

Police Misconduct Update: *Arrests*

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Police Misconduct Update: Front Burner Topics under Section 1983*

Wayne C. Beyer, Esq.

Arrest

Facial Recognition Technology

Law enforcement has compared file photos with video footage through facial recognition technology to make arrests, but some say the use of the technology is going too far. This topic supplements the discussion of mistaken identity arrests in the “Practitioner’s Guide,” Chapter 5: Fourth Amendment: Arrests with Warrants, IV. Recurring Issues, A. Mistaken Identity Arrests.

Here is how facial recognition technology works:

Generally, facial recognition technology (FRT) creates a “template” of the target’s facial image and compares the template to photographs of preexisting images of a face(s) (known). The known photographs are found in a variety of places, including driver’s license databases, government identification records, mugshots, or social media accounts, such as Facebook.

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A template for FRT is created by use of measurements. The face is measured through specific characteristics, such as the distance between the eyes, the width of the nose, and the length of the jaw line. The facial landmarks, known as nodal points, are measured and translated into a template with a unique code. New technologies are emerging that are improving recognition rates, such as 3-D facial recognition and biometric facial recognition that uses the uniqueness of skin texture for more accurate results. Once the face in question is analyzed, the software will compare the template of the target face with known images in a database in order to find a possible match.

ABA, “Facial Recognition Technology: Where Will it Take Us?” available at https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2019/spring/facial-recognition-technology/ (internal citations omitted; hereafter “ABA Article”).

Targeted photo comparisons between a surveillance photograph of a person of interest with a database of, say, drivers’ licenses to try to identify the person are not so much the target of objections as is indiscriminate surveillance: picking out faces in a crowd or inputting scans from officers’ body cameras to see if they have outstanding warrants. Critics of facial recognition technology raise First and Fourth Amendment privacy issues concerning persons who are not criminal suspects. ABA Article. There are also racial and ethnic objections. A study by the National Institute of Standards and Technology (NIST) “found that, when conducting a particular type of database search known as ‘one-to-one’ matching, many facial recognition algorithms falsely identified African-American and Asian faces 10 to 100 times more than Caucasian faces.” Reuters, “U.S. government study finds racial bias in facial recognition tools,” available at

<https://www.reuters.com/article/us-usa-crime-face/u-s-government-study-finds-racial-bias-in-facial-recognition-tools-idUSKBN1YN2V1>

“The Hill” newspaper reports that

The Privacy and Civil Liberties Oversight Board (PCLOB), an independent agency, is coming under increasing pressure to recommend the federal government stop using facial recognition. Forty groups, led by the Electronic Privacy Information Center, sent a letter [in January] to the agency calling for the suspension of facial recognition systems “pending further review.”

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The letter cited a recent New York Times report about Clearview AI, a company which claims to have a database of more than 3 billion photos and is reportedly collaborating with hundreds of police departments.

It also mentioned a study by the National Institute of Standards and Technology, part of the Commerce Department, which found that the majority of facial recognition systems have “demographic differentials” that can worsen their accuracy based on a person’s age, gender or race.

The Hill, “Government Privacy Watchdog under Pressure to Recommend Facial Recognition Ban,” available at <https://thehill.com/policy/technology/480152-government-privacy-watchdog-under-pressure-to-recommend-facial-recognition>.

Federal agencies defend their use of technology. The FBI has access to about 640 million photographs, including drivers’ licenses, passports and mugshots, that can be searched using facial recognition technology. AP, “Watchdog Says FBI Has Access to More than 640M Photographs,” available at <https://apnews.com/6f45d569c3084c5ca823ced145de8f82>. Customs and Border Protection (CBP) and the Transportation Security Administration (TSA) use facial recognition tech programs in airports and border areas. The Hill, “Trump Officials Defend use of Facial Recognition Technology Amid Backlash,” <https://thehill.com/policy/technology/452529-trump-officials-defend-use-of-facial-recognition-amid-backlash>

But lawmakers and others have expressed concern and opposition. The U. S. House Committee on Oversight has held hearings on facial recognition technology. NextGov, “Lawmakers Working on Legislation to ‘Pause’ Use of Facial Recognition Technology,” available at <https://www.nextgov.com/emerging-tech/2020/01/lawmakers-working-legislation-pause-use-facial-recognition-technology/162470/> The ACLU has sued the Federal Bureau of Investigation (FBI), Department of Justice (DOJ), and Drug Enforcement Administration (DEA) for “records on the government’s use of face recognition programs and other biometric identification and tracking technology.” AP, “ACLU Sues FBI, DEA for Facial Recognition Records,” <https://www.usnews.com/news/best-states/massachusetts/articles/2019-10-31/aclu-sues-fbi-dea-for-facial-recognition-records>. Sens. Chris Coons (D-DE) and Mike Lee (R-UT) have introduced the Facial Recognition Technology Warrant Act to require federal agents to obtain “a judge’s approval before using facial recognition to conduct surveillance of a criminal suspect.” The bill “would require federal law enforcement to explain to a judge why they want to use facial recognition to track someone in real time for longer than three days, and would limit that surveillance to 30 days.” NBC News, “Federal Bill Would Restrict Police Use of Facial

Recognition Technology,” available at <https://www.nbcnews.com/news/us-news/new-federal-bill-would-restrict-police-use-facial-recognition-n1082406>.

Over law enforcement objection, state and local governments have sought to ban or limit use of facial recognition technology. California passed legislation prohibiting police departments from outfitting body cameras with technology to identify subjects through their facial features and other biometric traits. The law took effect January 1, and is subject to renewal when it expires in 2023. San Francisco Chronicle, “California Blocks Police from Using Facial Recognition in Body Cameras,” <https://www.sfchronicle.com/politics/article/California-blocks-police-from-using-facial-14502547.php>. Cambridge, Massachusetts has joined Brookline, Northampton, and Somerville in banning the municipal use of the technology, and “[a] bill before the State House would also establish a statewide moratorium on the use of facial recognition technology and other forms of biometric surveillance, including the analysis of a person’s gait or voice, until the legislature regulates the software.” MassLive.com, “Cambridge Bans Facial Recognition Technology, Becoming Fourth Community in Massachusetts to do So,” <https://www.masslive.com/news/2020/01/cambridge-bans-facial-recognition-technology-becoming-fourth-community-in-massachusetts-to-do-so.html>.

Practice Tip: The civil rights practitioner is likely in the future to be involved in an arrest assisted in part by the use of facial recognition technology. The issue will be whether there was evidence in addition to the result of the “match” of the suspect to the database to support probable cause.

Effects of Legalizing Marijuana

Searches of Vehicles and Occupants

Historically, the smell of marijuana gave officers grounds to search a vehicle without a warrant under the motor vehicle exception, see *Carroll v. United States*, 267 U.S. 132, 149 (1925), and to search an occupant incident to arrest, see *Weeks v. United States*, 232 U.S. 383, 392 (1914). See “Searches of Vehicles and Occupants Based on Odor of Marijuana,” available at <https://nccriminallaw.sog.unc.edu/searches-vehicles-occupants-based-odor-marijuana/> A routine stop could lead to a search or arrest for drugs, a fugitive, or an illegal firearm. See “Practitioner’s Guide,” Chapter 2, Fourth Amendment: Searches of Premises, VII. Special Situations, B. Searches of Vehicles.

But now, 33 states permit the medical use of marijuana, and 11 states and the District of Columbia allow the recreational use of marijuana for adults. This has created a complicated litigation picture. Several cases show why.

In *State v. Seckinger*, 920 N.W.2d 842 (Neb. 2018), a state trooper stopped a woman in Nebraska for motor vehicle violations. The trooper smelled marijuana. The woman denied smoking and refused a search of the vehicle. But based on the motor vehicle exception, the trooper found methamphetamine and arrested the woman. Her defense was that the marijuana odor, illegal in Nebraska, could have come from its lawful consumption in Colorado, about 60 miles away. The Nebraska Supreme Court rejected the argument, ruling:

Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant

requirement. And while there may be innocent explanations for the odor of marijuana inside a vehicle, the concept of probable cause is based on probabilities and does not require officers to rule out all innocent explanations for suspicious facts.”

See “Despite Legal Marijuana Law, Odor in Car Still Creates Probable Cause to Search,” available at <https://www.lexipol.com/resources/blog/despite-legal-marijuana-law-odor-in-car-still-creates-probable-cause-to-search/>, citing cases. California is the largest state to allow marijuana possession. The article cites *People v. Strasburg*, 56 Cal.Rptr.3d 306, 310 (Cal. App. 1st Dist.), cert. denied, 552 U.S. 1049 (2007) (valid medical marijuana prescription did not overcome right to search vehicle; statute provided only limited immunity, not shield from investigation).

In a Maryland case, the defendant was sitting alone in his car when officers detected the smell of burning marijuana. They found a joint and rolling papers in his car and cocaine in a search of his person. State law in Maryland makes possession of less than 10 grams of marijuana a civil offense. The Maryland Court of Appeals, the State’s highest court, ruled that the search of the vehicle was permissible under court precedent. Amounts higher than 10 grams, distribution and driving under the influence are still crimes, but the search of the defendant was not justified. Under court precedent, the smell of marijuana did not justify a search incident to arrest. The amount involved made it a civil violation, not a felony or misdemeanor. Plus, there is a heightened expectation of privacy involving one’s person versus a diminished expectation involving a motor vehicle. See ABA Journal, “After Decriminalization, Pot Smell and Joint Didn’t Justify Search, Court Says; Hemp Laws also Raise Issues,” available at <http://www.abajournal.com/news/article/after-decriminalization-pot-smell-and-joint-didnt-justify-search-court-says-hemp-laws-also-raise-issues>, citing to *Michael Pacheco v. State of Maryland*, No. 17, September Term.

Lower state court decisions have limited motor vehicle searches based on the odor of marijuana. A PBS article reports:

[A] Pennsylvania judge declared that state police didn’t have a valid legal reason for searching a car just because it smelled like cannabis, since the front-seat passenger had a medical marijuana card. The search yielded a loaded handgun and a small amount of marijuana in an unmarked plastic baggie — evidence the judge suppressed.

“The ‘plain smell’ of marijuana alone no longer provides authorities with probable cause to conduct a search of a subject vehicle,” Lehigh County Judge Maria Dantos wrote, because it’s “no longer indicative of an illegal or criminal act.” She said that once the passenger presented his medical marijuana card, it was “illogical, impractical and unreasonable” for troopers to conclude a crime had been committed.

Prosecutors have appealed the ruling, arguing the search was legal under recent state Supreme Court precedent. But they acknowledge that marijuana odor is an evolving issue in the courts.

“We want to get it right,” said Heather Gallagher, chief of appeals in the district attorney’s office. “We need guidance, so law enforcement knows what to do.”

PBS, “In Era of Legal Pot, Can Police Still Search Cars Based on Odor?” available at <https://www.pbs.org/newshour/nation/in-era-of-legal-pot-can-police-still-search-cars-based-on-odor>.

The same article mentions that other states’ courts have restricted odor-based searches:

Massachusetts’ highest court has said repeatedly that the smell of marijuana alone cannot justify a warrantless vehicle search. In Vermont, the state Supreme Court ruled in January [2019] that the “faint odor of burnt marijuana” didn’t give state police the right to impound and search a man’s car. Colorado’s Supreme Court ruled in May [2019] that because a drug-detection dog was trained to sniff for marijuana — which is legal in the state — along with several illegal drugs, police could not use the dog’s alert to justify a vehicle search.

Driving while High; Finding a Test

Nine states and the District of Columbia have legalized recreational marijuana and 30 states and D.C. have legalized medical pot. NPR, “The Pot Breathalyzer Is Here. Maybe” available at <https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe>. And while it is still illegal to drive while under the influence in even those states that have decriminalized recreational and medical use, 70 percent of Americans think it is unlikely that they will be busted while high on marijuana. In fact, a study from the largest federation of auto clubs, the AAA, found that in the prior 30 days “almost 15 million drivers have gotten behind the wheel of a car within an hour of smoking, injecting or covering themselves with a marijuana product.” AAA says in states where marijuana is legal fatal accidents have doubled when drivers tested positive for THC, the active ingredient in marijuana. “Driving while high: Offenders don’t think they’ll be arrested,” available at <https://www.cbsnews.com/news/driving-while-high-offenders-dont-think-theyll-be-arrested/>. Marijuana “can cause slower reaction in braking, problems with staying in the center of the lane, and impaired attention, decision-making and risk-taking.” According to another study, “In 2016, 38% of fatally injured drivers tested positive for marijuana, 16% for opioids and 4% for both.” “Cops want to know who’s driving while stoned. Tests are being developed, but level of impairment after smoking weed is still hard to measure,” available at <https://www.chicagotribune.com/marijuana/illinois/ct-marijuana-roadside-drug-test-20191025-zr2ouoci6jfxdnjncifhtv3s4-story.html>. See Chapter 4: Fourth Amendment: Stops, Arrests without Warrants, VI. Recurring Warrantless Arrest Situations, D. Motor Vehicle Stops.

Most states still rely on standard practices to determine whether someone is driving while high: a motor vehicle violation to provide reasonable suspicion for a stop; the smell of marijuana or visible evidence such as a joint; and essentially the same field sobriety tests that are given to subjects suspected of driving under the influence of alcohol: the “horizontal gaze nystagmus test,” the “walk and turn test,” and the “one-leg stand.” The National Highway Traffic and Safety Administration (NHTSA) estimates that these tests are between 60 and 80 percent reliable. “How Police Test for Marijuana DUI in California” available at <https://www.duiease.com/test-for-marijuana-california/>

For alcohol, there is a national standard. “If your blood alcohol content (BAC) is 0.08 percent or higher, you’re considered cognitively impaired at a level that is unsafe to drive. Extensive research supports this determination, and the clarity makes enforcement of drunken driving laws easier.” NBC News, “Smoking weed: When is someone too high to drive?” available

at <https://www.nbcnews.com/health/health-news/smoking-weed-when-someone-too-high-drive-n954211>. Measuring marijuana consumption is more difficult; it stays in the blood longer and the science hasn't determined what is a "safe" level. But "[S]ix states have adopted 'per se' (inherently illegal) limits on THC found during a blood test, from 1 nanogram per milliliter in Oregon to 5 nanograms per milliliter in Montana and Washington. Other states have a zero tolerance for THC, including Illinois (which just legalized recreational consumption), Arizona, Indiana, Oklahoma and Rhode Island." "The Holy Grail for Law Enforcement: Accurate Roadside Testing for Driving While Stoned" available at <https://www.cannabissciencetech.com/news/holy-grail-law-enforcement-accurate-roadside-testing-driving-while-stoned>.

Refusal to agree to a blood test can lead to license suspension or revocation under states' implied consent laws. But blood cannot be drawn without a warrant, or in limited situations, exigent circumstances. *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019) (alcohol). Companies are now working on roadside tests that use saliva collected as oral swabs to detect THC and/or crystal meth, methadone, cocaine, and several other prescription medications. These include a German-made device, Drager DrugTest 5000; and domestic products made by mLife Diagnostics and SoToxa, already in use in Europe. These devices record the presence THC, but not the amount or recency of use. Chicago Tribune, "Cops want to know who's driving while stoned. Tests are being developed, but level of impairment after smoking weed is still hard to measure," available at <https://www.chicagotribune.com/marijuana/illinois/ct-marijuana-roadside-drug-test-20191025-zr2ouoci6jfxdnjncifhtv3s4-story.html>. Hound Lab in California has developed a breathalyzer that can measure THC in molecules in parts per trillion, whereas alcohol impairment is measured in parts per thousand. The company says, "When you find THC in breath, you can be pretty darn sure that somebody smoked pot in the last couple of hours[.]" NPR, "The Pot Breathalyzer Is Here. Maybe" available at <https://www.npr.org/2018/08/04/634992695/the-pot-breathalyzer-is-here-maybe>.

Practice Tip: Decriminalization of marijuana use has complicated the law enforcement landscape. The cases so far have arisen in motions to suppress evidence in criminal cases. When to stop, search a vehicle and arrest and search an occupant is unclear and evolving to keep up with changes in the law. Based on the foregoing, it is much harder to arrest and convict someone for driving under the influence of marijuana. The practitioner's interest here is in civil cases involving § 1983. Based on the lack of clarity in established law, law enforcement officers can certainly employ the qualified immunity defense to their benefit.

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