

CRIMINAL LAW UPDATE

Gary E. Lacey – Lancaster County Attorney
575 South 10th Street
Lincoln, NE 68508

Spring 2002

Inside This Issue

Nebraska Supreme Court Decisions

Go Ahead, Make My Day, "Heckle" Me <i>State v. Hookstra</i>	1
"By the Way, I Keep Drugs in My Purse." <i>State v. Manning</i>	2

United States Supreme Court Decisions

Probation: Reasonable Expectation of Privacy is Diminished <i>United States v. Knights</i>	5
---	---

Federal Courts in the Eighth Circuit

"So, Where Are You Going?" <i>United States v. Sparks</i>	8
What Part of "No, and No" Don't You Understand <i>United States v. Jones</i>	9
"Hey, Can We Ask You a Few Questions?" <i>United States v. Robinson</i>	11
Do You Speak English? <i>United States v. Rodriguez-Lechuga</i>	14

Other Federal Circuits

<i>United States v. Thompson</i>	1
<i>United States v. Banks</i>	1
<i>United States v. Genao</i>	15

Other Items of Interest

Judge Finds Wisdom (and other articles) <i>Compiled by: County Attorney Gary Lacey</i>	3
Where Did the Misdemeanor Go? <i>By Deputy County Attorney Pat Condon</i>	6

NEBRASKA SUPREME COURT

Go Ahead, Make My Day, “Heckle” Me.

State v. Hookstra, 263 Neb. 116, 638 N.W.2d 829 (2002)

Factual Background

"In the early morning hours of March 20, 1999, Lincoln police officer Mitchell Evans was administering field sobriety tests to a motorist whom he had stopped at an intersection in downtown Lincoln on suspicion of driving under the influence. Hookstra and two other pedestrians observed this process from a distance of approximately 15 to 20 feet.

When Evans concluded the sobriety tests and began placing the motorist in the back seat of his police car, Hookstra and his friends began to 'heckle' Evans and the motorist. Hookstra shouted slogans and told the motorist that he was not required to cooperate with Evans. Evans testified that this distracted him and upset the motorist. Evans was concerned for his own safety and that of the motorist because the commotion detracted from Evan's ability to pay attention to



the traffic around him and the motorist.

Evans told Hookstra to leave the area, but Hookstra refused to do so despite the urging of his companions. After repeating the order two or three times, Evans then walked toward the sidewalk where Hookstra then began to walk backward, facing Evans with his fist raised in the air. Alerted by Evans, other Lincoln police officers took Hookstra into custody approximately one block from the scene of the incident and charged him with a violation of Lincoln Municipal Code §9.08.050."



Supreme Court Analysis

Lincoln Municipal Code §9.08.050 makes it unlawful to "intentionally or knowingly refuse to comply with an order of a police officer made in the performance of official duties at the scene of an arrest, accident, or investigation." On appeal, Hookstra asserted that the ordinance was unconstitutionally overbroad and vague on its face in violation of his right of free speech under the Constitution of Nebraska and the Constitution of the United States. The Nebraska Supreme Court held that the ordinance was not unconstitutionally overbroad and vague on its face, and upheld Hookstra's conviction.

UNITED STATES V. BANKS 282 F.3d 673 (9th Cir. 2002)*

The delay of 15-20 seconds after a single knock and announcement before police forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards of the Fourth Amendment.

*Summary From: National District Attorneys Association Daily Clips

UNITED STATES V. THOMPSON 282 F.3d 699 (9th Cir. 2002)*

Because the defendant could neither produce vessel registration nor identify the owner of the boat he was sailing, officers had a reasonable suspicion, following a safety check, to run a warrants check lasting 15-20 minutes, which led to a seizure of marijuana.

*Summary From: National District Attorneys Association Daily Clips

SEARCH AND SEIZURE

“By the Way, I Keep Drugs In My Purse.”

State v. Manning, 263 Neb. 61, 638 N.W.2d 231 (2002)

Factual Background

On February 22, 2000, police officers served a search warrant on Manning’s residence in Grand Island. The police were searching for stolen property as part of an investigation. Manning was not the subject of this investigation. Manning arrived at her residence as the search was in progress. One of the officers asked Manning about her use of methamphetamine, to which she replied that she had quit using the drug months ago. The officer told Manning she was free to leave, but asked her if he could search her vehicle before she left. Manning gave the



officer consent to search her vehicle, but told the officer to “retrieve her purse from the vehicle because drugs were in her purse.” The officer then searched Manning’s purse and found methamphetamine. Subsequently, Manning was charged with possession of a controlled substance.

At the trial court level, Manning filed a motion to suppress the evidence obtained by the search. The State and Manning stipulated that Manning gave consent to the search of her purse, which was in her vehicle parked in her driveway. Furthermore, the trial court concluded that the original search warrant served on the residence was invalid since the affidavit was insufficient

regarding the information given by an informant. However, the trial court found that Manning’s consent to the search of her vehicle was a sufficient intervening circumstance to purge the taint of the illegal search warrant.

Supreme Court Analysis

The Nebraska Supreme Court did not address the legality of the warrant, but rather premised its reasoning on the trial court’s initial determination that the search warrant was invalid. In doing so, the Court stated, “[o]ur analysis of whether the search of Manning’s purse was sufficiently attenuated from the illegal search begins with *Wong Sun v. United States*, 371 U.S. 417 (1963). In *Wong Sun*, the Court stated: ‘We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’ ”



In the present case, the Court noted, “[t]he search for stolen property was completely unrelated to the search of Manning’s purse. Manning was not the subject of the original investigation, and she was not confronted with any illegally obtained evidence. No evidence indicated that she was threatened or coerced in any manner, and it was stipulated that Manning consented to the search of her purse.” The written stipulations also indicted that Manning was free to leave, and that her permission to search the purse was voluntarily given to the officer. Thus, the Court concluded that the search of Manning’s purse was permissible and legal, as it was sufficiently attenuated from the illegal search due to her giving consent to search.

Judge Finds ‘Wisdom’

(From the Archives of *Forensic-Evidence.com*, *law.com*, and other news sources)

*Compiled By Gary Lacey
Lancaster County Attorney*

After first refusing to permit fingerprint evidence in a Pennsylvania criminal trial because of the defendant’s assertion of its unreliability, Federal Judge Louis S. Pollak reversed himself and admitted the evidence.

In an uncommonly candid self-rebuke on March 13, 2002, the Judge wrote:

“In short I have changed my mind. ‘Wisdom too often never comes, and so’-- as Justice Frankfurter admonished himself and every judge—‘one ought not to reject it merely because it comes late.’ ”

You can read the entire opinion at http://onin.com/fp/expert_topics.html (scroll down to: "13 March 2002 Order From Judge Pollak").



...And a Not So Wise Judge

After putting a convicted rapist on probation, Massachusetts Judge Ernest B. Murphy said about the 14 year old victim: “Listen she got raped, she’s 14, she’s got to get on with her life. She’s got to get over it.”

Bristol County District Attorney Paul Walsh who asked for a 7 to 10 year sentence said publicly that Judge Murphy should not handle criminal cases. (Unlike Nebraska, in Massachusetts judges are appointed for life and never have to face a vote of the electorate).

The Massachusetts Lawyer’s Weekly took D.A. Walsh to task for criticizing the judge, citing the Rules of Professional Responsibility. For more see www.bostonherald.com and www.boston.com.

Coincidentally, Bristol County is the new home of former Lincoln Police Detective Linda Steinman.

Meth Takes Its Toll in Lincoln

The County Attorneys Office reports that in the first two months of 2001, 100 mostly methamphetamine possession cases were filed. Just one year later, during those two same months, the office filed 200 such cases; a 100 percent increase in just one year.

The Omaha World Herald reports that police in Nebraska took down 231 labs in 2001. According to the Herald, as of March 17, 2002, law enforcement has busted 49 methamphetamine labs.

In spite of the increased methamphetamine arrests, the legislature is shutting down a state correctional facility in Hastings, skimping on probation staff, and has virtually no treatment capability.



From Florida: Defendants Dress Smartly

The Miami Herald reports:

The cuffs are tailored to the perfect length. The French made shirt is crisply pressed. The elegant Italian tie matches an Emmanuel Ungaro suit.

A former Ft. Lauderdale librarian, William Coady, charged with beating his wife to death with a hammer in 1997, is ready for trial armed with a coordinated wardrobe bought for him by his father.

Public defenders in major Florida urban areas keep closets of donated clothing for clients who don't have the money for fancy clothing. Cast-off or new defense lawyers like to see their client dress well.

"Personally, I like to see my clients in a blue blazer, a white shirt and a red tie," says defense lawyer Kevin Kulik of Broward County, FL. "Red, white and blue. It conveys a certain image, like they are a nice kid from a good neighborhood, not a punk from the streets."

It isn't a question of vanity. Defendants are cloaked with a presumption of innocence and have a right to face a jury without jail-issue clothes.

UNITED STATES SUPREME COURT

SEARCH AND SEIZURE

Probation: Reasonable Expectation of Privacy is Diminished

U.S. v. Knights, 534 U.S. 112 (2002)

Factual Background

A California court sentenced James Knights to probation for a drug offense. "The probation order included the following condition: that Knights would 'submit his ... person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.' " Knights agreed to this condition, by his signing of the probation order. Three days after Knights was placed on probation, a Pacific Gas & Electric (PG&E) power transformer and communications vault



were set on fire and damaged. Knights and his friend, Simoneau, were suspects in nearly 30 recent acts of vandalism against PG&E facilities. Subsequently, a sheriff's detective, having reasonable suspicion (based on his observance of Knights and Simoneau with numerous explosive materials in the back of his pickup), conducted a search of Knights' apartment. The

detective was aware of the search condition in Knights' probation order and therefore, believed that a warrant was not necessary. The search revealed destructive devices and other items related to the crime of arson. "Knights was arrested, and a federal grand jury subsequently indicted him for conspiracy to commit arson, for possession of an unregistered destructive device, and being a felon in possession of ammunition." In District Court, Knights moved to suppress the evidence found in the sheriff detective's search on the ground that the "search was for 'investigatory' rather than 'probationary' purposes." The District court granted the motion and the Ninth Circuit Court of Appeals affirmed.

Supreme Court Analysis

The Supreme Court held that the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable under the Fourth Amendment. The Court noted that nothing in Knights's probation condition limited searches to those with a "probationary" purpose and thus, the search of Knights's apartment must be analyzed under the Fourth Amendment. "The Fourth Amendment's touchstone is reasonableness, and a search's reasonableness is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which is needed to promote legitimate governmental interests. Knights's status as a probationer subject to a search condition informs both sides of that balance. The sentencing judge reasonably concluded that the search condition would further the two primary goals of probation --



rehabilitation and protecting society from future criminal violations.” It is clear that Knights was informed of the search condition in the probation order and thus, his reasonable expectation of privacy was significantly diminished. The Court further stated, “no more than reasonable suspicion was required to search this probationer’s house.

Although the Fourth Amendment ordinarily requires probable cause, a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.” In the present case, the Court held the search was supported by reasonable suspicion and was reasonable under the Fourth Amendment.

WHERE DID THE MISDEMEANOR GO?

By Pat Condon
Deputy County Attorney

As the summer months approach, officers will begin working on more "theft from auto" cases. In so doing, you may make a case on someone and cite him or her with a felony and several misdemeanors stemming from these break-ins. When the tickets get to this office we may only charge the felony count. The reasons for doing this are varied, but below are four of the more common reasons.

- 1. Six months speedy trial clock.** We often do not charge misdemeanors with felonies in the initial complaint, because the six months speedy trial clock begins to run on the misdemeanor when we file the complaint. (To digress, we have six months to bring a case to trial once we file. For misdemeanors, this clock begins when we file the complaint. For felonies the clock does not begin until the case is bound over to district court, i.e. after the preliminary hearing, and the information is filed.) Thus if we file the misdemeanor and felony on the initial complaint, by the time the case gets bound over to district court on the felony, we have lost a month or more on the six month speedy trial clock on the misdemeanor charge. This can cause serious problems that can be avoided by not filing on the misdemeanor until the felony charge is bound over. By doing this the clock for the felony and misdemeanor run on the same schedule.
- 2. Are the previous convictions “good” or “bad”.** If the defendant has been previously convicted of a charge of theft and you cited him or her with an enhanced charge, (i.e. a second or subsequent theft charge) the reason we did not file that charge may be because the prior was "bad." To be a "good" conviction for the purpose of enhancement the prior must have been charged under state statute, and not city ordinance. Also, the level of offense must have been the same. Although two class II misdemeanor convictions can be used to enhance a third offense class II misdemeanor to a felony, a prior class I misdemeanor and a class II misdemeanor cannot be used to enhance a third offense class II misdemeanor to a felony. Finally, we sometimes wait to charge the enhanced theft charge until we get the certified copy of the prior conviction to determine if it is a valid "good" conviction for the purposes of enhancement. Primarily, that consists of determining from the certified copy if the defendant had been represented by an attorney on the prior conviction. Getting this certified copy takes some time to order, to have the court process the request, and then to get it back to us.

- 3. Missing information.** Sometimes there is information missing from your reports that we need for charging. Value or amount of damage is the big one. As you all know the level of a theft charge is based on the value of the item stolen. If there is no value listed in the report, it is difficult for us to charge. It is important that you ask that all reports, including the Incident Report (IR) be sent to our office. We can get the supps and statements from the computer but the IRs we have to get from the records bureau. So if the value is listed in the IR and nowhere else, and the IR is not sent to us, we need to call down and order it (again causing some delay in charging). Further, although the victim tells you they paid an average of \$10.00 a CD, the Nebraska Supreme Court, has said value is determined by what the average buyer would pay for those used CD's. State v. Garza, 241 Neb. 256; 487 N.W.2d 551; 1992, (Theft: Value **of Goods**. In reference to the crime of theft, value is established by evidence concerning the price at which property identical or reasonably similar to the property stolen is offered for sale and sold in proximity to the site of the theft. Price is the amount that a willing seller indicates as acceptable payment for an article offered for sale, whereas value, in relation to a theft charge, is the price obtainable for property offered for sale in a market.) This definition puts the value more likely in the \$5.00 to \$6.00 range; this being the amount you can buy used CD's for at Homers. As for felony criminal mischief, we need to show damage in excess of \$300.00. Estimates are **very** helpful. Please ask the victim to get one and send it to you or to our office. Furthermore, the amount of damage cannot exceed the value of the vehicle. If it does, it is the value of the vehicle that determines the amount of damage.
- 4. Pleas.** Some defendants, who are arrested, have other cases that are already pending. In those cases, we may delay charging because we will use the new charge to effectuate a plea. Finally, it may be that since a felony was charged, we decided not to file the misdemeanor, as we do not believe it is going to make a difference with the sentence. Most of the time judges will give concurrent time for crimes stemming from the same series of events. That does not mean, however, you do not need to work these other charges. The information from the uncharged crimes can be used at time of sentencing for restitution and to give the judge a sense of the big picture. A pre-sentence report contains all the reports on the case, not just those reports that deal with what was charged.

Finally, if your case does not fall into any of these scenarios, **please call the assigned attorney** and ask us for a progress report. If you are not comfortable talking to that attorney talk to the attorney who is assigned as the liaison for your team and ask that attorney to talk to the assigned attorney for you. We are trying to e-mail your captains and the officer assigned with our charging decision, but that does not always happen. Even if we do email you with our charging decision, and you still have questions, still feel free to give us a call.

FEDERAL COURTS

SEARCH AND SEIZURE

So, Where Are You Going?

U.S. v. Sparks, No. 01-2697 (8th Cir. 2002)
unpublished.

Factual Background

On March 29, 1997, Officer Dean observed a white GMC Suburban with a trailer parked at a service station in Spearfish, South Dakota. The officer called in the license plate of the Suburban for a registration check. Though the dispatcher first misreported the license information, the dispatcher later gave the correct information that the plate had expired. The officer then initiated a traffic stop on the Suburban. The officer informed the driver, Sparks, of the reason for the stop and asked him to produce his license, proof of insurance, and vehicle registration. Sparks could only produce an “insurance letter” stating that the vehicle was insured. After checking with dispatch to see if the driver had a valid license, the officer asked Sparks where he was traveling. Sparks stated that he was traveling from Oklahoma to Indiana to see his wife. The officer began “to wonder about the highly circuitous route Sparks had chosen and inquired further about Sparks’s travel plans, whereupon Sparks began to stammer and stutter.” The officer asked Sparks what



was in the trailer and asked Sparks if he could look inside the trailer. “Sparks indicated that he did not mind if Officer Dean looked in the trailer and gave him a key to unlock it. Inside the trailer, Officer Dean found a motorcycle with a license plate that was reported stolen. Officer Dean arrested Sparks for possession of a stolen license plate and placed Sparks in Officer Dean’s patrol car.”



At this time, other officers arrived at the scene and conducted a “ cursory search” of the vehicle and “found a baggy containing a white powdery substance, a .45 caliber handgun with a loaded magazine, and a black ski mask. The powder later proved to be amphetamine. The serial number on the handgun identified it as stolen. Using this information, the officers secured a search warrant and thoroughly searched the vehicle, yielding additional weapons and narcotics.” Sparks argues that Officer Dean was not authorized to make the initial traffic stop. “He further contends that if Officer Dean was authorized to make the stop, the scope of the stop was unreasonable and Officer Dean was not at liberty to ask additional questions of Sparks or request the search.”

Eighth Circuit Analysis

Regarding Sparks’ first argument that the officer should not have been allowed to check his license plate without reasonable suspicion, the Court noted that this issue is in no way analogous to stopping drivers simply to determine whether the driver’s license and registration were valid. Sparks did not have a privacy interest in his license plates, thus, the officer here was justified in checking Sparks’ license plates. Once the dispatcher informed the officer that Sparks’

plates were expired, the officer had reasonable suspicion to pull him over. The Court also addressed Sparks' second argument regarding the officer's scope of questioning. "Because Officer Dean had decided not to ticket Sparks, Sparks argues that Officer Dean was not allowed to ask questions about Sparks' destination. Sparks is mistaken, as the 'reasonable investigation of a traffic stop may include asking for the driver's license and registration, requesting the driver to sit in the patrol car, and *asking the driver about his destination and purpose.*' Consequently, Officer Dean was well within reasonable bounds to inquire as to Sparks's destination." Finally, Sparks argues that Officer Dean was not permitted to expand the scope of the traffic stop to request permission to search Sparks' trailer. The Court explained, "[w]hile Officer Dean had decided not to issue a ticket, he is not required to turn a blind eye to new factors that present themselves in the process of the traffic stop. We have also previously stated that 'the mere fact that the officers' original ground for stopping [a suspect] dissipated does not prevent them from continuing their investigative stop based on new facts creating a reasonable articulable suspicion of criminal activity.'" In this case, the most suspicious fact that became present was the question of why Sparks was in western South Dakota when he stated he was driving from Oklahoma to Indiana. "This statement would likely raise



even the eyebrows of those who are not trained in the intricacies of law enforcement." Thus, the Court concluded that Sparks' failure to offer an explanation for the suspicious route he had chosen, coupled with this stuttering, stammering answers, amply justified Officer Dean's decision to expand the scope of the investigative stop.

What Part of "No, and No" Don't You Understand?

U.S. v. Jones, 269 F.3d 919 (8th Cir. 2002)

Factual Background

On December 11, 1998, Trooper DeWitt of the Missouri Highway Patrol observed a vehicle crossing traffic lanes and driving below the speed limit. Suspecting the driver to be either tired or intoxicated, Trooper DeWitt initiated a traffic stop. Trooper DeWitt then asked the driver, Jones, to accompany him to the patrol car while the trooper ran a license, registration, and criminal history check.



The license and registration check returned first and showed that both were valid.

"While waiting for the results of the criminal history search, and while still in the police car, DeWitt questioned Jones about the nature and purpose of his trip." Trooper DeWitt testified that Jones appeared to be nervous while inside the patrol car. Jones's voice cracked, he yawned, his thumbs shook, and Jones would not make eye contact with the trooper. "Despite this apparent nervousness, Jones responded to DeWitt's questions, explaining that he was traveling across the country from California to New Jersey to see his family for the holidays. Jones also explained that he had no permanent address and that the camper was his home. During this questioning, DeWitt asked Jones whether he had any prior arrests and Jones responded that he did not. Subsequently, the results from the criminal history check were transmitted to the patrol car. They indicated that Jones had a prior felony arrest. By this time, a second officer had arrived on the scene, and DeWitt used this

officer's cellular phone to call his dispatcher and inquire further into Jones's prior arrest. DeWitt learned that Jones had two prior theft arrests [occurring in the past 5 years]. DeWitt asked Jones about these arrests, and Jones initially denied that he had prior arrests. After several more minutes of questioning, however, Jones admitted that he might have been arrested for stealing cigarettes when he was a minor."

After Officer DeWitt gave Jones a warning and returned Jones's license and insurance card, Jones exited the vehicle. "DeWitt then followed Jones out of the vehicle and began to ask him more questions. DeWitt asked Jones if there was any contraband, including narcotics aboard the camper. Jones answered, 'no, and no.' . . . DeWitt then asked Jones for permission to search the vehicle, but Jones denied permission, stating that he had always been told 'not to let the police into your home.' In response, DeWitt told Jones that he was going to call in a canine narcotics unit to inspect the camper. Jones responded, 'fine.' In Jones' presence, DeWitt radioed for assistance of a canine unit." Since none was in the near vicinity, the canine unit did not arrive until an hour later. At no point did the trooper tell Jones that he was free to leave.

The search of the camper led to the discovery of videocassettes with homemade sleeves depicting nude pictures of young boys. Upon seeing the pictures, DeWitt placed Jones under arrest.

Eighth Circuit Analysis

"The principles of Terry provide that once Trooper DeWitt lawfully stopped Jones he was entitled to conduct an investigation 'reasonably related in scope to the circumstances which justified the interference in the first place.' The scope of a Fourth Amendment intrusion 'will vary to some



extent with the particular facts and circumstances of each case.' 'The scope of the detention must be carefully tailored to its underlying justification.' This means that the Fourth Amendment intrusion 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop' and that the officer should employ the least intrusive means available to dispel the officer's suspicion in a timely fashion. Consistent with these principles, our case law teaches us that a police officer, incident to investigating a lawful traffic stop, may request the driver's license and registration, request that the driver step out of the vehicle, request that the driver wait in the patrol car, conduct computer inquiries to determine the validity of the license and registration, conduct computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and make inquiries as to the motorist's destination and purpose. The officer may detain the driver as long as reasonably necessary to conduct these activities and to issue a warning or citation."

"After Trooper DeWitt had complete this initial investigation and determined that Jones was neither tired nor intoxicated, that his license and registration were valid, and that there were no outstanding warrants for his arrest, then the legitimate investigative purposes of the stop were completed. At this point, with the purpose of the traffic stop completed, it would be an unreasonable extension of the scope of the investigation for Trooper DeWitt to further detain Jones or his vehicle, 'unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify further detention.' "



The court determined that it had to answer two questions: whether there had been a

seizure, and if there had, whether there was reasonable suspicion to justify the seizure.

The court determined that Jones had indeed been seized. The detention had been extended without receiving consent from Jones, due to his refusal to permit a search of the trailer. Furthermore, Jones was not free to leave. Since there was a seizure, the court had to determine if there was reasonable suspicion to justify extending the duration of the stop. The court held that in considering the totality of the circumstances, Jones's nervousness and inconsistent answers to criminal history questions did not justify reasonable suspicion that criminal activity was afoot. Therefore, the defendant's right to be free from unreasonable seizure was violated.

INTERROGATION

“Hey, Can We Ask You a Few Questions?”

U.S. v. Robinson, 2001 U.S. Dist. Lexis 18510. (United States District Court for the District of Nebraska)

Factual Background

"Brandon Horn was assaulted and beaten in the early morning hours of June 23, 2001 at a party at Unit 96. At approximately 1:46 that morning, Officer Anthony Morris responded to a police dispatch that a fight was occurring at the residence. Officer Morris went to the residence and knocked on the door. Angel Merrick, who misidentified herself as Wilamet Springer, answered the door and stated that she had been sleeping and that no fight had occurred.

At approximately 2:46 a.m., Officer Morris received a report that a person was being

kicked and beaten outside Unit 96. He again responded and encountered Robinson and Merrick walking along the road near Unit 96. He called for them to stop and then exited his vehicle and stated that he wanted to talk to them. He asked Merrick about the events at Unit 96. Robinson stated that they had been drinking. Officer Morris told them both to go home.



Brandon Horn died late on the afternoon of June 23, 2001, and his body was found at approximately 4:30 p.m. At that time tribal police called the Federal Bureau of Investigation (FBI). The FBI began an investigation early that evening. Officer Roberto Gorrin of the tribal police was asked to bring Angel Merrick and Kareem Robinson to the police station for questioning. Neither Merrick nor Robinson were suspects at the time. Officer Gorrin saw Merrick and Robinson walking along a road approximately five blocks from the police station. He stopped and asked them to come to the station because the FBI wanted to question them. Officer Gorrin stated they did not object and got in his patrol car. Both sat in the back seat and neither was handcuffed or searched. The evidence shows that Merrick and Robinson were told they were not under arrest. At the police station, Merrick and Robinson were first seated in the front waiting room.

Angel Merrick was questioned in the captain's office, a ten-by-twelve-foot room with a desk and chairs, at 8:30 p.m. by FBI Agent Robitaile. Two Bureau of Indian Affairs officers were also present. Merrick was told she was not under arrest and was free to leave. The conversation lasted approximately 30 minutes. Merrick admitted that she drank a substantial amount of alcohol the previous evening but told



agent Robitaille that she was not intoxicated at the time of the interview. Merrick stated that she had passed out the previous evening and did not remember the night's events, at which time Agent Robitaille told her that he did not believe her and that providing false information to a federal officer was a separate offense. In addition, the evidence shows that Agent Robitaille, although aware that



Brandon Horn had died as a result of the assault, did not share that information with Merrick until well into the interview. Merrick was told that she was not in custody and she left the station immediately after the interview."

At approximately 9:00 p.m., Kareem Robinson was interviewed by Agent Robitaille. That conversation also lasted approximately one half hour. At the time of the interview, Agent Robitaille did not view Robinson as a suspect. Robinson was told that he was not under arrest and was free to leave. At the end of the interview, Robinson was asked to stay at the police station in case the officers need to ask him more questions. Approximately thirty minutes later, Robinson left.

On Sunday, June 24, 2001, the officers conducted several interviews of several more people and were given information that Robinson had beaten Brandon Horn and helped drag Horn's unconscious body to the field where it was later found. Four officers then went to the Robinson home. Officer Malcolm Bartucci told Robinson that the FBI wanted to speak to him again and asked if he would come to the station. . . . The evidence shows that Robinson was reluctant to go with the officers. Officer Gorrin testified that Robinson was "a little upset" at having to return to the station because he "thought they were done" with him. Gorrin testified that if Robinson had said he didn't want to

go to the police station, Gorrin would not have taken him. However, Gorrin admitted this fact was never conveyed to Robinson. It is uncontroverted that Officer Bartucci stepped inside the house while Robinson changed his clothes. At the police station, Agent Robitaille read Robinson his *Miranda* rights and Robinson signed a "waiver of Miranda rights" form before giving a statement to the police."

"In her motion to suppress, Angel Merrick seeks suppression of certain statements she made to law enforcement officers on June 23, 2001. She contends that the statements were not voluntary. Robinson moves to suppress statements he made during an initial interview with law enforcement officers on June 23, 2001, and during a second interview on June 24, 2001. He contends that the first statement was a custodial statement without a *Miranda* warning and that the second statement was made after an unlawful arrest."

Federal District Court Analysis

The court begins its analysis by examining the defendant's initial encounters with the police. The court found that the first encounter between Angel Merrick and Officer Anthony Morris at the door of Unit 96 on June 23, 2001 was consensual. In addition, the contact between Officer Morris and Robinson and Merrick on the side of the road later in the morning of June 23, 2001, although not consensual, was a valid investigative stop. Officer Morris had testified as to the "particularized and objective basis for the suspicions that led him to stop and question Merrick and Robinson," and this basis satisfied the investigative stop requirements found in *Terry v. Ohio*.



The court also found that the questioning of Merrick and Robinson in the Macy Police Department in the early evening of June 23, 2001, was consensual, that neither Merrick

nor Robinson were in custody, and that the statements were voluntary. *Miranda v. Arizona*, requires an individual to be informed of his Miranda rights at anytime he is taken into custody. Custody does not only occur upon formal arrest, but also under any other circumstances where the suspect is deprived of his freedom of movement. In determining whether an individual is in custody, the court must consider the totality of the circumstances and determine how a reasonable man in the suspect's position would have understood his situation. There are six factors that are an " 'indicia of custody': (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or free to request the officer to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of questioning." Considering these factors, the court determined that Merrick and Robinson were not subject to a custodial interrogation. "Merrick and Robinson agreed to go with the officer to the station for questioning. They were informed that they were not under arrest. At the station, they were allowed to wait in the waiting room until being brought to an office for questioning.



The interrogating officers wore casual clothes and used conversational voices. There is no evidence that coercive techniques or strong-arm tactics were used. The

interrogations were brief. Merrick and Robinson had been told they were free to leave and both did, in fact, leave."



The court also found that Merrick's statements were voluntary. "The appropriate test for determining whether a statement or confession is voluntary is whether it was "extracted with threats, violence, direct or indirect promises, such that a person's will and capacity for self-determination is critically impaired. In making that determination, a court should examine the totality of circumstances in assessing the conduct of the law enforcement officials and the capacity of the suspect to resist pressure to confess." Using this test, the court stated that "Agent Robitaille's intimation that Merrick could be subject to prosecution for lying and his failure to inform her that Brandon Horn had died are not actions that can be viewed as overcoming Merrick's will so as to render her statement involuntary. Questioning tactics such as a raised voice, deception, or a sympathetic attitude on the part of the interrogator will not render a confession involuntary unless the overall impact of the interrogation caused the defendant's will to be overborne. . . . Moreover, the record shows that neither Merrick nor Robinson had any special vulnerability that would affect the capacity of their wills to be overborne. Neither was intoxicated at the time of the interview, both were able to coherently answer questions and both were familiar with the criminal justice system." Furthermore, Robinson and Merrick were questioned for only one-half hour each, and they were not mistreated in any way.

Finally, the court analyses Robinson's statement to police on June 24, 2001. The court found that Robinson's seizure by tribal police rose to the level of a full-scale arrest and this warrantless arrest may well have

violated the Fourth Amendment. Regardless of whether the seizure was constitutional, Robinson was properly Mirandized prior to his giving of the statement. "Where the police have probable cause to arrest a suspect, the exclusionary rule will not bar the state's use of a statement made by a defendant outside of his home, even though the statement is taken after a [warrantless] arrest made in the home. Such a statement is not related to the underlying illegality and need not be suppressed. The evidence establishes that the tribal police had probable cause to arrest Robinson [because] law enforcement officers had been told by a witness that Robinson participated in the assault." Since Robinson's statement was sufficiently attenuated from (separated by the voluntary Miranda waiver) any illegality in his arrest, it is admissible.

SEARCH AND SEIZURE

Do You Speak English?

U.S. v. Rodriguez-Lechuga, 2001 U.S. Dist. Lexis 18509 (United States District Court for the District of Nebraska)

Factual Background

On May 18, 2001, FBI Agent Gord informed Sergeant Langan, of the Narcotics Division of the Omaha Police Department, that a confidential informant had provided him with information regarding a large shipment of cocaine. Agent Gord also said that the cocaine had been delivered by an individual known as Ernesto who was driving a white Crown Victoria to an apartment at 1138 South 29th Street, Apartment #7, in Omaha, Nebraska. Since the reliability of the informant was questionable, Sgt. Langan

decided to conduct a "knock and talk" in an effort to obtain consent to search or to form the basis for probable cause. Therefore, Sgt. Langan asked three other officers to knock on the front door of the apartment while he stood beneath the window of Apartment #7.

While the officer's knocked on the door, Sgt. Langan observed a man throw a bag out of the window of Apartment #7. Soon after the bag was thrown from the window three men from in the apartment approached the door front. The officers then asked the three men to step out of the apartment, at which time the officers handcuffed them. After Sgt. Langan informed the officers that the bag contained what appeared to be cocaine, the officers entered the apartment with guns drawn, to secure the area.

"As the officers exited the apartment, Sgt. Langan approached and identified the man whom he witnessed throwing the bag from the window as the defendant, Jorge Rodriguez-Lechuga. After Rodriguez-Lechuga identified himself as the renter of the apartment, Officer Heath asked if he could search the apartment. Officer Heath testified that he informed Rodriguez-Lechuga, in Spanish, that he had already seized the bag of narcotics thrown out of the window and that they wanted to search the apartment for additional drugs. Officer Heath informed Rodriguez-Lechuga that it was his decision whether or not to let the officers search the area. Officer Heath testified that Rodriguez-Lechuga did not appear to be intoxicated and was cooperative."

"Officer Heath then asked Rodriguez-Lechuga to sign a consent to search form. Officer Heath did not literally translate the form but testified that he conveyed the 'spirit of the form.' After Officer Heath filled in the information on the form, Rodriguez-Lechuga signed it. On the form, the police



filled in information regarding a search of Apartment # 7 and the white Crown Victoria. . . . During the second search that lasted approximately one hour and forty minutes, the officers found several scales, venue items, and cocaine residue. While transporting Rodriguez-Lechuga to the police station, Officer Heath read him his *Miranda* rights in Spanish for the first time. The defendant claims that the search of his apartment and vehicle was involuntary.

Federal District Court Analysis

"Consent is voluntary if it results from 'an essentially free and unconstrained choice' rather than from 'duress or coercion.' Whether consent is voluntary depends upon the 'totality of the circumstances.' When evaluating such circumstances the court pays particular attention to the characteristics of the person giving consent and to the encounter from which the alleged consent arose. Relevant characteristics of the suspect include age; intelligence and education; chemical intoxication, if any; whether the defendant was informed of his rights; and whether the suspect generally understood the rights enjoyed by those under criminal investigation. To assess the environment of the encounter, the court considers the length of time that the suspect was detained and questioned; whether the police intimidated the suspect; whether the suspect relied upon promises or misrepresentations made by the police; whether the suspect was in custody; whether the encounter occurred in a public or secluded place; and whether the suspect objected."

After examining the totality of the circumstances surrounding the search, the court found that the government had failed to meet its burden of proving that Rodriguez-Lechuga's consent was essentially free and unconstrained. Several factors were relevant in reaching this determination. First, "[t]he police did not inform Rodriguez-Lechuga of his rights under *Miranda* until he consented

to the search. While the reading of *Miranda* warnings is not necessary, it is a factor to consider when determining the voluntariness of a consent to search." Second, Rodriguez-Lechuga signed an English waiver form, even though Spanish forms were available and routinely used with Spanish-speaking suspects. Third, it was unclear if Rodriguez-Lechuga actually understood the form. Officer Heath testified that he did not translate the form verbatim, but instead conveyed the "spirit of the form." The court can not be guaranteed as to what the officer actually said to Rodriguez-Lechuga since he did not specifically translate the form. "While an understanding of an individual's rights is not required for a voluntary consent, it is a factor for the court to consider." Fourth, the environmental factors surrounding the search are problematic. "Here Rodriguez-Lechuga was handcuffed, hands behind his back, and seated on the landing outside of this apartment. Prior to his consent, Rodriguez-Lechuga witnessed four officers with their guns drawn go through his apartment. His understanding of any choice he had to deny a search is questionable."

"Considering the factors discussed above, this court finds that the consent to search both the apartment and the vehicle was involuntary. Accordingly the evidence seized during the second search of the apartment and the vehicle shall be suppressed."



UNITED STATES V. GENOA

281 F.3d 305 (1st Cir. 2002)*

The facts that the defendant was in custody when he confessed, and that a sizable team of police officers (including a police dog) was present in his apartment at the time of his confession, did not add up to "police overreaching," such that his confession was coerced.

*Summary From: National District Attorneys Association Daily Clips