SJ Crime Quarterly

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In re Chase C. (2015) ___ Cal.App.4th ___

http://www.courts.ca.gov/opinions/documents/D067787.PDF

In the Forest Ranch area of San Diego, deputies responded to a report of high-school age suspects selling drugs at a middle school. Deputy Hill quickly found and detained the suspects, Hewgley and McBride.

He asked them to sit on the curb. McBride complied, but Hewgley refused. Hewgley resisted physically, and Hill placed him in the patrol car waiting for backup.

Some other high-school-age kids were with the suspects, and Hill told them they could leave. Most did not, including Chase. As Hewgley refused to cooperate, Chase encouraged the two to challenge their detention and to be uncooperative.

When backup arrived, they handcuffed all the minors on scene. Trying to identify the minors detained, they initially met with some refusal, encouraged by Chase. But they cooperated when they were told they'd be brought to the station and their parents called.

Chase continued to refuse to identify himself, claiming he was "pleading the Fifth." Deputies then placed Chase under arrest. He didn't physically resist, but continued to object and continued to encourage the others to "Don't say shit."

The juvenile court found that Chace had violated PC 148. The Court of Appeal reversed.

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What Are The Probation Search Terms?

People v. Romeo (2015) 240 Cal.App.4th 931

http://www.courts.ca.gov/opinions/documents/A140146.PDF

In November of 2012, Officer Miller of the Martinez Police Department, with seven other officers, went to the house shared by Randy Mills and Julie Bolstad. Mills and Bolstad, as probationers with search-waiver conditions, were the targets of the search. Officer Miller testified no particular crime was suspected and that the probation status of Mills and Bolstad was the sole reason for the search. To satisfy the court as to Mill's probation-status information, Miller testified that he knew Mills and Bolstad and had just confirmed their probation status with the county's computer system.

Bolstad and Romeo were in the house when the officers arrived, as were Bolstad's brother and father. As is their department's protocol, the officers handcuffed them all and removed them from the house before searching. Mills was found about a block away and was brought to the house during the search.

Entering the attached garage, Officer Miller saw that it was arranged as a living quarters. It had a couch and a desk with a computer and TV on it. On top of the desk he saw a baggie containing about two and a half grams of methamphetamine and a small amount of marijuana.

After Mirandizing Bolstad, Mills, and Romeo, Romeo said he lived in the garage and admitted the drugs were his. Examining Romeo, they found him to be under the influence of a stimulant.

Charge with possession and being under the influence, Romeo moved to suppress the evidence. He argued that Officer Miller had insufficient information to justify the probation search, and further argued that his detention was unlawfully prolonged. The magistrate denied the motion at his preliminary hearing. He renewed the motion in superior court by filing a PC 995 motion, which the superior court denied.

He entered a plea admitting the possession charge, in return for the dismissal of the under-the-influence charge. Then he appealed.

One issue litigated involved the "*Harvey-Madden*" rule. The rule stems from two cases, *People v. Harvey* and *People v. Madden*. They establish that, although an officer may obtain his justification for a detention, search, or arrest through "official channels"—that is, information that comes from a law-enforcement source, to counter a suppression motion, there must be proof that the underlying cause originated elsewhere. In other words, when faced with a *Harvey-Madden* challenge, it is insufficient for an officer simply to testify that he pulled a car over based on information from dispatch. The prosecution must also show that the information from dispatch originated outside the department.

Romeo argued that relying on the county's computer to establish that Bolstad and Mills were on searchable probation failed the *Harvey-Madden* test.

The AG argued that a 2009 U.S. Supreme Court case, *Herring v. United States*, established that, for Fourth Amendment purposes, reliance on a computer database cannot result in evidence suppression if the officers' reliance was "objectively reasonable." *Herring*, thus, nullifies the *Harvey-Madden* rule in relation to electronic information.

The Court of Appeal expressed some doubt as to that argument, but left it for another day. Rather than address *Herring*'s effect on *Harvey-Madden*, the Court of Appeal said the computer information authorized the search through established hearsay rules.

But knowledge that the two were on searchable probation was not enough. No evidence was presented as to what locations were open to search or what items officers could search for. Probation searches are grounded in the probationer's advance consent. But, because there was no evidence as to the scope of consent, the Court of Appeal reversed.

Reasonable Belief Suspect on PCRS

People v. Douglas (2015) 240 Cal.App.4th 855

http://www.courts.ca.gov/opinions/documents/A140279.PDF

Detective Miles Bailey of the Richmond Police Department was investigating recent gun violence in Richmond. Riding as a passenger in a patrol car, he saw Lathel Douglas behind the wheel of a parked car. He recognized Douglas, having arrested him in 2011 for a firearms offense.

He also knew Douglas was on Postrelease Community Supervision (PRCS), since part of his assignment was to regularly review the local database, Automated Regional Information Exchange System (ARIES) to see who was on probation, parole, or PRCS. He didn't immediately confirm this before approaching Douglas because there wasn't time.

As Bailey approached Douglas on foot, Douglas attempted to drive off. Bailey ordered him to stop. Then Douglas put his car in reverse. Bailey again told him to stop. When Douglas stopped, Bailey ordered him out of the car.

For his own safety, Bailey pinned Douglas with the car door. After a short struggle, Bailey handcuffed Douglas. As he was cuffing him, Douglas dropped a .380 pistol on the floor of the car.

Douglas was charged with a violation of PC 29800 and moved to suppress evidence. He argued the gun was discovered as a result of an unlawful detention. At the suppression hearing, Douglas's probation officer testified that, at the time of the search, Douglas was on PRCS. The trial court denied the motion, finding that Douglas's furtive movements in the car raised a reasonable suspicion that he was in violation of his probation conditions or was engaged in criminal activity. After admitting the charge and an enhancement, Douglas appealed.

The Court of Appeal focused its analysis on the PRCS search condition and divided the issue into four questions. First, must an officer who knows a suspect is on PRCS have specific knowledge of the search condition prior to a search or seizure? Second, how much "advance knowledge" of PRCS justifies a search or detention? Third, was there substantial evidence that Detective Bailey had sufficient knowledge of the PRCS status? Finally, was Detective Bailey's belief that Douglas was on PRCS objectively reasonable?

Unlike probation searches, parole searches are not considered searches justified by consent. Instead, because th parolee is virtually in custody, he has fewer privacy expectations, and a parole search may be justified by "a proper supervisory purpose or other law enforcement needs."

Also, probation search conditions can vary widely. For instance, some expressly authorize suspicionless searches. For others, courts may insert a "reasonable cause" requirement.

For parole searches, however, there is no such variation. The officer need only know that the suspect is on parole. This is because the search authorization for parolees is statutory (PC 3067). By statute, every parolee is subject to the same search condition.

Thus, for probation searches, it may be important whether the officer is aware of the nature of any search condition. For parole searches, however, the officer need only know that the suspect is on parole.

Just like for parole, every person subject to PRCS is subject to a statutory search condition. PC 3465 states, "Every person placed on postrelease community supervision, and his or her residence and possessions, shall be subject to search or seizure at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer. " The Court of Appeal rejected Douglas's attempt to have courts add a "reasonable cause" precondition. To detain and search someone on PRCS, an officer need only know that the person is on PRCS.

Douglas further attempted to add a requirement that the searching officer be absolutely certain of the PRCS status with up-to-the-minute information. The Court of Appeal instead reasoned that the officer need only have an "objectively reasonable belief" in the PRCS status, based on a totality of the circumstances.

In Douglas's case, Detective Bailey's belief was objectively reasonable. The current search was in May of 2013, and Bailey specifically recalled having arrested Douglas for a "firearms-related-offense" in 2011. Also, Bailey had seen Douglas's name on a list of probationers and/or parolees subject to search within the previous two months.

Continued, *PRCS*, page 5

Chemical Test Refusal Does Not Violate PC 148

People v. Valencia (2015) 240 Cal.App.4th Supp. 11

http://www.courts.ca.gov/opinions/documents/JAD15-13.PDF

Patrolling in Riverside about 1:30 a.m., CHP Officer Brian Seel saw a car run a red light, make a wide turn, and then straddle the lane lines. He pulled the car over. The driver, Valencia, would only roll his window down a couple of inches to talk to Officer Seel, even though Seel six times asked him to lower it more.

In talking with the driver, Officer Seel notices several signs that he was intoxicated. With his partner, Officer Sell ordered him 15 times to get out of the car, but Valencia refused. Eventually the partner was able to unlock the doors through an opening in the passenger's window.

The signs of intoxication were even more pronounced, and Officer Seel arrested him.

One charge at trial was a violation of PC 148. Besides the delays in rolling the window down and getting out of the car, the trial court also told the jury that his refusal to submit to a chemical test was evidence of PC 148.

The Appellate Division of Riverside County'superior court reversed. First, the Legislature has not included chemical test refusal within PC 148, instead setting out specific consequences in the Vehicle Code. Second, the Appellate Division said the PC 148 conviction was unconstitutional. It held that there is a Fourth Amendment right to refuse a warrantless chemical test. And it is unconstitutional to punish people for exercising constitutional rights.

But, in that case, wouldn't the enhanced punishment in the Vehicle Code (VC23577) for test refusal also be unconstitutional? No, the Court answered. It applied the "strict scrutiny test" and found that VC 23577 passed constitutional muster. It is "narrowly tailored to serve a compelling state interest."

"Take Me Home" is Invocation

People v. Villasenor (2015) Cal.App.4th

http://www.courts.ca.gov/opinions/documents/C071432.PDF

Villasenor, a 17-year-old Sureño, shot rival Norteños on two occasions about three months apart in North Sacramento. He was convicted of two counts of attempted murder and associated charges.

The Court of Appeal affirmed the convictions, but found there was a *Miranda* violation when detectives questioned Villasenor.

Villasenor was arrested after the second shooting. A Sacramento Police Department detective interviewed him for several hours. After about four hours, he demanded to be taken home. But the detective kept putting him off and asking more questions. Prior to trial, the defendant moved to suppress the statements he made following his demand to be taken home, arguing this constituted an unambiguous invocation of his right to remain silent. The trial court denied the motion, concluding the demand was not an "unambiguous invocation."

The Court of Appeal cited several instances when statements of reluctance to continue do not constitute "unambiguous" invocations of the right to silence. In the California Supreme Court's *Martinez* (47 Cal.4th 911), "That's all I can tell you" was not an invocation. Similarly, in *In re Joe R.* (27 Cal.3d 496), the defendant's "That's all I have to say," taken in context, was equated to "That's my story and I'm sticking to it." Another such example came in *Williams* (49 Cal.4th 405). "I don't want to talk about it" was held not to be an unambiguous invocation.

Even closer was *Jennings* (46 Cal.3d 963). In *Jennings*, the defendant said, "'I'll tell you something right now. You're scaring the living shit out of me. I'm not going to talk. You have got the shit scared out of me,' and 'I'm not saying shit to you no more, man. You, nothing personal man, but I don't like you. You're scaring the living shit out of me. . . . That's it. I shut up.'" Taken in context, these statements were not an unequivocal invocation.

Continued, *Villasenor*, page 5

***PRCS*, from page 3**

Although Detective Bailey could have consulted the local law enforcement database to confirm this, it was reasonable for him not to do so. This was because, as the officers approached, Douglas began to pull away from the curb as if fleeing.

Is Asking For ID a Detention?

People v. Castaneda (1995) 35 Cal.App.4th 1222

People v. Linn (2015) Cal.App.4th

http://www.courts.ca.gov/opinions/documents/A145052.PDF

In Napa, Officer Helfrich on a motorcycle saw the passenger in the car ahead of him flicking ashes out of the window. He thought this was a violation. When the car parked, he parked his motorcycle next to it. As the driver and passenger got out, he spoke with them. He first asked the passenger about flicking the ashes and asked for his ID. He radioed in a records check.

Then he spoke with the driver. He asked for her ID and radioed it in. He had her put out her cigarette and set down her soda.

He then turned back to the passenger and asked further questions, writing ID information on a notepad.

He then returned his attention to Ms. Linn. He smelled alcohol, and asked her about it. She produced a perfume bottle from the car and suggested that he might be smelling the perfume. He examined her for nystagmus and placed her under arrest.

She was charged with driving under the influence, and moved to suppress evidence. The trial court concluded that *People v. Castaneda* required suppression.

Castaneda involved two incidents, only the first being pertinent in *Linn*. An officer found Castaneda seated in an illegally parked car. He told the officer the car was owned by a friend, but he didn't know where the friend was or where he lived. The officer asked for Castaneda's ID and radioed both the car information and information on Castaneda. The incident lasted about eight minutes. Castaneda had an outstanding arrest warrant, and the officer arrested him.

Affirming denial of the suppression motion, the Court of Appeal found that, in light of Castaneda's answers as to car ownership, it was not unreasonable to detain him as the officer wrote the parking ticket and radioed for registration information on the car.

The *Castaneda* Court, however, stated that the detention commenced upon Castaneda providing his ID and the officer beginning to write the citation. At this point, a reasonable person would not feel free to leave.

The *Linn* Court of Appeal rejected the trial court's reading of Castaneda to the extent the trial court found that voluntarily providing an ID *per se* transforms an encounter into a detention. There is no such bright-line rule.

Instead, providing the ID is just one factor to consider in looking at the "totality of the circumstances." Turning to Ms. Linn's case, the Court of Appeal found that there had, in fact, been a detention prior to the officer noticing symptoms of intoxication. Given the totality of the circumstances, a reasonable person in Linn's shoes would not feel free to leave. And since there was no justification for the detention, granting the suppression motion was affirmed.

***Villasenor*, from page 4**

As for Villasenor's statement, the Court of Appeal reached a different conclusion. The demand to "Take me home" was an invocation. Note that, earlier in the interview, the defendant had asked about being taken home, but had not so demanded. There was no suggestion that these earlier statements were an invocation.

Since the detective continued to question Villasenor following the invocation, the trial court erred in refusing to suppress the ensuing statements. Yet, the error was deemed harmless, in view of the other evidence and Villasenor's earlier admissible statements.

Probation Search of Social Media

In re Malik J. (2015) 240 Cal.App.4th 896

http://www.courts.ca.gov/opinions/documents/A143355.PDF

Juvenile, Malik J., was on probation in Oakland as a result of three robberies he committed with two friends of women near a BART station. In one robbery, they stole an iPhone.

He was already subject to a search condition, having already been on probation. The prosecution pointed out that the robberies seemed to have involved the three coordinating their actions, and suggested that the search include electronic devices. Also, since they stole a mobile phone, the electronic devices might be stolen.

The juvenile court ordered that Malik provide all passwords for electronic devices, and ordered that he provide passwords to social media sites. (The court orally stated the condition relating to social media passwords, but this was not on the signed minute order.)

The Court of Appeal disapproved the order that Malik provide his social media passwords. "[T]he threat of unfettered searches of Malik's electronic communications significantly encroaches on his and potentially third parties' constitutional rights of privacy and free speech." The Court of Appeal ordered that the condition be modified to omit the social media password order. Information in such a remote location cannot be considered to be within the minor's custody and control, Further, "Officers should not be allowed to conduct forensic examination of the device using specialized equipment that would allow them to retrieve deleted information . . . They should also first disable the device from any internet or cellular connection."

This opinion troublingly fails to acknowledge the connection between social media and criminal communication. It is fairly common knowledge today that social media sites can provide an important method for criminal communication. Facebook messenger is just one example. Further, the opinion would seem to prohibit law enforcement from accessing deleted phone calls and text messages.

Yet, the opinion acknowledges that the juvenile court had valid concerns that Malik would "use cell phones to coordinate with other offenders."

New Law to Require Search Warrants For Electronic Devices

In October the Governor signed the Electronic Communications Privacy Act (ECPA), which will require search warrants for the search of electronic devices or any other location that might reveal electronic communication. Penal Code sections 1546-1546.4 became effective on January 1st.

To some extent, the law is simply redundant to recent opinions of the U.S. Supreme Court. Yet, certain elements go beyond the Fourth Amendment requirements.

The law excuses any search warrant requirement in the following situations:

- Someone's in danger of death or injury
- To prevent a suspect's flight
- To prevent evidence destruction or alteration
- To prevent witness intimidation
- To avoid "serious jeopardy" to the investigation or undue trial delay
- The consent of a device's "authorized possessor"
- The consent of the device's owner, but only if the device has been reported lost or stolen

The definition of electronic communication is not limited to the contents of the electornic mail, text message, etc. It broadly includes any means of electronic communication and most of the related data that would surround such communications. The statutes also govern the pertinent facts, such as names, dates, locations, IP addresses, etc.

In addition to the search-warrant method, the law also authorizes obtaining electronic information by a legal subpoena and pursuant to the regulations governing wiretaps.

Continued, *ECPA*, page 8

Dispatch Error Does Not Result in Suppression

People v. Wolfgang (2015) 240 Cal.App.4th 1268

http://www.courts.ca.gov/opinions/documents/E059661.PDF

Deputy Yamaguchi of the Riverside County Sheriff's office was sent to a modular home on the report of "suspicious activity." He ran the plate on the trailer at the location and it had been reported stolen.

He knocked on the door of the modular home and Wolfgang answered. He identified Wolfgang, and dispatch informed him that Wolfgang was on probation for brandishing a weapon.

Deputy Yamaguchi searched the home and found a rifle and ammunition on Wolfgang's bed.

Wolfgang was charged with being a felon in possession of a firearm and ammunition. He moved to suppress evidence, arguing that the probation search was unlawful. After the court denied his suppression motion, he took the case to trial. A jury convicted him on both charges, and the court sentence him to serve three years in prison.

At the suppression motion, Deputy Yamaguchi testified that, in his ten years as a deputy, it was his experience that everyone on probation for a charge of brandishing a firearm had a search condition attached to his probation. In fact, he knew of no probation grant for a weapons violation that did not contain a search condition.

Also, at the suppression hearing, there was evidence that the dispatcher had misadvised Deputy Yamaguchi. It turns out that Wolfgang's probation for the brandishing charge had expired a month prior to the search. Nonetheless, there was also evidence that, unknown to the deputy, Wofgang was on searchable probation for another felony.

On appeal, Wolfgang claimed it was error to deny his suppression motion. He argued that the only searched him without knowing of any valid probation search condition

The appeal presented several conflicting principles. First, it is a settled principle that a later-discovered search condition cannot validate a previous search. For instance, as discussed in *People v. Douglas* (see page 3), an officer can only employ a parole or PRCS search condition when the officer has advance knowledge of the suspect's status.

Then there is the good-faith principle. Often, an officer's error, made in good faith, is a condition that weighs against the suppression of evidence. This was the trial court's rationale in denying the suppression motion.

The Court of Appeal, concluded, however, that good faith was not available, in Wolfgang's case. This is because Deputy Yamaguchi's mistake was due to the dispatcher's error. This is due to the "collective knowledge principle." An officer cannot be excused from a mistake made elsewhere in law enforcement.

Other principles were also involved One was the purpose of the exclusionary rule—to deter unlawful police conduct. Another was judicial integrity. Would upholding the search impugn judicial integrity? Also, the Court of Appeal stated concerns for avoiding the gamesmanship of awarding a defendant a windfall for a police error.

They reached the conclusion, "Under the totality of these circumstances, we cannot conclude that the dispatcher and the deputy were collectively at fault for an inaccurate record that resulted in an unconstitutional search or that the deputy's actions constituted misconduct."

***ECPA*, from page 6**

Should law enforcement encounter a device believed to be lost, stolen, or abandoned, warrantless search authority is limited. Officials may only attempt to identify and attempt to contact the owner.

Upon issuing a search warrant for electronic information, a court may attach restrictions. For instance, the court is allowed to appoint a special master to ensure any limitations on the warrant. Issuing the warrant, the court "shall" order that matter not related to the warrant's objective be sealed. Also, the court could issue a protective order that information extraneous to the warrant's purpose be destroyed as soon as feasible.

Of course, the law does not prohibit the release of information to law enforcement with the consent of the intended recipient of any electronic communication. This is in line with Fourth Amendment law concerning the abandonment of any expectation of privacy.

Also, the ECPA does not limit accessing or searching devices seized from prisoners in detention facilities or found where prisoner's might access it. It does not, however, allow searching devices of authorized visitors.

As for information that's been voluntarily released, the law directs that, with certain exceptions, the material is to be destroyed in 90 days.

The law has notice requirements. Upon executing the warrant, law enforcement is to notify the intended target of the warrant. Such notice can be excused, but the affidavit must specifically so request with an explanation.

The law provides for motions to suppress evidence pursuant to PC 1538.5. Note that, since over two -thirds of the Legislators voted for it, it's suppression mechanism is not blocked by the Truth-in-Evidence Rule.

***PC 148*, from page 1**

The Court divided Chase's conduct into three actions.

The first action discussed was telling Hewgley not to cooperate. The Court noted that nothing Chase did impeded the arrest of Hewgley. Objecting to Hewgley's arrest was simply lawful political speech.

The second action was telling the non-suspect minors not to cooperate. This was insufficient to violate PC 148 because the officers were not lawfully performing any duty—since they had no justification for detaining the other minors.

Third was Chase's refusal to provide his own information. While refusing to identify yourself in booking would be a delay, refusing to identify yourself in the field is not.

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News and articles of local law enforcement interest and assistance invited and encouraged.

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