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Contents

Marijuana Odor Still Allows Car Search

The public and many law professionals seem to have an important misunderstanding about Proposition 64. Yes, it has legalized the possession and use of small amounts of marijuana. Yet, it is still unlawful for the operator or passenger to use or have an "open container" of marijuana in most types of motorized transportation.

The statute legalizing possession, use, sharing, and cultivation of small amounts of marijuana is HS 11362.1. But section 11362.1 says this is "subject to sections 11362.2, 11362.3, 11362.4, and 11362.45."

Important with respect to cars are sections 11362.3 and 11362.4. HS 11362.3(a)(4) states that nothing in the legalization provision makes it lawful to, "Possess an open container or open package of marijuana or marijuana products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation." Then section 11362.4(b) makes it clear that the marijuana-vehicle offenses are infractions.

The Vehicle Code, in VC 23222(b), appears to address marijuana only as to drivers. That section make it an infraction for the driver to have "open containers" of marijuana while operating a motor vehicle.

Searching a vehicle for evidence of an infraction does not violate the Fourth Amendment. The California Supreme Court made this clear in *In re Arturo D.* There, the Court held it lawful to conduct a limited warrantless search for driver identification and car registration information when the driver fails to produce these things.

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Emergency Exception Excuses Mistake

People v. Pou (2017) 11 Cal.App.5th 143

http://www.courts.ca.gov/opinions/documents/B269349.PDF

Just after noon, Los Angeles Police Department Officers Ramsey and Anaya received a radio report of a woman screaming and a "distressed moaning" coming from 2314 Juniper Drive. They responded to the house, using emergency lights and siren.

Their supervisor, Sergeant Parry, arrived there before them. Approaching the door, the officers could hear loud arguing. There were several voices, including male and female voices. From outside, they could see two males making gestures as if arguing.

Officer Ramsey knocked on the door several times with no response. Eventually, two males answered the door. Officer Ramsey told them of the radio call of a woman screaming and informed them that he had to come in to look. The defendant, Alexander Pou, repeatedly objected. The officer found two females on the couch. After checking on those women, he continued to check other locations for additional people.

As part of the search, he checked closets for people. In a closed bedroom closet, the officer saw what appeared to be narcotics. It was a large apartment. So, before opening the closet door, he didn't know if it was for a closet or another room.

The suspected narcotics turned out to be cocaine, methylone, and MDMA. Also found were scales, money, and a handgun.

After finding no screaming woman, Sergeant Parry followed up with the caller. The caller was an Uber driver who said that the screaming was actually from across the street from 2314 Juniper. Although the computer printout showed "across," the radio broadcast simply said the screaming was from 2314 Juniper. Pou was charged with possessing the drugs for sale, along with a firearm enhancement.

He filed a motion to suppress evidence, and the trial court denied the motion. Pou entered a plea admitting possessing ecstasy for sale and then appealed the denial of the suppression motion.

The Court of Appeal examined the emergency-aid exception to the Fourth Amendment's warrant requirement. It started with the modern principal case on the subject, the U.S. Supreme Court's *Brigham City v. Stuart*. In that case, police responded to a loud party at 3:00 a.m. Arriving there, the officers heard shouting from inside and saw a fight going on inside between four adults and a juvenile. The adults were trying to restrain the juvenile, who broke free from the adults and hit one in the face, making him bleed. The adults held the juvenile against a refrigerator and made it move across the floor. The U.S. Supreme Court held that, when harm is imminently threatened, to "protect or preserve life or avoid serious injury" police may enter a home without a warrant.

The U.S. Supreme Court followed this with *Michigan v. Fisher*. In *Fisher*, the Michigan Supreme Court held that an entry violated the Fourth Amendment and the U.S. Supreme Court reversed.

Police went to Fisher's house on a report of a man "going crazy." When they got there, they saw a smashed truck on the driveway. There were damaged fenceposts on the property and the house had broken windows. They could see Fisher inside the house screaming and throwing things and his hand was bleeding.

Fisher initially refused to answer the door. When he eventually came to the door, he cussed at the officers and told them to get a warrant.

The officers nonetheless entered the house and Fisher pointed a gun at them. They were able to disarm and arrest him.

The Michigan Supreme Court held that the entry was a Fourth Amendment violation. "[T]he mere drops of blood did not signal a serious, life-threatening injury."

In reversing, the U.S. Supreme Court determined that Michigan misread *Brigham*. The emergency-aid doctrine, the Court stated, did not require ironclad proof of imminent injury. Police may prevent violence and restore order—the doctrine is not "simply rendering first aid to casualties."

Under the circumstances, it was reasonable to believe they needed to intervene to stop Fisher from hurting himself or others.

The California Supreme Court followed this with *People v*. *Troyer*. In *Troyer*, the Court highlighted the pragmatic considerations involved. When faced with such situations, officer often need to make split-second decisions and don't have time to engage in judicial contemplation. "[T]he Constitution may impose limits, but it will not bar the way."

Troyer also spoke to the issue of reasonable mistakes. The Court stated, "[t]he possibility that immediate police action will prevent injury or death outweighs the affront to privacy when police enter the home under the reasonable but mistaken belief that an emergency exists."

In Pou's case, the Court of Appeal held the entry squarely fell within the emergency-aid exception. Officers were responding to a report of a woman screaming. Approaching the door, they heard loud voices inside. Through the window, they could see two men gesticulating as if arguing. Adding to the concern, there was a significant delay in answering the door. Later finding out that they were misinformed of the address did not negate the existence of the exception.

Should The Merits of a *Pitchess* Motion be Reviewable?

*People v. Nguyen (*2017) 12 Cal.App.5th 44

http://www.courts.ca.gov/opinions/documents/G052484.PDF

Sections 1043-1047 lay out the process for attempts by defendants to look into law enforcement personnel records. In *Pitchess*, the defendant was charged with battery on Los Angeles County sheriff's deputies. Claiming he acted in self defense, he subpoenaed records of the sheriff concerning investigations of the deputies involved who might have faced public accusations of excessive force. The sheriff sought to quash the subpoena. The trial court denied the motion to quash, and the case eventually reached the California Supreme Court.

The Supreme Court held that, yes, such records are discoverable by a defendant who can show that the records might lead to admissible exculpatory evidence.

In response to that decision (and lobbying by law enforcement unions and associations), the Legislature enacted Evidence Code provisions to limit and lay out procedures for such access. In essence, upon a proper showing (in a "*Pitchess* motion"), the court may review the sought records in camera—with only an attorney for the law enforcement agency present. Neither the defense attorney nor the prosecutor are permitted to be present for the court's review of the records. If the court finds that any investigations might involve witnesses who might have relevant evidence, it may order only the contact information for such witnesses. For instance, if the officer's credibility is important and a witness has complained about the officer's falsehoods, the court can order the complainant's ID released. The court may not even release the substance of the complaint.

Occasionally, if a *Pitchess* motion is denied in whole or in part, a defendant might appeal the denial. Pursuant to *Mooc*, an opinion by the California Supreme Court, an appellate court may only review the procedures. That is, the reviewing court may look at the motions to see whether a proper showing was made.

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Significant Immunity Restriction

S.B. v. County of San Diego (2015) ___ Fed.3d ___

http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/12/15-56848.pdf

In *S.B.,* the Ninth Circuit reversed a lower court's denial of qualified immunity for a sheriff's deputy. This may seem on its face to be beneficial for law enforcement. But read further. Is using a firearm against a man with a knife now presumptively unreasonable?

On August 24, 2013, San Diego County deputies responded to a "5150" situation at a house in San Marcos. The deputies met with the family of Brown, the person of concern. The family feared for their safety and had fled to a local fire station.

They told the deputies that Brown was bipolar and schizophrenic and that he was under the influence of Valium and alcohol. Brown had threatened the family, saying that "someone was gonna get hurt" if he did not get more alcohol. They told the deputies that the only weapons Brown could access were kitchen knives and a pocket knife.

The two met Deputy Billieux at the house. They found another relative working on a car on the driveway. He confirmed to the deputies that Brown was in the house, was acting strangely, and had been taking medicine and drinking alcohol all day. He said that Brown would not be happy about the deputies being there.

Deputies Moses and Vories entered the house. Moses had his gun drawn and Vories had drawn his Taser. Billieux monitored the door from the house to the garage. They announced "Sheriff's Department" and called for Brown.

They heard kitchen drawers opening and closing. The deputies entered the kitchen and found Brown with kitchen knives sticking out of his pockets. Vories yelled and radioed "knife," drew his gun, and holstered his Taser.

Pointing his gun at Brown, Moses told him to raise his hands. He initially did not comply, then raised his hands to his shoulders. Brown asked Moses why he was pointing the gun at him. Moses replied that Brown had knives on him. Brown said he'd put the knives on the table, but Moses told him not to.

Brown was rambling statements like, "Just shoot me," "I can't bring him back," and "He's gone." Brown would drop his hands and Moses told him to put them back up. Moses said, "If you go for the knife, you will be shot." They ordered Brown to his knees, and Brown complied.

The depositions of the deputies differed in particulars. In essence, Vories and Billieux were attempting to handcuff Brown. Brown reached down, grabbed a knife, and began to stand. Moses opened fire on Brown, shooting three-to-six times, killing him.

Brown's relatives sued the county and Deputy Moses under 42 USC § 1983 for using excessive force in violation of the Fourth Amendment. The defendants moved for summary judgment, claiming Deputy Moses was entitled to qualified immunity. This district court denied the motion. The court found that the statements of the deputies were inconsistent as to three details. First was the question whether Brown was on his knees or was attempting to stand when he was shot. Second was whether Deputy Moses, possibly partially obstructed by a wall, could clearly see the other deputies when he shot. And third was whether the distance between Brown and Deputy Vories was closer to three or closer to eight feet. These inconsistencies, the court ruled, raised a triable issue whether the force was reasonable.

The defendants appealed the denial of the motion to the Ninth Circuit Court of Appeals. The questions faced by the appellate court were (1) whether there was a violation of the plaintiff's constitutional right, and (2) whether that right was clearly established at the time of the officer's misconduct.

Within the first question is the principle that officers are allowed to use "objectively reasonable" force. The Ninth Circuit agreed with the district court that, yes, a jury could find the force was unreasonable. The factual scenario supporting this conclusion is as follows. Brown was on his knees, complying with orders. Brown reached to his back pocket and grabbed a knife, whereupon Deputy Moses immediately shot him. At that time, Brown was six-to-eight feet from Deputy Vories, and Deputy Moses could not see the other deputies. Brown was given no orders to drop the knife.

Finally, the court noted that non-lethal force was available. So the Ninth Circuit held that the use of force was objectively unreasonable.

Yet, the Ninth Circuit concluded that the case did not meet the second prong of the qualified immunity test. That is, at the time of the incident—August 24, 2013—there was no clear precedent putting Deputy Moses on notice as to what was objectively unreasonable as to the situation like the one he faced with Brown.

This case plainly limits officer immunity in the use of force. Yes, for this particular case, it reverses the denial of immunity. Yet, in no way is it a "pro-law-enforcement" opinion. It calls what Deputy Moses did "objectively unreasonable." So, as of this opinion, officers all over the country are on notice and can no longer expect immunity in similar circumstances.

***Marijuana in Vehicles*, from page 1**

The Court of Appeal in *People v. Waxler* specifically allowed car searches, even for infraction amounts of marijuana.

Impound Brings Lawsuit

Brewster v. Beck (2017) ___ Fed.3d ___

http://cdn.ca9.uscourts.gov/datastore/opinions/2017/06/21/15-55479.pdf

A California woman loaned her car to her brother-in-law, who drove it with a suspended license. When stopped by police, the license suspension was discovered and the car was impounded for 30 days per VC 14602.6,

She went to get the car back, showing her valid license and proof of ownership. The situation was not covered by the various exceptions within the statute, so the police refused to release the car.

She filed a class-action lawsuit under 42 U.S.C. § 1983, alleging the impoundment was a Fourth Amendment seizure. The federal district court held it to be a valid administrative penalty, and dismissed the suit.

The Ninth Circuit reversed, holding the impoundment was a warrantless seizure in violation of the Fourth Amendment. The "community caretaker" exception excused seizing the car and removing it from the road. Once a lawful licensed owner appeared, however, that justification evaporated.

***Nguyen*, continued from page 7**

If the showing is made, the only issue left is whether the trial court, in fact, went in chambers to review the records. The Court of Appeal also gets a sealed list of the documents the trial court reviewed. The appellate court may not review the merits of the review. The appellate court cannot look at the personnel records to decide whether the trial court ruled correctly.

People v. Nguyen was such a case. The defendant made a *Pitchess* motion, and it was denied. Nguyen was convicted and, in his appeal, claimed denial of the *Pitchess* motion was error.

The Court of Appeal affirmed as to the *Pitchess* motion, simply stating that the trial court did not abuse its discretion.

In a concurring opinion, Justice Bedworth questioned the wisdom of *Mooc*. Justice Bedworth suggested that, just as other such evidence can be sealed for appellate review, there is no reason personnel records could not be sealed and referred to the Court of Appeal.

"Provocation Rule" Quashed

Los Angeles v. Mendez (2017) ___ U.S. ___

https://www.supremecourt.gov/opinions/16pdf/16-369_09m1.pdf

Deputies of the Los Angeles County Sheriff were informed of a house where they might find a parolee-at-large, Ronnie O'Dell. The parolee was thought to be armed.

As some deputies searched the house, Deputies Conley and Pederson encountered a shack behind the house. Unexpectedly, they encountered Mendez and Garcia, who lived there and were asleep. Mendez was holding a BB gun he used against pests. Deputy Conley yelled, "Gun," and he and Deputy Pederson opened fire, seriously injuring both. Mendez's right leg had to be amputated below the knee.

O'Dell was not found in the house or anywhere else on the property.

Mendez and Garcia sued pursuant to 42 USC § 1983. The District Court looked at three Fourth Amendment claims. The plaintiffs claimed the deputies acted without a search warrant, that they violated the knock-notice rule, and that the used unreasonable force. As for the first two, the District Court found liability on the search warrant and knock-notice claims, but awarded only nominal damages. The Court held the BB gun was a superseding cause as to damages.

The District Court also considered the force reasonable. In so deciding, the District Court relied on the U.S. Supreme Court's *Graham v. Connor*. Under *Graham's* "totality of the circumstances " standard, the deputies acted reasonably "given their belief that a man was holding a firearm rifle threatening their lives."

But, citing Ninth Circuit precedent, the Court felt compelled to find the force unreasonable.

The Ninth Circuit precedent is called the "Provocation Rule." The rule sets forth that otherwise reasonable and lawful defensive uses of force can be deemed unreasonable if (1) the officer inten-

tionally or recklessly provokes a violent response and (2) that provocation is independently a Constitution violation. Following the provocation rule, the District Court awarded $4 million in damages.

The Ninth Circuit affirmed in part and reversed in part. The officers, the Court held, were entitled to qualified immunity on the knock-notice issue. The warrantless entry, though, violated the Fourth Amendment according to clearly-established law. Finally, the Court affirmed as to application of the provocation rule.

Independently, the Court held that liability could be founded on the proximate cause doctrine of civil law. This can result from the "foreseeability or the scope of the risk created by the predicate conduct."

The Supreme Court granted certiorari and reversed. It stated that the provocation rule "provides a novel an unsupported path to liability in cases in which the use of force was reasonable." The high court reaffirmed the principles laid out in *Graham*. Specifically, "[i]f there is no excessive force claim under *Graham*, there is no excessive force claim at all."

With respect to the proximate cause ruling, the high court held that the Ninth Circuit improperly conflated the proximate cause analysis with the provocation rule. On remand, the Supreme Court ruled that the Ninth Circuit should revisit its proximate cause analysis without regard to the tenets of the provocation rule.

Stop And Get Second Warrant?

People v. Nguyen (2017) ___ Cal.App.5th ___

http://www.courts.ca.gov/opinions/documents/H042795.PDF

Having encountered a suspect sharing child pornography over the internet, San José Police found an IP address identified the account subscriber as Jennie Reynolds at a house in San José. The San José Police Department found three names associated with that address—Ms. Reynolds, Joshua Blankenship, and Kevin Nguyen.

An overhead Google Maps view showed that the address included a house facing the street and an L-shaped structure about 25 feet behind it. From the street, they could see that the address had only one mailbox and one driveway. The structure in back had a garage door, so they believed it was a garage.

There were two cars at the house. One was registered to Reynolds. The other was registered to Kevin Nguyen, who was a police officer for the Mountain View Police Department. Prior to searching the house, the detectives had no knowledge of the relationship between Reynolds, Blankenship, and Nguyen.

The search warrant the detective obtained for the house authorized the search of "garages . . . outbuildings, storage areas and sheds." The affidavit for the search warrant did not mention Nguyen.

The day before the search warrant, they told the Mountain View Police Department of the impending search. They arranged to conduct the search while Nguyen was at the office and had Mountain View department inform Nguyen of the search and wait beside him while it was conducted.

Reynolds let them in for the search. She told them Nguyen was her landlord and lived in back. She had no key to enter his place. Police found a router in her house and she was unsure whether the signal reached the back and unsure whether Nguyen had a password.

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***Nguyen*, continued from page 7**

***Nguyen*, continued from page 7**

Searching the rear house, after forcing entry, police found a laptop computer that contained child pornography.

Ngyuen was charged with possessing child pornography. He filed a motion to quash the search warrant, and the trial court granted the motion. The court dismissed the charges when the People stated they had insufficient remaining evidence to proceed. Then the People appealed.

The Court of Appeal affirmed. First, it held that searching Nguyen's residence exceeded the scope of the warrant. Nguyen's place was clearly a distinct residence, so it could not be termed a "garage" or "outbuilding." The Court looked to a U.S. Supreme Court case, *Maryland v. Garrison.* In that case, police, while executing a search warrant, unexpectedly found the floor they were searching held a second residence. Upon learning of the error, police should cease the search and, should there be probable cause, seek a second warrant. In *Garrison*, the police discovered the contraband before realizing the mistake, so suppression was not in order.

Here, though, the police learned of the error in the warrant before searching Nguyen's place. They should have stopped and sought another search warrant.

The Court of Appeal went on to address the internet access issue. Even if Nguyen's place could be called an outbuilding, the warrant affidavit failed to show probable cause to search it. This is because there was no probable cause stated that anyone living in that rear area had access to the router (and IP address) in the front house.

The prosecution also made a "good-faith" exception to the trial court. The trial court rejected this and the Court of Appeal affirmed. The argument was that the officers believed in good faith that the rear structure was covered by the warrant. The trial court was correct in rejecting this, the Court of Appeal said. Before the police searched Nguyen's place, Reynolds had told them that Nguyen lived there, was her landlord, and she had no key to its wooden door (though she had a key to the outer security door). Given this information, no reasonable officer could believe the rear structure was a garage or outbuilding instead of a separate residence.

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

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