Shasta County District Attorney

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THE PROSECUTOR'S PERSPECTIVE

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The Provocative Act Murder Doctrine

By Deputy District Attorney Rachel Donahou

The provocative act murder doctrine is a theory of murder that is commonly used in gang cases. However, it can apply in situations that are not related to gangs and can be a very useful tool for prosecutors and law enforcement.

A provocative act murder occurs when someone maliciously does an act that set in motion a chain of events that is likely to provoke a deadly response, and a death occurs. It is normally a victim or third party who responds to the provocative act and kills an accomplice. In provocative act murders, both a physical and mental element are required. The physical element is satisfied when the defendant commits an act, the natural and probable consequence of which is the use of deadly force by a third party. The mental element requires that the defendant personally harbored malice.

For example, Gang A does a drive by and shoots at Gang B. Gang B responds by shooting at the car and the driver (member of Gang A) is killed. The shooter from Gang A would be responsible for the driver's death because he set in motion a chain of events that is likely to provoke a deadly response and his accomplice was killed.

The Second District Court of Appeals recently decided a case (*People v. Johnson* (2013) B214044) that was prosecuted under the provocative act murder doctrine. In that case, the defendant planned a home invasion robbery and had two accomplices commit the robbery instead of actually going to the home himself. The victim of the robbery shot and killed an accomplice and Johnson was charged with first degree murder. Johnson appealed and argued that he had no malice in the murder of his accomplice and that he wasn't present during the robbery. The Court affirmed and found that malice is implied by law and imputed to the defendant regardless of whether he went to the home and participated in the robbery.

This is a unique theory, but it can be applied to many different situations that are often not considered. It can apply to robberies as well as drug deals gone bad. It holds criminals accountable because they do not need to actually pull the trigger to be guilty of murder.

SEARCH WARRANTS; STALE INFORMATION

PEOPLE V. JONES *(JUNE 28, 2013) 217 CAL.APP.4TH 735*

By Robert C. Phillips, Retired Deputy District Attorney

Rule: The continuing nature of on-going related criminal activity helps support a finding of probable cause for a search warrant despite the passage of time between the last criminal act and the execution of the warrant.

Facts: Karen Flann's purse was stolen in March, 2002. In July, 2004, she discovered that someone had used her date of birth and Social Security number to open cell phone accounts with AT&T and Liberty Wireless. Both accounts had overages, resulting in collection agencies contacting Flann for payment. A third company, Sprint Wireless, also notified Flann that her application for phone service, made in in July, 2004, but for which she never applied, had been denied. An investigation led to information that someone began illegally using Flann's identity in November 2003, The name and address on the AT&T account were defendant's. On September 20, 2004, Detective Ilya Bezuglov of the Davis Police Department sought and obtained a warrant to search defendant's residence, recounting the information as indicated above. Executing the warrant, officers found two sawed-off shotguns along with 20 shotgun shells in a bag under a bed in the master bedroom. They also found the cell phone associated with the AT&T account obtained using Flann's identifying information. It was determined during the investigation that the AT&T account was open from November 18, 2003, to April 17, 2004. The Liberty Wireless account was opened May 9, 2004, and closed on an unknown date. Defendant was arrested and charged in state court with using another's personal identifying information to obtain credit, goods, or services, per P.C. § 530(a).5, a number of weapons-related charges, and other offenses. Defendant's motion to suppress the evidence recovered from his residence was denied. He pled "no contest" and appealed.

Held: The Third District Court of Appeal affirmed. Defendant's argument on appeal was that the information contained in the affidavit to the search warrant used to search his home was stale, and therefore without probable cause. The Court noted that information concerning criminal activity, when it becomes so remote in time that it is deemed stale, will no longer be worthy of consideration when attempting to determine whether the evidence sought will still be at the place to be searched. When remoteness causes the information to become stale, it may no longer be considered in determining whether probable cause exists. Whether or not staleness is an issue must be determined on a case by case basis. For instance, it has been held that while there is no "bright line rule" telling us when information becomes stale, a delay of over four weeks between a drug transaction and the obtaining of a search warrant has been held to be insufficient to establish probable cause. However, in this case, the circumstances show an ongoing identity theft enterprise that continued from March, 2002 (theft of the victim's purse), to November, 2003 (when the victim's identity was first used illegally by defendant), to July, 2004 (when the Sprint application was used in the victim's name). This set of circumstances shows an "ongoing operation," unlike a solitary drug transaction, that was likely continuing through September, 2004, when the warrant was obtained.

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SEARCH WARRANTS...

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The Court also rejected defendant's argument that because the last direct connection between him and Flann's identity was November, 2003, when he opened the AT&T account in his name but with the victim's address and Social Security number, nothing after that was relevant. While the affidavit did not expressly connect defendant to the Liberty Wireless account or the Sprint Wireless application, the magistrate could reasonably infer that since defendant had used the victim's identification information illegally in November, 2003, the later illegal uses for similar purposes were also connected to him. This inference supported the probable cause determination. The warrant, therefore, was valid.

Note: This type of warrant is sometimes referred to as a "historical warrant," reflecting a continuous ongoing criminal enterprise. The natural inference from a series of similar criminal acts over an extended period of time is that they are all connected, involving the same players, similar evidence, and with continuing criminal intent, which all leads to probable cause to believe that the sought-after evidence will still be at the place to be searched despite the passage of some time since the last criminal act. It all comes under the heading of "reasonableness," and using one's common sense.

DNA SAMPLE COLLECTION FOR ANY FELONY OFFENSE WITHOUT A SEARCH WARRANT

PEOPLE V. LOWE (2013) 221 CAL.APP.4TH 1276

By Deputy District Attorney Emily Mees

Penal Code section 296(a)(2)(C) authorizes the collection of a DNA sample from a person who has been arrested for any felony offense without a search warrant. The authorization is for the taking of a buccal swab sample. It is mandatory under Penal Code section 296(d) and does not give any discretion.

This section was recently upheld by California Court of Appeals in *People v. Lowe* (2013) 221 Cal.App.4th 1276, which was asked to review its previous decision in light of the recent United States Supreme Court case, *Maryland v. King* (2013) 133 S.Ct 1958. In *Maryland v. King*, the Supreme Court upheld a statute similar to the California one allowing for a buccal swab sample to be taken from arrestees on serious felony crimes. In *People v. Lowe*, the Court of Appeals held that the taking of a buccal swab was minimally invasive compared to the benefits of taking the DNA samples.

Pursuant to Penal Code section 295, subdivision (e), "[u]nless otherwise requested by the Department of Justice, collection of biological samples for DNA analysis from qualifying persons under this chapter is limited to collection of inner cheek cells of the mouth (buccal swab samples)." Once those samples have been requested by the Department of Justice there is a process for collecting those samples (see Penal Code section 298) and a process for the use of force in collection of those samples (see Penal Code section 298.1).

UNLAWFUL USE OF PERSONAL IDENTIFICATION INFORMATION, PER P.C. § 530.5(A)

PEOPLE V. BARBA ET AL. *(NOV. 20, 2012) 211 CAL.APP.4TH 214*

By Robert C. Phillips, Retired Deputy District Attorney

Rule: The Unlawful Use of "Personal Identification Information," per P.C. § 530.5(a), does not require that the perpetrator portray himself as another person.

Facts: On the evening of April 18, 2011, Aaron Ashby, owner of "Ashby Remodeling & Services," parked and left his unlocked car out on the street with the windows rolled down. The next morning, he discovered that someone had stolen a company checkbook and files from his car. The checks had printed on them the name and telephone number of the business along with the checking account number, bank name, and bank routing number. Ashby did not know the defendants and did not give anyone permission to be using his checks. On April 21, defendant Saul Barba cashed one of Ashby's checks at the Lakeside Discount Market. The check was made payable to Saul Hinojosa in the amount of $250. It being so easy the first time, defendant Barba returned to the store later with his wife, Claudia Lizethe Aguilera, presenting another of Ashby's checks. This one was made out to Aguilera and was for $600. This time the clerk attempted to verify its validity by calling the number listed on the check, but no one answered. Using a cellphone number provided by Barba, the clerk eventually talked to an unknown woman who verified that the check was good. So it too was cashed. On April 21, defendant Barba entered "The Check Cashing Place" with another stolen check made out to Saul Hinojosa for $600. Defendant also showed an identification card to the clerk in the name of "Saul Barba Hinojosa." While attempting to verify the validity of this check, the clerk eventually looked up the Ashby Remodeling & Services phone number in a phone book and contacted Ashby himself. Being told that the check had been stolen, the police were called. Officer Roberto Bonilla responded and detained defendant Barba. Officer Anthony Kolombatovic also responded and found Aguilera, co-defendant Jessica Jean Lofgreen, and a female juvenile, sitting in a van in a nearby parking lot. Co-defendant Lofgreen told Officer Kolombatovix that she and an individual named "Jeff" had stolen the checks from the victim's car. Co-defendant Lofgreen admitted that she had written out the checks and had signed the signature lines on many of them. When questioned by Officer Bonilla, defendant Barba admitted to knowing the checks were stolen and to cashing them as described above. The People filed a complaint charging defendants Barba and Lofgreen with, among other things, the unlawful use of personal identification information, per P.C. § 530.5(a). Following a preliminary examination, the magistrate bound over the defendants on all the charges except the section 530.5(a) charge, which he dismissed for insufficient evidence. The People, however, in filing a six-count Information two weeks later, realleged the section 530.5(a) charge. (Aguilera, although not a party to this appeal, was eventually added to the charging document, apparently having been prelim'd separately.) Defendants filed a motion to dismiss the section 530.5(a) charge in the Superior Court. The motion was granted and the People appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. The preliminary hearing magistrate's reasoning for the dismissal of the section 530.5(a) charge was that the evidence presented at the prelim did not demonstrate that the defendants had portrayed themselves to be anyone other than themselves. The Superior Court trial judge apparently agreed that this was a necessary element, dismissing the section 530.5(a) charge a second time. The People disagreed, arguing on appeal that the section does not require a defendant to have personated another individual in using someone else's personal identifying information. The Appellate Court agreed with the People. Penal Code section 530.5(a) provides that: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information, without the consent of that person, is guilty of a public offense, ..."

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UNLAWFUL USE OF PERSONAL IDENTIFICATION…

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The "personal identifying information," as described in section 530.55(b), includes a whole smorgasbord of items, including, but not limited to, one's name, address, and checking account number. The elements of this offense are as follows: (1) That the person willfully obtains personal identifying information belonging to someone else; (2) that the person uses that information for any unlawful purpose; and (3) that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being used. The first step in the art of statutory interpretation is to consider the ordinary meaning of the words used. Doing that here, the Court determined that nothing in section 530.5(a) suggests a requirement that a perpetrator have falsely personated another person. Neither the phrase "identity theft" nor anything similar is used in this section. The section, by its terms, was intended to deal with a much wider range of conduct than merely personating another person. The statute clearly and simply provides that anyone who *obtains* personal identifying information and *uses* it for an unlawful purpose without the victim's consent has violated section 530.5(a). The Court also found that this interpretation of section 530.5(a) is consistent with the legislative intent. In so finding, and in looking at the section's legislative history, the Court rejected the defendants' argument that the section was intended to prohibit "identity theft," and that to give it any other interpretation in effect duplicated the forgery statutes (i.e., P.C. §§ 470, 475), thus serving no purpose. The Court noted that there's nothing unusual about more than one statute being violated by a single act. Also, it was pointed out that section 530.5(a) has a different purpose than the forgery statutes. The forgery statutes are intended to protect the *recipient* of the forged document from being defrauded, while section 530.5(a), on the other hand, is intended to protect the person or entity whose personal information has been misappropriated and is used for an unlawful purpose. In this case, based upon the evidence as presented at the preliminary examination, defendants willfully obtained personal identifying information, in the form of victim's checks, that they used that information for an unlawful purpose, and that they did so without the victim's consent. As such, the case should not have been dismissed.

Note: Good case. Using section 530.5(a) in this situation is probably something that wouldn't have occurred to me, had I been the issuing deputy, in that forgery seems like the obvious offense to use. Forgery-related counts were also filed, which the Court says is also okay. But kudos to the perceptive Deputy District Attorney who took a chance by trying something a little different, and to whoever determined that he or she wasn't going to let a Superior Court judge get the last word on it when he was so obviously wrong. Too often, I have to admit, prosecutors tend to be a little reluctant to take a chance when the results aren't certain. We can't make good case law, as was done here, unless we're willing to push the envelope a little once in a while.

WANT TO MAKE A JUDGE HAPPY? HERE'S HOW.....

By Honorable Judge Gregory Gaul

As all Shasta County peace officers are aware, whenever a suspect is arrested and booked into the county jail, the arresting officer must fill out a "probable cause" statement. These statements are routinely reviewed by a judge who must independently determine if there is sufficient probable cause to keep the individual in custody.

Every person who is arrested has the right to a judicial determination of probable cause within 48 hours of their arrest. Therefore, each day, including weekends and holidays, a judge independently reviews these statements of probable cause to determine if they present a factual basis justifying the individual offender's incarceration.

While brevity in the probable cause statement is appreciated by the judges, the statement must contain sufficient information for the judge to make an informed decision concerning an arrestee's custodial status.

The key to a proper summary of probable cause is to avoid the use of "conclusory" statements. For example, simply stating that "the suspect assaulted the victim," "the suspect was found intoxicated in a public place," or "the suspect possessed a bindle of methamphetamine," is not sufficient. These are mere conclusions without supporting facts or observations to support those conclusions.

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WANT TO MAKE A JUDGE HAPPY?

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Similarly, if an arrest follows what initially started as a routine traffic stop for a vehicle code violation, it is important to state what violation you observed. It is not sufficient to simply state something like, *"I stopped the driver for a vehicle code violation."* Instead, you should specify in your statement of probable cause which vehicle code section was violated, or briefly articulate what independent observations you made to justify the traffic stop.

Put simply, it's not the loaded handgun that you find under the driver's seat that establishes probable cause for the stop. Rather, the probable cause is the vehicle code violation that gave you a legal basis for the stop.

Additionally, a proper statement of probable cause must include objective facts and/or your objectively reasonable opinion in support of any legal conclusions you formulated before making an arrest.

For example, if an arrest is based upon the possession of methamphetamine, you would need to articulate that based upon your training and experience, the substance you seized from the suspect had the physical appearance, texture, odor, etc., of methamphetamine. If the charge was possession for sale of methamphetamine, you would need to include a "brief" description of what leads you to that conclusion, such as: multiple bindles of methamphetamine, a scale, packaging materials, pay-owe sheets, large sums of money, etc.

It is also very important to provide sufficient information that establishes the elements of any crime(s) for which a suspect has been arrested. Thus, if you have arrested an individual for auto burglary (as opposed to petty or grand theft), you will need to establish in your probable cause statement that the victim's vehicle was locked prior to the theft.

Similarly, to clarify why you arrested an individual for auto burglary, as opposed to merely receiving stolen property, you would need to provide essential facts demonstrating that a burglary occurred and why your suspect is logically connected to that burglary. This could easily be established by including in your probable cause statement brief objective facts, such as (1) the victim locked her car in her driveway the previous evening, (2) the next morning she discovered that her passenger window had been smashed, (3) her stereo appears to have been recently forcibly removed from the vehicle dash, and (4) the suspect was found in possession of the stereo that next morning five blocks away from the victim's residence.

Finally, if identity is an issue, be sure to articulate the facts which connect the offender to the crime. For example, in an assault case, you should articulate that you, a victim, or some other witness actually observed the suspect assault the victim. This would then be supported by a "brief" description of the victim's injuries (such as a black eye, bruised arm, or bleeding wound).

The bottom line? It takes very little effort to write a clear and concise statement of probable cause. If you do it right, the offender stays in custody. If not, you may be requested to clear up any confusion by resubmitting a corrected statement to address the deficiencies. Or, even worse, the offender may be released from custody.

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A FINAL THOUGHT

Shasta County Supervisors recently passed a new land-use ordinance that addresses outdoor marijuana grows in the unincorporated parts of Shasta County. This ordinance, which takes effect at the end of February, bans outdoor grows, meaning there is no longer a legal basis for outdoor marijuana grows in the unincorporated areas. Officers working on these cases should make sure they include misdemeanor charges identified in the new ordinance when submitting police reports to the Shasta County District Attorney's Office for filing.

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