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:**

"*Wouldn't you know it! Brain cells come and brain cells go, but FAT cells live forever*."

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ADMINISTRATIVE NOTES:

WARNING; Spam E-mail: Some unscrupulous person just (this morning; May 22, 2019) put out an e-mail purportedly from me or my publisher from a "gmail" account, saying "*Hello User: Thank you for subscribing Legal Updates. Please Signup with legal Updates to get access of the awesome data*." It then provides a box for you to click on that says "*Visit Our Site*." The poor English and misuse of upper case letters is in the original. *DO NOT CLICK ON OR RESPOND TO THIS MESSAGE*!!! It obviously is not from me or my publisher, and will no doubt lead to bad things if you respond to it.

Arresting Trespassing Solicitors: I had an interesting call from a gentleman the other day who complained to me that he has been arrested on several occasions for trespassing under circumstances where he was doing nothing more than hawking his wares and espousing his political views in front of shopping mall big box stores in various Orange County and other Southern California locations. As of yet, none of his arrests have led to criminal charges being filed, which is not a surprise. After telling him I do not provide legal advice to non-law enforcement, I suggested to him that he seek his own legal counsel and consider a declaratory relief-type civil lawsuit. But more to the point, I've long been of the opinion that for you, as a law enforcement, to allow shopping center security or store managers to persuade you to make arrests in situations similar to this caller's, or to allow a citizen's arrest, is a mistake on your part. Your cases are not getting filed. That's simply because California's trespass statutes are not written to cover shopping mall solicitors. And more importantly, what law is out there is unmanageably vague as to what such persons are allowed to do or not do in shopping malls and similar public locations, and under what circumstances. A resolution of the issues in such cases inevitably depends upon an evaluation of the totality of circumstances; a problem that is best evaluated by a civil court in an evidentiary hearing. This requires the offended store or shopping mall to take it upon themselves (as opposed to dumping it in a cop's lap) to seek judicial civil injunctive-type relief; not for a law enforcement officer to attempt to guess off the cuff what a court might later decide. You also have to add to this the fact that such occurrences often include certain First Amendment Freedom of Expression issues that only muddy the waters, and that a Court must take into account in determining what "time, place, and manner" restrictions, if any, might apply. The cop on the beat is simply not equipped to take into account all these problems and then correctly decide whether the person is violating the law or not. I have an extensive memo on this and other related issues (entitled "*Constitutionally Protected Expressive Activity*: *Who Ya Gonna Call*?) that is available to you upon request. If you already have this memo, your copy is likely out of date in that I am constantly revising this publication, adding new cases whenever they come out, with the latest version being dated "May, 2019."

CASE LAW:

***Searches Incident to Arrest*:**
***Probable Cause Searches*:**
***Suspicionless Pre-Transportation Searches of the Person*:**
***Odor of Marijuana*:**
***Search Warrants for Residences*:**

United States v. Johnson **(9th Cir. Jan. 9, 2019) 913 F.3rd 793**

Rule: With probable cause to believe a suspect possesses a controlled substance, whether he is arrested first and then searched incident to that arrest or searched first and then arrested, is irrelevant. So long as an officer has probable cause to arrest a suspect for some offense, what the officer in fact arrests him for is irrelevant. Upon arresting a suspect and in preparation for his transportation to jail, a search of that suspect's person is lawful with or without any suspicion to believe the arrestee possesses weapons, contraband, and/or evidence on his person. The warrantless search of a suspect's vehicle in which he was a "recent occupant" is lawful so long as there exists reasonable grounds to believe evidence relevant to the crime of arrest might be found in the vehicle. A search warrant for a drug trafficker's home is lawful when based upon an expert law enforcement officer's opinion that such drug traffickers are known to store their contraband in their homes.

Facts: On August 7, 2015, defendant was stopped for an unspecified traffic violation by Sgt. Clint Simmont of the East Palo Alto Police Department. Sgt. Simmont immediately smelled the odor of burnt and fresh marijuana coming from defendant's car; an odor he recognized from his work patrolling East Palo Alto and having been a member of the San Mateo County Narcotics Task Force. Asked for the registration and proof of insurance for the car, defendant responded that it was a borrowed car and that he did not have the requested documentation. When asked if he was sure, defendant opened the glove box as if to check. In the glove box, Sgt. Simmont could see some empty plastic bags and pill bottles. Defendant stuck his hand into the glove box, but it appeared to Sgt. Simmont that he was only feigning to look for the vehicle's documentation. About then Sgt. Simmont, having done a warrant check, was told by the police dispatcher than defendant had previously been arrested for parole violations, indicating that he had been convicted of a felony. Defendant was asked to step out of the car. Sgt. Simmont searched defendant's person. As he did so, it was discovered that defendant was wearing a bulletproof vest.

Defendant was arrested for being a felon in possession of body armor. When backup arrived, defendant's car was searched. The search resulted in the recovery of a loaded handgun, a pill bottle containing acetaminophen/hydrocodone pills, plastic bags, scales, and concentrated cannabis. Johnson was transported to a police station where a second search of his person revealed additional controlled substances. About seven months later, defendant was the subject of a separate narcotics-related investigation. Detective Christopher Sample was working with a confidential informant (CI) who told the detective he could buy cocaine base from a man, known to him as "Lamar," simply by calling him at a specified telephone number. Two controlled buys within 10 days of each other were arranged by the CI calling Lamar and then meeting him at a

specified location where cocaine was purchased. After the first buy, Detective Sample stopped the seller—who turned out to be defendant—for a minor traffic violation. Defendant's driver's license listed the house address where defendant had been stopped. After this traffic contact, defendant was observed entering that same house. Defendant was followed after the second buy and again observed entering the same residence.

Ten days later, on March 16, 2016, Detective Sample applied for, and received, a search warrant for defendant's residence and vehicle. In the affidavit, Detective Sample described how, based upon his training and experience, he knew that drug traffickers who sold cocaine base often purchased their wares in bulk quantifies, storing it in their cars and homes. Executing the warrant, the search of defendant's residence resulted in the recovery of a firearm, ammunition, scales, plastic bags, pills, and cocaine base. Defendant was subsequently indicted in federal court on nine counts of drug and firearms offenses based upon the August and March incidents. After defendant's motion to suppress evidence was denied, he was convicted of seven of the alleged offenses and sentenced to prison. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. On appeal, defendant alleged various Fourth Amendment search issues as to both incidents.
The August, 2015, Traffic Stop and Probable Cause Arrest: When a law enforcement officer has probable cause to search an individual, he may, as a general rule, search the person first and then arrest him (i.e., a "probable cause" search), or make the arrest based upon that same probable cause and then search him incident to the arrest. It is irrelevant whether the arrest or the search occurs first. When the search occurs first, however, the only rule is that probable cause to arrest must exist at the time of the search, and the arrest must follow immediately thereafter "during a continuous sequence of events." It is also a rule that the mindset of the arresting officer is irrelevant as to the cause of the arrest. This means that it is generally irrelevant that the officer believed he was arresting a suspect for one offense when in actuality he had probable cause to arrest him for a different offense. The officer's state of mind matters only to the extent that probable cause must be based on "the facts known to the arresting officer at the time of the arrest." Therefore, "so long as the search (of defendant's person) was incident to and preceding a lawful arrest—which is to say that probable cause to arrest existed and the search and arrest are roughly contemporaneous, . . .—the arresting officer's subjective crime of arrest (i.e., what the officer thinks he's arresting the suspect for) need not have been the crime for which probable cause existed."

Here, Sgt. Simmont arrested defendant for being a felon in possession of body armor. Whether or not this was a valid arrest is irrelevant in that the sergeant did in fact have probable cause to arrest him for transporting marijuana, based upon the odor of fresh and burning marijuana coming from his car. Also, as an alternative theory allowing for the search of defendant's person, it was noted that when an arrested person is to be transported (i.e., a "custodial arrest" as opposed to a cite-and-release situation), the fact that there is a pending transportation is justification for a thorough search of his person for weapons, evidence, or contraband. Such a suspicionless search is justified by the need to insure that he is not armed (i.e., for "officer's safety") and to prevent the introduction of contraband or evidence into the jail. It is not necessary for the People to prove under this theory that there is in fact any seizeable items on his person. As for the search of defendant's vehicle, it is a rule that whenever an arrestee is a recent

occupant of a vehicle, that vehicle is also subject to a warrantless search if the subject has yet to be secured (i.e., handcuffed and placed into a patrol car), *or* (as an alternative ground) when there exists "reasonable (grounds) to believe evidence relevant to the crime of arrest might be found in the vehicle." (*Arizona v. Gant* (2009) 556 U.S. 332, 343.) Based upon the odor of marijuana emanating from his car, the Court found *Gant's* alternative grounds to be justification for searching defendant's car without a search warrant.

The March, 2016, Warrant Search of Defendant's Residence: Search warrants are presumed to be valid. Nevertheless, defendant argued that there was no probable cause justifying the search of his residence; i.e., that contraband would be found in his home. It has been held, however, that "an officer's 'first hand (sic) knowledge' of the defendant's possession of controlled substances, combined with the officer's 'experience with other drug dealers,' provided the 'substantial basis' for the magistrate to determine that probable cause existed." (*United States v. Terry* (9th Cir. 1990) 911 F.2nd 272, 276.) In this case, Detective Sample averred that he had twice observed defendant distribute cocaine to the CI within 20 and then 10 days of obtaining the search warrant. ("Staleness," therefore, was not an issue.) He also determined that the residence searched was in fact where defendant lived. This, added to Detective Sample's expert opinion that drug traffickers can be expected to secret their supply of illegal drugs in their homes (as well as their vehicles), was sufficient to provide the necessary probable cause to believe that cocaine would be found in defendant's home (which, indeed, it eventually was).

Although defendant also challenged the CI's credibility, the Court found this issue to be "beside the point." The necessary probable cause in the warrant affidavit was based upon Detective Sample's observations of the two controlled buys, and not upon the CI's credibility. To the extent that the CI's credibility needed substantiation, this was supplied by the officers watching the controlled buys and their verification that the CI did in fact receive cocaine base from defendant on the two observed occasions. Lastly, defendant complained that the affidavit to the warrant failed to describe the size of the cocaine rocks defendant sold to the CI. The Court found this omission to be irrelevant to the magistrate's decision to authorize the warrant. The search warrant in this case, therefore, was valid.

Note: I found the Court's findings relative to the August, 2015, search of defendant's person to be unnecessarily confusing, mixing various legal justifications into a single analysis. The Court's decision would have been much easier to understand (and brief) if it had simply noted that the search of defendant's person can be justified on any one of at least three separate legal grounds; i.e., (1) incident to a custodial arrest, (2) with probable cause to believe contraband would be found on his person, *and* (3) pre-transportation to jail. I've always found it helpful to separate the various legal theories justifying Fourth Amendment intrusions (i.e., an arrest or search) into totally separate boxes, noting that while there is often a certain amount of factual overlap, finding any one of the described legal theories to apply is enough on its own to uphold an arrest or a search. Prosecutors need to use every available legal theory that might be applicable to the situation at hand and toss them all against the wall in the hope that at least one of them sticks. That's all it takes to find an arrest or a search to be lawful.

It should also be noted the Court here found that the odor of marijuana, *all by itself*, was enough to provide the necessary probable cause for an arrest and/or a search of both defendant's person

and his vehicle. In this case, there was also the plain sight observation of some empty plastic bags in defendant's glove compartment, but the Court did not mention this as an additional fact that had to be added to the odor of burnt and fresh marijuana to give the officer probable cause to believe defendant was illegally transporting the substance. Not all judges are comfortable with the argument that the odor alone constitutes probable cause, at least to a properly trained officer, even though there's good case law to this effect.

Also note the fact that the arrest and search in this case occurring before marijuana's legalization in California is irrelevant to the issue of the Court's probable cause findings in that it has been held that just because recreational and medical marijuana is now legal in California does not detract from an officer's probable cause to believe that a suspect may still be violating California's marijuana restrictions, such as those contained in H&S Code § 11362.3. (See *People v. Fews* (Sept. 24, 2018) 27 Cal.App.5th 553: The warrantless search of a motor vehicle, done in order to verify compliance with California's marijuana regulations, is lawful when based upon probable cause to believe that the vehicle may contain evidence of additional marijuana. Briefed at *California Legal Update*, Vol. 23, #11, Sept. 28, 2018.)

Lastly, California case authority similarly upholds the search of a drug trafficker's residence under the theory that that's where they are going to store their drug supplies. Such a warrant is often referred to as a "*Cleland warrant*," based upon the California Supreme Court's decision in *People v. Cleland* (1990) 225 Cal.App.3rd 388. But this rule applies to "drug traffickers" only. Arresting someone for simple possession (i.e., "personal use") of a controlled substance will *not* justify (at least by itself) the issuance of a *Cleland* warrant. (*People v. Pressey* (2002) 102 Cal.App.4th 1178.)

***Accessing Private Social Media Accounts*:**
***The California Electronic Communications Privacy Act and Voluntary Consent as an Exception*:**

People v. Pride **(Jan 10, 2019) 31 Cal.App.5th 133**

Rule: Posting videos on social media, even when restricted to "friends" and where the posting is automatically deleted within a given time period, waives any expectation of privacy a person might have in that posting. The fact that an undercover police officer falsely poses as a "friend" is irrelevant. The California Electronic Communications Privacy Act includes an exception to governmental restrictions on accessing such information; i.e., when the one posting a video voluntarily consents to others viewing it.

Facts: On the night of May 25, 2017, our victim-to-be—referred to by the Court simply as "D.C."—was visiting San Diego (they didn't say from where) when he became lost on the trolley near Petco Park, a few blocks from San Diego's downtown business district. At the time, D.C. was distinctively attired in red Jordan shoes, a hat, a gold chain, and two (yes, "*two*") gold watches. He was also carrying his handy iPad and had some $2,700 and a credit card in his pocket. Thus dressed in a manner as if to say, "*somebody rob me*," D.C. nonetheless decided that it would be easier to abandon the trolley and take a cab to his hotel. Hitting the streets, D.C. came across some nice looking fellow, presumably similarly attired. Being a friendly guy, D.C.

told his new best friends that he was looking for some marijuana and suggested that they all go to his hotel room where they could *partee*. (I'm embellishing, if you haven't figured that out yet.) All too happy to accommodate D.C., they led him to a nearby parking lot where three more men was standing. Still oblivious to his pending fate, apparently ignoring the ever-present gangster tattoos, attire, and mannerisms (still embellishing), D.C. asked again about obtaining marijuana. In response, one of the men (later identified as defendant Pride) yelled out; "*This is West Coast*!" (or ". . . *West Coast Crips*"), as all five of them piled on, hitting and kicking a stunned D.C.

In the process of the beating, D.C.'s Jordans, hat, iPad, money, credit card, and gold watches (yes, again, "*two*" gold watches) were all taken. Most significantly, D.C. lost his very hip, one of a kind, gold chain. Calling 9-1-1, the call being recorded at 10:29 p.m., San Diego Police immediately launched a search for the gangsters. Most significantly, D.C. was able to describe one of his assailants as having a distinctive scar along his jawline. The following morning, a SDPD gang detective assigned to the case recognized D.C.'s description of the West Coast Crip gangster with the distinctive scar as probably being defendant. The gang detective later testified that he had been monitoring the West Coast Crips' social media accounts in general, and defendant's in particular, for over three years. The particular social media account viewed in this case was restricted to others identified as "friends" of the defendant. Postings on this account were automatically deleted within a short period of time; after having been viewed by those for which the video was intended; i.e., those defendant accepted as "friends."

Although invoking the "official information privilege" when testifying about how he got into defendant's restricted social media account without "hacking" into it, it was determined through his testimony that the detective was able to get accepted by defendant as a "friend." Defendant, of course, was unaware that this particular "friend" was "not really all that friendly," but rather a law enforcement officer. Logging onto defendant's social media account on the morning of May 26th, the detective observed a video posted by defendant earlier that same morning showing him wearing a chain resembling the one taken from D.C. and with defendant bragging; "*Oh, check out the new chain, dog. Ya feel me? Ya feel me? All on this thang*." The detective was able to preserve this video before it was automatically deleted. D.C. was shown a still photo from the video showing the chain, with defendant's face blocked out so as not to prejudice any later identifications. D.C. identified the gold chain as his. A photo lineup later shown to D.C. provided a tentative (i.e., his "*gut*" told him) identification of defendant as the one who took the gold chain. A search warrant was obtained for defendant's residence and executed a few days later.

Recovered from defendant's home was D.C.'s credit card and a jacket defendant was wearing in the video. Defendant, still wearing D.C.'s gold chain, was arrested. Charged in state court with having committed a robbery, with gang and various prior conviction allegations attached, defendant's motion to suppress the social media video and other evidence was denied. With the video being introduced into evidence and played for the jury, defendant was convicted. Defendant appealed from his 21-year sentence.

Held: The Fourth District Court of Appeal (Div. 1) affirmed (except to remand the case to the trial court for resentencing; see Note, below.). The primary issue on appeal was whether the social media video was lawfully obtained. In particular, defendant argued that for the detective

to portray himself as "friend," gaining access to his restricted social media account without a warrant violated the Fourth Amendment. Defendant's argument centered on the fact that the social media platform he used was intended for private messages, rather than messages open to the general public. He also argued that his expectation of privacy in those messages was heightened by the fact that the social media platform he used would automatically delete messages after they had been viewed by the intended recipients. The Court was not impressed. Whether or not one's expectation of privacy has been violated by the government depends upon whether the privacy right claimed by the defendant is one that "society is prepared to recognize as reasonable." If it is, then the Fourth Amendment requires that a warrant, supported by probable cause, be obtained. Whether or not the privacy right claimed by defendant—e.g., in the posts he made in his restricted social media account—is one that "society is prepared to recognize as reasonable," is an issue of first impression in this jurisdiction. But other jurisdictions have ruled that no such right to privacy exists. Citing cases from other jurisdictions as its authority (e.g., *Everett v State* (Del. 2018) 186 A.3rd 1224, 1236; *United States v. Meregildo* (S.D.N.Y. 2012) 883 F.Supp.2nd 523, 526; *Palmieri v. United States* (D.D.C. 2014) 72 F.Supp.3rd 191, 210.), the Court ruled that there is no Fourth Amendment violation when an undercover officer poses as a "false friend" and obtains incriminating information from a suspect's social media page.

As noted by the Delaware Supreme Court (*Everett v State*, *supra*.): "[T]he Fourth Amendment does not guard against the risk that the person from whom one accepts a 'friend request' and to whom one voluntary (sic) disclosed such information might turn out to be an undercover officer or a 'false friend.' One cannot reasonably believe that such 'false friends' will not disclose incriminating statements or information to law enforcement—and acts under the risk that one such person might actually be an undercover government agent. And thus, one does not have a reasonable expectation of privacy in incriminating information shared with them because that is not an expectation that the United States Supreme Court has said that society is prepared to recognize as reasonable." Also, as noted by a lower federal court in the State of New York (*United States v. Meregildo*, *supra*.): [The defendant's] legitimate expectation of privacy ended when he disseminated posts to his 'friends' because those 'friends' were free to use the information however they wanted—including sharing it with the Government. [Citation.] When [the defendant] posted to his [social media] profile and then shared those posts with his 'friends,' he did so at his peril." As noted by the Fourth District Court of Appeal, these cases are consistent with the long-standing rule (in other contexts) that "the Fourth Amendment affords no protection for voluntary communications with individuals who are secret government informers or agents.

The Fourth Amendment does not protect 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' (Citations omitted)" The Fourth District found the same principles to apply to defendant's situations. It further found that the fact that defendant chose a social media platform where the posts automatically disappear after a given period of time did nothing to "heighten" his expectation of privacy. Lastly, the Court rejected defendant's argument that the *California Electronic Communications Privacy Act* ("CalECPA;" P.C. §§ 1546 et seq.)), which restricts the government's access to electronic communication information from a service provider, prevented the prosecution's use of the video. As noted by the Court, subdivision (a)(3) of section 1546.1, specifically provides that:

"This section does not prohibit the intended recipient of an electronic communication from voluntarily disclosing electronic communication information concerning that communication to a government entity." Also, P.C. § 1546.1(c)(4) provides that a government entity may access electronic device information by communicating with the device with "the specific consent of the authorized possessor of the device." The Court found these exceptions to the CalECPA's restrictions applicable to the instant case because the detective *did not* seek to compel, without his consent, access to defendant's electronic device or information on his device. Rather, defendant voluntarily granted access to his social media account to "friends," which included the undercover detective. As such, the CalECPA was not violated. The video was therefore properly introduced into evidence.

Note: Great case for the good guys, with some good solid authority (albeit from out of state) supporting the Court's conclusions. This case is also valuable for noting the fact that the *California Electronic Communications Privacy Act*, which was obviously intended to restrict governmental access to one's private electronic devices and information, is *not* applicable because of defendant's voluntary consent to allow (or encourage) his "friends" (including undercover cops posing as friends) to see what a pseudo-macho piece of crap he really is, by posting his self-promoting ranting and ravings on the Internet.

The remanding of this case back to the trial court, by the way, had nothing to do with the issues discussed here. Rather, a reconsideration of defendant's well-earned and appropriate 21-year prison sentence was made necessary because of recently enacted amendments to P.C. §§ 667 and 1385, instigated by California's current "soft on crime" Legislature, giving the trial court discretion to strike the previously mandatory five-year sentence enhancement for having a serious prior felony conviction on his record.

***Prolonged Traffic Stops*:**
***Demanding Identification from Vehicle Passengers*:**

United States v. Landeros **(9th Cir. Jan. 11, 2019) 913 F.3rd 862**

Rule: Prolonging a traffic stop beyond the time it takes to accomplish the mission of the stop is a Fourth Amendment violation, and illegal. Demanding identification from a passenger in a motor vehicle stopped for a traffic violation, without at least a reasonable suspicion to believe the passenger is himself engaged in criminal activity, is illegal.

Facts: During the early morning hours of February 9, 2016, Officer Clinton Baker of the Pascua Yaqui Police Department (who, in this capacity, has authority to enforce both the Pascua Yaqui tribal code and Arizona state law) stopped a vehicle near the Pascua Yaqui Indian Reservation for speeding. Upon approaching the vehicle's driver, Officer Baker noted that aside from the driver himself, there was a person (eventually identified as Alfredo Landeros, the defendant) in the right front passenger seat and two young females in the back. Officer Baker immediately noticed the odor of alcohol coming from the car. The driver was cooperative, providing his identification without incident and apologizing for speeding. The women in the backseat appeared to be younger than 18 year of age which, if they were, would make them in violation of a 10:00 p.m. curfew for minors. When asked for their identification, they both complied,

proving themselves to be 21 and 19 years old, respectively. Defendant, however, did not appear to be underage (he was not). Nonetheless, Officer Baker "commanded" that he also provide identification. Officer Baker's reason for this was that it was "standard for (law enforcement) to identify everybody in the vehicle." Defendant refused to identify himself, informing Officer Baker that he was not required to do so.

After defendant declined to provide identification a second time, Officer Baker called for backup. Upon the arrival of Officer Frank Romero, defendant was asked for identification again, and again he declined. Because defendant was not being "compliant," he was told to exit the car. He initially declined this command as well, but, after repeated requests, eventually did get out of the car. From when first asked for identification until he finally got out of the car, "several minutes" (the exact time was not recorded) was expended during which the traffic citation for speeding was not getting written. When defendant finally got out of the car, Officer Baker saw for the first time pocketknives, a machete, and two open beer bottles on the floorboard by the front passenger seat. Defendant was arrested for possessing an open container (Ariz. Rev. Stat. Ann. § 4-251), for failure to provide his true full name (Ariz. Rev. Stat. Ann. § 13-2412(A)), and for refusing to comply with the directions of a police officer. (Ariz. Rev. Stat. Ann. § 28-622(A)). Section 13-2412(A) specifically provides: "It is unlawful for a person, after being advised that the person's refusal to answer is unlawful, to fail or refuse to state the person's true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime."

Section 28-622(A) provides: "A person shall not willfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic." (The legality of a custodial arrest for the open container violation was not discussed because defendant was never actually charged with this offense.) Defendant was immediately handcuffed upon exiting the car. Asked for consent to search his person, defendant agreed. Upon searching him, Officer Romero found (among other stuff not relevant to anything here) six bullets in his pockets. Defendant was indicted in federal court for being a felon in possession of ammunition. (18 U.S.C. §§ 922(g)(1), 924(a)(2)). He filed a motion to suppress the ammunition, which was denied. Defendant pled guilty and was sentenced to 405 days in prison. He appealed.

Held: The Ninth Circuit Court of Appeal reversed. Two factually and legally intertwined issues were discussed by the Court: (1) Prolonged traffic stops and (2) whether a passenger in a vehicle stopped for a traffic violation can be required identify himself. The U.S. Supreme Court in *Rodriguez v. United States* (2015) [135 S.Ct.1609] provided the controlling authority for unlawfully prolonged traffic stops. In *Rodriguez*, the U.S. Supreme Court held that "[a]n officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." In other words, during a traffic stop, an officer may inquire about other unrelated criminal activity, but he or she must confine such unrelated inquiries to within the time it takes to accomplish the mission of the traffic stop; e.g., to address the traffic violation, check the driver's license and the vehicle's documentation, and to attend to any related safety concerns that an officer might reasonably have under the circumstances. Absent a reasonable suspicion to believe that there's criminal activity afoot beyond the traffic

stop itself (whether developed before or during the traffic stop), anything the officer does that takes longer than the time it would have taken to accomplish the mission of the traffic stop is likely to be held to be illegal. Evidence recovered during an unlawfully prolonged traffic stop is subject to suppression under the Fourth Amendment, no matter how minimal (or "di minimis") the prolongation of the traffic stop. "(T)he critical question is whether the check prolongs—*i.e.*, adds time to—the stop." Prior to *Rodriguez*, some courts had held that a di minimis prolongation of a traffic stop was okay so long as "reasonable." *Rodriguez* has overruled those cases, even if only by implication. (The Court discussed its own prior case that okayed a di minimis prolongation of a traffic stop—*United States v. Turvin et al.* (9th Cir. 2008) 517 F.3rd 1097—"abrogating" it in the process.)

In this case, the Court "assumed" that prolonging the traffic stop was okay when Officer Baker took some extra time to ask the two women in the backseat for identification in that he apparently had (without really deciding the issue) a reasonable suspicion that they were underage and in violation of a local curfew ordinance. But in defendant's case, the only reason Officer Baker asked him for identification was that it was "standard for (law enforcement) to identify everybody in the vehicle." "A demand for a passenger's identification (absent a reasonable suspicion that he is involved in any criminal activity) is not part of the mission of a traffic stop." Prior to having defendant step out of the vehicle, Officer Baker did not have any reasonable suspicion to believe he was involved in any criminal activity. The Court rejected the Government's argument that Officer Baker was allowed to check defendant to see if he was unlawfully consuming alcohol in the car, based upon the odor of alcohol the officer could smell. The Court rejected this argument because Officer Baker did not claim that that was his intent in asking defendant for identification, but rather that is was "standard" practice to identify everyone in the car. The government also contended that defendant's refusal to identify himself "provided reasonable suspicion of the additional offenses of failure to provide identification and failure to comply with law enforcement orders," violating Arizona law (see above).

The law is clear, however that a person is not required to identify himself absent a reasonable suspicion to believe he himself is involved in criminal activity. (See *Kolender v. Lawson* (1983) 461 U.S. 352.) As noted above, there was no such suspicion in this case. Also, Ariz. Rev. Stat. Ann. § 13-2412(A) (see above) did not make it a criminal violation for defendant to refuse to identify himself in that the statute requires that he be lawfully detained at the time, which he was not. And Ariz. Rev. Stat. Ann. § 28-622(A) wasn't violated in that demanding identification is not a "lawful order," as the section requires. The United States Supreme Court has previously upheld a "must identify" statute where there was a reasonable suspicion that the defendant was engaged in criminal activity (*Hiibel v. Sixth Judicial District Court of Nevada* (2004) 542 U.S. 177.), and reversed a conviction involving a similar statute where there was *no* reasonable suspicion of criminal activity. (*Brown v. Texas* (1979) 443 U.S. 47.) In this case, the Court found that there was no legal justification for demanding identification from defendant. "There was therefore no justification for the extension of the detention to allow the officers to press (defendant) further for his identity." As such, prolonging the traffic stop, even for a mere few minutes, was illegal. In that the ammunition found in defendant's pocket was a product of this unlawfully prolonged detention, it should have been suppressed.

Note: Note that Arizona has a statute making it illegal for a lawfully detained person to refuse to identify himself. Nevada has a similar statute (as noted in *Hiibel*), as does Texas (as noted in *Brown*). California has no such statute. The closest we have in California is P.C. § 148(a)(1); delaying or interfering with an officer in the performance of his or her duties. But there is case authority for the argument that the refusal of a *detained* person to identify himself is not a violation of section 148. (*In re Chase C.* (2015) 243 Cal.App.4th 107, 117-118; although it is a 148 violation for an *arrestee* who refused to identify himself during the booking process; see *People v. Quiroga* (1993) 16 Cal.App.4th 961. *See also In re Gregory S.* (1980) 112 Cal.App.3rd 764, 776, where the Court "assume(d) for the sake of discussion" that a violation of Penal Code section 148 may not be premised on a refusal to answer questions, *including a request for identification*. See also *Martinelli v. City of Beaumont* (9th Cir. 1987) 820 F.2nd 1491.) So it is questionable in California whether even a detained person is required to identify himself. I would think, however, that we can still make out a case for a P.C. § 148(a)(1) violation when a detained person's refusal to identify himself does in fact "delay" an officer in the performance of his duties, with specific proof of how much of a delay the suspect's lack of cooperation caused. (See *State v. Aloi* (2007) 280 Conn. 824.)

Also note that the U.S. Supreme Court has held a passenger in a motor vehicle stopped for a traffic violation is in fact detained, merely by virtue of being in a lawfully stopped vehicle. (*Brendlin v. California* (2007) 551 U.S. 249.) Although *Brendlin*, on its face, appears to deal only with the right (i.e., "*standing*") of the passenger to challenge the legality of the traffic stop (*Brendlin v. California*, *supra*., at pp. 256-259.), and arguably was not intended as authority for the continued detention of a passenger who might choose to walk away, the U.S. Supreme Court subsequently ruled quite clearly that "(t)he police need not have, in addition, cause to believe any occupant of the (lawfully stopped) vehicle is involved in criminal activity" to justify a continued detention of the passenger for the duration of the traffic stop. (*Arizona v. Johnson* (2009) 555 U.S. 323.) Neither *Brendlin* nor *Johnson* was mentioned by the Ninth Circuit in this new case, and the consequences of such a *Brendlin* detention of a passenger in a motor vehicle has not been discussed in any other subsequent case other than *Johnson*. It is likely, however, that when it does become an issue, a Court is likely to find that a *Brendlin* detention of a passenger in a motor vehicle is only for purposes of officer safety, and not meant as justification for demanding the person's identification. On that issue, we'll just have to wait and see.