DEPARTMENT NOTICE

20-181
12/11/20

Winter 2020 Legal Updates

FOURTH AMENDMENT

***People v. Bowen* (2020) 52 Cal.App.5th 130**
The court held that the exigent circumstances exception to a warrant requirement justified the officer's pinging of the defendant's cell phone, without a warrant, to locate him. The information available to the officer when he requested the phone ping included that less than an hour earlier the victim had been repeatedly stabbed in an unprovoked attack, it occurred within 200 yards of a preschool, the suspect fled on foot, and was possibly still armed.

The court specifically did not address, nor has any court addressed, whether obtaining real-time cell-site location information ("CSLI") constitutes a Fourth Amendment search. Nor did the court address the alternative argument that the police acted in good faith reliance upon Penal Code section 1546.1(h).

Reminder: California Penal Code section 1546.1(h), states, "[i]f a government entity obtains electronic information pursuant to an emergency involving danger of death or serious physical injury to a person, that requires access to the electronic information without delay, the government entity shall, within three court days after obtaining the electronic information, file with the appropriate court an application for a warrant or order authorizing obtaining the electronic information or a motion seeking approval of the emergency disclosures that shall set forth the facts giving rise to the emergency, and if applicable, a request supported by a sworn affidavit for an order delaying notification under paragraph (1) of subdivision (b) of Section 1546.2. This subdivision does not apply if the government entity obtains information concerning the location or the telephone number of the electronic device to respond to an emergency 911 call from that device."

If exigent circumstances require a member to obtain an emergency ping of a suspect's location, members shall comply with Penal Code section 1546.1(h) and apply for a search warrant within three court days.

***Kansas v. Glover* (2020) 140 S.Ct.1183**
A Kansas deputy sheriff ran a license plate check on a truck and discovered that the registered owner had a revoked driver's license. The deputy assumed the registered owner was driving the vehicle and pulled it over. The registered owner, Glover, was in fact driving and charged with being a habitual offender. Thereafter, Glover moved to suppress the evidence, claiming that the deputy lacked reasonable suspicion to detain him.

The United States Supreme Court held that, "when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable." The Court noted that the Fourth Amendment permits an officer to detain an individual when that officer has

"particularized and objective basis for suspecting the particular person stopped of criminal activity." Officers must be permitted to make commonsense judgements and inferences regarding human behavior. The Court found that prior to pulling the vehicle over, the deputy observed an individual operating the vehicle, he knew the registered owner had a revoked license, and the model of the vehicle matched what he observed. From these facts the deputy drew the commonsense inference that the driver was the registered owner and the Court found that provided more than reasonable suspicion to initiate the traffic stop.

***United States v. Ramirez* (9th Cir. 2020) WL 5742052**

The Ninth Circuit Court of Appeal held that the FBI agents' use of deceit to seize and search the defendant violated the Fourth Amendment. FBI agents obtained a warrant to search Ramirez's residence and any vehicle located at the residence. At the time that the warrant was issued, because of the number of individuals living at the residence, the FBI had not identified Ramirez as the suspect. Under *Michigan v. Summers,* the agents had no authority to seize Ramirez or search his car because neither Ramirez nor the vehicle were at the residence when they arrived to execute the warrant. Agents manufactured a ruse and lured Ramirez home by falsely claiming to be police officers responding to a burglary call at his residence. Through the ruse, agents obtained incriminating statements from Ramirez and evidence from the vehicle.

The court noted that warrants must particularly describe the place to be searched and to the extent that the government wants to seize information beyond the scope of the warrant, they should seek another warrant. It has long been recognized that law enforcement may use deceit in certain circumstances but not every ruse is reasonable under the Fourth Amendment. In assessing reasonableness, courts weigh the government's justification against the intrusion into the defendant's interests.

"Law enforcement's use of deception is generally lawful when the chosen ruse hides the officer's identify as law enforcement and facilitates a search or seizure that is within its lawful authority, such as pursuant to a valid search warrant. *Deception is unlawful when the government makes its identity as law enforcement known to the target of the ruse and exploits the target's trust and cooperation to conduct searches and seizures beyond that which is authorized by the warrant or other legal authority, such as probable cause.*"

The concern is when the government's chosen ruse invokes the public's trust in law enforcement and government agents lie in order to gain access to places or things, they would otherwise have no legal authority to reach.

Implications for SFPD: The Fourth Amendment is not violated when law enforcement members conceal their identities or create a ruse to persuade a subject to open their door or exit a residence pursuant to a valid warrant when this is done for officer safety concerns. A violation of the Fourth Amendment occurs if members access evidence by misrepresenting the scope, nature, or purpose of a government investigation.

***People v. Lopez* (2020) 46 Cal.App.5th 317**

Defendant was arrested for a drug DUI and informed of implied consent regarding proving a blood sample. The officer told the Defendant that if she did not consent, he would obtain a warrant. The Defendant did not object to a blood sample and cooperated with the phlebotomist.

The Defendant appealed arguing that she cannot be deemed to have consented merely because she did not object. In analyzing both implied and actual consent in the DUI context, the court ruled that the defendant voluntarily consented to the blood draw.

Reminder: While consent may be express or implied it is best practice to always obtain explicit *recorded* consent during a DUI investigation. Absent extraordinary circumstances, Members shall use the DMV DS-367 or DS-367 M (Under age 21) form to read the proper chemical test or drug test admonition including specifically asking the driver if they are willing to take the test.

Additionally, when seeking consent, members should be careful if they inform an individual that they will seek a search warrant if they refuse consent. Remember that consent must be voluntary and free from coercion. Courts have held that so long as officers have probable cause, sufficient to obtain a warrant, consent will not be deemed involuntary if officers merely inform a subject that they will seek a warrant if they do not cooperate. Consent will be held involuntary if an officer tells a subject they do not need a warrant (when they in fact do) or that they have one (when they do not) in order to gain consent.

MIRANDA

***People v. Henderson* (2020) 9 Cal.5th 1013**
Henderson was convicted of first-degree murder with special circumstances, the personal use of a deadly weapon, and sentenced to death which triggered an automatic appeal to the California Supreme Court. Following his arrest, and during a custodial interrogation, Henderson initially waived his *Miranda* rights. When asked if he was present at the scene of the crime, Henderson stated, "Uhm, there's some things that I, uhm, want uh …" He was again asked if he was present and Henderson continued, "[want] uh, want to speak to an attorney first, because I, I take responsibility for me, but there's other people that…"

Under established *Miranda* law, officers must terminate a custodial interrogation of a suspect when that individual invokes their right to counsel or to be silent. That being said, "various cases have held that a suspect's use of equivocal words or phrases does not constitute a clear request for counsel." A suspect must unambiguously assert his right to counsel or to remain silent. Courts objectively look to whether the suspect expressed their desire for counsel with sufficient clarity "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Courts have found the following statements to be equivocal and not an invocation: "maybe I should talk to a lawyer;" "[i]f you can bring me a lawyer;" "I think it'd probably be a good idea for me to get an attorney." In this case the court found that by stating, "[I] want to, speak to an attorney first," Henderson did not use equivocal language and the California Supreme Court found this was a violation of the Fifth Amendment.

Reminder: An invocation of the right to counsel must be unequivocal or unambiguous. The United States Supreme Court has stated that an invocation occurs when the suspect "clearly requests an attorney" and the invocation "requires, at a minimum, some statement that can be reasonably construed to be an expression or desire for the assistance of an attorney in dealing with custodial interrogation by the police." It is not enough for a reasonable officer to understand that the suspect *might* be invoking their rights. It must be clear therefore, unless a suspect actually requests an attorney, questioning may continue.

PROPOSITION 47

***People v. Harrell* (2020) 53 Cal.App.5th 256**
A felony violation of unauthorized possession of the personal identification information of another (Penal Code § 530.5(c)(2)) is not a form of theft and thus is not subject to reclassification as a misdemeanor under Proposition 47.

***People v. Jimenez* (2020) 9 Cal.5th 53**
A felony violation of misuse of personal identifying information (Penal Code § 530.5(a)) is not a form of theft or shoplifting under Proposition 47 and thus is not subject to reclassification.

Implications for SFPD: Penal Code §§ 530.5(c)(2) and 530.5(a) are both wobblers and punishable as either a misdemeanor or felony. SFPD typically books these charges as felonies.

Marijuana (Proposition 64)
***People v. Herrera* (2020) 52 Cal.App.5th 982**
Proposition 64 does not decriminalize possession of marijuana at a penal institution (e.g. jail or prison).

SECOND AMENDMENT
***Duncan v. Becerra* (9th Cir. 2020) 970 F.3d. 1133**
In August of 2020, the Ninth Circuit Court of Appeals affirmed a district court decision that large capacity magazines (Penal Code § 32310) violated the Second Amendment. The ruling by the Ninth Circuit does not lift the stay that the Attorney General secured and will remain in effect until all appeals are final.

William Scott
WILLIAM SCOTT
Chief of Police

Per DN 20-150, all sworn & non-sworn members shall electronically acknowledge this Department Document in PowerDMS. Members whose duties are relevant to this Document shall be held responsible for compliance. Any questions regarding this policy should be made to sfpd.writtendirectives@sfgov.org who will provide additional information.