Tenth Circuit Legal Advisor

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The good guys finally win one

Flight upon sight of law enforcement

By Curt Morgan

In January, the United States Supreme Court, in the decision of *Illinois v. Wardlow,* expanded when police may briefly detain suspects for investigative purposes.

In the past, when suspects saw the police and fled, you where unable to chase and detain them without some probable cause to believe they had committed a crime. The suspects' flight by itself did not establish probable cause.

Now when you observe a suspect in a place that can be defined by you as a "high crime area" (for example- an area known for heavy narcotics sales) and he flees upon sight of the police, you may chase and briefly detain the suspect for investigative purposes (i.e. a Terry stop).

Conduct your business with the suspect as you would with any Terry stop situation, but be aware the suspect's flight alone DOES NOT give the police probable cause to search him.

As you know, during this detention you may:

1. Conduct a pat down if you have concerns for officer safety (for example, bulges in clothing, or hand movements concealing unknown items in clothing, etc.)

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2. During the pat down, objects felt by "plain feel" which in your training and experience are consistent with contraband may properly be seized.

3. Conduct a warrants and probation/community control violation check.

4. Remember, the suspect at this point is "lawfully detained". If during the course of your investigation he provides a false name or otherwise falsely identifies himself, the offense of Giving False Identification to Law Enforcement (F. S. 901.36) has been committed and the suspect may be searched incident to arrest.

5. Seek consent from the suspect to search his person.

If during the flight the suspect is instructed to stop and fails to do so, he has committed the offense of Resisting Without Force or Violence (F. S. 843.02). Upon detaining the suspect in this situation you are permitted to search his person incident to arrest.

If contraband is taken from the suspect, ensure that your report includes the facts which support the basis for seizing the evidence.

The terms "plain feel" during a pat down, "consent", or "search incident to arrest" are conclusions. You need to include the facts that describe the search, for example: what you felt during the pat down, why you did the pat down and where the evidence was located.

Additionally, your report needs to include facts supporting your description of the place being described as a “high crime area”.

A REVIEW OF CONSENT SEARCHES OF PERSONS

The appellate courts have in recent years been closely scrutinizing consent to search given by suspects to law enforcement.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving the consent was, in fact, freely and voluntarily given, by clear and convincing evidence.

This is a very valuable crime fighting tool for law enforcement, but you need to be cautious for the courts will closely consider the following areas:

1. Whether the suspect was told he was free to leave or free to refuse the search. You are not required to tell a suspect this information, but it will

increase the chances of the search being upheld if done.

2. The Florida Supreme Court has ruled that a request to "search you" DOES NOT include a pat down or search of the crotch or groin area. To do so, the officer must obtain specific consent to search the individual's crotch or groin.

3. The type of response received by your request to search will be closely reviewed. Verbal and non-verbal permission by the suspect MUST be clear. Non-verbal gestures or statements that
are ambiguous will not support a finding by the court that the consent was freely given.

4. Withdrawal of consent situations:

a. Where a suspect voluntarily removes items from his pockets, then states nothing else remains - consent to search is withdrawn.

b. When an officer begins to search and the suspect covers or prevents entry into a pocket - consent to search is withdrawn.

c. Where an officer gets consent but the defendant begins to walk away or turns away before the search begins- consent to search is withdrawn.

If the suspect withdraws consent to search and you had probable cause to search the suspect prior to getting consent or developed it during the search (for example, something felt by plain feel, C.I. information, etc.) you may still detain and search the defendant.

Just because you choose to get consent from a suspect does not mean you have lost your probable cause if the consent is withdrawn. However, the mere fact that the suspect has withdrawn his consent for a search is not probable cause by itself.

In conclusion, a lot of cases are based upon consensual searches. It is important for you to remember that the burden is on the prosecution at a suppression hearing where the search was based upon the defendant giving consent.

It is critical that the officer's report, which is the basis for the officer's testimony, clearly outlines the facts that were the basis for the search of the defendant.

If the defendant at some point

FROM THE COURTS

Edited by Chip Thullbery

The "unarrest" of the defendant did not stop speedy trial

The defendant was charged with sale of cocaine and filed a notice of expiration of speedy trial.

The facts on which the notice was based were that the defendant was arrested for selling cocaine during a controlled buy operation.

He immediately agreed to cooperate with police, and they let him go.

After he worked for them for several weeks, they rearrested him on the sale charge.

The trial court found that the speedy trial time period only began at the time of the second arrest, disregarded the notice of expiration, and denied a motion for discharge.

The defendant was convicted as charged.

On appeal, the Fifth District reversed, holding that the "unarrest" of the defendant did not stop the running of the speedy trial period.

Williams v. State, 25 FLW D1165 (Fla. 5th DCA May 12, 2000).

Facts supported dealing conviction

The defendant was charged with dealing in stolen property.

At his trial, the evidence showed that about ten days after a radio was stolen, he pawned it.

When he did so, he signed a form stating that the radio was his, and he told the pawn broker that he was upgrading the radio he had in his car.

However, when a police officer identified the radio by serial number and contacted the defendant, the defendant told the police officer he pawned the radio for a friend.

The defendant was convicted as charged.

On appeal, the Fourth District affirmed, holding that the evidence that the defendant made contradictory statements and made a false statement as to his ownership of the radio was sufficient to defeat the defendant's hypothesis of innocence that the radio had been given to him by a friend.

Cleveland v. State, 25 FLW D1080 (Fla. 4th DCA May 11, 2000).

A pocketknife is a weapon on school property

The defendant, a juvenile, was charged with possession of a weapon on

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school property in violation of section 790.115(2)(a), Florida Statutes.

At his trial, the evidence established that he was found at school with a pocket knife with a three-and-a-half inch blade.

He was found guilty as charged.

On appeal, the Fourth District affirmed, holding that a pocket knife is a weapon under the definition of a weapon contained in section 790.115.

A.B. v. State, 25 FLW D1020 (Fla. 4th DCA Apr. 20, 2000).

Choking victim unconscious equals attenpted murder

The defendant was charged with, among other things, attempted second degree murder.

At his trial, the victim testified that she was attacked by the defendant when she went to her car in a school parking lot garage.

At one point during the attack, the defendant choked her so hard that she thought she passed out for a few moments.

The defendant was convicted as charged.

On appeal, the Third District affirmed, holding that the evidence was sufficient to support a guilty verdict for attempted second degree murder.

Marti v. State, 25 FLW D1014 (Fla. 3d DCA April 2000).

Tenth Circuit
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