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Contents

Knocking is Attempt

By Jerry Coleman, retired Chief Deputy District Attorney, San Francisco County

(Reprinted from July-August issue of *Did You Know* by the California District Attorneys association)

People v. Zaun (2016) 245 Cal.App.4th 1171

PC 459 states that "[e]very person who enters . . . with intent to commit . . . larceny or any felony is guilty of a burglary." This sounds deceptively simple. But for anyone who has fought off PC 995 motions and tried burglary cases to verdict (especially old career criminal vets like myself), the issues that affect (and infect) burglary cases are as twisted and sharp as the claws on a cat burglar's paw. I've written about the many aspects of burglary law for *Did You Know* for nearly two decades, covering the myriad intricacies of burglary law. Over the years, appellate courts have usually been pretty generous in expanding the reach of burglary law to capture dangerous situations where strangers intrude upon our personal domains. *People v. Zaun* does so with that most intangible of elements—intent.

Defendant Bradley Michael Zaun and his three coperpetrators were a four-man wrecking crew for residential burglaries in the gold country foothills of El Dorado County. Their standard scheme was for one of the men to knock on a house's front door, and if nobody answered, force it open and steal what they could. However, during their fall 2013 spree in and around Diamond Springs, the men encountered two houses where the homeowners answered the knock on the door. Undeterred, the designated knocker had a Plan B: asking if "Tyler" lived there.

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Change Implied-Consent Warning

Birchfield v. North Dakota (2016) ___ U.S. ___

https://www.supremecourt.gov/opinions/15pdf/14-1468_8n59.pdf

By TSRP Phil Rennick

On June 23, 2016, the United States Supreme Court decided *Birchfield v. North Dakota*. The ultimate issue was the constitutionality of criminalizing chemical test refusals. The Court addressed three cases: *Birchfield v. North Dakota*, *Bernard v. State of Minnesota*, and *Beylund v. Grant Levi*.

In *Birchfield*, the defendant was arrested and refused a blood test; he was charged with a violation of the refusal. Similarly, Bernard was arrested and refused a breath test; he too was charged with a violation of the refusal. Beylund actually submitted to a blood test after being given the advisory that there were criminal sanctions for refusal.

The Court held that while a breath test was a valid search incident to arrest, and therefore a refusal could be criminalized, a blood test was *not* a valid search incident to arrest, thus a refusal could not be criminalized. In its analysis, the Court expressed a clear expectation that, absent one of the accepted warrant exceptions, such as exigency or consent, a warrant should be obtained for a blood draw.

The Court found that a breath test does not implicate significant privacy concerns, and since the need for blood alcohol content (BAC) testing is great, the Fourth Amendment *does not* prevent a warrantless breath test as a search incident to arrest. On the other hand, the Court held that "blood tests are significantly more intrusive and their reasonableness as a search incident to arrest must be judged in light of the availability of the less invasive alternative of a breath test."

***Unconscious Drivers**:* Based on *Birchfield* and *People v. Arredondo* (on review in the state Supreme Court), a search warrant is required if the person is unconscious, unless exigent circumstances can be articulated.

The threat of criminal sanctions as set forth in Vehicle Code sections 23612(a)(1)(D) and 23577 is invalid and may be coercive in nature. Therefore, all references to criminal sanctions for refusing a blood test should be removed from the implied consent admonishment.

1. Develop probable cause to believe that the suspect is an impaired driver.

2. Read the admonition pursuant to Vehicle Code section 23612 with these changes:

A. Delete the language of paragraph 4 of the DS 367 that states: *"Refusal or failure to complete a test will also result in a fine and imprisonment if this arrest results in a conviction for driving under influence."*

B. *Note*: This must be done in both the Alcohol and Drug sections.

3. Administer the breath test.

4. If the officer suspects drugs are involved:

A. The officer can request a blood sample. The suspect must actually consent. The burden is on the prosecution to show the consent was freely and voluntarily given. If so, draw the blood in an approved fashion.

B. If the suspect does not actually consent (including being unconscious), the officer must get a warrant or find an exception, typically exigent circumstances. Be sure to check the status of the suspect with regards to probation/parole/PRCS search or test terms. If one of these is true, an exception to the warrant requirement would exist.

Alameda County and Kern County have each developed recommendations on how law enforcement officials should proceed in light of the *Birchfield* holding. Thanks to both counties for permitting them to be linked here.

Dashcam Videos Not *Pitchess* Information

Eureka v. (Humboldt) Superior Court (2016) ___ Cal.App.4th ___

http://www.courts.ca.gov/opinions/documents/A145701A.PDF

In Eureka, police arrested a minor after he was on the ground, having been pushed or having fallen on his own. Much of this was recorded on the dashcams of police vehicles. The prosecution filed a wardship petition, but then withdrew it.

Upon a citizen complaint, Eureka Police Department conducted an internal affairs investigation. Following the investigation, the district attorney charged Eureka Police Sergeant Laird with a misdemeanor violation of PC 149—assault by a law enforcement officer without lawful necessity. Reviewing the videos, experts concluded the charge was unsupported. The prosecution then dismissed its complaint.

Thadeus Greenson, a local reporter who'd written about the incident for two local newspapers, filed a California Public Records Act (CPRA) request for the video recordings. The City denied the request, citing the exceptions of personnel records and investigative files.

Greenson also requested the videos via WI 827, which allows limited releases of juvenile records, which are normally strictly confidential. The justification he provided was to shed some light on the unexplained dismissal of the charge against Sergeant Laird. In a motion to dismiss, Laird had claimed officials were retaliating against him for exercising his free-speech right.

The County argued that the pertinent details had already been made public. Releasing the videos contained nothing in the nature of confidential personnel matters, such as citizen complaints. The video would only invade the privacy of the minor, with no redeeming benefit. The City joined the opposition, stating that Greenson further needed to file a *Pitchess* motion (for court screening of personnel files) for the WI 827 request. Greenson had not done so.

Reviewing the multiple videos in camera, the trial court ordered their release. Rejecting the *Pitchess* objection, the court noted that the videos contained nothing concerning confidential citizen complaints or related investigations.

The court then weighed the principles governing WI 827 disclosure. It looked at the public interest in disclosure, the interest in the transparency of juvenile proceedings, and the minor's interest and/or consent. The court then ordered disclosure with a protective order—directing that the minor's image be blurred and that any data that could identify the minor be retracted or blurred. The court declined to order disclosure of some of the video recordings, finding them to be redundant to the video being disclosed.

The City of Eureka challenged the order with a writ petition to the superior court. When that petition was denied, the City appealed.

When the press seeks access to records of the juvenile court, the court must balance certain interests. In general, the records are confidential. The court must weigh this against the asserted public interest in disclosure. Factored into this, the court must also respect other privileges protecting the information.

The City responded that the records were privileged personnel records. Pursuant to *Pitchess v. Superior Court* , PC [2] 76.[1] , and EC 5487-1045, certain procedures must be followed and the court cannot release such records without making certain findings. The reporter could not escape those requirements, the City argued, by obtaining them through WI 827.

Reviewing the matter de novo, the Court of Appeal ruled that the trial court was correct in finding the videos were not personnel records. Analogizing this to another case involving a CPRA request for records about a Long Beach police shooting, the Court of Appeal ruled that such records only become personnel records when they are generated for officer appraisal or discipline. The City argued that the videos might be used at some unspecified future date for an internal affairs investigation. Such speculation, the Court of Appeal ruled, would not transmute the videos into personnel records. Even if the videos were the "backbone," as the City claimed, of an internal affairs investigation, this also would not cause them to become protected personnel records.

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***Dashcam videos*, continued from page 3**

In sum, the videos were not subject to the laws protecting police personnel records. The Court of Appeal did not address the trial court's application of WI 827 because the City did not raise that issue on appeal. Nor did the city contest whether the videos were subject to the CPRA .

No Qualified Immunity For Shooting

A.K.H. v. City of Tustin (2016) ___ Fed.3d ___

http://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/16/14-55184.pdf

Just after 3:00 p.m., Hilda Ramirez called 911 to report that her boyfriend, Benny Herrera, stole her cell phone. Shortly later, she added that he struck her on the head while they were arguing over the phone. She also stated that Herrera did not use weapon to take the phone, did not carry any weapons, and had not been violent with her before. She told the dispatcher where he could be found, walking in the street.

The dispatcher broadcast this information to Tustin police, adding that Herrera "is shown in house" to be a gang member, he is on parole for HS 11350, and he possibly has a $35,000 traffic warrant.

Officer Miali found Herrera walking on the shoulder of the road. To Herrera's right was a high wall. When the officer activated his light, Herrera put his right hand in his sweatshirt pocket and began to walk and skip backwards toward the patrol vehicle. Officer Miali told him three times over the loudspeaker to "get down." He didn't comply.

Officer Villarreal pulled up beside Herrera and yelled out the window for him to take his hand out of his pocket. Villarreal did not hear Miali command Herrera to get down. When Herrera pulled his hand from his pocket, Villareal shot him twice, killing him. Viewing Miali's dashcam, the shooting occurred less than a second after Villarreal's command.

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What is "Clearly Established"?

Reyes v. Lewis (9th Cir. 2016) ___ Fed.3d ___

https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/17/12-56650.pdf

Reyes, then a juvenile, killed the victim in a drive-by shooting. Riverside Police Department detectives questioned Reyes at his house, explaining that he was free to leave. He was not arrested. The next day, Reyes volunteered to come to the San Bernardino County Sheriff's office to take a polygraph examination. He was told at length that this was voluntary and he was free to stop at any time. He signed a written consent to that effect. This was recorded by video.

At the end of the examination, the examiner told him he'd failed it. After some further discussion, he chose not to continue with the examination and asked that the detectives be called in. Reyes shortly thereafter confessed that he was the shooter.

The detectives drove him to the Riverside police station, about 15 minutes away, where they read him his *Miranda* rights. Reyes again confessed to being the shooter. In questioning him post-*Miranda*, the detectives did not confront him with any contradictions with his earlier statements.

After being charged with first-degree murder, Reyes sought to suppress his statements. The trial court, finding that he had been in custody, suppressed the pre-*Miranda* statements. The court, however, declined to suppress the post-*Miranda* statements.

A jury convicted him of first-degree murder with gang and firearm enhancements.

On appeal, he argued that his *Mirandized* statement was rendered involuntary, having been tainted by his earlier one. Reyes acknowledged on appeal that the earlier *Miranda* violation was not made in bad faith. Thus, he did not argue that law enforcement was using the "two-step" process condemned by the U.S. Supreme Court in *Missouri v. Seibert*. This two-step process is where the police first deliberately violate *Miranda* to obtain a confession or admission. And then they read

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the suspect his *Miranda* rights and have him repeat the statement(s).

The fact that he did not raise *Seibert* is understandable. It was far from settled that Reyes was in custody for the initial statements. Thus, even if there was a *Miranda* violation, finding that it was deliberate seemed out of the question.

The California Court of Appeal affirmed his conviction, discussing and distinguishing *Seibert*. It reasoned that the circumstances were not such that the *Miranda* warning was deprived of its efficacy. Someone in Reyes's shoes, the court reasoned, would still believe he retained a choice about whether to talk.

The California Supreme Court denied review. In his petition for review, Reyes did not mention *Seibert*. The U.S. Supreme Court denied certiorari.

Reyes then filed a habeas corpus petition in federal court. Again, he did not mention *Seibert*. Nonetheless, the District Court raised the *Seibert* issue on its own and ruled the forbidden two-step process was not employed. There was no evidence that law enforcement deliberately used a two-step method and the District Court ruled that the post-*Miranda* statements were voluntarily made. The District Court denied the habeas corpus petition.

Reyes then appealed to the Ninth Circuit. Yet again, he did not cite *Seibert*. The *Seibert* issue was raised by the Ninth Circuit, which requested supplemental briefing on that issue. Without even having the video recordings, the Ninth Circuit found a *Seibert* violation and reversed the denial of the habeas corpus petition.

The government asked for the case to be reviewed en banc, in which the entirety of the Ninth Circuit would review the case, vacating the opinion of the three-justice panel.

The larger court voted to deny rehearing. But Judge Callahan, joined by Judges Bea and O'Scannlain, filed a lengthy dissent.

The Antiterrorism and Effective Death Penalty Act (AEDPA) is a stringent restriction of the ability of federal courts to interfere, via *habeas corpus* petitions, with state court decisions. They may only do so if the state appellate court decision fails to follow "clearly-established" law as voiced in a U.S. Supreme Court opinion.

Note that *Seibert* was a 4-1-4 decision. A conviction was reversed based on a quite deliberate two-step interrogation the police used to escape the *Miranda* protections. Accordingly, since there was no majority statement as to what should occur where there IS a *deliberate* two-step *Miranda* evasion, there plainly was no majority on the effect where there is NOT one.

According to Judge Callahan's dissent, the Ninth Circuit's three-judge panel in Reyes relied entirely on Justice Kennedy's concurring opinion, which discussed how a later *Mirandized* admission might be cured of any taint from an earlier un-*Mirandized* one. The panel found that the taint was not cured.

As Justice Callahan points out, the federal circuit courts, themselves, are split as to whether Justice Kennedy's concurrence controls. If the federal courts cannot agree, how then can this be called "clearly-established law"? Thus, she concludes, the decision violates AEDPA.

Moreover, she argued, the state appellate court and the district court both concluded the initial *Miranda* violation was not deliberate. The Ninth Circuit panel wrongly applied *de novo* review and erroneously concluded the *Miranda* violation to be deliberate.

***Knocking*, continued from page 1**

After brief exchanges at the two doorways with the now-suspicious residents, the knocker retreated to his other three criminal compatriots and quickly drove away. It may have been one of the accomplices at the door, but Zaun was charged with attempted burglary in both incidents, three completed burglaries, and a receiving stolen property count.

The jury convicted Zaun of all counts and all priors, and sentenced him to 26 years in the Big House. His instant appeal concerned only the two attempted burglary counts.

Zaun argued on appeal that there was insufficient evidence to support the attempted burglary convictions because he never formed the intent to enter the homes. As he put it, he and his associates were only casing the houses, so the presence of actual residents was not an intervening circumstance frustrating the attempt, but the failure of a condition precedent to even forming the intent. The appellate opinion was short, but its initial discussion of the defendant's assertion was shorter still: "We disagree."

An appellate court reviews the record to see if there is "reasonable, credible, and solid evidence from which a trier of fact could find the defendant guilty beyond a reasonable doubt . . . Before the judgment of the trial court can be set aside for insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict . . . ."

The Third DCA then turned to the reasonable and credible evidence of the attempted burglary, considering the elements of an attempt are "specific intent to commit a crime, and a direct but ineffectual act done toward its commission."

For Zaun, his intent to burglarize was confirmed by his participation in three completed burglaries using the same "knock-then-entry."

Affirming the convictions, the Court of Appeal held that the jury could reasonably infer—and evidently did—that Zaun intended to burglarize the homes when he (or his accomplice) knocked.

PC 69 and Expert Witness

People v. Sibrian (2016) 3 Cal.App.5th 127

http://www.courts.ca.gov/opinions/documents/A143369.PDF

Shortly after 1:00 a.m., Contra Costa County Sheriff's Sergeant Buford saw a car in a high-crime area commit numerous traffic violations and he signaled it to pull over. It had run two red lights and a stop sign. It only stopped when it reached the driver's house.

He held his firearm at the low ready position and ordered the driver, Sibrian, to show his hands. Sibrian extended his hand and part of his upper body out of the window. His speech was slurred and he seemed intoxicated.

Deputy Moschetti quickly arrived to assist. Buford opened the driver's door and ordered Sibrian to exit the car. He refused, speaking incoherently and gripping the steering wheel with both hands.

The two tried to pull him from the car, and he continued resisting. Deputy Moschetti punched him twice and told him that if he continued resisting he would be tased. When Sibrian tried to pull the taser from Moschetti's hand, Moschetti fired the taser, striking Sibrian in the stomach.

Deputy Santos arrived, and the three of them pulled Sibrian out onto the asphalt. Sibrian kept his right arm tucked under his body and kicked his legs. Sibrian refused to move his arm from underneath him, and Deputy Moschetti hit him in the ribs.

Moschetti suffered cuts to his hands and bruises on his shins. Sibrian scratched Santos with his fingernails, leaving a four-inch mark. Sibrian continued to struggle and kick and they were only able to handcuff him when a fourth deputy, Trinidad, arrived.

Sibrian was never tested for intoxication and the only offense charged was a violation of PC 69.

At trial, besides the above officers, the prosecution called George Driscoll, a senior inspector for the District Attorney's office. The court allowed

him to testify as an expert concerning law enforcement training, procedures, and tactics concerning the use of force.

Convicted of the PC 69 charge, Sibrian appealed. He claimed it was error to allow the expert testimony and that the testimony conferred undue credibility on the officers.

Finding no error, the Court of Appeal reviewed the standards concerning expert testimony. The question is not whether an expert is required to assist jurors on a matter of which they are wholly unaware. The testimony is proper where "even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury."

Here, Inspector Driscoll's testimony was useful for explaining the escalation in use of force, including the taser, when the subject continues to resist. He also helped explain the officers' decision not to use chemical sprays in the closed space of the car.

The Court of Appeal also discussed whether the recent case of *People v. Brown* (2016) 245 Cal.App.4th 140 might require a different result. In *Brown*, PC 69 was also charged involving officers struggling with a subject stopped on his bicycle. The *Brown* court held it was error to allow expert testimony on the reasonableness of force. No specialized knowledge needed to be conveyed to the jury because no specialized tools (taser, OC spray, etc.) were used. The use of force was reduced to its "most primitive form—bare hands." The *Brown* court also held the expert there was wrongly allowed to testify as to (erroneous) legal interpretations of PC 835 and the Fourth Amendment.

***Immunity*, continued from page 4**

This happened less than a minute after Miali came to the scene.

When Herrera's relatives sued Villarreal in federal court under 42 USC 1983 for, *inter alia*, excessive force, Villarreal moved for summary judgment, claiming qualified immunity. The trial court denied the motion and Villarreal appealed.

The Ninth Circuit Court of Appeals looked at the totality of the circumstances to see whether the officer's actions were "objectively reasonable." The criteria include the severity of the crime being addressed, the danger posed to officers and civilians, and whether the subject is trying to escape or evade contact. Deadly force is only allowed "if the suspect threatens the officer with a weapon or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm."

With respect to a summary judgment motion, the reviewing court must view the evidence in the light most favorable to the plaintiff. Based on these circumstances, the Ninth Circuit concluded the government's intrusion on Herrera's rights substantially outweighed the government's interest in using deadly force. Thus, Villarreal violated Herrera's Fourth Amendment right.

The Ninth Circuit further held that this right was "clearly established" at the time of the shooting. Thus, Villarreal was not entitled to qualified immunity from the lawsuit.

Car Search Incident to Arrest

Arizona v. Gant (2009) 556 U.S. 332

People v. Nottoli (2011) 199 Cal.App.4th 531

For many years, the widespread belief was that the Fourth Amendment generally allowed unlimited warrantless searches of a car and its contents whenever someone was arrested from the car. The U.S. Supreme Court changed that in *Arizona v. Gant*. In that case the driver was arrested for driving on a suspended license and he and the passengers were handcuffed and placed in patrol vehicles. Then the officers searched the car and found contraband. The Supreme Court limited the search-incident-to-arrest doctrine, once the arrestee is secured away from the car, to allow only a search for evidence relevant to the crime for which the person is arrested.

In *People v. Nottoli*, the Court of Appeal addressed the effect of *Arizona v. Gant* where the driver was arrested for being under the influence of narcotics. In addition to an inventory search issue—since Nottoli's car was towed—the *Nottoli* court looked at the search-incident-to-arrest question. As in *Gant*, the arrestee was secured at the time of the search. Also as in *Gant*, the Court held it unreasonable to believe that the car contained evidence of the expired license.

But *Nottoli* held it reasonable to believe the car might contain evidence relevant to narcotics intoxication. In doing so, the Court discussed cases suggesting that an arrest for DUI might justify such warrantless searches where something suggests there might be alcohol in the car.

Nottoli suggested that a DUI, standing alone, would not necessarily justify an auto search incident to arrest. It looked to the *Terry v. Ohio* standard for reasonable suspicion—"specific and articulable facts." In terms of DUI arrests, this might include evidence of recent drinking or other evidence that there might be alcohol or narcotics in the car.

But a question seems to remain. *Arizona v. Gant* held that it was unreasonable to believe that searching Gant's car could lead to evidence of his driving with a suspended license. The high court simply stated this without analysis.

But Gant might have had notice of his suspension in the glovebox. Or perhaps an application for reinstatement. These questions seem to remain unanswered. Does it not seem reasonable that the car might contain relevant evidence regarding license revocation, suspension, or reinstatement? What about evidence of the classes or programs the driver is taking to reinstate a driver's license?

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

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