The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*If you think your boss is stupid, remember*; *you wouldn't have a job if he was any smarter*." (John Gotti.)

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ADMINISTRATIVE NOTES:

Talking Finances: My publisher and I are seeking our readers' financial support in the form of voluntary donations. No pressure. No obligation. But the simple fact is that publishing the California Legal Update, along with extensive monographs on Fourth Amendment and Miranda issues (plus other legal memos), costs money. In short, we have mounting expenses related to maintaining the necessary legal research tools, subscribing to various legal publications, payment of annual bar dues, paying for the "continuing education" requirements to maintain my bar license, hiring experts to set up and service the Legal Update Website, and the day to day expenses of the *Legal Updates Publishing Company* which was established for the sole purpose of keeping this publication going.

To date, the costs related to these activities have been shouldered by myself and, even more so, by my publisher, both of us having been financing this endeavor out of our respective retirement checks. As we work to seek better, faster, and more efficient methods to expand our services, while continuing to provide you with the legal information you need in your efforts to protect and serve the public, we have finally, after almost eight years of pro bono work (so to speak), decided it was time to ask for some voluntary help. You will note that there is a "*Support Legal Update*" button located on the face of the *Legal Update* notification you received, as well as on the home page of the *LegalUpdates.com* Website, by which, using your credit card, you can help to keep this publication alive with donations of any amount, no matter how large or small. Your assistance is greatly appreciated.

***Firearms*; *Carrying in a Backpack on the Person*:**

CASES:

People v. Wade **(May 9, 2016) __ Cal.4th __ [2016 Cal. LEXIS 2563]**

Rule: Carrying a backpack which is found to contain a loaded firearm constitutes the carrying of that firearm "on the person" of the suspect, in violation of P.C. § 25850(a).

Facts: Defendant was found to be wearing a backpack containing a loaded revolver while being pursued by a police officer under circumstances not described in the decision. Being arrested and charged in state court with a felony violation of P.C. § 25850(a) (formerly, P.C. § 12031(a)), defendant was held to answer to the charge after a preliminary examination. Defendant subsequently filed a P.C. § 995 motion to dismiss in the Superior Court (i.e., the trial court). The motion was granted on the theory that a firearm in defendant's backpack, despite the fact that he was wearing the backpack, did not qualify as carrying that firearm "on the person." The People appealed. The Second District Court of Appeal (Div.5) reversed the trial court's decision and reinstated the charges. (See *People v. Wade* (2015) 234 Cal.App.4th 265; petition granted.) The defendant's petition to the California Supreme Court was granted.

Held: The California Supreme Court affirmed. The issue on appeal was whether a person wearing a backpack that contains a loaded revolved is "carrying a loaded firearm on his person" for purposes of P.C. § 25850(a). Section 25850(a) provides: "A person is guilty of carrying a loaded firearm when the person *carries a loaded firearm on the person* or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." (Italics added) Defendant admitted that he *carried* the loaded firearm, but argues that, because it was in his backpack, and even though he was carrying the backpack, the gun was not "*on his person*." The Court disagreed.

The authority cited by defendant is *People v. Pellecer* (2013) 215 Cal.App.4th 508. In *Pellecer*, it was held that a knife contained in a suspect's backpack is not carried on the person. However, another case, *People v. Dunn* (1976) 61 Cal.App.3rd Supp. 12, found that where a person has a concealed firearm in a suitcase that he is carrying at an airport is carrying that firearm "upon his person" under former P.C. § 12025(b); now P.C. § 25400(a)(2). This being the only California

authority on the issue, the Court turned to a half dozen cases from other states, as well as considered the legislative intent in enacting P.C. § 12031, later renumbered as 25850. In so doing, the Court noted that other jurisdictions have consistently found that carrying a weapon, whether a gun or a knife, in containers such as suitcases, briefcases, bags, purses, and handbags, when that container is held by the suspect, is necessarily "upon the person" of the defendant.

Looking at the legislative history, the Court found that it was the intent of the Legislature to make illegal a suspect's immediate access to a firearm. Having a firearm (or a knife) in a backpack (or other container) which is carried by the defendant gives him that immediate access. In so ruling, the Court found as "untenable," and rejected, defendant's argument that there should be a distinction between carrying a firearm in one's clothing and carrying it in a container held by the suspect. As for the decision in *Pellecer*, it was noted that there was some discussion in that case that the particular legislative intent in enacting P.C. § 12020(a)(4), referencing dirks or daggers, made for a different result than we have in *Dunn*, where the illegal weapon was a gun. The Court here did not agree or disagree with that conclusion.

Pellecer, however, can also be distinguished on its facts from both *Dunn* and the instant case. In *Pellecer*, defendant was observed "*leaning on a closed backpack*" (as opposed to carrying it) that was later found to contain an illegal dirk or dagger. This difference, per the Court, "arguably," gave the defendant "less immediate control over its contents than defendant had in this case, where he was actually wearing the backpack." Therefore, the Court "disapprove(d)" *Pellecer* "to the extent its analysis is inconsistent with this opinion, although not necessarily its holding." By having a loaded firearm in a backpack he was carrying, defendant was held to have violated P.C. § 25850(a).

Note: So *Pellecer* is still potentially good law, at least when the issue is having an illegal knife in some container possessed, but not actually carried, by the suspect. I say "potentially" in that the Supreme Court only said that they were not "*necessarily*" disapproving the ultimate holding in *Pellecer*. Too bad: It would have been nice to get rid of that case altogether. But as for carrying backpacks, suitcases, briefcases, purses, etc., in which a loaded or otherwise concealed firearm is found, it is clear that doing so is a violation of P.C. § 25850(a) (formerly P.C. § 12031(a)) and/or P.C. § 25400(a)(2) (formerly P.C. § 12025(b)). That much is clear.

***Miranda*: *Unequivocal Invocation of the Right to Remain Silent*:**

<u>*Garcia v. Long*</u> (9th Cir. Dec. 21, 2015) 808 F.3rd 771

Rule: An in-custody suspect's response of "*no*" when asked if he wishes to waive his rights is off limits to any attempts to seek clarification as to whether he really meant "*no*" despite other pre and post-invocation comments tending to indicate to the contrary.

Facts: Sixteen year-old Jane Doe reported that her step-grandfather, defendant, had been molesting her since she was six or seven years old. The reported molestations consisted of being forced to perform oral sex on defendant ten to fifteen times per month and sexual intercourse once or twice a year. Detectives with the Moreno Valley Police Department brought defendant into the police station for questioning. The detectives initially asked defendant some innocuous preliminary "booking questions," including whether he went by any other names or had ever been arrested. Defendant initially answered "*no*" to both questions, but then proceeded to

volunteer additional information to the effect that he'd used another name once in the past and that he'd been detained and released on a prior occasion. He was then read his *Miranda* rights, which he said he understood. But when asked; "*Okay, now having that* [*i.e., your Miranda rights*] *in mind, do you wish to talk to me*?", defendant answered with a simple "*No*."

Rather than terminating the questioning, the detective immediately pressed on, responding to defendant with a perplexed; "*No*?" Defendant answered this with a disjointed explanation, indicating that he was unsure of what to do without knowing what he was being accused of, that he didn't "*know what was going on*," and that he wanted to hear why he had been brought in to the police station. After telling defendant that Jane Doe was claiming that he had abused her, one of the detectives reminded defendant the he had said that he didn't want to talk to them, but then added; "(*S*)*o is it my understanding right now that you do want to talk to me then*?" After some more equivocating from defendant concerning what the detectives had told him about remaining silent and getting an attorney, the detective finally just asked for clarification whether or not he wanted to talk. Defendant then agreed, saying: "*Yeah, we can talk, yeah, I guess, why not*."

For the most part of the next three hours and 45 minutes, defendant denied any inappropriate physical contact with Jane Doe. Finally, however, he admitted to three sexual occurrences, but claimed that Jane Doe had initiated them. He denied ever having had sexual intercourse with her. ("*I have never had sex with that woman*." Oops. Sorry. Wrong case.) At the detective's suggestion, defendant wrote out an apology to Jane Doe, telling her he never meant to hurt her and that she was not "guilty of anything." At the end of the interview, defendant was placed under arrest. Charged in state court with various child molest and rape-related offenses, defendant's entire taped interview and his written apology to Jane were introduced into evidence over his objection. Convicted of all counts, defendant appealed. His conviction was upheld by the California District Court of Appeal, the Court ruling that taking into account his statements before and after he said that he did not want to waive his rights, his "*no*" was ambiguous, and that the detectives acted properly in seeking clarification. After the California Supreme Court denied review, defendant filed a petition for writ of habeas corpus in the federal District Court. The District Court reversed and the People appealed.

Held: The Ninth Circuit Court of Appeal affirmed the District Court's decision, ruling that "*no*" means "*no*," and that defendant's statements should *not* have been admitted into evidence against him. The earlier California Court of Appeal's affirmance of defendant's conviction was based upon the conclusion that saying "*no*" in response to whether he wished to waive his rights was ambiguous and equivocal in light of both the prior and subsequent statements he made during the interrogation. In analyzing this issue, the Court first reiterated the clear rule that a suspect's right to cut off police questioning is triggered when the suspect *unambiguously and unequivocally* invokes his rights by telling officers that he either wishes to remain silent or to have the assistance of a lawyer.

The issue here, then, is whether defendant's pre-admonishment and/or his post-admonishment statements can be used to render as ambiguous and equivocal what otherwise, on its face, appears to be an invocation of his right to silence. As for his pre-admonishment statements, where he volunteered further clarification after claiming that he was not using a different name and had never been arrested, the Court held that although the context of the situation may be relevant in determining whether a suspect's attempt to invoke is ambiguous, supplemental

volunteered responses to pre-admonishment questions may not be used as an excuse to "badger" the suspect into waiving his rights after a suspect unambiguously invokes his right to silence. And even if it could, the Court found under the circumstances of this case that defendant's volunteered clarifications to his negative responses to using a different name or to ever having been arrested were not contradictory. Specifically, defendant was asked if he used a different name. After saying "*no*," he clarified his denial by telling the detectives that although he was not currently using a different name, he did so once "a long time ago." And as to whether or not he had ever been arrested, he again said "*no*," but quickly volunteered the fact that he had been "detained" once, and then released. Neither response was an attempt to renege on his initial "*no*," but only attempts to further explain his answer.

As for defendant's post-invocation statements, the rule is quite clear that once a subject unequivocally and unambiguously invokes, his wish to remain silent must be "scrupulously honored." Officers are not allowed to attempt to muddy the waters by asking defendant why he wishes to invoke, or whether he is sure. "Where nothing about the request . . . or the circumstances leading up to the request would render it ambiguous, all questioning must cease." (*Smith v. Illinois* (1985) 469 U.S. 91.) In such circumstances, the Court held, it is improper for an officer to attempt to clarify the request. There is nothing to "clarify." Defendant having effectively invoked his right to silence, the detectives should have ceased questioning at that point. Having failed to do that, his subsequent statements and the apology to the victim should have been suppressed.

Note: The Court kind of equivocated on using defendant's pre-admonishment statements to help interpret what was meant by a later possible invocation, noting that the context in which his statements are made are in fact relevant. However, where he never really contradicts his negative responses to using a different name or ever having been arrested, that "context" is irrelevant. But more to the point, the rule here is that when a person says he does not wish to waive his rights, you're done. The word "*no*" can't be much clearer. Contrary to what you see on television, responding to such an unambiguous invocation with some form of; "*Okay, but let's talk about this some more*," is just not going to fly. "*No*" means "*no*." Period. Finito. You're done. (See ***People v. Peracchi*** (2001) 86 Cal.App.4th 353; Asking defendant "*why*?" after he had invoked, causing him to eventually change his mind, held to be improper.)

***Miranda*: *Unequivocal Invocation of the Right to Counsel*:**

Mays v. Clark **(9th Cir. Dec. 8, 2015) 807 F.3rd 968**

Rule: An in-custody suspect asking to have his lawyer brought to him has clearly and unequivocally invoked his right to counsel. An officer's confusion under the circumstances as to whether this request constituted a clear and unequivocal request for counsel is irrelevant if a reasonable officer would have understood it to be an invocation.

Facts: At about 4:30 a.m., on January 24, 2005, Sheppard Scott and his girlfriend drove into a Jack In The Box drive-through on Norwood Avenue in Sacramento, to order an early morning meal. At the same time, two individuals, defendant and another (apparently defendant's older brother), were standing outside an adjacent AM/PM minimart store. As Scott and his girlfriend were in line waiting to order, defendant and the other person walked up to them and asked if they had any "weed," to which Scott told them no. Apparently something was said that upset Scott,

because he got out of the car and engaged them in an "animated conversation" during which Scott claimed a gang affiliation. Scott then got back into his car, ordered his food, and started to drive out of the parking lot. As he did so, defendant approached them ("*Hey*, *homey*.") and indicated that he wished to apologize. As defendant extended his hand as if to shake on it, he suddenly pulled out a gun and shot Scott six times, killing him.

Much of this incident was captured on surveillance cameras in the area. An investigation of Scott's murder led to defendant who was arrested a little more than two weeks later. Upon being arrested, a detective interviewed defendant in a videotaped interrogation after first advising him of his *Miranda* rights, which defendant said he understood. Despite being shown a photograph of the shooter from the surveillance videos, who appeared to be defendant, he repeatedly denied being involved. Defendant volunteered to take a polygraph test. Finally, defendant said: "*Look. Can I—can I call my dad so I can have a lawyer come down 'cause I'm—I'm telling you, I'm . . .*" Apparently not hearing what defendant had said, the detective asked; "*Call who*?" Defendant responded that he wanted to call "*my step-dad 'cause I'm—I'm going to tell you I'm going to pass that test a hundred percent.*"

After telling defendant that they didn't need his step-dad, defendant then said: "*He got my lawyer.*" Still not sure what defendant was talking about, the detective asked who was his lawyer. To this, defendant responded; "*My—my step-dad got a lawyer for me.*" Feeling that this may become a *Miranda* issue, the detective sought clarification, asking: "*Okay. So what do you want to do with him?*" Defendant then responded: "*I'm going to—can—can you call him and have my lawyer come down here?*" The detective's immediate response was unintelligible, but the conversation immediately reverted back to defendant's denial to even being at the scene of the shooting and his wish to take a lie-detector test. Still unsure whether defendant was attempting to invoke, the detective sought clarification as to whether defendant wanted the assistance of counsel or to take a polygraph test, to which defendant clearly and unequivocally responded: "*I want a lie detector test.*"

So, with no polygraph examiner being available, the detective set up a "mock polygraph" test where, with body patches and wires connected to him, a fake test was administered and fabricated written results were produced. Showing this to defendant, telling him that he'd failed the test, defendant eventually made admissions to at least being at the scene of the shooting and that he was in fact the person depicted in the surveillance videos. The videotape of defendant's admissions were introduced into evidence at his subsequent trial for murder. Defendant was convicted of first degree murder with a "lying in wait" special circumstance and a firearm-use enhancement. Sentenced to life in prison without the possibility of parole, plus a consecutive 25 years for the use of a firearm, defendant appealed.

California's Third District Court of Appeal affirmed, ruling that defendant's request for a lawyer was ambiguous, thus allowing the detective to seek clarification. (See *People v. Mays* (2009) 174 Cal.App.4th 156.) The California Supreme Court denied review. A state petition for a writ of habeas corpus was also denied. Filing another habeas corpus petition in the federal district court, it was ruled that defendant had in fact invoked his right to counsel and that his subsequent continued interrogation was illegal. However, the court also ruled that use of defendant's

admissions was harmless error, thus affirming his conviction. Defendant appealed this ruling to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal affirmed, agreeing with the federal district court that defendant had effectively invoked his right to counsel and that the interrogation should have been stopped at that point, but that given the other evidence in the case of defendant's guilt, the error was harmless. Citing the landmark case decision of *Edwards v. Arizona* (1981), it is a well-established rule that once an accused, during his interrogation and despite an earlier waiver, "express(es) his desire to deal with the police only through counsel, (he) is (no longer) subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

It is also a well-established rule that "the suspect's 'postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel.'" (Citing *Smith v. Illinois* (1984) 469 U.S. 91.) In this case, it is apparent that when defendant first indicated that his step-father had a lawyer for him (i.e., "*Look. Can I—can I call my dad so I can have a lawyer come down 'cause I'm—I'm telling you, I'm . . .*"), the detective didn't hear him. So the Ninth Circuit Court ignored this first mention of a lawyer. But then shortly thereafter, after defendant mentioning the "*L*" word (i.e., "*Lawyer*") a couple of more times, he finally said: "*I'm going to—can—can you call him and have my lawyer come down here*?" This clearly was an invocation of his right to counsel, per the Court. And even though defendant was still intermingling this with his request to take a polygraph test, the detective should have understood this to be an invocation and the questioning should have ceased.

Further attempts to insure that defendant was in fact attempting to invoke were inappropriate. An officer seeking clarification is only justified in doing so where the previous attempt to invoke was equivocal and ambiguous. Defendant's responses to those attempts cannot be used as an argument that his previous request for the assistance of counsel wasn't clear and unambiguous. Therefore, the fact that defendant later seemed to change his mind, agreeing to undergo the polygraph without his lawyer, is irrelevant to the issue of whether he had already invoked. His later admissions, as a result, should not have been used against him at his trial.

Note: It is easy to see how the detective, under these circumstances with defendant mixing his comments about wanting the detective to call and ask his step-father to bring his attorney to him with requests to take a polygraph test, could have been confused. The Court, in hindsight however, fixated on the exact wording of defendant's invocation, i.e.; " . . . *have my lawyer come down here*," pulling it out of everything else that was going on and labeling it as a clear and unequivocal invocation. A questionable conclusion, given the confusing circumstances, but that's how the Court decided the issue here.

***A Claim-Of-Right Self-Help Defense Under CALCRIM No. 1863*:**

People v. Anderson **(Mar. 13, 2015) 235 Cal.App.4th 93**

Rule: In a theft or robbery case, the defendant's good faith belief that the property (or money) taken is his property is a defense. Such a "self-help" defense, however, does not apply when the property belongs to a third person and the defendant is not acting as an aider or abettor.

Facts: Defendant, an ex-con, lived with his cousin, Kellie Thomas. Thomas was hooked on prescription pills. Before defendant had come along, however, another cousin, Niya Watson, and her boyfriend, Gregory Moore, lived with Thomas. Moore would occasionally give Thomas Vicodin Pills (for which Moore had a prescription) in exchange for letting him and Watson use her electronic benefit transfer (or "EBT") card (which Thomas referred to as her "food stamp card") to buy food. When Thomas' mother discovered that Moore was supplying Thomas with Vicodin, she forced Moore and Watson to move out. But moving out didn't prevent Moore and Thomas from continuing their arrangement to trade pills for use of the card. The usual plan was for Moore to "front" Thomas the pills. Thomas would then repay him with the use of the EBT card about a week or so later.

On March 1, 2012, owing Moore $200 for Vicodin he'd given her a week earlier, Thomas met him at a grocery store to loan him the card. On this occasion, Moore had had other pressing business, so he took the card home without using it. By this time, defendant was living with Thomas. When he discovered that Moore had her EBT card, he telephoned Watson to verify that she and Moore had the card. Thomas also texted Moore and Watson, telling them that she, her mother, and defendant, were on their way to their apartment to retrieve the card, and that they were bringing $200 in cash in exchange for it. Defendant, however, showed up at Moore and Watson's door alone. Moore opened the door to defendant's knock with the EBT card in his hand, but refused to turn it over unless he received $200 instead. Defendant, however, told Moore that he didn't have the money and that he would give it to him later.

Moore declined to give defendant the card without the money and tried to close the door. Defendant pushed the door open, hitting Moore in the head, causing Moore to lose his balance and fall. Defendant produced a firearm that he pointed Watson, telling her that; "I ought to rob you right now." Defendant left with the EBT card, having wrestled it away from Moore. (Defendant later denied the use of a firearm, but admitted that he "won the 'struggle' and left with the card." He also denied hitting Moore or knocking him down, but admitted that Moore might have fallen when he [defendant] took the card.) Charged in state court with a variety of offenses including first degree robbery, defendant was convicted by a jury. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed (except to modify the sentence). Among the issues on appeal was the trial court's refusal to give the jury an instruction on a "claim-of-right" defense, as described in CALCRIM No. 1863. The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for a conviction of theft or robbery. However, the California Supreme Court has declared a general principle that the theory of self-help is in conflict with the very idea of social order, and should be restricted in its

use, discouraging forcible or violent self-help as a remedy. (See *People v. Tufunga* (1999) 21 Cal.4th 935.) "It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger." It is better for one who believes that another is in possession of the other's personal property apply to the state for help rather than take it himself, particularly if the retaking of the property requires force or fear. The *Tufunga* Court, therefore, limited self-help to takings, even if by force, which are intended to recover specific personal property in which the defendant in good faith believes that he has a bona fide claim of ownership or title, refusing to extend the defense to "robberies perpetrated to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated."

It is also generally limited to the retaking of one's own personal property. The Third District Court of Appeal, however, in *People v. Williams* (2009) 176 Cal.App.4th 1521, has extended the claim-of-right defense to a defendant who acts as an "*aider and abettor*" to another, personally helping the other person to recover property the other person believed was his. In other words, when "A" uses self-help to recover property he, in good faith, believes is his, "B" is entitled to the same defense when he ("B") aids and abets "A" in that recovery. Defendant Anderson, in this case, argued that he also should be accorded the benefits of the self-help defense in that, similar to an "aider and abettor" as described in *Williams*, he was attempting to help Thomas recover property (the EBT card) that was lawfully hers. The difference is, however, that Thomas did not attempt to recover her EBT card. Defendant was the one using the force, on his own, to recover Thomas' card.

The Court here declined to extend the claim-of-right self-help defense to one who is recovering another person's property, other than when assisting as an aider and abettor. "We conclude that the trial court properly refused the claim-of-right instruction because (defendant) did not act to retrieve the EBT card from Moore and Watson with the belief that *he* had a lawful claim to the card. (Except as in an aider and abettor situation,) (t)he claim-of-right defense is generally limited 'to the perpetrator who merely seeks to effect what he believes in good faith to be the recovery of specific items of *his own* personal property.'" (Italics in original.) The trial court, therefore, did not err in refusing to instruct the jury on the "claim-of-right" defense.

Note: I haven't seen this theory discussed in a long time, so I thought it would be interesting to bring it to your attention. As a law enforcement officer, you need not be overly concerned with such an affirmative defense, it being the defendant's burden to convince a court that it applies. Basically, therefore, you can ignore it in determining whether you have probable cause to arrest. But it is also important that you recognize its existence so that, when it might apply, you can look for, and collect, the necessary evidence (pro and con) to help a prosecutor make an informed decision. For instance, it was noted here that when interviewed by the police, defendant had denied acting as Thomas' agent, stating that "it was all (him)," and that he himself had decided to retake the card without Thomas' encouragement. (See fn. 4.) Had not the police asked the right questions, defendant would have had a stronger argument that he was entitled to a claim-of-right defense as an aider and abettor. Also note that the claim-of-right defense does not require that the property taken actually belong to the defendant, but only that he had a "good faith belief" that it's his property.

***Prolonged Traffic Stops*:**

***United States v. Evans* (9th Cir. May 20, 2015) 786 F.3rd 779**

Rule: Extending a vehicle violation traffic stop beyond the time it take to handle those functions attendant to such a stop constitutes an illegal detention absent the officer developing further information justifying a reasonable suspicion of other criminal activity.

Facts: Detective Blaine Beard, a Washoe County, Nevada, Sheriff's Deputy assigned to the Drug Enforcement Administration (DEA) task force in Reno, received information from two jailhouse informants that defendant was distributing methamphetamine in the Reno-Sparks area. This information was never verified. In the summer of 2013, another informant told Detective Beard that he had traveled with defendant to the Sacramento Valley (in California) on more than one occasion to pick up a load of methamphetamine from a supply source in that area. He also told Beard that defendant was picking up five to ten pounds of meth every two to three weeks, staying at a Super 8 Motel in Sacramento while awaiting delivery, and returning to Reno the next day. The informant also told Detective Beard that defendant had moved from where he was registered, as a convicted felon. The case decision did not discuss whether this informant's reliability was ever established. But Detective Beard believed him. He obtained authorization from a state court judge to obtain "pings" from defendant's cell phone.

In the early evening of July 22, 2013, Detective Beard received GPS ping data showing that defendant's cell phone was leaving Nevada, traveling westbound. Later that night, the cell phone pinged from a parking lot of a Super 8 Motel in Sacramento. At Beard's request, officers with the Sacramento County Sheriff's Office drove by the Super 8 Motel and verified that defendant's car was at that parking lot. Detective Beard set it up with Deputy Brandon Zirkle of the Washoe County Sheriff's Office to intercept defendant when he returned to Nevada. Deputy Zirkle was canine-certified and had his trained drug-sniffing dog, Thor, with him. Deputy Zirkle was instructed to develop his own probable cause in making a traffic stop; i.e., a "wall stop," in order to protect the integrity of the ongoing investigation.

Other DEA agents eventually observed defendant's vehicle traveling eastbound on I-80, about 45 minutes west of Reno. It was 6:37 p.m. Deputy Zirkle was notified and quickly fell in behind defendant. Defendant obligedly committed a couple of traffic infractions allowing Deputy Zirkle to make a lawful traffic stop (the legality of which was not contested). The time was 7:09 p.m. Upon contacting defendant, Deputy Zirkle smelled a "very strong odor of methamphetamine" coming from inside the vehicle. Asked to step out of the car, defendant was told that he made an unsafe lane change. When asked where he was coming from, Defendant responded that he was heading back to Reno from Grass Valley where he had stayed for a couple of days with friends. Deputy Zirkle patted down defendant for weapons, then asked him to wait by the patrol car while he "checked some numbers" (i.e., the VIN number) on defendant's vehicle.

Deputy Zirkle contacted a female passenger in the vehicle who appeared to be "feigning sleep." She also appeared to be very nervous, with her hand shaking and her pulse "racing." This passenger told Deputy Zirkle that they were coming from California where they stayed one night with defendant's friend. Four minutes into the stop (7:13 p.m.), Deputy Zirkle told defendant

that he was not going to issue him a ticket, but that he was first going to run a check for outstanding warrants before letting him go. By 7:20 p.m. (eleven minutes into the stop), the radio dispatcher returned with a clean record check on the car, defendant, and his passenger. Deputy Zirkle decided at that point to also request an ex-felon registration check on defendant, who, in the meantime, had told the deputy that he had a felony conviction. This check entailed inquiring into defendant's criminal history and then determining whether he was properly registered at the address he provided to Zirkle.

While awaiting the results of this check, Deputy Zirkle asked defendant why his passenger had told him that they'd stayed in a motel while in California (which is not what she'd said). Defendant therefore changed his story to having stayed at a motel in Sacramento before driving to a friend's house in Grass Valley. A cover officer, Nevada State Trooper Jason Phillips, had in the meantime stopped to assist, talking with the passenger while Deputy Zirkle dealt with defendant. He told Deputy Zirkle that he smelled the strong odor of marijuana coming from the car, not mentioning the odor of methamphetamine. After this conversation, Deputy Zirkle asked defendant what he had been in prison for. Defendant told him that it was for "counterfeiting."

At 7:28 PM, more than eight minutes after Deputy Zirkle called in the ex-felon registration check, dispatch informed him that defendant had been convicted two times for "drug-related charges," but that he was properly registered. Deputy Zirkle gave defendant a warning, returned his license and paperwork, and shook his hand, and told him that "you're good to go." But then, as a relieved defendant started to walk away, Deputy Zirkle asked defendant if he could ask a few more questions. As defendant walked back to the deputy, Zirkle inquired whether defendant had any contraband in the car, mentioning marijuana, methamphetamine, cocaine, and heroin. Defendant denied having any drugs. Deputy Zirkle then asked for defendant's consent to search the car. Defendant refused to consent. At this point, "[b]ased on everything [he] had seen in the stop," Deputy Zirkle believed he had "reasonable suspicion" to detain defendant longer in order to run Thor around the exterior of the vehicle. Thor was therefore deployed.

The dog alerted on the passenger door at 7:33 p.m.; 24 minutes into the traffic stop. A thorough search of the car resulted in the recovery of some "double-bagged" methamphetamine in crystalline form, marijuana, and crack cocaine, along with an unloaded firearm. Defendant (and his passenger) were indicted in federal court on various drug-related charges, as well as being a felon in possession of a firearm. Defendant's motion to suppress the results of the search of his vehicle was granted by the district court judge, the court finding that this was "a classic subterfuge traffic stop" and that the stop was unduly prolonged. The Government appealed.

Held: The Ninth Circuit Court of Appeal affirmed, but remanded the case back to the trial court for a determination of whether the officers had developed an independent reasonable suspicion to justify the prolonged detention. The Supreme Court authority on this issue is *Rodriguez v. United States* (Apr. 21, 2015) 135 S.Ct. 1609. In *Rodriguez*, it was held that a police traffic stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation, even if that extra time is only "de minimis." For a traffic stop, the rule is that "(b)eyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic]

stop.' Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."

If, during that allowable time period, the officer develops further reasonable suspicion of other criminal activity, then the detention may be extended long enough to investigate the newly developed information. In this case, after completing the warrant check, Deputy Zirkle held onto defendant longer for the stated purpose of doing an ex-felon registration check, which itself took another eight minutes, to insure that the address he was using was the same where he was registered. The Court found that absent independent reasonable suspicion beyond that of the observed traffic violation itself, this extra eight minutes constituted an unconstitutional extension of the time necessary to complete the purposes of the traffic stop. And then Thor didn't alert on the vehicle until some 24 minutes after the initiation of the traffic stop. A dog sniff itself is not part of the recognized "mission" of a police officer during a traffic violation stop. Clearly, unless justified by other information constituting a reasonable suspicion, the discovery of the contraband in the vehicle was made during an illegally prolonged detention. However, because the lower court did not litigate whether there was independent reasonable suspicion justifying the prolonging of the traffic stop, the Court remanded the case to the trial court for further hearings.

Note: Believe it or not, the federal district court, as reported in *United States v. Evans* (Aug. 7, 2015) 122 F.Supp.3rd 1027, held that there was *not* the necessary reasonable suspicion to justify prolonging the detention beyond the running of the warrant check, and that defendant should have been released at that point. The trial court justified its ruling on (1) disbelieving the officers, (2) rejection of the "*Collective Knowledge Doctrine*," and (3) even if the officers were believed, the circumstances were insufficient to constitute a reasonable suspicion. Disbelieving the officers is a judgement call that is tough to get reversed. But ignoring the Collective Knowledge Doctrine is inexcusable.

Under this theory, it has been held that officers working jointly on an investigation are deemed to have the knowledge of whatever each other knew, even if they really didn't. Citing absolutely no relevant authority for rejecting this theory, the trial court merely found that it doesn't apply in this case, failing to even mention defendant's history of transporting drugs as told to Detective Beard by three separate informants, one of whom was talking from personal experience, having gone with him on trips very similar to this one. *Ludicrous*! It's also beyond belief that the odor of dope coming from the car, nervousness of the passenger, and inconsistent stories, is not enough to establish a reasonable suspicion. But aside from this, the lesson learned here is that once you're done with a traffic stop, unless you've found more reasons to hold the vehicle's driver longer, you have to either let the guy go or seek his voluntary submission to remaining at the scene. That much is clear.