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CRIMINAL PROCEDURE

United States v. Arango, 912 F.2d 441

Author: Judge Tacha

Defendant, Arango, was convicted of possessing a controlled substance with intent to distribute. Arango argued that the district court erred in denying his motion to suppress evidence of cocaine on the grounds that: (1) he had standing to contest the search of the truck because the government failed to introduce evidence demonstrating Arango's possession of the truck was unlawful; (2) his allegedly illegal detention fatally tainted his subsequent oral consent to search; (3) his allegedly illegal arrest fatally tainted his subsequent written consent; and (4) his written consent to search was invalid on its face.

The Tenth Circuit affirmed the decision of the district court. The court found the issue of standing to be intertwined with substantive fourth amendment analysis. Two factors considered in this analysis are whether the defendant manifested a subjective expectation of privacy in the area searched, and whether society would recognize that expectation as reasonable. Because Arango failed to present any evidence that his possession of the truck was lawful, the court ruled he did not have a reasonable expectation of privacy in the truck and, therefore, had no standing to contest the search. Second, the court held Arango's detention and arrest to be lawful because they were supported by reasonable suspicion and probable cause respectively. There was reasonable suspicion because Arango failed to prove he had lawful possession of the truck, and he had an inadequate amount of luggage in the truck for a two week vacation. Also, the officers discovered a hidden compartment underneath the truck bed, plus the insufficient amount of luggage provided probable cause. The court concluded that because Arango lacked standing to challenge the search of the truck and because the arrest was legal, the issue of voluntary consent need not be decided.

United States v. Baker, 894 F.2d 1144

Per Curiam

Defendant, Baker, a Southern Ute Tribe member, was convicted of manufacturing methamphetamine and possessing the precursor P2P with intent to manufacture methamphetamine. Baker appealed his convictions, claiming that the district court erred in denying his motion to suppress evidence obtained through an improper search warrant. Specifically, Baker reasoned that the evidence was improperly obtained through the use of a state search warrant. Plaintiff, United States, contended that it was entitled to the good faith exception to the exclusionary rule and, therefore, the search warrant was valid.

The Tenth Circuit held the evidence to be inadmissible. The court found that the evidence obtained through a state issued search warrant

was inadmissible in Baker's federal prosecution. The court reasoned that Colorado has never obtained an extension of its jurisdiction to include land located within Indian country. Furthermore, the court stated that since a reasonably well-trained officer would have known that the search was illegal, the officers did not possess the requisite good faith necessary to trigger the exception. The court, therefore, found the United States' claim to be invalid.

United States v. Bell, 892 F.2d 959

Author: Chief Judge Holloway

Dissent: Judge Ebel

Defendants Bell's and Ziebarth's cases were companioned on appeal. Bell was convicted of attempting to possess with intent to distribute cocaine. The district court held that Bell was not detained by the arresting officer. Rather, Bell consented to accompany the officer, thereby implicating no fourth amendment interest. The district court also adduced that the canine sniff of Bell's package was reasonable in light of the circumstances. On appeal, Bell argued that his fourth amendment rights were violated in an improper detention and search. Bell also contended that the evidence did not sustain his conviction. Ziebarth was convicted of possession with intent to distribute cocaine. The district court found that Ziebarth also consented to accompany an officer. On appeal, Ziebarth argued that the detention violated his fourth amendment interests. The district court denied both defendants' pre-trial motions to suppress evidence.

The Tenth Circuit affirmed the district court's conviction of both Bell and Ziebarth. First, the court found reasonable grounds for Bell's detention and the limited canine sniff. The court reasoned that the dog's alert to the package was probable cause for his arrest. Also, the court found that the detention of Ziebarth was voluntary. Accordingly, no error was found in the district court's denial of his motion to suppress.

United States v. Benitez, 899 F.2d 995

Author: Judge Theis, sitting by designation

Defendant, Benitez, entered a conditional guilty plea for possession of a controlled substance with intent to distribute. On appeal, Benitez argued that: (1) the border patrol violated his fourth amendment rights by exceeding its authority in detaining him and seizing his vehicle; (2) he did not knowingly and voluntarily consent to a search of his vehicle; and (3) the evidence seized from his vehicle should be suppressed because it was not supported by probable cause.

The Tenth Circuit affirmed Benitez's conviction and the district court's denial of his motion to suppress. First, the court held that Benitez's nervous conduct gave rise to a reasonable suspicion to conduct the search. Accordingly, the detention did not violate his fourth amendment rights. Second, while Benitez did not verbally consent to the

search, he did exit his vehicle, open the trunk, and open a suitcase contained in the truck. The court stated that in light of these circumstances, the situation was not coercive in nature, and Benitez voluntarily consented. Third, since the detention was based on reasonable suspicion and the search was consensual, the evidence seized was supported by probable cause.

Cordoba v. Hanrahan, 910 F.2d 691

Author: Judge Moore

Defendant, Cordoba, was found guilty of driving while intoxicated. Cordoba appealed the district court's dismissal of his writ of *habeas corpus*, arguing that he was not advised of his right against self-incrimination before the officer started the interrogation.

The Tenth Circuit affirmed the decision of the district court. The court ruled that *Miranda* requires police officers to advise a defendant of his right against self-incrimination before initiating a custodial interrogation. The court stated, however, that Cordoba was not in custody when he admitted to driving while intoxicated. Thus, Cordoba was not entitled to a *Miranda* warning against self-incrimination at that point. The court explained that routine traffic stops for roadside questioning do not impair a person's free exercise of the privilege against self-incrimination. Thus, an officer arriving at the scene of an accident may ask a moderate number of questions without warranting a *Miranda* warning.

United States v. Corral-Corral, 899 F.2d 927

Author: Judge Phillips, sitting by designation

Defendant, Corral-Corral's ("Corral's"), vehicle was consensually searched pursuant to a traffic stop near Laramie, Wyoming. During the search, officers found cocaine and a large sum of money in Corral's car. Shortly thereafter, officers obtained a search warrant from a California judge to search Corral's California residence some one hundred miles away. During this search, numerous weapons and additional drugs were seized. The district court suppressed the evidence seized from Corral's residence, concluding that probable cause did not exist. Moreover, the "good faith" exception to the exclusionary rule did not apply. The government brought an interlocutory appeal, seeking reversal of the suppression of evidence.

The Tenth Circuit reversed the district court's suppression of the evidence. The court explained that the seized evidence was the product of a search pursuant to a valid warrant. The court then discussed the purpose of the exclusionary rule, finding that it was designed to serve the privacy interests protected by the fourth amendment. The "good faith" exception permits admission of evidence from a search warrant later invalidated because of lack of probable cause; the officers conducting the search, however, must act in good faith and with reasonable reliance on the warrant. Suppression of evidence is mandated by the exclusionary rule only in cases where it would deter police misconduct.

The court explained that since the officer's reliance on the judge's probable cause determination was reasonable and the technical sufficiency of the warrant was also reasonable, the evidence should not have been suppressed.

United States v. Finney, 897 F.2d 1047

Author: Judge Moore

Defendant, Finney, appealed the district court's order revoking her probation. She contended that the district court erred in admitting evidence obtained in an illegal search. Moreover, she argued that the exclusionary rule is applicable in federal probationary hearings.

The Tenth Circuit affirmed the district court, holding that the exclusionary rule is not applicable in federal probationary hearings. The court reasoned that applying the exclusionary rule to revocation proceedings will not deter illegal police conduct when it occurs before state charges are filed. Therefore, the deterrence to illegal conduct, if any, can be accomplished in the context of the state proceedings. Moreover, application of the rule at a federal revocation proceeding would be redundant and would inhibit the pursuit of criminals who have abused their probation privileges.

United States v. Gonzales, 897 F.2d 504

Author: Judge Anderson

Defendants, Gonzales and Gomez, entered a conditional plea of guilty to possession with intent to distribute marijuana. On appeal, each challenged the district court's denial of their motions to suppress evidence obtained during an investigatory stop. In particular, Gonzales and Gomez contended that information conveyed by a confidential informant to the investigatory officers was insufficient and lacked any indicia of reliability to justify an investigatory stop.

The Tenth Circuit ruled that the confidential informant was considered reliable. The court explained that the informant had previously provided the agents information. Moreover, the information supplied by the informant was sufficient. The court reasoned that the information was based on personal knowledge acquired over a period of time and through past dealings. The judgment of the district court was, therefore, affirmed.

United States v. Gottschalk, 915 F.2d 1459

Author: Judge Anderson

Certain evidence was seized from defendant Gottschalk's vehicle during the execution of a valid search warrant at the residence of William Bailey. The district court suppressed the evidence, however, reasoning that the vehicle which was parked in Bailey's driveway, did not belong to and was not actually controlled by him at the time of the

search. Plaintiff, United States, appealed the district court's determination to suppress the seized evidence.

The Tenth Circuit reversed the district court's decision. The court stated that a warrant authorizing the search of a certain premises generally includes any vehicles either actually owned or under the control and dominion of the premises owner. Thus, where the officers act reasonably in assuming the vehicle is under the control of the premises owner, it is included in the warrant. In the case at hand, the police officers had sufficient indicia of control to render the search of the vehicle proper. For example, the officers discovered the vehicle on the premises at the time the search commenced, they knew the vehicle was inoperable, and the owner of the premises had physical access to keys left in the ignition. Accordingly, the search was valid.

United States v. Henning, 906 F.2d 1392

Author: Judge Brimmer, sitting by designation

Defendant, Henning, was convicted by a jury of one count of possession with intent to distribute more than twenty grams of methamphetamine, two counts of carrying or using a firearm during and in relation to a drug trafficking offense, and one count of possession of an unregistered firearm. Henning appealed his convictions contending that the district court: (1) erred when it did not suppress both the physical evidence seized during a search and the statements regarding this evidence; (2) erred in failing to define the phrase "in relation to" in the jury instructions because it excluded the jury's consideration of the *mens rea* element; and (3) erred in convicting Henning on two violations of 18 U.S.C. § 924(c)(1) in relation to only one underlying offense.

The Tenth Circuit affirmed the district court's order not to suppress the seized physical evidence or statements. The court found that unless the facts relative to a denial of a motion to suppress are clearly erroneous, they must be accepted. Since the physical evidence was seized during a lawful arrest, and Henning was advised of his *Miranda* rights prior to his statements, the evidence and statements were admissible. Second, the court held that the failure to define the "in relation to" clause in the jury instructions was not plain error and so prejudicial that justice could not be done. The court reasoned that the jury was presented with enough testimony to secure the conviction, and the giving of an "in relation to" instruction would not have changed the result. Finally, the court remanded for resentencing. The court held that Henning could only be sentenced for one count under 18 U.S.C. § 924(c)(1) since he was convicted of only one underlying drug trafficking offense.

United States v. Johnson, 895 F.2d 693

Author: Judge Barrett

Defendant, Johnson, appealed the district court's order denying his motion to suppress marijuana seized from his vehicle at a border patrol checkpoint. Johnson appealed, arguing that the district court erred in:

(1) failing to suppress evidence because the seizure of Johnson and his vehicle violated the fourth amendment; and (2) failing to suppress evidence because the duration and scope of his detention and that of his vehicle exceeded the constitutional limits applicable to checkpoints.

The Tenth Circuit held that the search was not in violation of Johnson's fourth amendment rights, and that the district court did not err in denying Johnson's motion to suppress. First, the court found that customs officials had probable cause to believe Johnson's vehicle carried narcotics. Accordingly, they were not limited to investigate solely the citizenship of the occupants. The court explained that detention and search beyond a routine customs inspection may be undertaken upon a "reasonable suspicion" standard. Reasonable suspicion is justified by a particularized and objective basis for suspecting the person of a crime. The court found the inspection to be proper because after Johnson's passenger could not produce any identification and Johnson failed to produce a registration form, the car was properly detained. Once detained, the search of the vehicle, predicated upon the custom official's observation of a large marijuana cigarette in plain view, was valid.

United States v. Keys, 899 F.2d 983

Author: Judge Tacha

Defendant, Keys, appealed his conviction and sentence for knowingly possessing a weapon while an inmate of a federal correctional institution. On appeal, Keys contended that the district court erred by: (1) failing to exclude evidence of his prison gang membership; (2) permitting the testimony of two government witnesses to be reread during jury deliberations; (3) adding two levels to his base offense level for obstruction of justice; and (4) departing upward from the Sentencing Guidelines due to his prison disciplinary record.

The Tenth Circuit affirmed the district court's decision. First, the court held that evidence of Keys' prison gang membership was properly admitted because it demonstrated "bias due to fear." Second, the court stated that it failed to find an abuse of discretion in allowing testimony to be reread to the jury. The court reasoned that the district court previously instructed the testimony be read in its entirety, and the jury could hear it because they felt it was "absolutely essential" to come to a verdict. Third, the court held that the district court properly added two levels to Keys' base offense level for obstructing justice. Evidence at trial showed that Keys did not testify truthfully. Further, he instructed a fellow inmate to perjure himself on Keys' behalf. Finally, the court held that the upward departure from the Sentencing Guidelines based on Keys' prison disciplinary record was proper because: (1) the circumstances cited by the district court justified the departure; (2) those circumstances actually existed; and (3) the departure was not unreasonable.

Kitty's East v. United States, 905 F.2d 1367

Author: Judge Logan

Plaintiff, Kitty's East ("Kitty's"), appealed the district court's denial of its motion for the return of property seized under two search warrants. On appeal, Kitty's disputed the validity of the seizure, arguing that the local warrant failed to describe with sufficient particularity the items to be seized. Moreover, Kitty's contended that the national warrant was overbroad.

The Tenth Circuit affirmed the district court's denial of the motion. The court held that the local warrant was sufficiently specific, even though it did not identify items by name. Second, the national warrant was not overbroad. The court stated that the warrant restricted the items that could be seized. Finally, the government's retention of Kitty's property was reasonable. The court explained that there was a chance the evidence might be lost if it were returned. Also, copies of all the records were previously returned.

United States v. Lux, 905 F.2d 1379

Author: Judge Seay, sitting by designation

Defendant, Lux, was convicted of conspiracy to possess with intent to distribute cocaine and attempting to possess with intent to distribute cocaine. Lux appealed, arguing that the district court erred by denying her motions to: (1) suppress statements made by her to law enforcement officers; and (2) suppress evidence of cocaine seized from a package addressed to her.

The Tenth Circuit affirmed the district court's denial of Lux's motions. First, the court stated that Lux's statements to police officers were made freely and voluntarily. She was advised of her *Miranda* rights, acknowledged that she understood those rights, and voluntarily executed a waiver of them. Moreover, Lux's questions concerning how long she would be detained if she asked for a lawyer and if she had to stay in jail while she waited for one, were not an equivocal invocation of her right to counsel. Second, the court ruled that the cocaine seized from the package was properly admitted into evidence. The court explained that the authorities had reasonable suspicion to detain the package containing the cocaine. In particular, the package met three factors of the "drug package profile," thereby giving authorities reasonable suspicion to subject it to a drug detection dog. Consequently, the detention of the package was reasonable and did not amount to a seizure of personal property.

United States v. Maher, 919 F.2d 1482

Author: Judge Brorby

Defendant, Maher, was indicted for concealing and storing stolen explosive materials and for transporting them in interstate commerce. Maher motioned to suppress evidence of the explosive materials seized

in his unregistered vehicle. The district court granted his motion, and plaintiff, United States, appealed. The government contended that the evidence was properly seized because the participating officers had probable cause to arrest Maher. Moreover, the government challenged the district court's holding that impoundment of Maher's trailer was an unlawful seizure that further tainted his consent to a search.

The Tenth Circuit reversed and remanded the district court's decision. The court ruled that based on the totality of the circumstances, the officers had reasonable cause to believe that Maher was engaged in criminal activity. The court explained that the license plate on Maher's vehicle was stolen, Maher's trailer was unregistered, and Maher was unable to identify the trailer's previous owner. Thus, the officers had probable cause to arrest Maher. Second, the district court erred in holding that impoundment of Maher's trailer was an unlawful seizure. The court explained that just as the officers had probable cause to arrest Maher for possession of a stolen trailer, they had probable cause to impound the trailer and search it without a warrant. Moreover, the subjective intent of the officers in deciding to impound the trailer was inapplicable.

United States v. McAlpine, 919 F.2d 1461

Author: Judge Seymour

Certain police officers were summoned to defendant McAlpine's home at the request of Hale. Hale claimed that she lived against her will with McAlpine. After arriving at McAlpine's home, the police officers scanned the home with Hale's consent. Based on the information found, the police officers obtained a search warrant. McAlpine motioned to suppress evidence obtained during the warrantless search of his residence. In essence, McAlpine argued that because the warrant obtained for the later search was based on the product of the prior illegal search, the warrant was deficient under the fruit of the poisonous tree doctrine. The district court denied the motion to suppress, and McAlpine appealed.

The Tenth Circuit affirmed the ruling of the district court. The court explained that Hale had common authority over the home when the police performed the search. If common authority is established, the person whose property is searched is unjustified in claiming an expectation of privacy in the property. Essentially, that person cannot reasonably believe that the joint user will not, under certain circumstances, allow a search in her own right. The court found common authority in the fact that Hale regularly slept in the room where the guns were found, and the house contained her possessions. Moreover, the court rejected McAlpine's argument that "kidnap victims" cannot give consent to a search of the premise where they are being held. The court explained that the relevant analysis in third-party consent cases is the relation between the third-party and the property searched, not the third-party and the defendant. Consequently, there is no *per se* rule that a crime victim cannot consent to a search of the perpetrator's home.

Second, Hale actually lived in the house, even though it was against her will. Thus, police officers could reasonably believe, under the circumstances, that she had authority to consent to the search.

United States v. Monsisvais, 907 F.2d 987

Author: Judge Brorby

Dissent: Judge Barrett

Defendant, Monsisvais, appealed the district court's holding that the stop of his vehicle and the resulting search were proper. Border Patrol Agent Goad believed that the vehicle contained aliens because of the out-of-state Arizona plates, the weight of the back of the camper shell, and the route chosen by Monsisvais. Consequently, Goad stopped the vehicle and detected a strong odor of marijuana. Goad then placed Monsisvais under arrest for possession of marijuana. After another agent arrived at the scene with a dog to verify the marijuana odor, the agents opened the camper shell on the vehicle and discovered the marijuana.

The Tenth Circuit reversed the district court on the issue of the investigatory stop and, therefore, did not address the propriety of the search. The court stated that an investigatory stop is justified when unusual conduct leads an officer to conclude that there is criminal activity. In assessing the propriety of the stop, the totality of the circumstances must be taken into account. Based on the totality of the circumstances, therefore, the court held that the conduct observed by Goad was not unusual enough to indicate criminal activity. First, the record did not provide the court with a basis for concluding that the vehicle's presence on the highway at 7:30 p.m. was at all unusual and, thus, it was not suggestive of criminal conduct. Second, the court could not conclude from the record that Arizona vehicles are more likely to transport aliens than other out-of-state vehicles. Third, although some vehicles may attempt to circumvent the checkpoint by driving that route, Monsisvais evidenced no evasive driving maneuvers or any other unusual or suspicious behavior. Fourth, even though a pickup with a camper shell, riding heavy, is a significant factor, it is not automatic indication of criminal conduct.

United States v. Morales-Zamora, 914 F.2d 200

Author: Judge Tacha

Defendant, Morales-Zamora ("Zamora"), was indicted on drug charges after a narcotics detection dog directed attention to his vehicle while the vehicle was detained at a roadblock. The stated purpose of the roadblock was to check drivers' licenses, vehicle registrations, and proof of insurance. A subsequent search revealed 126 pounds of marijuana in the vehicle's trunk. The district court granted Zamora's motion to suppress on the ground that the dog sniff was an improper "search" under the fourth amendment.

The Tenth Circuit reversed the decision of the district court. The

court first noted that the purpose of the roadblock was not a pretext to search stopped vehicles for drugs. The court first found that the two-minute detention was not an unreasonable seizure under the fourth amendment. Second, the court found that using a narcotics-detection dog to sniff a vehicle already lawfully detained was not a search within the meaning of the fourth amendment. The court explained that a limited investigation of a vehicle which reveals only evidence of contraband does not constitute a fourth amendment search. The court reasoned that persons have a lesser expectation of privacy in a vehicle.

United States v. Payan, 905 F.2d 1376

Author: Judge Logan

Defendant, Payan, entered a conditional plea of guilty to possessing marijuana with intent to distribute. Payan appealed, arguing that the initial stop of his vehicle at the border patrol check point was unconstitutional on two grounds: (1) the check point was analogous to a roving border patrol and, therefore, the fourth amendment requirement of reasonable suspicion of criminal activity applies; and (2) the border patrol must demonstrate that the location and operation of fixed checkpoints are reasonable. Payan also argued that the search of his vehicle was not supported by consent or probable cause.

The Tenth Circuit affirmed the district court's determination. First, the court held the stop of the vehicle to be valid. The court explained that the checkpoint involved little officer discretion and was not likely to result in abusive or harassing stops. Moreover, the appearance of the officer's authority at the checkpoint allayed the concerns of lawful travelers. Also, permanence of the checkpoint is not required. In addition, the government was not required to demonstrate the reasonableness of its location. Second, the court ruled that the search of the vehicle was not clearly erroneous. Payan interpreted the officer's statement to exit his car and open the trunk as an order, whereas the officer stated it was a question to which Payan consented. The district court was simply required to choose between these differing accounts, and it did so properly.

United States v. Pollack, 895 F.2d 686

Author: Judge Barrett

Defendant, Pollack, was convicted of possession with the intent to distribute marijuana after customs officials stopped his car and seized its possessions. Pollack appealed, and argued that: (1) the stop was not based on reasonable suspicion; (2) the search was executed without probable cause; and (3) he was unlawfully detained after the initial stop.

The Tenth Circuit held the search and seizure valid. The court found that based on the totality of the circumstances, the detaining officers had a reasonable suspicion of criminal activity to justify stopping Pollack's car. The court held that border patrol agents may consider the following factors in determining reasonable suspicion: (1) the area in

which the vehicle is stopped; (2) patterns of traffic on the road; (3) proximity to the border; (4) previous experience with drug trafficking in the area; (5) appearance of the vehicle; and (6) other relevant information. These same factors gave rise to probable cause to arrest Pollack after he was stopped and questioned. Giving due consideration to the time of the stop, the area of the stop and the officer's concern for safety, the court held that the delay following Pollack's arrest was not unlawful.

United States v. Roper, 918 F.2d 885

Author: Judge McWilliams

Defendant, Roper, and two co-defendants were charged with possession with intent to distribute cocaine in excess of 500 grams. Roper filed a motion to suppress cocaine seized from the rented automobile he was driving. The district court denied Roper's motion, finding that he lacked standing to challenge the search of the vehicle.

The Tenth Circuit affirmed, holding that Roper lacked standing to challenge the search of the vehicle he was driving at the time of the stop. The court reasoned that only the owner or one in lawful possession or custody of a rented vehicle has standing to challenge the search of a vehicle. Having keys to a rented car, or permission from the renter to use it, are not sufficient to confer standing. Rather, a defendant must show that an arrangement was made with the rental car company that would have allowed him to drive the car legitimately. Here, the vehicle was rented by a co-defendant's common-law wife, and Roper was not listed as an additional driver in the rental contract.

United States v. Rubio-Rivera, 917 F.2d 1271

Author: Judge Baldock

Defendant, Rubio-Rivera, was convicted of possession with intent to distribute less than fifty kilograms of marijuana. Rubio-Rivera's motion to suppress forty-four pounds of marijuana was denied by the district court, and he subsequently appealed. In particular, Rubio-Rivera argued that the border patrol officer improperly directed him to a secondary checkpoint. Rubio-Rivera alleged that this exceeded the legitimate scope of the initial stop and violated the fourth amendment.

The Tenth Circuit affirmed the district court's denial of the motion to suppress. First, the court acknowledged that Rubio-Rivera had standing to raise the issue, even though the car was borrowed. The court then ruled that border patrol agents have virtually unlimited discretion to refer motorists to a secondary checkpoint. In the case at hand, the border patrol had reasonable suspicion to direct Rubio-Rivera to the secondary checkpoint. The court explained that at the primary checkpoint, Rubio-Rivera was apprehensive and would not maintain eye contact when questioned. Further, the car contained no luggage or personal belongings, and it had a temporary Colorado sticker even

though Rubio-Rivera stated that the car was purchased in El Paso, Texas.

United States v. Scales, 903 F.2d 765

Author: Judge Seymour

Defendant, Scales, was convicted of possession with intent to distribute cocaine. Scales appealed, alleging the district court improperly admitted into evidence cocaine found in his suitcase.

The Tenth Circuit reversed the district court's judgment. First, the court ruled that the drug enforcement agents who seized Scales' luggage did not act in good faith. In particular, the agents did not act in reliance on a search warrant when they seized the luggage and held it for more than twenty-four hours. Consequently, the cocaine found in the suitcase should not have been admitted into evidence. Moreover, the court noted that the intrusion was exacerbated by the agents' failure to inform Scales where they were transporting his luggage, the length of time the luggage would be detained, and the arrangements to be made for the luggage's return. Thus, the seizure exceeded the agents' authority to detain the suitcase for investigative purposes.

United States v. Snow, 919 F.2d 1458

Author: Judge Logan

Defendant, Snow, pleaded guilty to two counts of conspiracy to defraud the government, thereby reserving the right to appeal the district court's denial of his motion to suppress evidence. Consequently, after sentencing, Snow appealed alleging: (1) the affidavit used to obtain the search warrant failed to establish probable cause because it was based on stale information and unreliable hearsay; (2) the search warrant affidavit contained false statements; and (3) the search warrant and search were overly broad.

The Tenth Circuit affirmed the decision of the district court. First, the court stated that it could not determine that the information contained in the affidavit was stale. In making this determination, the court based its decision on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized. Moreover, the investigation into Snow's affairs took place over a five week period. The information gathered during this period was cumulative in nature, requiring the application for the search warrant to be delayed until sufficient evidence was obtained. In addition, since Snow was being investigated for running an ongoing and continuous operation to defraud the government, the passage of time became a less critical factor. Also, the items sought in the search were of the type that would be kept for a lengthy time. Further, the court ruled that hearsay evidence may be used to establish probable cause for a search warrant. The court reasoned that, given all the circumstances described in the affidavit, there was a fair probability that evidence of a crime would be found at the designated location. Second, the court stated that, despite the inaccu-

rate statements contained in the affidavit, it was still valid. The court reasoned that an affidavit which contains erroneous or unconstitutionally obtained evidence is valid if it also contains sufficient accurate or untainted evidence. Finally, the warrant was not overly broad because it did not authorize a general exploratory rummaging of Snow's place of business. Instead, the warrant described with sufficient particularity the items to be seized. For example, it identified the location of the search and described the items to be seized. In addition, the search did not exceed the scope of what was authorized. Snow's personal financial statement and keys were items bearing a reasonable relation to the conspiracy scheme.

United States v. Ware, 897 F.2d 1538

Author: Judge Kane, sitting by designation

Defendants, Ware and Daniels, were convicted of participation in racketeering activities, conspiracy to participate in a criminal racketeering enterprise, conspiracy to possess with the intent to distribute heroin, possession with the intent to distribute heroin, use of the telephone to facilitate distribution of heroin, and other charges. Ware and Daniels appealed, alleging: (1) evidence obtained by a wiretap should have been suppressed because the wiretap was illegal under Oklahoma law; (2) without the wiretap evidence, their convictions for use of the telephone and RICO conspiracy charges cannot stand; (3) the district court should have declared a mistrial because one or more jurors saw the defendants handcuffed in the hallway; (4) sentencing was improper because the indictment did not allege the quantity of heroin distributed and, therefore, their sentences could not be enhanced. Ware also argued that the prosecution's use of evidence of two prior heroin distribution convictions was unduly prejudicial.

The Tenth Circuit affirmed the district court's rulings. First, the court held that the wiretap was not in violation of the Oklahoma Constitution because the police officers remained state employees during their federal commission and were authorized to execute the wiretap. Second, since the wiretaps were found legal, the convictions could stand. Third, the district court's refusal to grant a mistrial was not an abuse of discretion. The court reasoned that Ware and Daniels did not show prejudice because of the incident. Fourth, during sentencing, a judge may consider quantities of drugs involved in a crime, even though the quantity is not charged in the indictment. Finally, the two heroin transactions that resulted in Ware's prior convictions were probative of conspiracy to distribute heroin and were admissible under Fed. R. Evid. 404(b).

United States v. Werking, 915 F.2d 1404

Author: Judge Tacha

Defendant Werking's vehicle was stopped by a patrolman for improper registration. The patrolman asked Werking if he could search

the trunk of the car. Werking agreed, and the patrolman found seventy-five pounds of marijuana. Werking subsequently pleaded guilty to possession with intent to distribute. Werking's plea was conditioned on his right to challenge the district court's refusal to suppress the marijuana. Werking appealed, contending that the district court erred in finding that: (1) the initial stop was lawful; (2) further questioning by the patrolman was a consensual encounter outside the scope of the fourth amendment; and (3) the consent to search the car was voluntary.

The Tenth Circuit affirmed the district court's refusal to suppress the marijuana. The court ruled that the initial stop was a lawful investigative detention because the patrolman had reasonable suspicion to believe Werking's car was improperly registered. The court found that the patrolman's subsequent search of the trunk, during which Werking was free to leave, was a lawful consensual encounter because Werking's license and registration were returned to him.