

**FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
JANUARY 31, 2009**

SELECTED VICTORIES IN THE FIRST DISTRICT

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INTRODUCTION

One hundred and thirty victories! In 2008, FDAP Staff and Panel Attorneys won approximately 130 appeals in the First District Court of Appeal resulting in unpublished opinions. Congratulations to all of the victorious advocates and their clients. Credit also goes to the trial attorneys who took appropriate actions at the lower court level to preserve these issues for appeal.

These 130 appellate victories yielded a wide range of results for our clients. In some cases, serious felony convictions were reversed or sentences were substantially lowered. Sometimes, a fine was reduced or days of additional credit were awarded. Some victories secured second chances – a new trial or a remand for re-sentencing. Whatever the results, our clients benefitted.

Summaries of all 130 victories, with links to the unpublished opinions, can be found in the “Victories blog” on the FDAP website (www.fdap.org) In these materials, we provide just a small sample – synopses of 16 winning unpublished opinions in criminal and juvenile delinquency cases involving pre-trial, trial, and sentencing issues. We do not claim to have provided a significant or representative sample of the broad range of appellate arguments that prevailed in 2008. However, the 16 successful appeals discussed in these pages yielded interesting and sometimes surprising results. These opinions come from all five divisions of the First District Court of Appeal, and they discuss a wide variety of appellate issues.

Why should we read unpublished opinions? Because they can help us with issue selection, research and analysis. By reviewing unpublished opinions, one can determine the types of issues and fact patterns that lead to reversals. Also, one can discern the kinds of arguments that the Court of Appeal finds most persuasive. Although unpublished opinions cannot be cited as authority, the Court, in these decisions, cites to published authority in support of its reasoning; you can rely on those cases in your briefing.

Here are some issues that yielded multiple victories in 2008: A conviction was supported by insufficient evidence (9). The defendant was improperly convicted of a lesser included offense and the greater offense (7). A term was imposed in violation of Penal Code section 654 (9). The upper term violated *Blakely* and *Cunningham* (8). The court miscalculated fines and fees (5). In dependency appeals, the court failed to comply with ICWA requirements (12). The juvenile court erred in calculating the minor’s maximum confinement time (7). The juvenile court failed to designate a sustained wobbler offense as a misdemeanor or felony (6).

PRE-TRIAL MOTIONS

In re Anthony B., A118072 (Division Three)

Subjects: Confessions - Voluntariness, Waiver of *Miranda* rights

Date Filed: March 28, 2008

Attorney: Linda Harvie

FDAP Buddy: Kathryn Seligman

Westlaw Citation: 2008 WL 821605

The Court of Appeal reversed the juvenile court’s jurisdictional finding that appellant had committed second degree robbery. Division Three held that the juvenile court had erred in denying appellant’s motion to suppress his post-arrest incriminating statement, because he did not knowingly and voluntarily waive his *Miranda* rights and his confession was not voluntary.

Appellant, age 16, was one of four minors charged with second degree robbery. Allegedly, the four boys stopped the adult victim while he was riding his bike and asked him for money. When the victim said he had no money, the boys knocked him off of his bike, took \$160 from him, and punched and kicked him. Appellant and three others were arrested nearby. The next day, police officers conducted a recorded interview with each of the four minors, starting with appellant. After repeatedly denying his participation in the crime, appellant ultimately confessed. At appellant’s jurisdictional hearing, this confession was the principal incriminating evidence; the juvenile court found that the victim’s identification of appellant as one of the robbers was “suspect”, “troubling” and “inconsistent”, and that without the confession, it had not heard sufficient evidence.

After listening to the recorded interview, the Court of Appeal found that appellant had not voluntarily, knowingly and intelligently waived his *Miranda* rights. The Court considered the totality of circumstances, including appellant’s age, experience, education and capacity. The Court noted, in particular, that appellant was only 16 and – as he told the officer – this was his first time in custody. Appellant was obviously nervous and upset during the interrogation. During the officer’s recitation of the *Miranda* rights, appellant asked, “Wait, what’s an attorney?”, and he never stated that he understood or waived the right to have an attorney present during questioning.

The Court of Appeal also found that appellant’s confession was involuntary. Again, the Court considered all of the surrounding circumstances, including appellant’s young age, his evident emotional state, and his lack of experience with the criminal justice system. The Court emphasized that the officers had implicitly promised leniency, stating that

appellant would likely receive a lighter sentence if he “told the truth” and a heavier sentence if he persisted in declaring his innocence. The officers repeatedly lied to appellant, falsely telling him that his co-participants had already made statements implicating him in the crime. Finally, the officers threatened appellant with incarceration if he did not “act like a man” and confess.

Division Three concluded that the error in admitting the involuntary confession, which was obtained in violation of appellant’s Miranda rights, was not harmless beyond a reasonable doubt. As the juvenile court had stated, without the confession, there would have been insufficient evidence to sustain the petition.

Note: If you have a case in which you suspect that the officer’s recitation of the defendant’s *Miranda* rights was not adequate or complete, be sure to view the latest published First District victory on this issue: *People v. Bradford* (2008) 169 Cal. App. 4th. 843 (Division One; Attorney: Stephen Bedrick). In *Bradford*, the Court held that appellant’s confession was erroneously admitted, and that its admission was not harmless beyond a reasonable doubt. Before beginning the post-arrest interview, the officer quizzed appellant about his knowledge of the *Miranda* warnings based on prior arrests and watching television. Although the officer mentioned three of the four required warnings, he omitted any reference to the fact that appellant’s statement could be used against him in court.

***People v. Kuntz*, A117631 (Division One)**

Subjects: Search and seizure, Traffic stops, Probationers

Date Filed: June 11, 2008

Attorney: Gordon Brownell

FDAP Buddy: Fran Ternus

Westlaw Citation: 2008 WL 2358878

The Court of Appeal held that the trial court erred in denying appellant’s pre-plea motion to suppress evidence. The lower court should have suppressed drug evidence found in pill bottles inside of appellant’s backpack, as well as additional evidence found during a subsequent search of appellant’s home, conducted pursuant to a search warrant – the fruits of the illicit search of the backpack and pill bottles. The officers could not search inside the pill bottles during a lawful registration search, and the search of the backpack was not justified as a probation search.

Appellant was one of four passengers sharing the bench seat of a pickup truck with the driver. The officer pulled the truck over for suspected seatbelt violations. During the

traffic stop, the officer ordered all of the occupants to exit the truck and sit on the curb. He asked the occupants if anyone was on probation and appellant stated he was on probation subject to search and seizure. In fact, he did not have a search condition. The driver produced his driver's license but was unable to produce vehicle registration. The officer searched the truck for the missing registration, looking in the glove box, the driver's end of the bench seat, and the vehicle's pockets. The officer then searched a backpack that he found in the storage area behind the bench seat. In that backpack, he found a pill container, which he opened, finding two baggies of suspected cocaine. Also inside the backpack, he also found prescription medicine with appellant's name on it. The officer then arrested appellant and subsequently obtained a search warrant to search his home, where he found more drug evidence.

Division One found that the officer lacked probable cause to search the backpack, or any containers therein, for contraband. Arguably, the officer could search the backpack for registration documents (See *In re Arturo D.* (2002) 27 Cal. 4th 60, 78-81), but the search of the pill bottle was not justified as a registration search. The officer had no reason to expect that the missing registration documents would be found inside the pill container.

Although the officer had a good faith belief -- based on appellant's statement -- that he was on probation with a search condition, the search of the backpack was not justified as a probation search. The officer did not know that the backpack belonged to appellant before he searched it, and the search could not be retroactively justified.

***In re T.C.*, A120235 (Division Five)**

Subjects: Search and seizure, Pat search, Probable cause to arrest

Date Filed: October 27, 2008

Attorney: Kelly Cronin

FDAP Buddy: Jeremy Price

Westlaw Citation: 2008 WL 4696074

The Court of Appeal held that the juvenile court erred in denying appellant's motion to suppress stolen property discovered during an illegal search of appellant's pockets. Because the officers lacked probable cause to arrest appellant, the search was not justified as incident to arrest. Moreover, the officers had no right to pat search appellant for weapons and they exceeded the scope of a lawful pat down search when they reached into appellant's pockets.

Appellant was the passenger in a car stopped at 11:30 p.m. The officer stopped the car "packed with a large number of kids" because he had observed a broken tail light and

learned from dispatch that the vehicle was stolen. The officer arrested the driver and then ordered the passengers out of the car at gunpoint. The officer ordered appellant, the first one out, to walk toward the back-up officer. That officer handcuffed appellant and immediately frisked him for weapons. He found no weapons but then emptied appellant's pockets, removing a checkbook, driver's license and credit cards, which were subsequently identified as stolen property.

Division Five held that the officer lawfully stopped the car for having a broken tail light. The prosecution conceded that appellant was arrested when the back-up officer handcuffed him. The Court held that the officer lacked probable cause to arrest appellant merely because he was the passenger in a stolen car. There was no evidence linking appellant to the purported theft of the vehicle.

Next, the court held that the officers lacked a reasonable belief that appellant was armed or dangerous, as necessary to lawfully initiate a pat search. His presence in a stolen car at night was not sufficient. The officers did not see any weapons or bulges in appellant's clothing, and he did nothing to threaten the officers' safety. Finally, even if the pat search was lawful, the officer did not feel any likely weapons during the frisk of appellant's outer clothing. Consequently, he had no right to empty appellant's pockets.

Note: Three recently published Fourth Amendment victories are relevant to the issues discussed in this opinion. In two cases, the Court of Appeal found that officers converted a lawful detention into a de facto arrest, requiring probable cause, when they unreasonably handcuffed the defendant; the circumstances did not support a reasonable belief that the detainee presented a safety threat or flight risk. (See *In re Antonio B.* (2008) 166 Cal. App. 4th 435; and *People v. Stier* (2008) 168 Cal. App. 4th 21 [petition for review and request for depublication pending].) In *People v. Sandoval* (2008) 163 Cal. App. 4th 205 [petition for review denied], the Court of Appeal held the officer lacked reasonable suspicion to conduct a pat search of the defendant merely because he was sitting in front of a house where the officers intended to conduct a probation search. The officers suspected that the probationer was dealing drugs from his residence, and the defendant was a known associate of the probationer who had previously been arrested for possession of methamphetamine. Nevertheless, the frisk was unlawful because the officers lacked a particularized reasonable suspicion that appellant was engaged in any criminal activity or that he was armed and dangerous. The police are not entitled to pat search all persons present at a residence searched for drugs.

In re Terrell J., A118072 (Division Five)

Subjects: Search and seizure, Pat search

Date Filed: February 7, 2008

Attorney: Kathryn Seligman

Westlaw Citation: 2008 WL 821605

The Court of Appeal reversed the trial court's order denying appellant's motion to suppress a firearm seized by the police during an unlawful pat search, finding that it was unsupported by a reasonable suspicion that appellant was armed.

Appellant, a minor, was the back seat passenger in a car parked, at 9:00 pm., in a private tenants-only lot in a high crime area. The area was known for gangs, shootings and homicides. As they drove by, four officers noticed a group of five to ten "guys hanging out" near the car. One of the men in this group approached the parked car and spoke with someone inside before returning to the group and telling them they had to leave. The officers stopped and exited from their patrol car; two officers approached the group while two others approached the car in which appellant was sitting. The officers learned that the car's driver, Ms. Garcia, did not live at the private residence and requested her drivers license. As she was retrieving her license, the other officer noticed that appellant appeared nervous and was looking around the vehicle. The officer ordered appellant out of the car, pat searched him, and removed a small gun from his back pocket.

Division Five held that the totality of circumstances did not support a particularized reasonable belief that appellant was armed and dangerous. The officers could not frisk appellant because he was a passenger in a car that was possibly illegally parked in a high crime area at night. Nothing about appellant's appearance reasonably suggested that he was armed and he made no furtive gestures or threatening movements. Appellant's evident nervousness was an understandable reaction to the police encounter and "too slim a reed to warrant the intrusion of a patdown search". Finally, the circumstances did not support a reasonable suspicion that appellant was personally engaged in criminal activity, and the presence of the group of men nearby did not suggest that appellant was armed.

Note: During a traffic stop, or while detaining individuals seated in a parked car, an officer can order the occupants to exit from the vehicle. He can do this routinely for officer safety, without any reasonable suspicion that the occupants are armed. (See *Pennsylvania v. Mimms* (1977) 436 U.S. 106, 110-111 [driver]; *Maryland v. Wilson* (1997) 519 U.S. 408, 415 [passenger].) However, after an occupant exits from the vehicle, the officer cannot pat search him unless the circumstances support a reasonable belief that the individual is armed. (See *Mimms, supra.*, at 110, n.5; *United States v.*

Brown (7th Cir. 1999) 188 F.3d 860, 864; *People v. Medina* (2003) 110 Cal. App. 4th 171.) Officers frequently disregard this rule, as they did in *Terrell J.* This case thus presents a common scenario and discusses many of the factors that the prosecution typically relies on to justify a weapons frisk under these circumstances.

***People v. Chavez*, A120902 (Division Three)**

Subjects: *Marsden* motions and procedure

Date Filed: August 19, 2008

Attorney: Alex Green

FDAP Buddy: Alan Siraco

Westlaw Citation: 2008 WL 3846431

The Court of Appeal reversed the judgment and remanded the matter to the trial court to conduct a *Marsden* hearing to properly assess appellant's complaints and determine if appellant's trial counsel rendered ineffective assistance.

Appellant was alleged to have violated his probation by committing new crimes. Towards the end of his contested probation revocation hearing, appellant addressed the trial court and complained that his trial attorney had failed to interview two witnesses and obtain allegedly exculpatory video evidence. The trial court told appellant that he could not talk about his attorneys perceived deficiencies, and that he should limit his comments to the sufficiency of the evidence against him. The court found appellant in violation of his probation without inquiring further regarding appellant's complaints.

The Court of Appeal relied on two recent published cases from the Fifth District discussing the trial court's obligations under *Marsden*: *People v. Eastman* (2007) 146 Cal. App. 4th 688; and *People v. Mendez* (2008) 161 Cal. App. 4th 1362. The Court held that appellant's complaints about the adequacy of his appointed counsel triggered the trial court's obligations under *People v. Marsden* (1970) 2 Cal. 3d 118, even though appellant had not expressly requested new counsel. Appellant should have been given the opportunity to fully and fairly articulate the causes of his dissatisfaction and his trial counsel should have been permitted to respond. The trial court should have conducted an inquiry sufficient to ascertain whether counsel had rendered ineffective assistance. The matter was remanded to the trial court to conduct a *Marsden* hearing and appoint substitute counsel if it found ineffective assistance.

ISSUES AT TRIAL OR JURISDICTIONAL HEARING

***People v. Urbina*, A118420 (Division Three)**

Subjects: Evidence of other crimes, Evidence Code secs. 352, 1108

Date Filed: September 30, 2008

Attorney: Janet Gray

FDAP Buddy: Tara Mulay

Westlaw Citation: 2008 WL 4414206

The Court of Appeal reversed appellant's four convictions for touching two girls under age 14 with lewd intent; the trial court had abused its discretion, under Evidence Code section 352, by admitting evidence of an alleged prior molestation of a young girl for which appellant had previously been tried and acquitted. Appellant was prejudiced by the erroneous admission of the prior act because it is reasonably probable that the jury would not have convicted him without that evidence.

The 30-year-old defendant had played hide-and-go-seek with two young girls, aged eight and nine, who lived in his apartment complex. During the game, while they were together in the laundry room, he briefly touched each of the girl's stomach and buttocks. Over defense objection, the trial court granted the prosecutor's motion to admit a prior act of lewd touching of a ten-year old girl that had occurred two years earlier. The prior act involved more inflammatory conduct and more extensive touching than the current offenses. Appellant had been tried but acquitted of that prior offense.

The Court of Appeal found that the prior sexual offense evidence was admissible under Evidence Code section 1108, to establish appellant's lewd intent and predisposition to commit sex crimes. The evidence was admissible even though appellant had been acquitted of the prior crime. However, the admission of evidence pursuant to section 1108 is subject to Evidence Code section 352. In this case, the trial court abused its discretion in admitting the evidence because it was more prejudicial than probative. The testimony concerning the prior incident was of limited probative value because it was unsupported by independent evidence of other instances of similar misconduct. The prior act evidence was highly prejudicial, because it was more inflammatory than the charged offenses, and because of the possibility that the jury would seek to punish appellant for this previous unpunished conduct. Finally, the erroneous admission of the evidence was prejudicial under the test of *People v. Watson* (1956) 46 Cal. 2d 818, 836. Because the testimony regarding the prior act was virtually the only evidence that appellant committed the current acts with lewd intent, it is reasonably probable that the jury would not have acquitted appellant in the absence of this testimony.

***People v. Joachim*, A118149 (Division Three)**

Subjects: Evidence of other crimes, Evidence Code sec. 1101(b)

Date Filed: April 22, 2008

Attorney: William Lawrence

FDAP Buddy: Paula Rudman

Westlaw Citation: 2008 WL 1801348

The Court of Appeal reversed appellant's conviction for possession of burglary tools because the trial court abused its discretion in admitting evidence of two prior uncharged burglaries to prove a common plan and intent pursuant to Evidence Code section 1101(b).

During a routine traffic stop, a police officer searched appellant's vehicle and discovered stolen property and alleged burglary tools (a pair of bolt cutters and a tire iron flattened into a pry bar). Based on these discoveries, appellant was charged with possession of stolen property and possession of burglary tools. At trial, the court granted the prosecution's request to admit evidence regarding two prior uncharged burglaries, under Evidence Code section 1101(b), to establish a common plan and to show that appellant had the intent necessary for both crimes – that he knew the property found in his possession was stolen, and that he possessed the tools with the intent to break and enter into a building or vehicle. In the first prior incident, a witness had observed appellant leaving the burglary scene with a stolen weed-eater in his hands. In the second incident, appellant was stopped by the police driving a vehicle containing stolen goods.

The Court of Appeal held that the trial court abused its discretion in allowing the evidence of the two prior uncharged crimes to be considered in respect to the burglary tools possession charge. There was no evidence that burglary tools had been used or found in either of those incidents. There was no similarity between the prior incidents and the charged offense, so they were irrelevant to prove either a common plan or appellant's intent. They only showed that appellant had a propensity to commit criminal acts. Moreover, admission of the incidents on the burglary tools charge was not harmless error. There was weak evidence that the tools discovered in appellant's vehicle had been used in a burglary. It was reasonably probable that appellant would have been acquitted of the charge if the evidence of the prior incidents had been excluded.

As to the second conviction, for possession of stolen property, the Court of Appeal found that the evidence regarding the first prior uncharged crime (when appellant was observed with stolen property in his hands) was too dissimilar, and thus improperly admitted to show a common scheme or appellant's intent. However, the erroneous admission of this

evidence was not prejudicial. Moreover, the facts of the second prior incident (when stolen property was previously found in appellant's truck) was sufficiently similar to the current offense to permit an inference that appellant knew the property discovered in his car was stolen. Thus, the evidence of the second prior crime was properly admitted in respect to the receiving stolen property charge.

People v. McCovey, A115759 (Division Three)

Subjects: Evidence, Hearsay, Unavailable witness, Use of prior testimony

Date Filed: February 15, 2008

Attorney: Richard Neuhoff

FDAP Buddy: Richard Braucher

Westlaw Citation: 2008 WL 401581

The Court of Appeal reversed appellant's convictions for assault and criminal threats, because the trial court erroneously admitted the victim's preliminary hearing testimony without an adequate showing that she was an unavailable witness at trial.

The victim testified against appellant at the preliminary hearing. On the eve of trial, she recanted this testimony, claiming she had lied. The victim invoked her Fifth Amendment right and refused to testify at trial. Even after the prosecution offered her immunity, she continued to assert her Fifth Amendment privilege and refused to testify. Over defense objection, the trial court declared the victim an unavailable witness and admitted her preliminary hearing testimony, which incriminated appellant.

The trial court committed prejudicial error in admitting the victim's prior testimony, under Evidence Code section 1291, because there was an inadequate showing that she was unavailable as a witness. Her mere refusal to testify was not sufficient. The trial court had failed to take reasonable steps to induce her to testify before declaring her unavailable. The trial court could have urged her appointed counsel to explain the legal import of the prosecution's offer of immunity; it could have put her on the stand to impress upon her the gravity of the situation; it could have ordered her to testify; or it could have threatened her with contempt or fines. The Court concluded: "[Appellant's] right to confront and cross examine [the victim] should not have been so easily discarded, because [her] testimony was critical to the prosecution's case."

***People v. Brown*, A118032 (Division Four)**

Subjects: Accomplice corroboration rule; Text messages as evidence

Date Filed: April 30, 2008

Attorney: Barry Karl

FDAP Buddy: Richard Braucher

Westlaw Citation: 2008 WL 1899910

The Court of Appeal reversed appellant’s convictions for burglary and receiving stolen property, because they were based on the uncorroborated testimony of an accomplice in violation of the accomplice-corroboration rule set forth in Penal Code section 1111. The Court held that appellant’s motion for judgment of acquittal, made at the close of the prosecution’s case-in-chief, should have been granted.

Appellant was convicted by a jury of burglary and receiving stolen property. Allegedly, she participated with two men in stealing electronic equipment from a garage. One of the two male accomplices confessed and entered into a plea bargain with the prosecution. He testified at appellant’s trial and was the only witness implicating her in the crimes.

Penal Code section 1111 provides that a conviction cannot be based on the testimony of an accomplice unless that testimony is corroborated by independent evidence tending to connect the defendant with the crime. This is because accomplice testimony is deemed to come from a tainted source who often gives his testimony in the hope or expectation of immunity or leniency. In the present case, the accomplice’s testimony – claiming that appellant had directed him to take the electronic equipment and assisted him in removing and storing the property – was the only evidence implicating appellant in the alleged burglary and receipt of stolen property. There was no independent corroboration.

The prosecution also introduced eight cell phone text messages into evidence, all signed by “SHAWNA B!” (appellant’s first name and last initial). The accomplice testified that these cryptic messages had been received on his cell phone from appellant, and that they related to her participation in the crimes. Division Four held that these text messages did not qualify as independent corroborating evidence because they were authenticated by the accomplice, and only the accomplice’s testimony established that appellant had actually sent the messages allegedly pertaining to the theft.

Note: It has long been held that the accomplice corroboration rule, set forth in Penal Code section 1111, does not apply to juvenile delinquency adjudications. (See *In re Mitchell P.* (1978) 22 Cal. 3d 946.) Recently, Division Four applied this rule to affirm a juvenile court’s jurisdictional finding that the minor had committed residential burglary, although

the only evidence implicating the minor was supplied by an accomplice. (*In re Christopher B.* (2007) 156 Cal. App. 4th 1557.) Division Four held that it was required to apply the Supreme Court's *Mitchell P.* rule and affirm. However, the Court of Appeal noted that because of significant changes in the purpose and consequences of juvenile court jurisprudence over the last 30 years, the rule of *Mitchell P.* is well positioned for reassessment. The Supreme Court denied a Petition for Review in *Christopher B.*, although Justice Kennard stated that the petition should have been granted.

***People v. Joseph*, A117929 (Division Two)**

Subjects: Prosecutorial misconduct, Witness tampering

Date Filed: December 19, 2008

Attorney: Han Tran

FDAP Buddy: Brad O'Connell

Westlaw Citation: 2008 WL 5274808

The Court of Appeal reversed appellant's jury trial convictions for possession of a firearm and ammunition upon concluding that the trial court had erred in denying appellant's motion for a mistrial based on prosecutorial misconduct. Division Two held the prosecutor had violated appellant's constitutional right to present witnesses in his defense by threatening and intimidating a key witness.

During a parole search of a residence that appellant, a parolee, shared with D.R., officers found a sawed off shotgun and ammunition. From the time of the search, D.R. claimed that the weapon belonged to her and not to appellant (a convicted felon), and she consistently expressed her intent to testify to this effect at appellant's trial. During trial, after restating this intention to defense counsel, D.R. met with the prosecutor who informed her that "possession of a sawed off shotgun is a felony and she would be charged." The witness then met with her court-appointed attorney and subsequently refused to testify, invoking her Fifth Amendment privilege against self-incrimination. After the jury reached a verdict convicting appellant of all charges, he personally provided the court with a motion for a mistrial based on prosecutorial misconduct and witness tampering. The trial court denied the motion.

The Court of Appeal found that appellant had made the requisite three-part showing to prevail on a claim that the prosecutor had interfered with his constitutional right to compel the attendance of defense witnesses at trial: 1) He established that the prosecutor had committed misconduct by engaging in activity that was wholly unnecessary to the proper performance of his duties and was of such a character as to transform a defense witness from a willing witness to one who refused to testify. 2) Appellant demonstrated

that there was a causal link between the prosecutor's misconduct and his inability to present a witness on his own behalf – that the misconduct was a substantial cause of the witness's refusal to testify. 3) Appellant showed that there was a reasonable possibility that the witness would have given material and favorable testimony. Finally, appellant established that the prosecutorial interference was not harmless beyond a reasonable doubt in this case.

Discussing the unusual procedural history of this case, Division Two held that the claim of prosecutorial interference was not waived for purposes of appeal. (See footnote 2) After the jury reached its verdict, but before that verdict was read, appellant had personally raised the issue to the trial court. He handed defense counsel a "motion to dismiss" based on prosecutorial misconduct and witness tampering. Defense counsel asked the court to consider this motion. The court did so and allowed appellant to verbally argue the motion. The court denied the motion without prejudice as it was not supported by a declaration, but stated that appellant could refile it as a motion for a new trial. Defense counsel never filed a motion for a new trial. The Court of Appeal held that appellant's actions preserved the issue for appeal. Moreover, even if appellant had not objected to the prosecutor's conduct, it could have reached the issue: "[O]ur Supreme Court had found that failure to object to prosecutorial interference with a defendant's right to present witnesses does not waive the issue since 'the claim involves a question of fundamental fairness, and any misconduct, had it existed, could not readily have been cured by the trial court's intervention, in contrast to other instances of prosecutorial misconduct in the course of trial'. (*People v. Lucas* (1995) 12 Cal. 4th 415, 457.)

Note: In this opinion, the Court of Appeal discusses several published cases regarding prosecutorial interference with the defendant's right to present witnesses: *In re Martin* (1987) 44 Cal. 3d 1, 31-51; *People v. Lucas* (1995) 12 Cal. 4th 415; *People v. Robinson* (1983) 144 Cal. App. 3d 962; *People v. Bryant* (1984) 157 Cal. App. 3d 582; *People v. Warren* (1984) 161 Cal. App. 3d 961.)

***In re A.V.*, A120280 (Division Four)**

Subjects: Insufficiency of the evidence, Resisting an officer

Date Filed: September 25, 2008

Attorney: Clifford Stanley

FDAP Buddy: Jeremy Price

Westlaw Citation: 2008 WL 4359535

The Court of Appeal reversed the juvenile court’s jurisdictional finding that appellant had resisted, delayed or obstructed an officer in the discharge of his duties, in violation of Penal Code section 148(a)(1), finding insufficient evidence.

Shortly after 1:00 a.m., a police officer responded to the report of a disturbance at an apartment complex. He encountered three young men, including the minor appellant “being loud”. Appellant, who appeared to be under the influence of alcohol, refused to comply with the officer’s orders to sit down, yelled at the officer, and insisted that the officer read him his rights. He only sat down after the officer pointed a taser at him.

Relying on a decision from Division One (*People v. Quiroga* (1993) 16 Cal. App. 4th 961), Division Four held that appellant’s failure to respond with alacrity to the police officer’s orders did not constitute a violation of section 148. Moreover, appellant merely exercised his First Amendment right to verbally dispute the officer’s actions. As the United States Supreme Court has held: “[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.” (*Houston v. Hill* (1987) 482 U.S. 451, 461.) “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” (*Id.*, at 462-463.)

People v. Starritt, A118625 (Division Four)

Subjects: Insufficient evidence, Lesser included offenses, Section 654 error

Date Filed: May 21, 2008

Attorney: Matthew Siroka

FDAP Buddy: Paula Rudman

Westlaw Citation: 2008 WL 2123527

Appellant prevailed on three claims in this appeal from multiple drug convictions. First, the Court of Appeal reversed appellant's conviction for managing a location for the unlawful manufacturing, storing or distributing of a controlled substance, because there was insufficient evidence of that crime and the jury had been improperly instructed. Second, the Court reversed appellant's conviction for simple possession of heroin because it was a lesser included offense of possession of heroin for sale. Third, the Court held that appellant's sentence for transportation of heroin should have been stayed pursuant to Penal Code section 654.

Appellant was convicted by a jury verdict of six drug offenses: 1)possession of heroin for sale; 2)transportation of heroin; 3)possession of heroin; 4)possession of methamphetamine; 5)possession of marijuana; and 6)management of a location for unlawful manufacture, storage or distribution of a controlled substance. The charges were based on evidence seized during searches of a car which appellant occupied as a passenger and a house where he resided.

In the most extensive portion of the opinion, Division Four reversed appellant's conviction for managing a location for unlawful manufacturing, storing or distributing a controlled substance, in violation of Health and Safety Code section 11366.5(a). This crime has three elements: 1)the accused knowingly permitted a controlled substance to be manufactured or stored; 2)for purpose of sale or distribution to others; 3)in a building under his or her management or control. In the present case, the trial court instructed the jury on the elements of a different crime – maintaining a location for specified unlawful drug activities, in violation of Health and Safety Code section 11366. That offense has two elements: 1)the accused opened or maintained a place; 2)with the purpose of continuously or repeatedly using it for selling, giving away, or using a controlled substance. Moreover, the prosecutor emphasized the elements of section 11366, rather than the elements of section 11366.5, in her closing argument to the jury. Appellant had never been charged with violating section 11366.

Appellant argued and the prosecution conceded that there was insufficient evidence, in the record, to support a conviction for the charged offense of managing a location for the

unlawful manufacturing, storing or distributing of a controlled substance. There was no evidence that appellant managed or controlled the house where he lived, or that he allowed a third party to use the property for the prohibited drug activities. Moreover, because the jury was never instructed as to the elements of that crime, appellant was deprived of his right to have the jurors determine each element beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

The Court of Appeal refused the prosecution's request to modify the judgment to reflect appellant's conviction of the uncharged offense, section 11366. The Court declined to do this because section 11366 (maintaining a place for the purpose of using it for specified unlawful drug activities) is not a lesser included offense of the charged crime, section 11366.5 (managing a location and permitting it to be used for manufacturing or storing controlled substances). The Court reversed appellant's conviction for violation Health and Safety Code section 11366.5

The Court of Appeal also reversed appellant's conviction for simple possession of heroin, because that crime was necessarily a lesser included offense of possession of heroin for sale. Both convictions were based on appellant's possession of heroin found in the trunk of the car. The conviction of the greater offense, possession of heroin for sale, was allowed to stand. The respondent had conceded this issue.

Finally, the trial court had sentenced appellant to five years for transportation of heroin and a concurrent four-year term for possession of heroin for sale. The Court of Appeal held that the term for possession for sale should have been stayed pursuant to Penal Code section 654, as the two crimes had a single purpose and criminal intent.

SENTENCING ISSUES

***People v. Finks*, A118616 (Division Two)**

Subjects: Probation conditions, Medical marijuana

Date Filed: June 30, 2008

Attorney: Robert Angres

FDAP Buddy: Kathryn Seligman

Westlaw Citation: 2008 WL 2569407

The Court of Appeal struck a probation condition which required appellant to surrender his valid medical marijuana card and not obtain a new one during the term of probation. The condition had been imposed over defense objection, so the challenge was preserved for appeal.

Appellant had pled no contest to evading an officer. The officer had signaled a traffic stop for expired registration, and appellant (the vehicle driver) had failed to pull over until he finished smoking a marijuana cigarette. Instead, he led the officer on a high speed chase, during which he drove erratically and broke several traffic laws. As conditions of probation, the trial court had ordered appellant to: 1) not drive with any amount of alcohol or drugs in his system; and 2) surrender his medical marijuana card and not obtain a new card while on probation.

Division Two held that this second condition was unconstitutionally overbroad and not reasonably related to the compelling state interest in rehabilitation and reformation. The more narrowly drawn condition prohibiting appellant from operating a motor vehicle with drugs in his system adequately ensured that appellant would not drive while under the influence of marijuana, thus protecting public safety. It was unnecessary to prohibit appellant from using medical marijuana when he was not driving.

Note: This opinion includes discussion of published cases regarding restrictions on the use of medical marijuana after the passage of the Compassionate Use Act of 1996, including *People v. Bianco* (2001) 93 Cal. App. 4th 748; *People v. Tilehkooh* (2003) 113 Cal. App. 4th 1433, and *People v. Mower* (2002) 28 Cal. 4th 457.

***People v. Brown*, A119857 (Division Three)**

Subjects: Sex offender registration

Date Filed: July 29, 2008

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Westlaw Citation: 2008 WL 2898652

The Court of Appeal struck the trial court's sentencing order requiring appellant to register as a sex offender because the lower court had mistakenly believed that registration was mandatory rather than discretionary for appellant's conviction. The matter was remanded for the trial court to exercise its discretion to determine whether sex offender registration should be ordered under Pen. Code. sec. 290.006.

Appellant was charged with committing multiple sex offenses with a 17-year old victim. He pled guilty to one count of orally copulating a minor, in violation of Penal Code section 288a(b)(1). Mandatory sex offender registration was not a condition of the plea. Nor did the trial court advise appellant that he would have to register as a sex offender at the time of the plea. Appellant was sentenced to two years in prison and ordered to register as a sex offender. The trial court stated that because of the nature of the conviction, the law "requires you to register as a sex offender".

As appellant had argued and the respondent had conceded, Division Three found that the trial court had erred when it imposed a sex registration requirement on the mistaken belief that registration is mandatory for a person convicted of orally copulating a minor, in violation of section 288a (b)(1). In fact, the registration requirement is discretionary and not mandatory for that offense.

In making its ruling, the Court of Appeal relied on the California Supreme Court's decision in *People v. Hofsheir* (2006) 37 Cal. 4th 1185. In *Hofsheir*, the defendant had engaged in oral copulation with a 16-year old minor. He pled guilty to violating section 288a(b)(1), and was required by section 290 to register as a sex offender. The Supreme Court noted that if the defendant had been convicted of unlawful sexual intercourse with a minor under the same circumstances, in violation of section 261.5, he would not have been subject to the mandatory sex offender registration requirements. The Court concluded that requiring sex offender registration for a defendant convicted of oral copulation with a 16 or 17 year old minor, but making it discretionary for a defendant convicted of unlawful sexual intercourse with a minor of the same age violated equal protection. Consequently, the mandatory registration requirement cannot be imposed on a defendant convicted of violating section 288a(b)(1).

Division Three struck the registration requirement and remanded the matter to the trial court to exercise its discretion as to whether to require sex offender registration under section 290.006. The trial court may order registration if it determines that appellant committed the oral copulation offense “as a result of sexual compulsion or for purposes of sexual gratification”, and it must state its reasons for requiring registration.

The Court of Appeal noted, in footnote 3, that appellant had waived his right to appeal (presumably at the time he pled guilty), but that waiver did not encompass sentencing errors. Moreover, appellant had not been required to obtain a certificate of probable cause to challenge the sex offender registration requirement, as that requirement was not a condition of appellant’s plea.

People v. Hall, A115416 (Division Four)

Subjects: Three strikes, Out-of-State priors

Date Filed: March 28, 2008

Attorney: Jenny Huang

FDAP Buddy: Stephanie Clarke

Westlaw Citation: 2008 WL 821706

The Court of Appeal struck 14 years from appellant’s 23-year prison sentence upon finding that appellant’s prior Texas robbery conviction did not qualify as a prior serious or violent felony conviction under California Law. Thus the nine years imposed for a prior strike and the five years imposed for a prior serious felony enhancement were stricken from appellant’s sentence.

A jury found appellant guilty of carjacking. The trial court then found that appellant’s prior Texas robbery conviction constituted a prior serious felony conviction and a strike under California law. The court sentenced appellant to 23 years in prison – the nine-year upper term for carjacking, doubled by nine years to 18 years because of the prior strike, plus a five-year consecutive term for the prior serious felony conviction enhancement.

Division Four held that appellant’s prior Texas robbery conviction did not qualify as a prior serious felony conviction under California law. At the time of appellant’s Texas robbery, Texas law did not require two elements of robbery mandated by California law – that the property be taken from the possessor’s person or immediate presence, and asportation of the property. The record from the Texas case established that appellant admitted to committing robbery under a Texas law that did not require those two elements. Moreover, nothing in that record indicated whether appellant actually took the property from the victim’s person or immediate presence and carried it away. Thus,

appellant's prior Texas robbery conviction did not constitute a robbery as California defines the offense, and it did not support the finding of a prior strike and a prior serious felony conviction enhancement.

On appeal, the Attorney General had conceded that the trial court erred when it found that appellant's prior Texas robbery conviction qualified as a California robbery. However, the Attorney General argued that the Texas prior constituted an attempted robbery under California law, which qualified as a serious felony conviction, warranting a strike and enhancement. The Court of Appeal rejected this argument because the prosecutor, in trial court, had alleged a completed robbery and not an attempt. To rely on an unpled allegation would violate due process requirements and the three strikes statute which requires that each strike must be pled and proven.

People v. Hawthorne, A119131 (Division Five)

Subjects: Victim restitution, Probation revocation

Date Filed: May 9, 2008

Attorney: Sara Zimmerman

FDAP Buddy: Tara Mulay

Westlaw citation: 2008 WL 1992030

The Court of Appeal struck a victim restitution award of \$8,346.64 because it was statutorily unauthorized. Appellant had been ordered to pay that award to the victim of his probation violation and not to the victim of a crime for which he had been convicted.

Appellant pled guilty to attempted first degree residential burglary, and he was placed on probation. The district attorney filed a motion to revoke probation, alleging that appellant had broken into a car and stolen some items from the vehicle. At the contested probation revocation hearing, the owner of the car testified that broken glass had damaged the car's interior. She claimed that the cost of repairing this damage and renting another car while repairs were being made totaled \$8,346.64. Trial court found appellant in violation of probation, based on the alleged auto burglary, and sentenced him to prison for the attempted residential burglary. The court ordered appellant to pay \$8,346.64 in victim restitution to the owner of the burglarized car.

As appellant alleged and the Attorney General conceded, the award of restitution to the victim of the probation violation was statutorily unauthorized. Consequently, the order could be challenged on appeal even if there was no objection in the trial court. The California Constitution and state statutes authorizes restitution to victims who suffer

economic losses as a result of criminal activity from persons convicted of crimes giving rise to those losses. In the present case, appellant was never convicted of auto burglary, auto theft or any other crime giving rise to the car owner's losses. That conduct had merely been alleged as a probation violation. Consequently, the order directing appellant to pay \$8,346.64 to the car owner was statutorily unauthorized.

Note: If you have a case in which your client was ordered to pay victim restitution for losses caused by a crime of which he was not convicted, you will want to look at the latest published First District victory on this issue: *People v. Woods* (2008) 161 Cal. App. 4th 1045 (Division One; Attorney: Stephanie Clarke). In that case, the Court of Appeal reversed the trial court's order requiring appellant to pay \$12,082.23 to the family of a murder victim. Appellant had been convicted of being an accessory after the fact to the murder. He had not been convicted of the murder, or of being a co-conspirator or an aider and abettor to the murder. When imposing a prison sentence, the trial court may only order the defendant to pay restitution, pursuant to Penal Code section 1202.4, for losses caused by the criminal conduct for which the defendant was convicted. The trial court has broader discretion to award victim restitution for losses caused by related conduct not resulting in a conviction when restitution is ordered as a condition of probation. (See, e.g. *People v. Carbajal* (1995) 10 Cal. 4th 1114; *In re I.M.* (2005) 125 Cal. App. 4th 1195 [First District, Division One].)