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LOITERING AND PROWLING

From the Courts

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LOITERING AND PROWLING

By Assistant State Attorney: Michael Hrdlicka

Loitering and prowling is a complex charge that is difficult to understand, involves conduct that can be difficult to describe, and is certainly difficult to prosecute without an ideal set of facts. While the charge of loitering and prowling is a misdemeanor, by its very nature loitering and prowling arrests can lead to additional felony charges. Hopefully, this article will clarify some of that complexity.

First, let's analyze the loitering and prowling statue, Fla. Stat. Sec. 856.021which states:

(1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

(2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

Assistant State Attorney: Michael Hrdlicka

The first section, subsection (1), describes the elements of loitering and prowling. Essentially, that section boils down to two elements: 1) the defendant loitered or prowled in a place, time, or manner not usual for law-abiding individuals, and 2) that loitering or prowling was done in such a way that it caused justifiable and reasonable alarm or immediate concern for the safety of persons or property in the area.

Before we get to the second subsection, let's spend some time on what the courts are really looking for in determining whether a defendant is guilty of loitering and prowling. The Florida Supreme Court requires that an officer have "specific and articulable facts" that support a loitering and prowling arrest. State v. Ecker, 311 So.2d 104, 106 (Fla. 1975). You may recognize the "specific and articulable facts" language from the US Supreme Court case, Terry v. Ohio, 392 US 1 (1968). That's because the Ecker case pulls that language directly out of the same case that created Terry stops.

However, it's important to note that in Ecker, the "specific and articulable facts" language is used to support the finding that someone was committing the charge of loitering and prowling. In an ordinary Terry stop, you can base your decision to detain someone on your suspicion that a crime is about to occur. However, if you are stopping someone for loitering and prowling then you must already have made a finding that someone has committed loitering and prowling.

This is important because loitering and prowling is a misdemeanor, which limits your decision-making to what's occurred in your presence. When making an arrest on a misdemeanor, the conduct you arrest on has to occur in the presence of an officer. D.L.B. v State, 685 So.2d 1340, 1342 (Fla. 2nd DCA, 1996). In other words, to detain someone for loitering and prowling, you have to have those "specific and articulable facts" that loitering and prowling has occurred from what you or another officer has personally observed.

This is problematic because your average loitering and prowling call is from a concerned citizen who has seen someone sneaking around the neighborhood. However, when law enforcement arrives on scene the suspect may not necessarily be anywhere near a residence or person. So, if you come across an individual that matches a description of a potential prowler, and that person is not doing anything to give rise to those "specific and articulable facts" that support a loitering and prowling arrest, you cannot detain them without reasonable suspicion for some other charge.

To illustrate this, let's look at a few cases. In E.C. v State, 724 So.2d 1243 (Fla. 4th DCA, 1999), a group of juveniles were observed walking past the front of the same strip mall eight times. This was determined to be insufficient to support an arrest for loitering and prowling. A defendant who looked around the corner of a house and fled upon arrival of law enforcement was not found to be sufficient evidence to support a conviction for loitering and prowling in Williams v. State, 675 So.2d 885 (Fla. 2nd DCA, 1996). Likewise, being found behind a business late at night in an area noted for burglaries, also wasn't enough to arrest someone on

loitering and prowling, as noted in D.S.D v. State, 997 So.2d 1191 (Fla. 5th DCA, 2008).

All this discussion is important because, although it may seem like it, loitering and prowling is not the crime of attempting to commit another crime. Walking by a strip mall eight times, looking around the corner of a house and running, and being behind a business in the middle of the night are all examples of suspicious conduct, but they aren't loitering and prowling. And that type of conduct, by itself, isn't enough to detain someone on a Terry stop either.

The problem we run into on loitering and prowling cases is that we use the charge as a tool to detain someone who is acting suspicious. You want to detain the prowler for a loitering and prowling charge because it gives you the opportunity to investigate a situation which doesn't rise to the level of a Terry stop. However, when that happens, the stop gets thrown out and, most likely, so does any evidence of any other crime you learn about during that stop.

So, if you're considering making an arrest for loitering and prowling, then you have to consider the elements from subsection (1). The key thing that we're looking for is "alarm." In that way, loitering and prowling is like assault. With assault, we're looking for the reasonable fear of contact or violence in the victim. With loitering and prowling, you, as the arresting officer, have to decide whether the conduct you've seen gives rise to the alarm that someone or something is going to suffer harm in the near future as the result of the suspect's actions. And remember, you have to have "specific and articulable facts" for why you are alarmed.

What that basically means is that, in order to make an arrest for loitering and prowling, you should also have enough evidence to make a Terry stop based on your reasoning that a crime is about to occur. If you don't have one, then most likely you don't have the other. Of course, there are always exceptions, but a general rule of thumb is to follow the above.

So, what do you do when you see the suspects walking past the strip mall or in the back of a business? In situations where you don't have those "specific articulable facts" then a consensual encounter is your best bet to get a feel for what is going on. Remember, you can't use the loitering and prowling statute as a tool to detain a suspicious individual, but you can always see if a suspect will provide you with the information you need to arrest the suspect.

I also want to touch briefly upon the second section, subsection (2). That section lays out three specific instances that help determine the actions that "cause justifiable and reasonable alarm." Of course, these three situations have also been further limited by case law. Flight by itself is hardly ever a reason to justify a Terry stop or an arrest for loitering and prowling. So, while a suspect's flight is a factor you can look at when deciding whether a person is loitering and prowling, it will not sustain a conviction without specific and articulable facts that support the "alarm" I mentioned earlier.

Likewise, refusing to provide identification to a law enforcement officer is only applicable when someone has been detained. If you've detained someone, then for our purposes you've already made a Terry stop or an arrest on loitering or prowling or some other charge. So, the fact that the suspect refused to provide identification is a fairly meaningless factor on your decision to arrest for loitering and prowling.

Finally, loitering and prowling has a defense built into the statute. In order to make an arrest, you have to, as written in the second section, "afford the person an opportunity to dispel any alarm." That means you have to give the suspect an opportunity to explain why the suspect was where the suspect was located or what the suspect was doing at the time. Of course, unless you're in a consensual encounter with the suspect, you have arrested the suspect for loitering and prowling. If you've arrested the suspect then you have to advise the suspect of the Miranda warnings. You can't compel an in custody suspect to explain what the suspect was doing without those Miranda warnings. Thus, the Florida Supreme Court requires that an officer give Miranda warnings prior to giving the suspect a chance to explain the suspect's conduct. Ecker, 311 So.2d at 110.

In this article we've covered the elements of loitering and prowling and the specific level of probable cause that is needed to make an arrest for loitering and prowling. The general rule to follow is that if you are going to make an arrest on loitering and prowling, you should also be ready to describe the evidence you have for a Terry stop on another crime. We also talked about the specific scenarios mentioned in the statute and how they generally are not a good basis in and of themselves for a loitering and prowling arrest. Finally, we covered the defense to loitering and prowling and how it requires Miranda warnings in the event of a loitering and prowling arrest.

Loitering and prowling is clearly a complicated charge. I hope that this article helps you better understand and better enforce this statute. On its face, it looks like a tool for law enforcement used to police and prevent harm to persons or property caused by people attempting to commit crimes, but it has been applied very differently in the various courts of appeal. Instead of the statute policing that harm, it polices the harm caused by the alarm to the observer—as in you, the arresting officer. Detaining a suspect is a risky, stressful situation and the purpose of the statute is to hold people accountable criminally when their actions force you to detain them.

FROM THE COURTS...

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SEARCH AND SEIZURE –TOTALITY OF CIRCUMSTANCES TEST

In this Polk County case, the Second DCA reversed the trial court's granting of the motion to suppress, holding that the court improperly applied the rigid "two prong test," which has been replaced by the "totality of the circumstances test." The trial court made a finding that the affidavit submitted in support of the search warrant did not provide probable cause that the residence in question contained any narcotics or narcotics related evidence because the affidavit lacked information on the credibility or reliability of the two informants. The Second DCA cited prior U.S. Supreme Court cases and Second DCA cases for the determination that affidavits should be considered in their entirety and read in a common sense manner. In this case, the surveillance, along with the criminal history of the co-defendant and homeowner, provided the necessary corroboration of the two separate informants to support the reasonable probability that contraband would be present when the search warrant was executed. *State v. Loredo*, 39 Fla. L. Weekly D171a (Fla. 2nd DCA January 17, 2014).

SEARCH AND SEIZURE – SUFFICIENCY OF AFFIDAVIT ESTABLISHING PROBABLE CAUSE FOR SEARCH WARRANT

The defendant challenged the sufficiency of a probable cause affidavit for a search warrant because there was a twenty-eight day gap between the last controlled buy and the issuance of the warrant. The trial court denied the motion to suppress. On appeal, the Second District affirmed the denial, holding that because there were two separate controlled buys at a specific location, for a particular amount of cocaine, and from an identifiable source, and that the defendant retrieved the drugs from a larger bag of contraband in both controlled buys, suggested ongoing criminal activity and therefore supported the conclusion that contraband would be located in her home twenty-eight days later. *Williams v. State*, 39 Fla. L. Weekly D216f (Fla. 2nd DCA January 24, 2014).

EVIDENCE – OPINION – IDENTIFCATION

At a trial for first degree murder, the trial court allowed the state to present the testimony of the lead detective that he had repeatedly watched the surveillance video from the convenience store camera and he concluded that it was appropriate to put out a BOLO for a "light skinned Hispanic male or a white male" and a "dark skinned male" for the second suspect. The appellate court found that the prosecutor presented opinion testimony from the lead detective as to what he believed he observed in the surveillance video. Although the question was designed to appear that it was regarding the investigation and the steps the detective took, the court found that state's reference to the investigation was gratuitous. The court stated that there was no record evidence that the detective was in a better position than the jurors to determine the race and skin color of the suspects by observing the surveillance video. Because the court determined that this was impermissible identification testimony and not harmless error, the conviction for first degree murder was reversed. *Alvarez v. State*, 39 Fla. L. Weekly D197a (Fla. 4th DCA January 22, 2014).