

John:

As you no doubt are aware, a number of individuals for whatever reason are openly carrying unloaded handguns - of public streets of incorporated cities as well as open carrying of handguns in vehicles which appears to be legal outside of school zones. Several individuals in the San Francisco Bay Area who thought that their behavior was legal have since learned that their possession in fact violated Penal Code § 626.9 because they in fact possessed the firearm within a school zone.

The United States Supreme Court and other Appellate Courts have aptly noted that it not "[U]nfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952)

While there no doubt will be state legislation on this matter in the interim period of time I would suggest that your clients can and should take the following actions under existing state law. [The NRA is not an advocate of open public carry for obvious reasons. They did not oppose the Cohn bill and as part of a DC Rewrite proposal they proposed post Heller, they banned open carrying of any gun outside of one's own private property.]

First, Penal Code § 626.9 is in full and effect. As such, each Department should provide its sworn officers with maps showing the application of the 1,000 foot boundaries within a school zone.

Secondly procedures are set forth in State law that mandate that police officers follow specific procedures in terms of weapons seizures. In order to carry a firearm one must have a firearm to carry.

In so far as persons try to conceal the serial numbers by taping the guns per the rational of New York v. Class, 475 U.S. 106, 114-115 (1986) removal of the tape is valid. As such, removal of covering is a legal search which is part of a valid "frisk" of "stop and frisk" to check serial numbers. See, e.g.: United States v. Watts, 7 F.3d 122, 126-127 (8th Cir. 1993); State v. Gutierrez; 94 P.3d 18, 23-24 (N.M.App. 2004), cert. den. 93 P.3d 1293 (N.M. 2004); State v. King, 949 P.2d 856, 862 (Wash.App. 1998)

In addition, the California Supreme Court held in People v. Chavers, (1983) 33 Cal.3d 462, 473 that Penal Code § 12031, (e) is valid as an authorization to inspect firearms to see if they are loaded.

In addition, California's "stop and frisk law" [Penal Code § 833.5] unlike that of other's State does not mandate - return of firearms at the completion of a stop.

Instead, Penal Code §§'s 11108, 12021.3, and 12028.7 mandate a series of steps before a gun is returned which would require of necessity retrieval of any seized firearm at a police facility after a background check and assuring that the gun is a handgun is properly registered. Indeed, because of the text of the Handgun Safety Certificate law [Penal Code § 12801(b)], return of a handgun without a HSC is illegal unless it is to the legal aka registered owner. See Penal Code § 12807(a) (7).

These laws are in effect and have to be followed. These California statutory mandates do not exist in other states which distinguishes continued retention in California from decisions in other states that ban continued detention at the end of the stop. See, e.g.: State v. Chapman, 921 P.2d 446, 452-454 (Utah 1996) As such, not only is immediate return not mandated, it is barred.

In fact, I emailed Professor LaFave on this issue - and I know him. I emailed him about the firearm seizure issue as to "immediate return" of the guns because we updated our seizure laws in 1997, 1999, 2001, 2004, and 2005 as part of NRA-DOJ deals.

In Arizona v. Hicks, 480 U.S. 321 (1987) the United States Supreme Court held that generally property seizures require "probable cause" to associate the activity with criminality for lengthy property seizures. My half brother was involved in Hicks as he was Scalia's first clerk and Scalia wrote Hicks. However, Hicks reaffirmed United States v. Place, 462 U.S. 696 (1983). Place held that in certain cases property seizures could be on reasonable suspicion as such the issue is does the United States v. Place "carve out" to Arizona v. Hicks apply so that continued detention i.e. no return at the scene - and the provisions of PC 12021.3 and 12028.7 apply and are constitutional.

Place held detention of 'effects" on less that probable cause but reasonable suspicion were subject to Terry-Mickelson stops. Moreover, in Coolidge v. New Hampshire, 403 U.S. 443 (1971) the Court affirmed seizure as to objects dangerous in themselves.

In Volume 4 of the LaFave Treatise at page 672, he raised the issue of immediate return when the object is a gun. He noted that when the seized object is a gun, it would appear that even if it is unloaded but bullets are at hand, then an officer should not be at risk being

shot in the back by returning a gun in that situation and therefore there is strong justification for the notion that the person pick the gun up particularly given the statutory procedures noted above. I asked him to expound on this.

In the vehicle context involving an "exit order", the California Supreme Court noted in People v. Hoyos, (2007) 41 Cal. 4th 872, 893-894 cert. den 552 U.S. 1201 (2008) that "Consistent with the Fourth Amendment, detention following a Mimms/Wilson order may continue at least as long as reasonably necessary for the officer to complete the activity the Mimms/Wilson order contemplates." If the statutory policy is valid, then the detention to effectuate that policy would appear to not violate the Fourth Amendment? I asked if I were correct in that assumption.

Unlike other states our Stop and Frisk statute as set forth in California Penal Code § 833.5 does not mention returns of guns after the stop is completed. That is important because a number of states with "stop and frisk" laws are based on the New York law referred to in Terry which is now New York Criminal Procedure Law § 140.50. 140.50[3] provides:

When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

In the case of guns, under New York Law, possession of a handgun is illegal unless either one is licensed to possess that gun or is a law enforcement type though there are face to face loan exemptions so unless the person is either licensed or a cop, the possession is legal, and it makes sense that the gun is immediately returned. The same is true for a number of states below.

Several states that adopted state statutes post Terry basically copy verbatim New York on the return issue with a mandate upon the

completion of the questioning do, at which time they require either the return of the items, if lawfully possessed, or arrest that person which suggests that continued retention is an invalid seizure. States besides NY with such Terry or Terry light statutes other than California are as follows:

Alabama

Ala. Code §15-5-31 - same as NY on returns - Alabama Court of Criminal Appeals held failure to return clear statutory violation. Clark v. State, 555 So. 2d 823 (Ala. Crim. App. 1989)

Arkansas

Ark. Code Ann. §5-71-213 - system down

Colorado

Colo. Rev. Stat. §16-3-103(1) - no provision on returns

Delaware

Del. Code Ann., Tit. 11, §§1902 - same as NY on returns

Florida

Fla. Stat. § 901.151 - no provision on return

Illinois

Ill. Comp. Stat., ch. 725, § 5/108-1.01 - same as NY -Illinois a licensing state to possess a gun.

Kansas

Kan. Stat. Ann. §22-2402 - same as NY

Louisiana

La. Code Crim. Proc. Ann., Art. 215.1(A) - same as NY

Montana

Mont. Code Ann. §46-5-401 - same as New York

Nebraska

Neb. Rev. Stat. §29-829 - same as New York

Nevada

Nev. Rev. Stat. §171.1232 - no provision on return.

New Hampshire

N. H. Rev. Stat. Ann. §594:3 - same as NY on returns

North Dakota

N.D. Cent. Code §29-29-21 - same as NY - licensing state to possess in public

Oregon

ORS § 131.15 - silent on returns.

Rhode Island

R. I. Gen. Laws §12-7-2 - same as NY.

Utah

Utah Code Ann. §77-7-17 - same as NY

Wisconsin

Wis. Stat. §968.24 - same as NY

As noted above, several states that adopted state statutes post Terry basically copy verbatim New York on the return issue with a mandate upon the completion of the questioning do, at which time they require either the return of the items, if lawfully possessed, or arrest that person which suggests that continued retention is an invalid seizure. See, e.g.: People v. Harris, 397 N.E.2d 733 (N.Y. 1979); State v. White, 1 So.3d 439 (La. 2009) Other states adopted statutes based on the Uniform Arrest Act which also mandate return but have time limits up to an hour for stops. They include Delaware, Rhode Island, and New Hampshire.

In White New Orleans Police validly stopped a vehicle and saw White holding a gun. The cop seized the gun under Louisiana "stop and frisk" law which requires as the end of the stop either arrest or release of the detainee and seized effects.

The officer seized the gun and "ran" both the gun and the possessor and failed to note that the detainee was on felony probation. The officer then took possession of the gun and told the detainee he could pick it up at the station later which was a statutory violation but not necessarily a flagrant Place violation.

The gun was held in the property room but not examined. Later the officer's Sergeant reviewed the police report and did his own checks which showed that White was a convicted felon. The Sergeant then prepared with the officer an arrest warrant application which detailed everything and a judge issued a warrant. The Sergeant then had the gun held in the property room as evidence and when White returned to pick up the gun he was arrested on the warrant.

In upholding a denial of the MTS by the trial court the Louisiana Supreme Court noted that the intrusion on White's possessory

interests were relatively minimal, they did not exploit physical custody of the weapon as a means of furthering an ongoing investigation by subjecting it to inspection or testing and the physical location of the handgun in the property room of had no bearing on the discovery by the Sergeant as he reviewed the officer's incident report based on her personal observations at the scene. All that changed in the intervening hours was the more sophisticated examination that would have justified White's immediate arrest of defendant and seizure of the gun incidental to that arrest if the officer had noticed and resolved the discrepancy in the data.

Given those circumstances the Court concluded that the arrest warrant secured from the magistrate on the following night, a judicial finding made approximately 24 hours after the traffic stop that probable cause existed for arresting White and for seizing the gun as evidence of a crime, constituted an intervening circumstance that dissipated any taint from the initial decision to confiscate the weapon overnight and attenuated any possessory interests White retained in the weapon, which had become subject to the state's right to forfeit crime-related contraband. It appears - and White cited Place - that the continued detention was a statutory - not a constitutional violation.

I would make four observations as to White:

One: At least as a matter of California law the physical possession of the gun did not affect the ability to obtain a possession conviction because the officer's legal observation of White in possession was itself sufficient to sustain a conviction per Evidence Code § 411, see, e.g.: People v. Richardson, (2008) 43 Cal.4th 959, 1030 cert den. ___U.S. ____, 129 S. Ct. 1316 (2009)

Two: It appears that the arrest warrant itself produced no suppressible fruits.

Three: Unlike other states which adopted stop and frisk statutes post Terry v. Ohio, California's codification of Terry "frisk authority" set forth in Penal Code § 833.5 does not mention returns of guns after the stop is completed - rather Penal Code § 12028.7 does and it provides that when a firearm is taken into custody by a law enforcement officer, the officer shall issue the person who possessed the firearm a receipt describing the firearm, and listing any serial number or other identification on the firearm, where the firearm may be recovered, any applicable time limit for recovery, and the date after which the owner or possessor may recover the firearm pursuant to Penal Code § 12021.3 which, in turn, requires a background check

and registration of the gun - if it is a handgun - *before* it is returned which is consistent with Due Process.

Four: White shows the need for better databases and in-field training.

Police officers are obviously allowed to seize weapons and the California Supreme Court noted in Gubler v. Commission on Judicial Performance, (1984) 37 Cal.3d 27 that seizure of weapons from persons is covered by and authorized by Penal Code 12028. Via cross-referencing these actions are exempt from certain prohibitions on "transfers" even though they are involuntary ones.

The basic procedure is the cop seizes the gun under Penal Code § 12028, the person is supposed to get a receipt under Penal Code § 12028.7 which includes make, model serial number, and an explanation of the return being covered under Penal Code § 12021.3.

In the interim, tracing is required as well as entry into CLETS under Sections 11108 and 11108.3. As such, continued retention of the gun to in fact see in fact if the possession is legal not only allowed - as noted above - is a statutory mandate of California law. As such, an immediate return of the firearm is not allowed. No one has questioned the statutes validity and in the absence of a declaration of unconstitutionality, they are in effect. Of necessity, the gun has to be picked up the gun at a police facility.

It is clear that the fact that these California statutory mandates exists which have not been challenged and do not exist in other states which distinguishes continued retention in California from decisions in other states that ban continued detention such as State v. Chapman, 921 P.2d 446, 452-454 (Utah 1996)

In the vehicle context involving an "exit order", the California Supreme Court noted in People v. Hoyos, (2007) 41 Cal. 4th 872, 893-894 cert. den 552 U.S. 1201 (2008) that "Consistent with the Fourth Amendment, detention following a Mimms/Wilson order may continue at least as long as reasonably necessary for the officer to complete the activity the Mimms/Wilson order contemplates." If the statutory policy is valid, then the detention to effectuate that policy would appear to not violate the Fourth Amendment? I asked LaFave if I were correct in that assumption - he said yes.

In terms of situations analogous to this, the only case that LaFave cites is the decision of Tennessee Supreme Court in State v. Harmon, 775 S.W.2d 583 (Tenn. 1989) where the defendant plead guilty to

petty larceny subject to right of appeal on grounds that evidence of items taken from him should have been suppressed.

In Harmon, the issue presented was "whether items of personal property taken without probable cause from the defendant and detained for several days violated the defendant's rights under the Fourth Amendment to the United States Constitution and Article 1, § 7 of the Constitution of the State of Tennessee."

At the Harmon MTS, it was established that cops did a valid stop and frisk and retrieved some items where there was an open issue of whether Harmon's possession of the same was legal.

The cops took the items found on Harmon into possession, telling Harmon to give them a couple of days to check on them. Harmon was further informed that if they found the articles were not stolen he could come by the police department and they would be returned to him. He never sought recovery of the items taken from him.

Subsequently, the items were determined to be stolen and an arrest warrant was issued for his arrest and he was convicted. The Tennessee Supreme Court affirmed the denial of the MTS on two grounds: (1) detention for a period of two weeks of the automobile stereo system component and audio cassette tape found on person of Harmon was the fruit of a reasonable stop and frisk did not violate defendant's search and seizure rights, and (2) in any event evidence could be introduced on independent grounds, as owner of automobile had reported stereo system stolen, had described items found on defendant and had then identified them. As to the detention/examination, the Tennessee Supreme Court specifically noted:

"In United States v. Place, 462 U.S. 696 (1983), the United States Supreme Court held that officers were justified in temporarily seizing personal effects from a person where there was a reasonable suspicion to believe the effects contained contraband or evidence of crimes. The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.... The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests.' See United States

v. Montoya De Hernandez, 473 U.S. 531 (1985).
(Citations omitted).

"In this case, at an early hour in the morning, with adequate indicia of criminal activity, the officers confiscated the three items taken from defendant in order to further their investigation. They advised him if they found out they were not stolen they would be returned to him in a day or two. We do not think this reasonable detention of the evidence taken from defendant's person violated his rights under the Constitution of either the United States or the State of Tennessee." 775 S.W.2d at 586

LaFave is supposed to get back to me by the end of next week with his thoughts but he tentatively agreed absent a statutory requirement, immediate return is not required.

Irwin