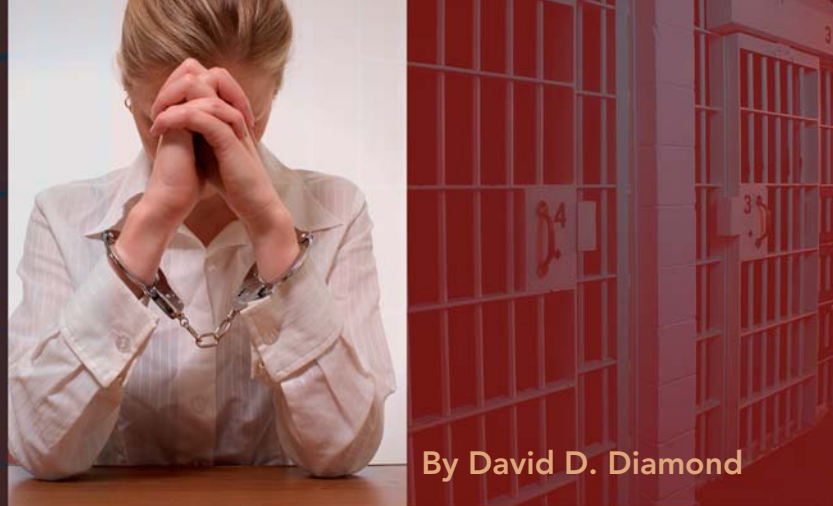


Criminal Law Update



By David D. Diamond

THIS PAST YEAR HAS BEEN VERY INTERESTING as it relates to criminal law, considering the court rulings on evidence and constitutional rights.

Evidence

For those that wonder how to deal with red light camera cases, the court provided some answers. In *People v. Khaled*, (2010) 186 Cal.App.4th Supp, 1, 2010 WL 2381959, the court focused on the legal foundation needed to admit the photographs from the red light intersections. There must be a showing of each foundational requirement and here, the court found the pictures to be hearsay. A record may not qualify as a business record if it is made in anticipation of litigation.

In today's technology age, attorneys are using social networking websites, such as Facebook and MySpace, for evidence. In a recent case, the admission of a picture from MySpace was found to be in error. Authentication was lacking and there were many foundation blunders. *People v. Beckley* (2010) 185 Cal.App.4th 509.

Constitutional Rights

In criminal cases, hearsay runs wild, particularly in drug cases. The United States Supreme Court held that reports and affidavits submitted by criminalists to prove the nature and content of controlled substances violate the Confrontation Clause. *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527.

As it relates to gun rights, the Second Amendment is now incorporated by the due process clause so that it can apply to all fifty states. Justice Alito also wrote a concurring opinion that implemented the right of self-defense. *McDonald v. City of Chicago* (2010) 130 S.Ct. 3020.

The foundation of the criminal justice system is the right to counsel. Recent questions forced the court to determine how this right applies to discovery. A non-indigent defendant does not have a right to free copies of prosecution discovery, although it appears to suggest that an indigent defendant may have such a right. *Schaffer v. Superior Court* (2010) 185 Cal. App.4th 1235.

Immigration Law

Criminal defense attorneys are always fearful of accepting a plea bargain that is an aggravated felony or a crime of moral turpitude as it will almost certainly result in deportation. The prosecution has never been concerned with such a collateral consequence. The U.S. Supreme Court found that a criminal defendant in state court must be advised of the federal immigration consequences. If his lawyer fails to do so, it constitutes ineffective assistance of counsel. *Padilla v. Kentucky* (2010) 130 S.Ct. 1473.

Search and Seizure

Most lawyers remember *New York v. Belton* as it relates to the

search of a vehicle. That case is no longer good law. *Arizona v. Gant* (2009) 129 S.Ct 1710 overruled the *Belton* case. The law now allows police and law enforcement to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. As such, the mere fact of an arrest in or near a car does not give law enforcement the right to search the interior of the vehicle.

Miranda

The erosion of the "Miranda" progeny continues as two recent cases injected great confusion as to the reasoning and rationale used by the Court. In *Maryland v. Shatzer* (2010) 130 S.Ct. 1213, the Court held that once a defendant asserted his right to counsel, the police must stop questioning the defendant. However, if there is a break in the defendant's custody, the police may reinstate the questioning after fourteen days. As such, if a suspect is arrested, invokes his right to counsel, and gets released from custody, the police may re-interview the defendant.

The second, and perhaps most intriguing of all criminal cases in 2010, was in the matter of *People v. Williams* (2010) 49 Cal.4th 405. The following is a direct transcript of the police encounter:

Police: Do you want an attorney here while you talk to us?

Defendant: Yeah.

Police: You do?

Defendant: Uh huh.

Police: You sure?

Defendant: Yes.

The court found that this first interaction did not invoke Miranda. The defendant later said the following: "I want to see my attorney cause you are all bullshitting now." He then added, "I don't want to talk about it." The court found that the two later statements were just expressions of frustration and not an invocation of Miranda.

Overall, 2010 was an interesting year in criminal law. There will be some very important cases that will be decided in 2011 that pertain to gun rights, defendant's rights and evidence. ⚡

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