everything in a second. Do not stand up; you don't want to do that." The tape-recording ended at this point.

At a subsequent suppression hearing, testimony was elicited to the effect that despite never being asked if the officers could search his cellphone, Officer Raymond opened it up and unsuccessfully checked for any suspicious text messages. However, in looking at photos contained in the phone, the officer found images of under-aged girls. Defendant was subsequently arrested for a violation of Penal Code § 311.11(a); Possession of Child Pornography. Detective Hayes testified at the hearing that he based his decision to search defendant on his suspected probationary status and on his belief that defendant's consent to remove items from his pockets constituted consent to examine the contents of the seized phone.

Hayes admitted, however, that after defendant was arrested, he finally checked the computer in his patrol car and learned that defendant had been discharged from probation several months earlier. With the motion to suppress being heard at defendant's preliminary hearing on the Child Pornography charge, the trial court denied the motion, accepting the prosecutor's argument that because defendant *could* have been arrested and booked for failing to stop at a stop sign (*Virginia v. Moore* (2008) 553 U.S. 164; see below.), he was lawfully searched incident to arrest, justifying the search of the cellphone under the then-existing authority of *People v. Diaz* (2011) 51 Cal.4th 84. Upon affirmance by the appellate court, defendant petitioned the California Supreme Court.

Held: The California Supreme Court reversed, ruling in a unanimous decision that the pictures found in defendant's cellphone should have been suppressed. Warrantless searches incident to arrest, as a general rule, are lawful. In this case, the People argued that because defendant *could* have been searched incident to a custodial arrest (i.e., meaning he *could* have been taken to jail) for failing to stop at a stop sign, searching him and his cellphone was lawful. Indeed; although under California statutes defendant should have been merely cited and released for the infraction of failing to stop for a stop sign (see P.C. § 853.5(a)), the United States Supreme Court has ruled that a custodial arrest for such an offense, even though in violation of a state's procedural statutes, does *not* violate the Fourth Amendment. Absent a constitutional violation in making such an arrest, evidence that results from a search incident to arrest will not be suppressed. (*Virginia v. Moore*, *supra*.) California cases are in accord with this rule. (E.g., see *People v. McKay* (2002) 27 Cal.4th 601, 607-619, a violation of V.C. § 21650.1, riding a bicycle on the wrong side of the street; and *People v. Gomez* (2004) 117 Cal.App.4th 531, 538-539, seat belt violation.) Also, the California Supreme Court has upheld the search of an arrestee's cellphone incident to his arrest. (*People v. Diaz*, *supra*.)

However, the fact is that defendant here was *not* arrested for the stop sign infraction. Just because he *could* have been so arrested is insufficient to trigger the rule under *Virginia v. Moore*. To the contrary, a search incident to a citation is in fact a violation of the Fourth Amendment. (*Knowles v. Iowa* (1998) 525 U.S. 113.) It was also noted that the *Diaz* decision, dealing with the warrantless search of a cellphone incident to arrest, was subsequently inferably overruled by the United States Supreme Court. (*Riley v. California* (June 25, 2014) 573 U.S. __ [134 S.Ct. 2473].) As noted in *Riley*: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." (134 S.Ct. at pp. 2494–2495].) The Court here summarized its position as follows: First, the phone search was conducted without a warrant and was improper unless justified by an exception to the warrant requirement. Second, defendant was not on probation, so the search could not be based on that nonexistent status. Third, the People concede that defendant did not consent to the search of his phone. Fourth, the search did not qualify as incident to arrest under the Fourth Amendment. Fifth, under *Riley*, even if defendant had been properly arrested, a warrant was required to search the phone.

The Court therefore held that only way to avoid suppression of the data found in defendant's cellphone is if the good faith exception to the exclusionary rule applies. As to this issue—*good faith*—the Court found that any reasonable officer should have known that the "search incident to arrest" theory did not apply to this situation. At that point in time when defendant's cellphone was searched, nothing had occurred indicating that the officers intended to arrest defendant (as constitutionally authorized by *Virginia v. Moore*, supra.) for rolling through a stop sign on his bicycle. And the officers could not rely upon the subsequently discredited rule of *People v. Diaz* in that because there was no probable cause to arrest defendant when his cellphone was searched, *Diaz* (even if a valid rule) did not apply. At worst, defendant was subject to being cited and released. As indicated above, a search incident to citation is unlawful under well-established precedence. The officers should have known this. Good faith not being applicable to this situation, the contents of defendant's cellphone being the product of an illegal search, should have been suppressed.

Note: The bottom line is that even in the days when we could search a person's cellphone incident to arrest, any reasonable officer should have known that a simple traffic stop doesn't allow him or her to go rummaging through a person's cellphone absent consent or probable cause. Also, a reasonable officer should have known that you can't just assume that a person is on probation and subject to search and seizure conditions (not all probationers necessarily being subject to a Fourth waiver) when you haven't taken the time to check, particularly when he tells you that although having been convicted of a drug offense at some point in the past, he himself doesn't even know whether he is still on probation. But the important legal point raised by this case is that just because a person *can* be subjected to a custodial arrest for a traffic infraction without violating the Fourth Amendment, doesn't mean that we can use this theory to save a subsequent search when the person is not in fact arrested and there is no indication that he is going to be. Also, you should not view this case as encouragement to violate California's statutory requirements that people be cited and released when nothing more than a citable offence has occurred. Those statutes are there for a reason. Professionalism and law enforcement's overall credibility dictate that you follow those rules even if failing to do so does not violate the Constitution.

***Knock and Notice*:**
***Residential Entries Based Upon the Consent of a Cotenant*:**

People v. Byers **(Dec. 14, 2016) 6 Cal.App.5th 856**

Rule: The statutory knock and notice requirements are not excused merely because police have the consent of a non-present co-occupant to enter a residence. Failure to comply with the statutory knock and notice requirements is but one factor in determining whether a warrantless entry into a residence was reasonable. It is not required that a co-occupant be sought out and given the opportunity to overrule another occupants consent. A person's in-custody status, even when he is handcuffed, does not automatically vitiate his consent and is but one factor to consider.

Facts: Officer Pedram Gharah and other officers, with information that someone was dealing drugs out of defendant's apartment, observed a man leave the apartment. Through a records check and the apartment manager it was determined that that man was Brandon Wallace and that he had an outstanding misdemeanor warrant for his arrest. When Wallace returned some 10 to 15 minutes later with another man, the subjects were contacted in the parking lot. With an officer removing his (the officer's) gun from its holster and pointing it down in a "low ready" position, Wallace and his companion were commanded to get on the ground. Wallace was handcuffed and placed into the back seat of an undercover van.

Wallace admitted to officer Gharah that he lived in the apartment and that the southwest bedroom was his own room. He admitted to having narcotics and a gun in his bedroom. He then gave Officer Gharah permission to search his bedroom and retrieve those items. No threats or promises were made to obtain Wallace's consent. Wallace told Officer Gharah that defendant was his roommate and that he might be home. Officer Gharah and two other officers went to the apartment. Hearing people inside, Officer Gharah knocked and announced; "Police

Department." When later asked in testimony if he waited long enough to give the occupants an opportunity to open the door, the trial judge sustained the prosecutor's objection that it was irrelevant whether or not he did. Without waiting for anyone to answer the door, Officer Gharah made entry. As he did so, he saw two men about three feet away walking toward the door. He also observed defendant sitting at the kitchen table. On the table was a box of sandwich baggies, a digital scale, and a white powdery substance later determined to be cocaine. Defendant refused to consent to a search of his bedroom. So based on the items in plain view on the kitchen table, the officers were able to obtain a search warrant for defendant's bedroom and the rest of the apartment. Charged in state court with possession of cocaine for sale (H&S § 11351) and possession of nitrous oxide for the purpose of intoxication, (P.C. § 381b), defendant's motion to suppress was denied by the trial court. Defendant then pled guilty and appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. On appeal, defendant argued (1) that California's "knock and notice" requirements were violated, requiring the suppression of any evidence found in the house, and (2) that Wallace's consent to enter the house was coerced, At the hearing litigating defendant's motion to suppress, defense counsel had attempted to cross-examine Officer Gharah concerning the circumstances of his entry into the residence; specifically, whether or not he had waited long enough after knocking to give defendant an opportunity to come to the door where, if given the opportunity, defendant would have refused a consensual entry. The trial judge had sustained the prosecutor's objection to this line of questioning, ruling that the issue was irrelevant. The Appellate Court ruled that this was error.

It is an exception to the general rule that a search warrant must first be obtained in order to enter and search a person's residence. Consent is an exception to this rule. Wallace, in this case, gave such a consent. However, it is also a rule that when an occupant (i.e., Wallace, in this case) consents to a search, but a co-occupant (i.e., defendant) who is present at the scene expressly refuses to consent, the co-occupant's refusal prevails, rendering the warrantless search unreasonable and invalid as to him. (*Georgia v. Randolph* (2006) 547 U.S. 103.) The Appellate Court held here that when the person who gives police consent to enter is off the premises (being under arrest and in a police van out front qualifying as being "off the premises"), the officers are not excused from compliance with the knock and notice requirements. (e.g., see *Duke v. Superior Court* (1969) 1 Cal.3rd 314, 321-322.) The knock and notice rules must be followed unless there is evidence that to do so would be dangerous or futile, or would allow the destruction of evidence. In this case, there was no evidence of any such issues. Therefore, knock and notice was required.

The trial court erred, therefore, in sustaining the prosecution's objections on this issue. However, non-compliance with knock and notice is but one factor to consider in determining whether the resulting evidence should be suppressed. (*Hudson v. Michigan* (2006) 547 U.S. 586.) Looking at the purposes of the knock and notice rule (i.e., to prevent violence due to an inhabitant being taken by surprise, property destruction (e.g., of a door), and loss of an occupant's privacy and dignity caused by an outsider's sudden entry), the Court held here that these did not apply in this case. Under the circumstances of this case, where the search was conducted pursuant to an absent co-tenant's consent, the Court found that the purposes of the knock-notice requirements were irrelevant and did not prevent law enforcement from seeing or seizing evidence pursuant to the consent exception. Also, the Court found that knock and

notice's historical "deterrence benefits" (discouraging police from violating the Constitution) were outweighed by the "substantial societal costs" incurred when evidence is suppressed.

Lastly, the Court noted that there is no requirement that defendant be sought out and given the opportunity to object to the entry into the apartment once the officers had Wallace's consent. Suppression, therefore, was held not to be an appropriate remedy in this case. Also, the Court upheld the trial judge's conclusion, being supported by "substantial evidence," that Wallace's consent was not coerced despite him being under arrest at the time. "A person's in-custody status, even when he is handcuffed, does not automatically vitiate his consent; this is 'but one of the factors, but not the only one, to be considered by the trial judge who sees and hears the witnesses and is best able to pass upon the matter.'" With Wallace admitting to the possession of drugs and a firearm in his room, his intent to cooperate with law enforcement was evident. The trial court did not abuse its discretion, therefore, in finding that he voluntarily consented to the officers entering into his apartment and searching his room.

Note: We haven't seen a *Georgia v. Randolph* residential entry case, debating the issue of consent vs. no consent by co-tenants, in some time. So this case is a good refresher on that issue. It's also good to have a new case on whether a knock and notice violation requires the suppression of evidence found inside a residence, noting that such a violation is but one factor to consider in the overall determination of "reasonableness." The Court's explanation, however, as to why suppression was not required under the circumstances of this case was a bit hazy, other than to say that the traditional purposes of the knock and notice requirements (i.e., prevention of violence, privacy of the occupants, and to discourage police from violating the Constitution) were either not there, or were outweighed by the costs to society by not allowing the use of relevant evidence in a trial. But the point here is that whether or not the exclusionary rule applies, knock and notice is required at least by statute (per P.C. §§ 844, 1531) absent an articulable exigency, and should be complied with, eliminating this issue.

***Theft by False Pretenses*:**

***People v. Hartley* (June 27, 2016) 248 Cal.App.4th 620**

Rule: The charge of "Theft by False Pretenses," per P.C. §§ 484, 488, is not proved absent evidence of a suspect's intent to defraud.

Facts: Defendant took a taxi home from a bar late one evening after work. While giving the Somali-born driver careful directions to his intended destination, there being a bit of a language problem, defendant was also engaged in a conversation with his girlfriend on his cellphone. At some point after the taxi driver missed a turn, defendant, became aware of his location and while still talking to his girlfriend, accused the driver of purposely running up the meter. During a heated argument during which profanity was used by both parties, with defendant throwing in a few unfortunate racial slurs, defendant announced that he was not going to pay the taxi fare. He got out of the cab and started walking home.

The driver caught up with him for the stated purpose of making a police report, precipitating a second argument. At some point, defendant pulled a knife from his back pocket and, allegedly,

threatened the driver. A neighbor heard the disturbance and called the police who, upon arrival at the scene, separated the two men. Defendant claimed to have had the money for the fare ($17) in his wallet. Defendant was subsequently charged with felony assault with a deadly weapon (P.C. § 245(a)(1)), making criminal threats (P.C. § 422), and misdemeanor petty theft by false pretenses (P.C. §§ 484, 488). After a jury trial, defendant was acquitted of everything *except* a misdemeanor assault (P.C. 240), as a lesser included offense of the P.C. § 245 charge, and the misdemeanor petty theft by false pretenses charge. Sentenced to probation, defendant appealed.

Held: The Sixth District Court of Appeal reserved the theft by false pretenses conviction (thus leaving only the P.C. § 240 conviction), finding the evidence as presented at trial to be "insufficient" to sustain the conviction. The crime of theft by false pretenses consists of three elements; i.e.; (1) that the defendant made a false pretense or representation to the owner of property, (2) that he did so with the intent to defraud the owner of that property, and (3) that the owner transferred the property to the defendant in reliance upon the representation. The "property" at issue here was the services provided by the victim/taxi driver. What this case came down to was whether defendant hired the cab while falsely representing by implication that he would pay the fare, but while not intending to follow through with that agreement.

While discussing this element, the Court noted that the necessary false pretense may consist of a false promise or misrepresentation of existing fact. It may be proved by evidence of a false representation made by either words or conduct, or by both. Yet it requires more than mere proof of the nonperformance of an agreement. The need to prove a suspect's fraudulent intent prevents ordinary commercial defaults from becoming criminal offenses. In other words, merely backing out of an agreement to pay one's cab fare mid-transaction (i.e., a "commercial default") does not suffice to show a false pretense or representation sufficient to prove defendant's fraudulent intent. In a theft by false pretenses, the false promise or representation is treated as continuing until the property or service is acquired. However, in viewing the record in this case in the light most favorable to the judgment, the Court found that there was in fact no evidence from which the requisite intent could be inferred. In other words, the records was devoid of any evidence of an intent to defraud. The fact that defendant, out of a belief that the taxi driver had purposely run up the fare by missing a required turn as he had been instructed, decided that he was not going to pay the cab fare, was insufficient to prove the necessary false pretense or representation sufficient to establish the necessary fraudulent intent. His conviction for this offense, therefore, could not stand.

Note: If you're a bit confused by all this, you're not alone. But what I get out of this case, after digging through all the legal mumbo-jumbo, is that proof of a fraudulent intent in a necessary element of the crime of "theft by false pretenses." Where it appears that defendant had every intention of paying for the taxi ride, but merely changed his mind because of what he (not unreasonably) felt was the taxi driver's failure to abide by his inferred agreement to drive defendant to his destination without unnecessarily jacking up the charge, then there is no fraudulent intent: It is a civil issue and not criminal. For instance, had defendant gotten into the cab without any means to pay the fare, that fact would have been proof of an intent to defraud. But when he has the money, and by all appearances was ready, able, and willing to meet his legal obligation to pay for the ride but for what he perceived as the driver's violation of their inferred civil contract, reneging on his part of the agreement is not criminal.

***The Californians Against Sexual Exploitation Act* (*CASE Act*):**
***Juveniles and the CASE Act*:**

<u>*In re N.C.*</u> (Nov. 2, 2016) 4 Cal.App.5th 1235

Rule: (1) The phrase "commercial sexual act," for purposes of the CASE Act, includes the pre-sex-act solicitation of an act of prostitution. (2) The CASE Act was intended to be applicable to juvenile as well as adult proceedings.

Facts: On May 12, 2015, undercover Los Angeles Police Officer Peter Ruiz, while working as a member of a task force monitoring prostitution near the intersection of Sepulveda Blvd. and Nordhoff St., approached defendant. Although defendant appeared to be in her early 20's, she was later determined to be 17 years of age. She directed Officer Ruiz to meet her around the corner, which he did. Upon entering the officer's unmarked police car, the two of them discussed various sex acts and how much she would charge him for performing them. Upon reaching an agreement, defendant had the officer drive to a local hotel where she said she had a room. Upon arriving at the hotel's parking lot defendant was arrested for engaging in an act of prostitution, per P.C. § 647(b). She was subsequently released to her mother in Antioch in Contra Costa County.

Two weeks later, however, defendant was back working the intersection of Sepulveda and Wyandotte Streets. On May 27, undercover Los Angeles Police Officer Marcos Gutierrez, also a member of an undercover task force monitoring prostitution, was posing as a "John." Defendant walked up to the open window of his unmarked police car and offered her sexual services for a specified sum. Officer Gutierrez drove the two of them to another location where she was promptly arrested for engaging in an act of prostitution. This time defendant was detained in Juvenile Hall pending the filing of a juvenile wardship petition in Juvenile Court. On May 28, 2015, the Los Angeles County District Attorney filed two separate W&I Code § 602 wardship petitions alleging the commission of the above-two offenses.

At the subsequent jurisdictional hearing, defendant moved to exclude all evidence that tended to show that she had solicited acts of prostitution (P.C. § 647(b)), arguing that as a victim of human trafficking, such evidence was inadmissible under Evid. Code § 1161(a); a part of the CASE Act (i.e., the "*Californians Against Sexual Exploitation*" Act). The Juvenile Court magistrate, before ruling on the motion, had its own appointed expert (Nadeah Vali) testify that defendant was in fact a victim of sexual exploitation, having suffered "severe trauma" at the hands of "a third party exploiter" (i.e., a "pimp") who controlled her choices and actions, abused her, transported her to and from certain locations, coerced her into engaging in sexual acts, and confiscated the money she earned as a result.

It was undisputed by the parties that Vali's testimony established that defendant committed the acts with which she was charged "as a result of being a victim of human trafficking." However, the trial court denied the defendant's motion, ruling that *(1)* defendant's specific acts in this case did not meet the legal definition of a "*commercial sexual act,*" as required by E.C. § 1161(a) and

P.C. § 236.1(h)(2), and *(2)* that the CASE Act did not apply to juvenile proceedings. After the Court sustained the petitions, defendant appealed.

Held: The First District Court of Appeal (Div. 2) reversed, overruling the Juvenile Court magistrate on both issues. The Californians Against Sexual Exploitation Act (CASE Act) was enacted by the voters of the state as Proposition 35 at the general election on November 6, 2012. The CASE Act increased penalties for human trafficking, authorized the collection of fines to be used for victim services and law enforcement, required persons convicted of trafficking to register as sex offenders, and required such offenders to provide information regarding Internet access and identities they use in online activities. *(1) Evidence Code § 1161*: The CASE Act also added new Evidence Code § 1161. Subdivision (a) of E.C. § 1161 (as amended by the Legislature in 2013) now declares that evidence that a victim of human trafficking "has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act."

Defendant, a 17-year-old victim of human trafficking, was charged in this case with prostitution under P.C. § 647(b), which provides that every person who "solicits or who agrees to engage in *or* who engages in any act of prostitution (is guilty of disorderly conduct)." (Italics added) Written in the disjunctive, a person may be guilty of P.C. § 647(b) without actually having engaged in any sexual conduct or received any compensation therefore. The mere solicitation and/or agreement to engage in such conduct is sufficient. The parities here agreed that that was all that defendant did in this case. The People argued that for the evidentiary protections of section 1161 to apply, therefore, it must be shown that the alleged victim actually engaged in "sexual conduct on account of which anything of value is given or received by any person," as is described in P.C. § 236(h)(2). The Court determined here, however (and as was later conceded by the People), that the phrase "*commercial sexual act*" as referred to in section 1161 must be interpreted more expansively than it is described in P.C. § 236(h)(2), and include other uncompensated sexual conduct punishable under P.C. § 647(b). The act of prostitution invariably commences, as it did in this case, with a discussion between the parties of the sexual activity or activities offered by one party and at what cost to the other party, an agreement as to the act and reciprocal payment, and conduct indicating a specific intention to perform the agreement.

After reviewing the legislative history and the legislative intent upon enacting E.C. § 1161, the Court concluded that this pre-sex-act activity must be included in the phrase "commercial sexual act" despite the absence of a completed and compensated for sexual act. Per the Court: "(T)he mere act of soliciting prostitution may properly be considered a "commercial sexual act" despite the absence of a completed and compensated sexual act." Prostitution cases seldom include evidence of a completed sex act. To rule that a "commercial sexual act" was not intended to include the pre-sex-act discussions between the defendant and her target would constitute, in the words of the Court, a "ridiculous result," and be "absurd." "(T)he CASE Act would provide no protection at all for victims of human trafficking prosecuted for acts of prostitution they were forced by traffickers to perform. Such a ridiculous result cannot, of course, be judicially countenanced." Defendant, therefore, is entitled to the evidentiary protections as provided for under the terms of E.C. § 1161(a). Evidence of her soliciting an act of prostitution is inadmissible.

(2) Juvenile Cases: The Juvenile Court magistrate found that the CASE Act did not apply to juvenile proceedings for the simple reason that in order for the Juvenile Court to protect minors from themselves, in effect, it is necessary to get them into the system. "There is no way for a juvenile judge to protect a minor like this without a declaration of wardship, without gaining jurisdiction over the minor." As a more legally-based theory, the Juvenile Court magistrate noted that E.C. § 1161 is applicable by its terms only when the evidence at issue is offered to prove "criminal liability," while, as noted in W&I Code § 203, "[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." The Appellate Court ruled otherwise, finding the statutory and case law protections afforded minors in the Juvenile Court to be more important. First, it was noted that W&I Code § 701 provides that in a hearing to determine whether a minor is a person described by sections 300, 601, or 602, "[t]he admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." The Court also could find no reason to deprive minors of the evidentiary protections afforded under the CASE Act, and that to attempt to do so would be to deny them a meaningful opportunity to present a complete defense.

Lastly, the Court found that one of the chief purposes of the CASE Act is to protect minors, as the crime of "human trafficking" is specifically made applicable to "[a]ny person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of [various specified sexual crimes]." (P.C. § 236.1(c)) The CASE Act, therefore, was held to apply to juvenile proceedings.

Note: It was further noted that a lot of the above is now academic upon amendments to P.C. § 647(b) (soliciting prostitution), as well as P.C. § 653.22 (loitering in any public place with the intent to commit prostitution), in that both offenses, as of January 1, 2017, no longer apply to "a child under 18 years of age." (Subds. (b)(5) and (a)(2), respectively) This, of course, means that juveniles whose conduct would be unlawful under those statutes if engaged in by an adult can no longer be prosecuted. However, given the fact that minors are often pulled into such activity by adults who obviously do not have the best interests of the minors in mind when they do so, and that such minors are as much a victim as anyone can be in such a "victimless crime," the CASE Act is an important provision as it relates to human trafficking, and you need to be aware of it.