Jerry Hill
State Attorney

LEGAL ADVISOR

OFFICE OF THE STATE ATTORNEY TENTH JUDICIAL CIRCUIT

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You are free to leave

From the Courts

Office Locations

Wauchula Office
124 South 9th Avenue
Wauchula, FL 33837
Phone: (863)-773-6613
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You are free to leave

Written by Assistant State Attorney: Karen Burnett

"You are free to leave", are the best words that any person who has been stopped by law enforcement could hear. These words are also music to prosecutors' ears when it comes to searches. Do I have to tell someone that they are free to leave before I can ask to search? The Second District Court of Appeals (Second DCA), our jurisdiction, has been quickly evolving on this issue and recently the answer seems to be YES.

Assistant State Attorney:
Karen Burnett

Searches are probably the hottest motion to suppress area because the burden rests with the State to show that consent was given, and that consent was freely and voluntarily given. What will the court consider in determining if consent was freely and voluntarily given? Good question. To determine if consent was freely and voluntarily given the court will look at the "totality of the circumstances." Oh boy, that old totality test again!!!

First, there is no consent if it was given only by threats, coercion, force, or implied threats or coercion. The area that law enforcement can quickly get into trouble is in how something is said. Always remember to ask, not tell. For example, "Do you mind if I take a look in that bag?" is completely different from, "I'm going to take a look in that bag, OK?" If a statement could be taken as a command even if presented as a question it will be perceived as a command by the court and no voluntary consent.

Second, the court will look at what kind of stop this is. Consensual encounters are where the person is not being detained and is free to walk away or leave at anytime. Investigatory stops are where the person is not free to leave during the course of the investigation, so you must have some kind of "articulable reasonable suspicion that person has committed, is committing or is about to commit a crime." Popple v. State, 626 So.2d 185, 186 (Fla. 1993). The third stop is an actual arrest and probable cause is required here. We will not concern ourselves with an arrest because at that point the person would not be free to leave. That leaves consensual encounters and investigatory stops. In consensual encounters the person is not considered detained. Therefore the question the court looks to determine in this particular situation is whether a reasonable person believe they could refuse consent to search and walk away or leave. In an investigatory stop the person is temporarily detained and not free to leave so there is a heightened level of scrutiny to determine if the person would believe they could refuse consent to search or were merely acquiescing to authority.

Next, the court will move to the totality of the circumstances test. Some of the things the court will look at are: 1) the circumstances of the contact, traffic stop, knock-and-talk, or just a consensual encounter; 2) the number of officers involved, particularly, directly in contact with the defendant; 3) whether the defendant was told he or she was free to refuse consent; 4) was there a written consent form signed by the defendant BEFORE the search. Remember, this is not an all inclusive list just some general areas the court will look at. But what in the world does "you're free to

leave" have to do with that list? Again, good question. Knowledge of right to refuse consent is the answer.

In recent years the courts have found that informing a defendant of their right to refuse, consent was not required for consent to be voluntary, but if the defendant was not advised he or she could refuse, the court would have to look at the totality to see if a reasonable person would believe they could have refused consent. A consent form signed prior to any search is almost a slam dunk for the State to prove freely and voluntary consent. This is why law enforcement officers always are asked about these forms by defense attorneys. More recently, the Second DCA, particularly in the area of traffic stops, is requiring more of an affirmative role on the part of law enforcement to let the defendant know he or she has the right to refuse consent. This is where "you are free to leave" comes in. The Second DCA has consistently stated that a law enforcement officer may ask for consent to search at any time during a lawful traffic stop even if the traffic stop has ended. Under the totality test, the court will look at the factors such as whether the defendant was being detained to determine consent versus acquiescence to lawful authority. If consent was requested during a traffic stop the person is considered to be detained, but if the traffic stop has ended, then the person is no longer considered detained. The factors that the court has often looked at to determine if the traffic stop has ended historically have been the issuance of citations and the returning of the person's driver's license. One would not feel free to leave if the officer still has his or her driver's license.

Recently, the Second DCA in Crist v. State, 98 So.3d 81 (Fla. 2d DCA 2012) has added a new level to the determination if the traffic stop has ended. In the Crist case, the defendant was stopped for riding a bicycle at night without a light and was issued a citation. After issuing the citation, the officer asked for consent to search, but he never told the defendant that he was free to leave. The Second DCA found that because it was not clear that the defendant knew that he was free to leave because he was never told; there was not sufficient evidence to prove that the consent was given freely and voluntarily. Again in Horne v. State, 113 So.3d 158 (Fla. 2d 2013) the Second DCA discussed the issue of retention of driver's license, but found that was not the most important factor. Instead, the court stressed that the weight has to be placed on the circumstances of the consent and whether a person would feel that he or she was free to leave. The court footnoted that a factor to be heavily considered was whether or not the person was told they were free to leave.

It appears that the court is moving toward requiring law enforcement to affirmatively inform the defendant that he or she is free to leave or that they have the right to refuse consent. Without telling the person they are free to leave or they may refuse consent to search, it appears that in this jurisdiction, consent will not be considered voluntary. Now that I have detained you, you are free to leave.

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Officers can submit their vacation to Witness Management at the following email address:

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P.O. Box 9000 Drawer SA
Bartow, FL, 33831

The Legal Advisor Staff

Jerry Hill, Publisher
Email: jhill@sao10.com
Brian Haas, Managing Editor
Email: bhaas@sao10.com
Michael Cusick, Content Editor
Email: mcusick@sao10.com
Casey Gorman, Content Editor
Email: cgorman@sao10.com
Steven Titus, Graphic Design
Email: stitus@sao10.com

SEARCH AND SEIZURE – UNLAWFUL DETENTION.

Police responded to an apartment complex based upon an anonymous tip that two juveniles were loitering and drugs were possibly involved. When the officer arrived, he encountered two adults, who claimed to be at the complex visiting a friend. The officer instructed the men to "stand by" while he verified that they were guests at the complex. During his attempt at verification, the officer noticed one of the men take something from his pocket (cocaine) and drop it on the ground. The man was then arrested for possession of cocaine. The defendant motioned to have the cocaine suppressed, arguing that the officer did not have reasonable suspicion to justify stopping and detaining the defendant. The state argued that the anonymous phone call and the officer's observations were sufficient to justify the brief detention. The trial court denied to the motion to suppress. On appeal, the Fourth District reversed, holding that the anonymous tip lacked a sufficient degree of detail and that a person's mere presence on property is not sufficient to give rise to a reasonable suspicion that the crime of trespass is being committed. Collins v. State, 38 FLW D1217b (Fla. 4th DCA June 5, 2013).

INVESTIGATORY STOP – ANONYMOUS TIP -- SEARCH AND SEIZURE.

Law enforcement was called to an area because of complaints of a disturbance involving several black males. One of the men were reported to have brandished a gun and fled south. Deputies investigated and found a person, later identified as the defendant, in the area that matched the description given by the anonymous callers, except that the person was wearing a black jacket. The deputies did not observe the defendant do anything suspicious or illegal. Despite the deputy's instructions to the defendant to come talk to him, the defendant left the area, went to a home and handed his jacket to a woman in the home. In compliance with the deputy's demands, both the defendant and the woman exited the house. Pills and cocaine were later found in the jacket the defendant handed to the woman. The defendant filed a motion to suppress, arguing that there was no reasonable suspicion for his stop and detention. The trial court denied the motion to suppress. On appeal, the Fourth District reversed, holding that law enforcement may not conduct an investigatory stop based upon an anonymous tip unless they observed "additional suspicious circumstances as a result of the independent investigation [of the tip]." The tips in this case did not provide any information regarding age, build, or other identifiable characteristics. Additionally, the deputies did not observe the defendant engaged in any unusual or suspicious behavior before stopping him. Stinson v. State, 38 FLW D1530a (Fla. July 17, 2013).

SEARCH AND SEIZURE – INVESTIGATORY STOP.

The Fifth District Court of Appeal found that behavior of the defendant, which included head and arm movement mannerisms, walking out of pharmacy with a white bag during normal business hours, without any hand-to-hand exchange observed, was insufficient to justify reasonable suspicion that a crime was committed by the defendant or anyone else. Remand for dismissal. Price v. State, 38 FLW D1797a (Fla. 5th DCA August 23, 2013).