

Tenth Circuit

Legal Advisor

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If you, as a law enforcement officer, intend to make cases that will make it into court and result in convictions, read and keep this issue of Legal Advisor.

Everything you need to know about the basics of law for police officers is spelled out by Allen Nelson of SAO's Felony Intake Division.

PLAIN TALK ABOUT PLAIN FEEL

By Allen Nelson

Still confused about "reasonable suspicion" and "probable cause"? Good! From confusion comes learning. And now comes "plain feel".

In Minnesota v. Dickerson, 113 S. Ct. 2130 (1993), a Minneapolis police officer stopped the defendant and patted him down for weapons. Both the stop and the patdown were valid on the facts of the case.

The patdown revealed no weapons but as the officer patted down the front of the defendant's jacket he felt a small lump in the front pocket. The officer examined it with his fingers and the lump slid. It felt like a lump of crack cocaine in cellophane.

The officer then reached into the defendant's pocket and retrieved a small plastic bag containing one-fifth of a gram of crack cocaine.

Having felt the lump, the officer did not believe that the lump was a

weapon and determined that it was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket.

The U.S. Supreme Court affirmed the suppression of the cocaine.

After the officer concluded that the object was not a weapon, the Court found that the continued manipulation of the defendant's jacket pocket was not for the officer's protection (weapons) but was for the discovery of evidence (cocaine), and thus went beyond the permitted scope of a valid patdown.

However, the Court went on to hold that if a police officer lawfully pats down a suspect's outer clothing for weapons and feels an object whose contour or mass makes its identity immediately apparent, and if the object is contraband, it may be seized. In other words, if, during the frisk, probable cause arises for drugs,

you may search and seize these drugs if you can explain the probable cause.

Your probable cause must be developed during your patdown for weapons and before you conclude that there are no weapons and the identity of the contraband must be immediately apparent.

Of course your training and experience are extremely important, including your experience with the specific type of contraband in question. You must be able to articulate specifics as to your training and experience, as well as be able to identify what gave you probable cause.

In Doctor v. State, 596 So. 2d 442 (Fla. 1992), the officer had made approximately 250 arrests for possession of a controlled substance, had been present for approximately 1,000 arrests, had seen or felt crack cocaine approximately 800 times and had found cocaine hidden in the groin area on 70 occasions.

The officer observed a large bulge in the defendant's groin area as the defendant exited his car, the defendant walked sideways as if to hide the front of his body, and the officer who saw the bulge thought it might be a weapon.

The officer performed a patdown and realized that it was not a weapon but reasonably believed, in light of his training and experience, that the bulge was a package of cocaine because of the texture, size, and "peanut brittle type feeling in it".

The Florida Supreme Court held that based on all these facts and circumstances, the officer had probable cause to believe the defendant was carrying the cocaine.

The U.S. Supreme Court makes it clear that the identity must be immediately apparent and cannot be developed by slipping, sliding or manipulating the object after you have concluded that the object is not a weapon.

The initial stop and reasonable suspicion

Florida Statute 901.151 is our statute on "Stop and Frisk". An officer who encounters any person under circumstances which reasonably indicate that person has committed, is committing, or is about to commit a violation of a criminal law or ordinance may temporarily detain that person for the purpose of ascertaining identification and the circumstances leading to the officer's beliefs.

The detention can be no longer than necessary to ascertain the identification of the suspect and the circumstances surrounding his presence and shall not extend beyond that place or the immediate vicinity.

To stop a person you must have a reasonable suspicion that criminal activity is afoot and that the person is linked to that criminal activity.

So, what is reasonable suspicion? A reasonable suspicion is a suspicion which has a

factual foundation in the facts and circumstances you observed, interpreted in the light of your training and experience.

If during your valid detention, you develop probable cause that your suspect has committed or is committing a crime, it does not have to be the matter about which you were first suspicious, you may arrest your suspect and search him incident to that arrest. If probable cause is not developed, you must release your suspect.

The frisk

O.K., what about the frisk (patdown)? Does the patdown automatically follow a valid stop? Nope. Like the "Texas Two-step", there are two steps, but one does not automatically follow the other.

If, during a valid stop, you reasonably believe you are in danger, you may frisk the suspect's outer clothing for weapons. You must be able to articulate why you reasonably believe you were in danger.

High crime neighborhood, guns, shape and location of bulge, information you have been given, defendant's movements, and anything else that makes sense are possible factors.

One officer testified that the reason for his frisk was that it was a high narcotics area and a lot of people were known to carry guns. The court was not convinced and suppressed the drugs.

Another officer testified that he frisked the defendant because the defendant acted nervous, had a bulge in his rear waistline, and kept turning so the officer could not see his back. The court agreed the officer believed that he was in danger and his belief was reasonable.

Again, your frisk or patdown must be of the outer clothing to discover weapons and not to discover evidence.

If you discover what you reasonably believe to be a concealed weapon during your patdown, you may seize that

concealed weapon, arrest the suspect for carrying a concealed weapon, and conduct a thorough search incident to arrest.

If you do not discover what you reasonably believe to be a concealed weapon, that is the end of it, and your patdown must stop.

If you develop probable cause for possession of drugs, or probable cause for the commission of some other crime, you must be able to explain your probable cause on the basis of every fact and circumstance you observe in the light of your training and experience.

If your probable cause is from plain feel, then it must be from the feel of an object whose contour or mass makes its identity immediately apparent rather than from your slipping and sliding it around after you already know that it's not a weapon.

Probable cause

What is probable cause?
Probable cause to justify an arrest

without a warrant means facts and circumstances, within your knowledge, sufficient to justify a reasonable person in believing that the suspect has committed or is committing a crime.

Reasonable belief

A reasonable belief is a high probability of guilt.

On a rainy Sunday night, at about 11:00 P.M., an officer saw a pickup truck pulling away from a city supply yard. There were fresh tire tracks. There was no other vehicle in the vicinity, and it was unusual to see a truck there at that time of night.

The officer knew that wire had been stolen recently from that same yard.

The tailgate was down and the officer could see coils of wire laid haphazardly in the bed, partially covered by a cloth. The vehicle was weighted down so heavily that its front end was sticking up.

The officer had a reasonable

suspicion that criminal activity was afoot and that the person or persons in the truck were linked to it.

He stopped the truck.

The suspects were detained for some twenty minutes while a backup officer determined that the tire tracks were still fresh despite the rain, that there were recent footprints on both sides of the fence, and that the ground had imprints made by wire.

He also found a pair of shoes which he took back to the truck where one of the suspects admitted that the shoes belonged to him.

At that point the officer had probable cause to arrest the suspects, which he did.

In another case, a restaurant was burglarized.

The suspect was described as a black male, approximately six feet tall, wearing a hat and a red and white striped shirt with baggy pants

and carrying a brown paper bag.

Twenty minutes later, one-half a mile from the restaurant, an officer saw the suspect. He was dressed as described and was carrying a brown paper bag.

At that point, the officer had a valid reasonable suspicion that criminal activity was afoot (burglary of the restaurant) and that the suspect was linked to it.

The officer detained the suspect while witnesses were brought over.

They identified the suspect as the burglar, whereupon he was

arrested and his bag searched incident to the arrest.

Summing up

In conclusion, please remember that it is important that you identify in your reports those facts which are the basis for your "reasonable suspicion" for the stop, as well as those facts which justify the frisk, where a frisk is justified, and finally, those facts which establish "probable cause" if an arrest is made.

Well-written reports make your job easier at deposition, at suppression hearings, and at trial.

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A parking lot can be a weapon

The defendant was charged with a first degree felony of manslaughter with a weapon.

The evidence at his trial indicated that he killed the victim by repeatedly striking the victim's head against the pavement of a parking lot. He was convicted as

charged.

On appeal, the Fifth District affirmed, holding that under the facts of this case the surface of the parking lot constituted a weapon. Houck v. State, 18 FLW D2277 (Fla. 5th DCA Oct. 22, 1993).

Request for defendant to get out of a car elevated citizen encounter into an illegal detention

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

The facts on which the motion was based were that the defendant was sitting in a legally parked car in a desolate area when an officer approached from the rear.

After the officer noticed the defendant making furtive movements he asked the defendant to get out of his car. As the defendant opened the door the

officer saw a cocaine pipe. The trial court denied the motion to suppress, and the defendant was convicted as charged.

On appeal, the Supreme Court reversed, holding that although the officer's initial encounter with the defendant was merely a citizen encounter, the officer's request that the defendant step out of the car elevated the encounter to a detention which was not justified by a reasonable suspicion of criminal activity. Popple v. State, 18 FLW S533 (Fla. Oct. 14, 1993).

Defendant not guilty of burglary where proof showed breaking but not entering

The defendant was charged with burglary and criminal mischief. The evidence at his trial showed that he and another man were stopped by police when the police saw them trying to pry the door off a store.

During the questioning that followed, the defendant told the officers that he and his friend had cut a hole into a wall of a nearby store.

The officers went to the store and observed a hole in the common wall between that store and an

abandoned building. The officers found that nothing was missing from the store, and that there was no damage except for the hole in the wall.

The defendant was convicted as charged, but on appeal the Second District reversed the burglary conviction, holding there was no evidence to show that in cutting a hole in the wall the defendant or the instruments he used entered the store. Stanley v. State, 18 FLW D2327 (Fla. 2nd DCA Oct. 27, 1993).

What officer saw justified detention

The defendant was charged with a crime and filed a motion to suppress evidence.

The facts on which the motion was based were that a plain clothes police officer with nine years experience in investigating robberies observed the defendant running for several city blocks

carrying three large shopping bags and continuously looking back over his shoulder.

The time was 9:00 P.M. and the stores in the immediate area were closed. The location was a high crime downtown shopping section of the city.

(See "Justified" next page)

"Justified"

Based on these facts the officer stopped the defendant, and that stop led to the seizure of evidence.

The trial court granted the motion to suppress, but on appeal,

the Third District reversed, holding that the facts known to the officer justified the temporary detention of the defendant. State v. Abraham, 18 FLW D2306 (Fla. 3rd DCA Oct 26, 1993).

Police need not provide DUI defendant with independent blood test

The defendant was charged with DUI and filed a motion to suppress the results of a breathalyzer test.

The facts on which the motion was based were that after the defendant was arrested for DUI, an officer requested that he submit to a breath test.

Thereafter the defendant requested that he be permitted to have an independent blood alcohol test.

This request was denied with the explanation that law enforcement policy did not authorize or require that a blood alcohol test be made available to a DUI arrestee upon request.

On appeal, the Second District reversed, holding that while section 316.1932(1)(f)3 allows a person to obtain an independent test, it does not require law enforcement to provide the means for such testing. State v. Saylor, 18 FLW D2238 (Fla. 2nd DCA Oct. 15, 1993).

Police actions entrapped defendant

The defendant was charged with two counts of sale or distribution of pornography to a minor and filed a motion to dismiss asserting that he had been entrapped.

The facts on which the motion was based were that police received a complaint that a video store was renting pornographic tapes to minors.

(See "Entrapped" next page)

"Entrapped"

As a result, police initiated an investigation of that store as well as others including the defendant's against whom no complaints had been made.

The police obtained a false membership card from the defendant's store and then sent a juvenile girl who looked like an adult into the store.

The girl was told to lie about her age and to indicate that the false card belonged to either her

brother or boyfriend. She did this and the defendant rented her two video tapes.

The trial court granted the motion to dismiss, and on appeal, the Supreme Court, in a comprehensive opinion discussing both subjective and objective entrapment, affirmed, holding that the defendant was entrapped as a matter of law under section 777.201, Florida Statutes. Munoz v. State, 18 FLW S537 (Fla. Oct. 14, 1993).

Officer's stop of defendant was not pretextual

In this Polk County case, the defendant was charged with possession of controlled substances and filed a motion to suppress.

The evidence on the motion showed that an officer saw a vehicle in the parking lot of a convenience store which had a smashed windshield and an inoperable taillight.

As he continued to watch, he

observed a hand transaction between the defendant who was the driver of the vehicle and a teenager standing outside the car. He then stopped the vehicle as it was leaving the parking lot.

When the defendant could not produce a valid driver's license, the officer ran a teletype and discovered that there were outstanding warrants for his arrest.

(See "Pretextual" next page)

"Pretextual"

He arrested the defendant and a search of the defendant's person and the vehicle produced cocaine and marijuana.

The officer admitted that he stopped the defendant because he suspected that he had observed a drug transaction, but he also testified that he routinely made stops of vehicles for windshield and taillight problems

The trial court granted the motion to suppress, but on appeal, the Second District reversed, holding that the stop was valid notwithstanding the subjective intent of the officer because a reasonable officer under the same circumstances would have stopped the vehicle absent the additional invalid purpose. State v. Pollard, 18 FLW D2290 (Fla. 2nd DCA Oct. 22, 1993).