The California Legal Update

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

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THIS EDITION'S WORDS OF WISDOM:

"*The brain is a wonderful organ; it starts working the moment you get up in the morning and does not stop until you get into the office.*" (Robert Frost)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***AB 392: Amended P.C. §§ 196 & 835a, and the Use of Deadly Force*:** Governor Newsom signed AB 392 (along with SB 230) into law on August 19, tightening up the standards for an officer's use of deadly force (through the use of firearms or otherwise) from what is "*reasonable*," to what is "*necessary*," under the circumstances (along with providing important training on the new standards). If you've read my stuff over the years, you know I've periodically criticized some officers for being too quick to shoot, preaching that just because you can lawfully shoot and kill a person under a given set of circumstances doesn't mean, with the training police officers receive in subduing a resisting suspect, that it was really necessary for you to do so. In other words, while using deadly force may have been "*reasonable under the law*" (E.g., see *Tennessee v. Garner* (1985) 471 U.S. 1.), doesn't mean it was really "*necessary under the circumstances*" to use deadly force. *Well*, under the category of "*be careful what you wish for*," a "*necessary*" standard is now the law in California, or at least it will be as of January 1, 2020. In my own defense, I have to say I never advocated that a "*necessary use of force*" standard be imposed on law enforcement by statute, but rather that we leave it to local law enforcement agencies to establish some common sense polices (as some have) and that individual officers also use their own good common sense (as most do). But now it's the law, like it or not. You're going to receive the necessary training (pursuant to SB 230) on the new standards, but if you want to get a preview of the new revised P.C. §§ 196 and 835a use of deadly force rules, I can send you the verbatim statutes as they will be appearing in your 2020 Penal Code.

***Red Flag Statutes*:** For anyone who is interested, I have compiled a list of California's so-called "*Red Flag Statutes*;" i.e. P.C. §§ 18100, et seq.—on the books since January 1, 2015 (as amended in 1/1/2019)—that deal with court petitions by "*immediate family members*" and/or law enforcement for "*gun violence restraining orders*" and the eventual confiscation of firearms from individuals who are a danger to themselves or to others. These relatively new statutes are in addition to the long-existing Welfare and Institutions Code sections dealing with the confiscation of firearms and other deadly weapons from mental patients, per W&I §§ 8102 and 8103, which I have had outlined for years in "*Mental Patients and Weapons*." As for the Red Flag Statutes, if you look at them closely, you will notice the serious lack of any case law (except for one Attorney General opinion) on the use of these statutes. I read somewhere that this is because the Red Flag Statutes are seldom used. In discussions with others (who happen to be card-carrying NRA members and vehement Second Amendment rights advocates), I'm told that Red Flag statutes are a bad idea in that any attempt whatsoever to water down our right to keep and bear arms violates the Second Amendment ("*slippery slope*," and all that). Others argue that Red Flag Statutes (along with more thorough background checks and restrictions on assault weapons) might help to curb the current and seemingly endless trend towards more and more mass (school, church, mall, theater, etc.) shootings. If you're interested in these outlines (i.e., "*Red Flag Statutes*" and "*Mental Patients and Weapons*," which I have conveniently combined into one, given their similarity in purpose), I will send it all to you via e-mail upon request. Oh, and if you're wondering (or even care), I am one of those "card-carrying" NRA (life) members and a strong

advocate of the Second Amendment, believing that restricting the ownership, carrying, and use of firearms by honest responsible citizens does little or nothing to help take the guns out of the hands of crooks, gangsters and mass murderers. But I also happen to believe that there is room for compromise, making me a supporter of the vigorous use of the Red Flag Statutes as well as W&I §§ 8102 and 8103. That's my position, and I'm sticking to it.

CASE LAW:

Residential Entries and Community Caretaking:
***Residential Entries and Exigent Circumstances*:**
***Protective Sweeps*:**

People v. Ovieda **(Aug. 12, 2019) __ Cal.5th __ [2019 Cal. LEXIS 5947]**

Rule: The Community Caretaking Doctrine does not apply to law enforcement entries into residences. Exigent circumstances also does not allow such a warrantless entry absent specific articulable facts justifying the finding of such circumstances. Protective sweeps are unlawful absent some reason to believe that someone is inside a residence who might constitute a danger to the officers or others.

Facts: On June 17, 2015, Santa Barbara police officers responded to a 9-1-1 call from members of defendant's family who had been alerted by another—Trevor Case—that defendant was suicidal; threatening to kill himself. Arriving at defendant's home, five officers set up a perimeter around the house. It was determined that while defendant's family and a roommate were not at the house, Case and his wife—Amber Woellert—neither of whom lived there, were inside with defendant. An emotional ("distraught and tearful") Case came outside and told officers that defendant was talking about committing suicide and had attempted it before. Prior to the arrival of the police, defendant had armed himself with a pistol and then a rifle, but Case and Woellert had been able to subdue and disarm him each time. Case had rounded up the pistol, two rifles, and some ammunition, and took it all to the garage. Case told the officers, however, that he did not know if there were any more guns in the house.

With the officers present, Case called Woellert and had her bring defendant outside. Defendant was handcuffed and searched. In talking to defendant, he denied being suicidal or that there were any guns in the house. With emotions running high at the scene, and unsure whether or not there might be others inside who were armed, injured, or in need of aid, two officers entered the house to do a "protective sweep to secure the premises." As justification for making this non-consensual entry into the house, Santa Barbara Police Officer Corbett later testified that based on his experience, each situation is different and requires consideration of multiple possible factors, and that "safety of persons is paramount." At that time, with emotions running high, and despite having been told by Case that there was no one else inside, he and the other officers were "unsure if all parties were accounted for." Officer Corbett further testified that at the time they did not have a clear picture of what had caused the situation.

As a result, they "felt duty bound to secure the premises and make sure there were no people inside that were injured or in need of assistance." Officer Corbett also testified, however, that Case had told him that all the guns he was aware of had been taken away from defendant, and that only he, his wife (Woellert), and defendant had been in the house. As far as the officers knew, there was no evidence that any domestic violence had been involved or that anyone else was inside. However, with "talk of multiple weapons in the house," and with the situation being "emotional and dynamic," he and Officer Bruce had decided to enter the house. Officer Corbett also testified, however, that they had no intent to search for criminal conduct and that they had "no reason to believe any other criminal conduct was afoot." Upon making entry (apparently without ever asking defendant for consent), an "overwhelmingly" odor of marijuana was noted. Numerous items related to "marijuana cultivation and concentrated cannabis production" was observed in plain sight, as well as large quantities of guns, ammunition, and drug-producing equipment. The recovered weaponry included a submachine gun and a rifle with a long-range scope. No search warrant was ever obtained.

Defendant was charged in state court with manufacturing a controlled substance, importing an assault weapon, and possessing a silencer and short-barreled rifle. Defendant filed a motion to suppress the evidence recovered from his home. In response, the prosecution relied upon the "community caretaking" exception to the search warrant requirement to justify the warrantless, non-consensual entry. Ruling that the officers were not required to accept Case's word that he had removed the firearms and noting that they would be "subject to criticism" if something untoward had occurred because they did not conduct a sweep for others who might pose a danger or need assistance, the trial court denied defendant's motion. Defendant pled guilty and appealed. A divided Court of Appeal (Second District, Div. 6) upheld the search under the community caretaking exception to the warrant requirement. (*People v. Ovieda* (2018) 19 Cal.App.5th 614, 619–623.) The California Supreme granted review.

Held: The California Supreme Court unanimously reversed. In so ruling, the Court discussed two possible exceptions to the Fourth Amendment search warrant requirement, finding (1) that the "Community Caretaking" Doctrine does not apply in the residential-entry context, and (2) the circumstances of this case did not justify an "exigency" entrance of defendant's home:

1. *Community Caretaking*: The Second District Court of Appeal, in its split 2-to-1 decision in this case, ruled that the co-called "community caretaking" doctrine allowed for the officers' entry into defendant's home, and that the officers' plain sight observations made during this entry justified the denial of defendant's suppression motion. The California Supreme Court disagreed. The California Supreme Court previously applied the community caretaking doctrine to the warrantless entry of one's home in the case of *People v. Ray* (1999) 21 Cal.4th 464. *Ray*, however, was a "plurality" decision only (i.e., three out of seven justices, with three others upholding the entry under an exigency theory, and one justice dissenting, arguing that neither theory applied). The Court overruled *Ray* here, noting that there's no authority for applying community to residential entries. This is important because to justify an entry and search under the community caretaking theory, it is only necessary to show that the officers' entry was for the purpose of providing some kind of aid unrelated to a criminal investigation; i.e., either to render emergency aid, or to preserve life or property. Also, it is not necessary to prove that a police officer had "probable cause" to believe that someone inside needed help, but some lesser

standard the Court referred to as a "less stringent showing." Per the Court, under the community caretaking rule; "the question is: 'Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?'" However, in reviewing the cases that talk about the community caretaking doctrine, the Court noted that there is no U.S. Supreme Court authority for applying this rule to entries of a residence.

The U.S. Supreme Court has applied this theory to vehicles only (e.g., *Cady v. Dombrowski* (1973) 413 U.S. 433.) And in so doing, part of the justification for the community caretaking rule as it applies to vehicles is that vehicles (as opposed to residences) are heavily regulated and have an expectation of privacy significantly less than that applicable to residences. The need to enter one's residence to render aid has traditionally come within the "exigency" exception to the search warrant requirement. To allow the police to enter a residence under the "less stringent" community caretaking rules, based on no more that the mere possibility someone inside may need an officer's help, only serves to dilute the appropriate standards required for exigencies. *People v. Ray*, to the extent that it applies the community caretaking doctrine to residences, therefore, is overruled. The warrantless entry into defendant's home was lawful only if exigent circumstances justify the entry.

2. *Exigent Circumstances*: The Fourth Amendment requires that police officers have a search warrant in order to lawfully enter a person's home, absent an exception to this rule. Exigent circumstances, when they exist, is one such exception. The People argued in this case that the officers, not knowing whether there might be others inside that needed the officers' help, or that all the firearms had been secured, had such an exigency. The Court disagreed. In order to justify an exigency, the People have the burden of proving that there existed "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." In this case, all the officers knew was that defendant had been threatening suicide and that his friend, Trevor Case (with the help of his wife), had secured any known firearms in the garage. Defendant had been brought outside without incident and taken into protective custody. Case and his wife were similarly outside.

The officers were unable to articulate any facts supporting their fears that there might be anyone else inside who either needed the officers' help or who might destroy evidence. There was no evidence, therefore, to support the officers' belief that an exigency, justifying a warrantless entry, existed. This being the case, a "protective sweep" also was not justified. Protective sweeps require some reason to believe that someone remains inside who might constitute a danger to the officers or others. Here, everything the officers knew failed to support the belief that anyone remained in the house. The fact that it was known that defendant's guns were still in the house (i.e., the garage), and not knowing if all his guns had been secured, also did not justify a warrantless entry. With defendant taken into custody, there was no danger of him possibly gaining access to those firearms. And with evidence (from Case and his wife) that defendant had been threatening suicide, the officers had the option of taking him for a mental health evaluation (per W&I Code §§ 5150(a), & 5260), and then obtaining a search warrant for the seizure of his firearms from his home. (P.C. § 1524(a)(10), W&I Code § 8102(a)) The officers' immediate warrantless entry therefore was unlawful. The evidence they observed (and smelled) in plain

sight upon making such an entry, and any evidence subsequently recovered, should have been suppressed.

Note: The Court in its reasoning forgets about the fact that when the officers made the decision to enter defendant's home to do a "protective sweep" for others in the house and to insure that the guns were in fact secured, everything was still in a state of confusion. Trevor Case was emotional as he tried to relate to the officers what had been going on. Defendant was denying everything Case was telling them. The officers at that point, in the face of conflicting stories, were faced with the proposition of doing nothing, and (as the trial court pointed out) being "'subject to criticism' if something untoward had occurred because they did not conduct a sweep for others who might pose a danger need assistance," or erring on the side of caution and going in to see what was in fact going on. Everything I'd ever read about the "community caretaking doctrine" seems to apply in this type of situation, despite the Court's conclusions here. The California Supreme Court is telling the officers, however, that they should have done nothing except take the time to get a W&I § 8102 warrant. One can fully understand the officers' reluctance to follow this advice. When I'm asked for advice from officers about what to do in similar situations, I have consistently counseled immediate action, feeling strongly that it is better to have some evidence later suppressed by a court than to walk away only to find out later that someone died or was seriously injured because I elected not to enter and see for myself what is going on. So, from a pure legal standpoint, I cannot disagree with the conclusions reached in this case. But from a more practical *real world* standpoint, I strongly disagree with the Court's rulings in this case.

***Miranda and the Reinitiation of an Interrogation*:**
***Admissibility of Un-Mirandized Victim/Witness's* (*later Co-Defendant's*) *Statements*:**

People v. Anthony **(Mar. 8, 2019) 32 Cal.App.5th 1102**

Rule: Statements relevant to motive and intent obtained during an interview of an in-custody suspect who had previously invoked, even when it was the suspect who reinitiated the questioning, are inadmissible absent a waiver of the suspect's *Miranda* rights.

Facts: A criminal street gang known as "North Side Oakland" (NSO) is a long-time rival with another gang known as the Berkeley Waterfront gang (Berkeley). On April 23, 2009, members of the Berkeley gang shot at Stephon Anthony (one of the four defendants in this case), Nguyen Ngo, and Bao Nguyen. Nguyen Ngo was hit by the gunfire and died at the scene as a result. NSO gang member Jermaine Davis was the suspected shooter. Less than a month later, on May 16th, co-defendants Anthony, Samuel Flowers, Anthony Price and Rafael Campbell—all NSO gang members—ventured into the heart of the Berkeley gang's claimed territory looking for vengeance. With Anthony driving his gold Cadillac, the four defendants came across 25-year-old Charles Davis walking on Allston Way near 10th Street at about 6:30 p.m. Although not a gang member himself, Charles was Jermaine Davis' brother. As they approached Charles, Flowers exited the Cadillac and, using an AK-47-type assault rifle, repeatedly shot Charles, hitting him from head to foot and killing him. Seventeen shell casings were later found at the scene.

In celebration, Anthony drove the car around in circles, doing "donuts" as another co-defendant made celebratory exclamations while a third held a second rifle aloft, as in triumph. Flowers then returned to the car, which sped away. Moments later, police responding to calls from witnesses found Charles's dead body lying in the street. Other responding officers saw Anthony's gold Cadillac traveling at a high rate of speed from the scene and gave chase. At the tail end of a five to seven minute high-speed chase, the Cadillac entered a busy intersection at Aileen and Martin Luther King, Jr. Streets, in Oakland, at about 60 miles per hour. The Cadillac collided with a Mazda, killing its driver; Todd Perea. The two cars spun out of control, hitting a third car. These three cars then slid into a pedestrian—Floyd Ross—killing him as well. Anthony and Price were taken into custody immediately.

Flowers and Campbell fled the scene on foot only to be arrested later. The four defendants were charged in state court with the murders of the three victims and with multiple murder special circumstances and gang-related allegations alleged, plus other related charges. At trial, certain admissions made by Anthony to Oakland detectives were admitted into evidence over his objections (as discussed below). Convicted of the first degree murder of Davis, and the second degree murders of Perea and Ross, and the jury finding true all the other special circumstances and allegations, all four defendants were sentenced to prison for life without parole. Defendant's appealed.

Held: The First District Court of Appeal (Div. 2) affirmed. Defendant Anthony was interviewed by police three times—April 23rd, following the murder of Nguyen Ngo; May 17th, shortly after his arrest in the instant case, and on May 18th—giving rise to the principle issue on appeal; i.e., the admissibility of some incriminating statements he made during these interviews.

The April 23rd Interview: Immediately after the murder of Nguyen Ngo, Defendant Anthony was interviewed by Oakland Detective Sergeant Sean Fleming. Because defendant was considered to be a co-victim and a witness in that case, he was not *Mirandized*. In that interview, Defendant admitted to a deadly rivalry between his gang—NSO—and the Berkeley Waterfront gang. E.g.; "*We got problems with Berkeley*," and: "*We funking with Berkeley, always. I don't know why*." Defendant also made statements indicating that he was likely to retaliate. These statements were admitted at Defendant's trial in the instant case as evidence of motive and intent for the May 16th murder of Charles Davis.

The May 17th Interviews: The in-custody defendant Anthony was initially contacted by Berkeley Detective Sergeants Christian Stines and Jim Counts shortly after Davis' murder and his (defendant's) arrest. When advised of his *Miranda* rights and given a *Miranda* waiver form, defendant wrote "*No*" after the line on the form asking if he wished to speak with the detectives. Feeling this to be ambiguous (or maybe wishful thinking), the detectives sought clarification, assuming he wished to continue the interview by the fact that he did not specifically say that he wished to invoke and because he continued to answer questions. Five minutes into the interview, however, defendant finally said; "*I wish I had my attorney present*," and "*I don't have nothing to say to you*." The detectives ended the interrogation at this point. Apparently, nothing incriminating had been said during this short 5-minute interroation.

Shortly thereafter--still on the 17th—Detective David Marble of the Berkeley Police Department contacted the still in-custody defendant Anthony in order to photograph his injuries. Knowing that defendant had already been questioned (and presumably that he had invoked), and in response to defendant's question, Detective Marble told defendant that he was being charged with three counts of murder. To this defendant responded: "*I didn't mean to kill those people. Man, I didn't mean for this to happen. They wouldn't stop chasing me. Why wouldn't they stop chasing me*?" Detective Marble also told defendant he knew his friend Ngo had been killed three weeks earlier and that he (defendant) had everything to do with it. To this, defedant responded that "he was thinking about talking to detectives about the murder of Bao's brother (Ngo)." Marble told him to let the jail staff know if he decided to do that.

The May 18th Interview: Apparently defendant did in fact ask to speak with the Oakland detectives investigating the April 23rd murder of Nguyen Ngo (or at least his above comments were interpreted as such) because Oakland Detective Sergeant Fleming obtained a judicial removal order so they could interview him at the Oakland Police Station. Defendant sat waiting for the detectives in an interview room at the Oakland P.D. station for almost five hours, "for the most part" (whatever that means) under restraints (handcuffs?). After defendant was fed dinner, Detective Fleming (and his partner, Sgt. Jones) finally came into the room to question him. The detectives immediately acknowledged that he had invoked his right to counsel and that he was the suspect in the Berkeley murder case from two days earlier. Detective Fleming told defendant, however, that they could not, and would not, discuss that other case.

Then without readvising defendant of his *Miranda* rights, and after telling him that they were told that he (defendant) wanted to speak with them but without asking him what he wanted to talk about, Detective Fleming launched immediately into a discussion of Nguyen Ngo's murder from April 23rd. The interview was recorded despite defendant's request that it not be, saying that he wanted to remain "anonymous." Details of the April 23rd murder were elicited from defendant, including his identification of Jermaine Davis (although he knew him by another name) as being involved. The taped interview was later played to the jury over defendant's objection as evidence of motive and intent in the killing of Charles Davis.

The Trial Court's Ruling: The trial court ruled that defendant's statements to the Berkeley detectives on May 17th (including those made to Detective Marble while photographing defendant's injuries) were inadmissible due to defendant's clear invocation of his right to remain silent and to the assistance of counsel. But it admitted into evidence defendant's statements to Oakland Detective Fleming from both the April 23rd and the May 18th interviews.

The District Court of Appeal's Ruling: There was no argument that the April 23rd interview, where defendant at that time was no more than a victim and a witness, was admissible, being relevant to the issues of motive and intent. Not being a suspect, there was no need for a *Miranda* admonishment or waiver at that time. The Court ruled that it was error, however, to admit into evidence defendant's May 18th interview with Oakland Detectives Fleming and Jones. In reaching this conclusion, the Court noted a number of factors that should have been considered, rejecting the People's argument that defendant, at that time, was again merely a victim and a witness to the April 23rd murder which is all the detectives intended to talk about. Considering the circumstances of the May 18th interview, it was first noted the manner by which an

incarcerated suspect is brought to the interview room is relevant. (*People v. Macklem* (2007)149 Cal.App.4th 674.) In this case, defendant was brought to the Oakland Police Department by a court order and left in an interview room while restrained for almost 5 hours. And while it was apparently at defendant's request that he be there, he was never even asked what it was he wanted to talk about, the detectives immediately launching into a discussion about his relationship to the April 23rd murder victim. It was also a factor that during the interview, defendant's request that the session not be recorded was ignored. The Court also rejected the People's argument that defendant had reinitiated this interrogation of his own accord despite his earlier invocation, pointing out that under such circumstances a suspect in a criminal case should first be readvised of his rights in order to determine whether he is indeed desirous of changing his mind about his previous invocation. The Court also rejected the People's argument that the detectives' intent was to do no more than continue their earlier discussion of the Ngo murder, noting that they should have understood that their questions were reasonably likely to elicit incriminating responses, providing proof of defendant's motive and intent for the Davis murder.

"In other words, the record indicates that when they questioned Anthony on May 18, Fleming and Jones had reason to believe Anthony was involved in a May 16 killing committed in gang-related retaliation for the April 23 shooting of Ngo. . . . Yet they did not advise Anthony of his *Miranda* rights and pursued lines of questioning that called for Anthony to give responses that bore directly on his motive and intent and were thus incriminating. . . . The People's contention that these lines of questioning were not reasonably likely to elicit an incriminating response from Anthony lacks merit." The May 18th interview, therefore, should not have been admitted into evidence. However, given the abundance of other evidence of defendant's guilt, including his similar admissible comments made during the April 23rd interview, the Court determined the error to be harmless beyond a reasonable doubt, and therefore upheld his conviction.

Note: It is a general rule that once an in-custody suspect invokes his right to the assistance of counsel (as opposed to remaining silent, noting that defendant here arguably invoked both rights), he is off limits to *all* questioning on *all* cases so long as he remains in custody. (See *People v. Sims* (1993) 5 Cal.4th 405, 440. Also see, however, *Maryland v. Shatzer* (2010) 559 U.S. 98, for the 14-day limitation to this rule.) An exception to this rule is when the suspect himself reinitiates the questioning. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.) Anthony, in this case, while in custody for the Davis murder and after invoking his *Miranda* rights, apparently asked to talk to the Oakland detectives investigating the earlier Ngo murder case.

What the Oakland detectives did *not* do in this case was (1) readvise defendant of his rights and obtain a free and voluntary waiver, and (2) find out exactly what it was he wanted to talk about. While readmonishing a suspect who has waived once, and then invoked mid-interrogation, but then indicates a desire to resume questioning, is not legally required (see *People v. Duff* (2014) 58 Cal.4th 527, 554-555; *People v. Jackson* (2016) 1 Cal.5th 269, 340-341.), defendant here never did waive his rights. And even if he had, it is certainly smart to get a new "express" (as opposed to an "implied") waiver in that it is the People's burden to prove that reinitiating an interrogation was the defendant's idea, and that it is really what he wants to do. Here, to the detectives' credit, they really only wanted to talk about Ngo's murder and not the one for which Anthony was in custody, and specifically told him so. But it is perhaps a little naive to think that given the

known obvious connection between the two murders, trying to limit the renewed discussion to just one of the two, without getting into intent and motive evidence relevant to the other, limiting the discussion to the one case just isn't going to happen. Also, on another topic, the Court gets into a "*Sanchez* error" discussion (*People v. Sanchez* (2016) 63 Cal.4th 665.) where the California Supreme court held that a gang expert, for instance, can no longer testify to specific incidents as a part of his or her expert opinion absent independent proof of those incidents as a basis for his or her expert conclusion that the defendant was acting in support of a criminal street gang (relevant to establish a pattern of criminal gang activity, necessary in order to support a P.C. § 186.22 gang enhancement); a Sixth Amendment, Right to Confrontation issue. (See *California Legal Update*; Vol. 21, #8; July 24, 2016.) The Court here, in its discussion, provides an excellent description of how *Sanchez* changed the rules for allowable evidence a "gang expert" is allowed to testify to in justifying his or her opinion as to a defendant's gang affiliation. (See pp. 1129-1131.) To the extent that the trial court here violated *Sanchez* (decided well after this case was tried) was also ruled to be harmless error.

***Consensual Encounters vs. Detentions*:**

People v. Chamagua **(Mar. 29, 2019) 33 Cal.App.5th 925**

Rule: Stopping to talk to a person, and even asking about possible criminal activity, does not necessarily convert a consensual encounter into a detention so long as a reasonable person under the circumstances would have felt that he was free to leave.

Facts: Uniformed Sheriff's Deputy Brian Gorski and his partner were patrolling in their marked patrol car at about 10:45 p.m. on February 8, 2018, when they observed defendant walking down the street. When defendant saw the deputies, he immediately (and suspiciously) changed directions and walked into an apartment complex driveway while shoving an unknown object into his pocket. Pulling their patrol car "just slightly" into the driveway alongside defendant, the deputies got out of their car. Deputy Gorski asked defendant: "*Hey, how are you doing*? *What's your name*?" And then getting to the point: "*Do you got* (sic) *anything illegal on you*?" Apparently having been taught by his parents that lying to the police is a bad thing, defendant immediately confessed: "*I have a pipe on me.*" Deputy Gorski searched defendant and retrieved a pipe from his pocket which contained traces of crystal methamphetamine. Perhaps a bit surprised how easy this was, Deputy Gorski then asked defendant: "*Hey, you know, anything else illegal that you have on you*?" Defendant responded: "*Yeah, I have a bunch of meth on me*," after which—also having been taught by his parents to be polite—he apologized (as if an apology would make this nightmare all go away). Searching defendant further resulted in the recovery of a ping-pong-sized ball of crystal meth inside a transparent green container; i.e., the type (as testified to by Deputy Gorski) "commonly used as, like, a marijuana container." Defendant was also found to have $162 in his wallet.

After waiving his *Miranda* rights, defendant confessed to being on his way to party with some girls and smoke some meth. Admitting that he had a "problem" with meth, defendant confessed to selling the stuff to support his habit. Defendant was arrested. Charged in state court with possession of methamphetamine with the intent to sell, defendant filed a motion to suppress.

Finding defendant's somewhat inconsistent version of the facts not to be credible, the trial court denied the motion. Defendant appealed.

Held: The Second District Court of Appeal (Div. 8) affirmed. The Court first found the initial contact between the deputies and defendant to be no more than a "consensual encounter." Not threatening to use force nor making any commands, but rather merely asking questions, does not constitute a detention. Detentions require that the officers have a reasonable suspicion of criminal activity before stopping and questioning someone. Consensual encounters—where a reasonable person in the suspect's shoes would have felt free to walk away—do not require any suspicion. Law enforcement officers doing no more than merely asking questions without any show of official authority constitutes nothing more than a consensual encounter. Per the Court: "Asking questions, including incriminating questions, does not (by itself) turn an encounter into a detention." The Court further noted that; "(p)eople targeted for police questioning rightly might believe themselves the object of official scrutiny. Such directed scrutiny, however, is not a detention."

Based upon the above, the Court rejected defendant's argument that the deputy's questions to him were sufficiently accusatory to convert the contact into a detention. The Court also held that the contact being at night was irrelevant ("Sundown does not remove the power of free consent."). And lastly, the Court rejected the defendant's argument that the officers' car had blocked his way into the apartment complex, noting that the only evidence of this was the defendant's testimony which the trial court had rejected as not credible. Therefore, assuming for the sake of argument that turning away from the officers while sticking something into his pocket is not sufficient reasonable suspicion to allow for a detention (which it probably was not; see *Illinois v. Wardlow* (2000) 528 U.S. 119.), the Court held that defendant was not detained up until that point when he admitted to possessing a pipe. Once defendant admitted to having "a pipe," upon being asked if he had anything illegal on him, Deputy Gorski had the necessary reasonable suspicion to detain him, and the necessary probable cause to conduct a search for the pipe defendant had admitted he had (legally termed as a "*statement against penal interest*," and generally considered to establish probable cause by itself). Defendant's motion to suppress was therefore properly denied.

Note: The Court, in upholding the initial search of defendant's person, erroneously used the term "*reasonable suspicion*" (which I corrected, above, to "*probable cause*") when it stated that Deputy Gorski could lawfully search him upon defendant admitting that he had a pipe. If we're going to use the correct legal terms, you can't search someone based upon a mere reasonable suspicion. Full probable cause is, of course, the correct legal standard when attempting to justify a search of one's person; i.e., going into his pockets, etc. (as opposed to merely patting him down for weapons). But more to the point of this case, what you should take away from this decision is that you can contact individuals on the street, and even make inquiries about whether or not they are doing something illegal, without converting the contact from a consensual encounter into a detention. But you have to keep it low key and non-accusatory. A consensual encounter *may* be inadvertently converted into a detention, or even an arrest, by any (or a combination of) the following; The circumstances which a court will take into account in determining whether a person is detained include (but are not limited to):

- The threatening presence of several officers;
- The display of a weapon by an officer;
- Some physical touching of the person of the citizen;
- The use of language or tone of voice indicating that compliance with the officer's request might be compelled;
- The time and place of the encounter;
- Whether the police indicated the defendant was suspected of a crime;
- Whether the police retained the defendant's documents; *and*
- Whether the police exhibited other threatening behavior.

(*People v. Linn* (2015) 241 Cal.App.4th 46, 58; see also *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *People v. Parrott* (2017) 10 Cal.App.5th 485, 493.) If you cross this line by engaging in any (or a combination of) the above, as vague as these standards may be, before developing at least a reasonable suspicion that the person is, was, or is about to be, involved in criminal activity, then it's going to be held that you illegally detained (or arrested) the person. And remember also: It's not what you are subjectively thinking that's relevant (absent you somehow conveying this thought process to the suspect), nor even what the suspect himself is thinking. It's what a reasonable person under the circumstances would be thinking: Would a *reasonable person* under the same or similar circumstances feel that he or she is free to leave?" (*Wilson v. Superior Court* (1983) 34 Cal.3rd 777, 790.) The more heavy handed, the more accusatory, and the more "in your face" you get, the more likely some court is going to second guess you and rule that you have detained the suspect.