Tenth Circuit

Legal Advisor

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Including the evidence on a criminal traffic charge in your report of a multiple offense stop involving additional criminal charges is necessary to make sure the case goes to court.

Swearing in the interpreter is required when taking statements using an interpreter. Also, an in-depth explanation of the stop and frisk rule -- all this courtesy of Intake director Mike Cusick in April Legal Advisor.

Investigative Procedures

By Mike Cusick

Reports must include basis for criminal traffic charges

When felony and traffic charges arise out of the same incident, they are now being filed together.

In the past, the criminal traffic charges were sent to county court.

The courts have ruled, however, that all criminal charges arising out of the same incident must be tried together.

Therefore, it is important that you also cover in your reports what evidence there is for the criminal traffic charges.

We have to file the criminal traffic charges in the Information and we must have sworn testimony on which to base the decision to charge.

For instance, if you stop an individual, determine that he is driving on a suspended license, and you find cocaine on him, you will need to include in your report what evidence there was for the suspended license charge.

Some officers already cover this material in their reports.

The purpose of highlighting this point is to notify those who didn't include this information in the past that this material must now be included

If the information is not included, we will have to either drop that charge or send a request to you asking for a supplement detailing the evidence for the criminal traffic charge.

Time constraints will determine which alternative we choose.

Interpreters need to be sworn in

Recently, a motion to dismiss was filed in a case because an officer did not swear in the interpreter when he was using an interpreter to take a sworn statement from a witness.

Remember that both the interpreter and the witness need to be sworn in.

First, swear in the interpreter. The following language is suggested: "*Do you swear to truthfully and accurately translate from English to Spanish and Spanish to English, so help you God?*".

Once the interpreter is sworn in, then use the interpreter to swear in the witness.

When the tape is transcribed, both oaths should be reflected in the transcript.

Only the English portion of the tape needs to be transcribed.

It is confusing if the witness sometimes answers the questions in English.

At the start of the interview, instruct the witness to answer the questions only in his native tongue allowing the interpreter to translate.

Use only an interpreter who is fluent in both English and the language of the witness.

Stop and Frisk

The law on stop and frisk comes from the landmark United States Supreme Court case of Terry v. Ohio, 88 Sup. Ct. 1868, 20 L. Ed. 2nd 889 (1968).

It is extremely important that every officer have a practical understanding of the statute because so many searches are based on this statute.

There are two separate and distinct parts of the statute.

The first part deals with the legal basis for a stop. The second covers the legal justification for a frisk.

As we shall see, sometimes you will be able to conduct a stop without being able to perform a legal frisk.

The Stop

The pertinent portion of the statute states: *Whenever any officer of this state encounters any person under circumstances which reasonably indicate that such a person has committed, is committing, or is about to commit a violation of the criminal laws of this state or the criminal ordinances of any municipality or county, he may temporarily detain such a person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding his presence abroad which led the officer to believe that he committed, was committing, or was about to commit a criminal offense.*

In justifying a stop based on this staute, you must be able to answer two questions: (1) What has the suspect done to cause the officer to reasonably believe that the suspect has committed, is committing, or is about to commit a violation of a law or ordinance. (2) What is the law or ordinance that has been, is being or is about to be violated.

Your report should answer these two questions anytime your stop is based on this statute.

Unless you can answer both questions, your stop of the suspect may be challenged as illegal.

Assuming you have a legal stop, the next issue is how long you can detain the suspect. The statute states: *(3) No person shall be temporarily detained under the provisions of subsection (2) longer than is reasonably necessary to effect the purposes of that subsection. Such temporary*

detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.

The time that is "reasonably necessary" to either confirm or eliminate the officer's suspicion is going to vary in each case.

There is no magic time period which is always reasonable.

It is important that you act as quickly as possible under the cricumstances to reach a decision.

While it is reasonable to say that the more serious crime, the longer you can detain the person, the real issue will still be what you did to verify or eliminate your "reasonable suspicion" and whether you did it in a swift fashion.

The Frisk

This law should not be called "stop and frisk" because that gives a lot of officers the impression that if you have a legal stop, then you can conduct a frisk.

That is not the law. Subsection (5) reads: *Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom he has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, he may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such search discloses such a weapon or any evidence of a criminal offense it may be seized.*

So the test for conducting a frisk is whether the officer has probable cause to believe the suspect is armed with a dangerous weapon.

This probable cause may come from what an eyewitness has told the officer.

It may be based on a bulge

which the officer believes is a weapon.

It might also be based on the suspect's reputation for always carrying a weapon.

Whatever the basis, it must reach the level of probable cause.

Clearly, it cannot be based on speculation or on a hunch.

Once the officer has probable cause, he may search the suspect for such weapons.

If he feels what he believes is a weapon, he can conduct a more intrusive search to determine if the item is a weapon.

On the other hand, if he feels what he believes is a controlled substance, the statute does not permit a further search.

The frisk is for weapons, not drugs.

As is always the case, consent eliminates a need to rely on the statute.

Therefore, if a suspect consents to being detained or consents to a search, the stop and frisk statute may not apply.

I use the term "may" because the court has to find that the suspect consented.

If practical, it is always useful to have the defendant's consent in writing so that it is mnore difficult for him to deny having given it once you get to court.

FROM THE COURTS

Edited by Chip Thullbery

A gun is a deadly weapon, no matter how it is used

The defendant was charged with and convicted of aggravated battery based on an incident in which he struck the victim with a revolver.

On appeal, he argued that he could not be convicted of aggravated battery because the revolver was not a dealy weapon since he used it to strike the victim and not shoot him.

The Third District rejected this argument and affirmed, holding tht a revolver would be a deadly weapon under the circumstances of this case.

Riggins v. State, 15 FLW D506 (Fla. 3d DCA Feb. 20, 1990).

A purse snatching isn't always a robbery

The defendant, a juvenile, was charged with robbery.

The evidence at his hearing showed that the victim was sitting in an outdoor cafe with a camera hanging from his shoulder.

The defendant grabbed the camera and fled.

The defendant was adjudication delinquent for the robbery, but on appeal, the Third District reduced the adjudication of delinquency to petit theft, holding that the force used to steal the camera was insufficient to constitute a robbery.

A.J. v. State, 15 FLW D616 (Fla. 3d DCA Mar. 6, 1990).

Causing people to gather isn't always disorderly conduct

The defendant, a juvenile, was charged with disorderly conduct.

The evidence at her hearing showed that she repeatedly interrupted an officer's conversation with another individual by singing "F--- THE POLICE".

At the direction of another officer she retreated to the front porch of her home but continued singing the same line.

The officer testified that her singing could be heard accross the street where adults and children were gathered.

She was adjudicated delinquent for disorderly conduct, but on appeal the First District reversed, holding that while her speech was annoying and offensive to the officers and attracted a group of curious onlookers, it did not incite those onlookers to breach the peace and thus she was not guilty of disorderly conduct.

Kye v. State, 15 FLW D666 (Fla. 1st DCA Mar. 12, 1990).

Once an attorney is appointed for a defendant, all police-initiated contact must cease

The defendant was arrested and at his first appearance hearing counsel was appointed for him.

Subsequently, police officers went to him in the jail where he signed a waiver of his constitutional rights and confessed to several burglaries with which he was then charged.

Subsequently, he filed a motion to suppress his confession, but this was denied.

He was convicted as charged, but on appeal, the Third District reversed, holding that once a defendant has requested an attorney at first appearance

(See "attorney" next page)

"attorney"
further contact with him.

Trody v. State, 15 FLW D618 (Fla. 3d DCA Mar. 6, 1990).

All occupants must consent to search

The defendant was charged with possession of cocaine and paraphernalia and filed a motion to suppress.

The evidence on the motion showed that the defendant's wife who jointly owned the marital home with the defendant called the police to the home and told them where they could find cocaine belonging to the defendant.

The police, over the objection of the defendant, proceeded to search for drugs and seized the cocaine and paraphernalia.

The trial court denied the motion to suppress, and the defendant pled no contest reserving the right to appeal.

On appeal, the Second District reversed, holding that when two joint occupants of a home are present and one objects to a search of the premises, the search is improper.

Mitchell v. State, 15 FLW D521 (Fla. 2d DCA Mar. 2, 1990).

Traffic stop was basis for valid search

The defendant was chargd with possession of marijuana and filed a motion to suppress.

The evidence on the motion showed that two officers of the Fort Myers police department were on uniform patrol on Interstate 75 for the purposes of narcotics interdiction through the use of probable cause traffic stops.

The officers were accompanied by a dog trained to detect the presence of controlled substances.

(See "valid" next page)

"valid"

The officers noticed a vehicle on which the tag light was not operating.

The officers stopped the van and during the stop the dog gave a signal that it smelled drugs in the van.

Based on this fact, the officers searched the vehicle and found marijuana in a plastic bag in the center console.

The trial court, finding that the traffic stop was a pretext, granted the motion to suppess.

On appeal, the Second District reversed, holding that the officers had a valid basis for the stop.

State v. Russell, 15 FLW D590 (Fla. 2d DCA Feb. 28, 1990).

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