CONTENTS

AUGUST 2013

VOLUME 49

Editor DALE ANDERSON

Business Manager JEFF WEINGARD  Managing Editor RENEE WEINGARD

ARTICLES

UNITED STATES SUPREME COURT – REVIEW OF THE 2012-2013 TERM

CAN OFFICERS SEARCH OCCUPANTS WHEN OFFICERS (OR THEIR DOGS) SMELL DRUGS IN A CAR?

HOW DO OFFICERS LEARN THE “LAW” THAT THEY ENFORCE?

CAN YOU QUESTION OCCUPANTS DURING THE EXECUTION OF A SEARCH WARRANT?

CELL PHONES – CAN YOU SEIZE OR SEARCH THEM -- OR CAN’T YOU?

MANDARINO (STREAMWOOD CASE) – WAS THIS CASE DECIDED RIGHT?

IS THIS A HOMICIDE – OR JUST ANOTHER EXPENSIVE CIVIL SUIT?

SURVEY / BRIEFING QUESTIONS FROM THE JULY BULLETIN

BRIEFING / SURVEY QUESTIONS FOR THIS / THE AUGUST BULLETIN

Page 119

Page 121

Page 123

Page 124

Page 125

Page 128

Page 129

Page 130

Page 131

Please note: The Bulletin welcomes comments and suggestions. The Bulletin is designed to convey general information and should not be construed as providing legal advice. Readers are urged to consult the in-house counsel at their law enforcement agency or government corporation counsel when seeking legal advice. The Bulletin would like to hear from you! Please send your comments and questions to jeff@officerslawbulletin.com.

Copyright 2013, Illinois Law Enforcement Officers Law Bulletin and Dale Anderson

REPRODUCTION OR RETRANSMISSION OF MATERIALS IS PROHIBITED. All rights are reserved. The material contained in the Illinois Law Enforcement Officers Law Bulletin may not be republished, retransmitted or forwarded without express written consent from the Illinois Law Enforcement Officers Law Bulletin, Inc. Violation of this copyright may result in subscription cancellation and/or collection of full or partial subscription charges from unauthorized users. This includes any use of the online edition of the Illinois Law Enforcement Officers Law Bulletin by more than the number of paid subscribers per account.

Contact us:
ILLINOIS LAW ENFORCEMENT OFFICERS LAW BULLETIN
P.O. Box A3046, Chicago, Illinois 60690
Phone: 312-788-9088
Email: jeff@officerslawbulletin.com
UNITED STATES SUPREME COURT – REVIEW OF THE 2012-2013 TERM

The 2012-2013 term of the United States Supreme Court was relatively unremarkable for officers. There were only a handful of cases that impact law enforcement and none that have anything like the landmark effect of a case like Gant.

I will review and briefly summarize the cases alphabetically.

United States v Bailey

Facts
Officers had a search warrant for a residence. Bailey left the residence and drove off. Officers stopped him about a mile away. The officers obtained admissions, handcuffed Bailey and brought him back to the residence, where the officers used Bailey’s key to gain admission to the residence.

Holding
The Supreme Court ruled that it makes sense in many circumstances (not all) to handcuff occupants of premises where search warrants are being executed. But that power is restricted to those in and around the premises – not suspects a mile away.

Florida v Harris

Facts
A drug dog alerted on Harris’ vehicle. Officers searched the car and discovered drugs.

Holding
A reliable drug dog creates probable cause when the dog alerts on a vehicle.

Florida v Jardines

Facts
A drug dog alerted on the front door of a house. Officers obtained a search warrant. During the execution of the warrant officers discovered drugs.

Holding
Bringing a dog to the front door of a home is a search – intruding into an area where Jardines had an expectation of privacy -- requiring a search theory. Therefore the evidence was suppressed.

A lot of officers do not like this ruling. They respond – if we can walk up to the door and talk to the people at the front door, why can’t we bring a dog? (This might not persuade you, but try to think of it this way --) An officer can walk up to a 16-year old kid in a class.
room, even if the kid is sitting at his desk – and the officer needs no theory to do so. However, an officer cannot bring his dog into the school room and have the dogs sniff a kid to see if he has drugs. So think of it this way – is sniffing the door of house more like sniffing a car or sniffing a 16-year sitting in a classroom? The Supreme Court said more like sniffing a kid.

**Missouri v McNeely**

**Facts**
An officer stopped McNeely because he was speeding and crossing the center line. McNeely’s eyes were bloodshot, his speech was slurred and his breath smelled of alcohol. He was unsteady on his feet and therefore performed poorly when trying to do sobriety tests.

McNeely refused to provide a breath or blood sample even after being read the implied consent form.

The officer took McNeely to a local hospital where staff there took a sample of his blood. His BAC was .154.

**Holding**
Unless exigent circumstances exist, officers must get a warrant to obtain blood.

**Salinas v Texas**

**Facts**
Officers asked Salinas whether the shotgun shells, recovered at the scene of the murder, would match the gun discovered at Salinas’ home. Salinas remained silent. Salinas was not in custody when the question was asked.

At trial the prosecutor introduced Salinas’ silence as an admission of guilt.

**Holding**
Salinas’ silence was admissible as *Miranda* rights are triggered by custody.
CAN OFFICERS SEARCH OCCUPANTS WHEN OFFICERS (OR THEIR DOGS) SMELL DRUGS IN A CAR?

A common question I’m asked by officers is whether they can search occupants of vehicles just because they smell drugs in the car during a traffic stop.

There is good reason for confusion about this as the cases in the past have been confusing.

Let me give the present applicable case law and explanation:

“[I]n People v Stout, 106 Ill2d 77, 477 NE2d 498 (1985), our supreme court held that the odor of burning cannabis emanating from a lawfully stopped automobile supplied probable cause to conduct a warrantless search of the driver’s person....In People v Boyd, 298 Ill.App3d 1118, 700 NE2d 444 (1998), the court concluded that there was no logical basis for treating the passenger differently from the driver in such circumstances. The Boyd court also noted authority from other jurisdictions that an officer who detects burning cannabis in an automobile may arrest and search all the occupants.” People v Neuberger, 959 NE2d 195 (2011).

So, what was Neuberger about?

First, Neuberger is a second district case. It involves a guy, Neuberger, who was behind some bushes that separated the sidewalk from a government building around midnight. Neuberger then jumped over the bushes and ran to a car parked in the street. Neuberger got in the front passenger seat.

A drug dog hit on the car and Neuberger was taken out of the car and searched. The officer discovered drugs in Neuberger’s shoe.

The Illinois Court of Appeals ruled that the probable cause to search the car for drugs also was probable cause to search the passengers for drugs.

Last month, district 4 ruled that the “strong odor of cannabis“ coming from the interior of a car gave the officer probable cause necessary to search a passenger, Williams, in the car. People v Williams.

The facts in this case are pretty simple.

An officer stopped the car Olympia Cook was driving because she was speeding. Williams was a front seat passenger and their two kids were in the back seat.

As Cook lowered her window, the officer smelled a “strong odor of cannabis [emanating] from the vehicle.”

Cook said the vehicle belonged to her cousin, and she had no idea what was in it.
Williams said he had $1,200 in cash in his pocket and that he was going to use the money to buy Christmas presents.

The officer asked Williams to remove his shoes. Williams refused, stating that the officer was violating his rights.

The officer then handcuffed Williams “for not complying with [his] request.”

Officers then searched the car and discovered “six unknown pink pills” and a stun gun.

An officer then searched Williams’ shoes and discovered 43 grams of cannabis.

The court held there was probable cause to search Williams for the drugs based on the fact there was probable cause to search the car.

Don’t forget that if you find crime-related evidence in the vehicle, you can then search all of the occupants under the search incident to arrest doctrine too. See Maryland v Pringle, 124 S Ct 795 (2003). In that case, however, you are probably going to have to continue your investigation to be sure who is responsible for the crime-related evidence.
HOW DO OFFICERS LEARN THE “LAW” THAT THEY ENFORCE?

I was channel surfing last night through all the garbage on TV, and I happened upon “COPS” – a reality show about (surprise!) cops.

Anyway, an officer was dealing with a woman who wanted her boyfriend out of her house because he cheated on her. So she had taken all of his things and had thrown them out on the ground.

The officer told her that she can’t throw the squatter out without going through eviction proceedings.

I, of course, think it’s best for officers to try to get out of the loop on these “civil disputes” – but I also wonder – where do officers “get” the law they enforce?

I have actually been told by officers that they get it from TV – but they have to be joking – aren’t they?

As I have mentioned before (many times), I have challenged my classes by stating that I have never known an officer (who is not also a lawyer) who knows the case law on obstructing. How can an officer arrest for obstructing without knowing the cases that either say – you can – or you can’t -- arrest for obstructing.

I am told that most officers learn the “law” from their FTO. Where did the FTO learn it?

So...here is my challenge for August – tell me where in the law it tells you how to handle a situation where you have a person who owns or leases a residence – and he / she wants to get rid of a deadbeat squatter who has been living there. Now, this isn’t a tenant, just somebody who moves in. Sort of like the situation at the beginning of this article. A girl falls in love with a guy. She tells him to move in. A few months she learns that he is a deadbeat and now wants him to leave. He really doesn’t feel like leaving because he likes it there.

What are the rules?

It’s fair to ask your lawyer, whatever, but you have to be able to point to a statute and / or case law that gives you the answer. Otherwise, you’re just guessing, aren’t you?

What are the vital facts that you need to know in order to either force the owner / renter to formally evict the squatter.
CAN YOU QUESTION OCCUPANTS DURING THE EXECUTION OF A SEARCH WARRANT?

Most of the time when officers execute search warrants related to the sale of drugs, the officers handcuff occupants.

Does anybody see where this is going?

Then you must read People v Hannah, just decided by the Illinois Court of Appeals.

Facts
Officers had probable cause that Angela was selling crack cocaine out of her home.

The officers got a search warrant and executed it against the residence.

During the execution of the warrant, they handcuffed Angela and Hannah who were present in the residence.

When an officer found a gun, the officer asked Angela and Hannah “whose gun was this” “to which the defendant (Hannah) made an incriminating statement to the police.”

Trial Court Ruling
The trial court judge ruled that the statement was admissible even though Miranda warnings were not administered as this was not a “custodial situation akin to an arrest at a police station where the officers had brought them there pursuant to probable cause” and besides, Hannah “could have chosen not to say anything.” (WHAT?)

The Illinois Court of Appeals
The Illinois Court of Appeals ruled that Hannah was in custody when he was questioned because he was handcuffed; and eight officers were there, all of whom had their guns drawn when they entered the premises.

Important Training Points
- Normally, if a suspect is handcuffed, you cannot ask him questions without first giving him his Miranda warnings and obtaining a waiver. Period.
- If the suspect is handcuffed and there is no probable cause, giving warnings can cause a statement to be suppressed by virtue of a 4th Amendment violation. So be sure to explain to the suspect that he is not under arrest and get him to agree – then be sure to remember to put that into your reports.
- The Court of Appeals here held that because Hannah later gave a full confession at the station, AFTER RECEIVING MIRANDA WARNINGS, the introduction of the original admission was harmless error. (So it might be a good idea to take a “good” statement when a bad one was originally taken.)
CELL PHONES – CAN YOU SEIZE OR SEARCH THEM -- OR CAN’T YOU?

I get a lot of questions about cell phone seizures and searches -- and for good reason. No one seems to know the answers for sure as we have not had enough case law to guide us.

Seizures of Cell Phones

We already have some cases here that are not good. When officers do something bad and then seize the phone of someone videotaping them, officers are liable to experience serious consequences.

A person can videotape an officer in public.

However, in a number of recent cases citizens who have videotaped serious crimes, even murders, have refused to turn over their cell phones. And officers have refused to seize them! (Are you kidding me?!) In circumstances such as those (serious crimes) here are my (suggested) 10 commandments:

1. Seize the phone. Give the person a receipt for the phone.
2. Tell the person you will seek a warrant for the phone.
3. Tell him / her that if the judge determines there is not probable cause, you will immediately return the phone.
4. Tell him / her that you will not look at anything in the phone unless the judge gives a court order for it.
5. Protect the contents of the phone from destruction.
6. Do not look “into” the phone without a warrant.
7. Get a warrant.
8. Get the information from the phone related to the crime.
9. Do not look at any other information in the phone.
10. Get the phone back to the owner ASAP – unless there is any other reason to hold onto it.

There is lots of case law allowing you to seize “closed containers” that hold crime-related evidence and seek a warrant. IMO, this is nothing but a sophisticated closed container.

Do not abuse the rule by seizing phones for fun, especially when citizens are videotaping you in public.
In one recent case, officers were aware that a citizen videotaped an arrest where the officer tased the arrestee. Officers asked for the video and the citizen refused to give it. The officers told the citizen to hold on to the video – that destroying the video might be obstructing. The officers then got a subpoena for the video.

Maybe I’m wrong, but I think most people will (want to?) cooperate. They just don’t want to lose their cell phones, so probably assurances of return, etc. might be important here. Then try to get the phone back the same day if possible. That will make you look lot’s better in court too.

**Searches of Cell Phones**

The usual question related to the search of cell phones is – can officers search a phone incident to arrest?

The answer is – who knows?

We have a case at the 7th Circuit level that says – after an arrest in a drug case officers can search the arrestee’s cell phone, but in this case, all the officers obtained was the cell phone’s phone number. *United States v Flores-Lopez*, 670 F3d 803 (7th Cir 2012).

Officers must search the phone immediately upon arrest. Obviously, when the arrestee is separated, by time and space, from his phone, the search incident doctrine is no longer available.

The scope of the search should probably be limited at most to:

- Phone number
- Phone calls
- Text messages
- Contact list

Explain in your report how easy it is destroy evidence in a cell phone.

An interesting case will be the one when officers searches a cell phone in a vehicle under the Scalia / Gant (search incident to arrest) doctrine. I will be very interested when that case is decided. An example will be – officers are aware that the suspect has been using his phone for calling about drug deals. The officers arrest the suspect in his car and find his phone in the car.
Anyway, when all is said and done --to be “safe” I think you should “protect” the contents of the cell phone and get a warrant, if it is an important case as we have no cases at the Illinois Supreme Court for guidance. See advice above.
MANDARINO (STREAMWOOD CASE) – WAS THIS CASE DECIDED RIGHT?

Everyone reading this is familiar with the Mandarino / Streamwood case.

Officer Mandarino was trying to stop a car for a traffic offense. The driver drove in next to his home. Apparently, the passengers bailed and went into the house.

If you are interested in seeing the “facts” from a video recorded by Mandarino’s patrol car simply go to YouTube and write in the subject line “Mandarino Streamwood.” You will see the entire encounter.

The basic facts are that Officer Mandarino struck the driver a number of times with his baton after the driver got down on all fours.

The trial judge ruled that Mandarino was guilty of a felony and sentenced him to probation.

You will be interested to know that the Illinois Court of Appeals has now ruled on the case and has upheld the trial judge’s verdict. You can see the case if you simply Google “Illinois Appellate Court” – Then scroll down from “documents” to “opinions” then scroll down to the appeals court. When you click on that go to the cases at July 9 – or just do a search for Mandarino. It’s easier than it sounds.

Most interesting for me (I have never seen this in case before), check out the first 23 pages (from page 3 to 23 of 69-page case) are pictures based on the video and an explanation of the pictures next to the pictures.

In what might be a small (or big?) snag in the decision, there was a dissenting opinion that might just get this case reversed at the Illinois Supreme Court, should the Supreme Court decide to take the case.

Many attorneys whose opinion I respect have taken both sides of this fight. Some have said that Mandarino’s force was reasonable under the circumstances. Some have said that the force was clearly excessive, constituting a felony. Some have said the trial court was unfair and the judgment should be reversed others have said it was perfectly legal.

I have heard that the civil suit against Mandarino and Streamwood was settled – and that it was rather expensive – but that is just rumor.

Watch the video, read the case – and let me know what YOU think.
IS THIS A HOMICIDE – OR JUST ANOTHER EXPENSIVE CIVIL SUIT?

A man with Down’s syndrome, Saylor, watched “Zero Dark Thirty” and apparently decided that he liked the show so much, he was going to sit through it again.

Theatre personnel told Saylor, age 26, that he had to leave, but Saylor would have none of it.

So the theatre personnel called the police to eject Saylor.

The police tried to persuade Saylor to leave. When it was obvious that Saylor was not going to leave without some force being applied, the officers decided to handcuff him.

Apparently during this period a mental health assistant, who had watched the show with Saylor, had gotten the car and had returned to get Saylor and take him home.

So she was present before and during the arrest and told the officers that if Saylor was touched, he would react with extreme emotions.

The officers handcuffed Saylor and put him on his stomach.

Saylor then died.

It was initially reported that the officers had been charged with murdering Saylor.

Later, it was reported that the grand jury refused to indict the officers.

The officers will be sued.

We’ll see what happens then. It’s probably going to be expensive.

Breaking News – I just heard on the news that senior center employees could not handle a 95-year old man. Officers arrived and shot him with a bean bag gun. Apparently the old guy had a 12-inch butcher knife. (Reminds me of an episode in Seinfeld.) Is this going to be another expensive law suit? (Probably.)

I am going to keep hammering until I can persuade officers / departments to try to enlist the help of experts when you run into situations you don’t understand – like ED, mental illness, Alzheimer’s, etc. More on that in next month’s publication.
SURVEY / BRIEFING QUESTIONS FROM THE JULY BULLETIN

The following are the briefing questions from last month’s bulletin – and, at a minimum what I think should have been discussed as an answer to the questions.

1. How can you be better prepared to deal with the mentally ill and avoid having to kill them?

   I think it would be very helpful to enlist the assistance of a person who can negotiate with the mentally ill person. Some departments are doing that. You should consider it. (More on that next month.)

   Barring your ability to enlist the services of an “expert” to help you, try thinking through ways to de-escalate, rather escalating the confrontation. Although I am not an expert, statements such as “Drop the knife or I’ll shoot” do not seem really helpful if the mentally ill person is suicidal.

2. What should you do if you feel you MUST handcuff someone during a Terry or a traffic stop. (i.e. you do not have probable cause to arrest.)

   You should do nothing constitutionally salient / important like searching or asking the suspect questions, if possible.

   When you get backup there – and / or you feel safe,
   - you must take off the handcuffs;
   - you must explain to the suspect that he is not under arrest or in custody;
   - you must get him to acknowledge that he understands that he is not under arrest or in custody;
   - you must put the above in your report.

3. When should officers take a statement?

   Always -- whether it is a traffic stop or a murder. If the suspect did it, his answers have to be an admission or lie. Admissions and lies are what convict.

4. When must officers give Miranda warnings?

   When the suspect is in “custody” and the officer is going to ask the suspect questions (which is always).
Custody is a tricky concept – there are probably 20 factors a court will look at that seem to lean toward custody (handcuffs are probably the most obvious). And there are probably 20 factors that tend toward not being in custody. (telling the suspect he / she is not in custody is a good one.)

On page 67 of the *Peace Officers Bible* I have listed ten factors that tend to reflect that the suspect was in custody and ten factors that tend to reflect that the suspect was not in custody.
Here are (some) briefing / survey questions for this month’s / August Bulletin.

1. What can you do when a suspect leaves a house that you are about to execute a search warrant on?

2. How can you get blood from a suspected DUI (drug) driver after an accident?

3. Can you search passengers when you smell (burnt or fresh) marijuana in a car during a traffic offense?

4. What is the rule on when an owner or renter of a residence can get rid of a squatter in the residence after that the owner had allowed the squatter to “move in” but now the owner / renter wants out of the premises?

5. Based on the case law -- what are the circumstances when you can arrest for obstructing? What are the circumstances when you can’t?

6. When can you question someone in handcuffs?

7. When can you seize cell phones?

8. When can you search cell phones?

9. Do you think the judge / court of appeals were right in their decision(s) in the Mandarino case?

10. What can you do to better handle circumstances when you deal with Down’s syndrome cases?

11. Extra Credit Question (Not covered by this bulletin)-- A repo tow truck is about to tow a car away. You are called out as there is a heated argument brewing. What factors are you looking to determine what to do? What do you do?