TENTH CIRCUIT

Legal Advisor

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WHEN CAN LAW ENFORCEMENT DETAIN A VEHICLE'S PASSENGER?

The answer to this question is found in the Florida Stop and Frisk Law, Florida Statute Section 901.151. This law states that a police officer may temporarily detain any person whom he reasonably believes under the circumstances has committed, is committing or is about to commit a crime. The officer can detain the person only long enough to obtain their identity and question them about the circumstances which led the officer to believe they were committing, had committed, or were about to commit a crime. During this brief detention, the officer cannot remove the person from the scene of the encounter. If the officer does not develop probable cause to arrest the individual then that individual shall be released. Also, if the officer has probable cause to believe that the person is armed then the officer can do a pat down for weapons.

Unless the above mentioned reasonable belief of criminal activity is present, a police officer cannot order a passenger to remain in or return to the vehicle. As stated in Wilson v. State, 734 So.2d 1107 (Fla. 4th DCA 1999), a "wholly innocent passenger in a vehicle stopped for traffic violation has the right to choose whether to continue on with his business or return to the vehicle..." Police officers cannot legally detain a passenger solely for the purpose of officer safety. Therefore, officers who implement a standard routine of detaining passengers for officer safety during traffic stops are illegally detaining these passengers and any evidence recovered as a result of such detainment will be suppressed.

What constitutes a reasonable belief that a passenger has committed, is committing, or is about to commit a crime? In determining whether or not the officer had a reasonable belief the courts look at the facts and circumstances surrounding the case and the officer's knowledge and experience. This criteria is to be applied on a case by case basis.

In, Hunter v. State, 660 So.2d 244 (Fla. S.Ct. 1995), the court ruled that the officer could

detain passengers when the vehicle they are in matches a BOLO. Additionally, when an officer observes contraband in plain view, all occupants of the vehicle can be detained for the purpose of determining who is committing the offense of possession of the illegal item. Smith v. State, 363 So.2d 21 (Fla. 3rd DCA 1978). The same can be said when an officer smells the odor of marijuana emanating from a vehicle. State v. T.T., 594 So.2d 839 (Fla. 5th DCA 1992).

In understanding what a reasonable belief of some past, present or future criminal activity is, it may help to know what it is not. In Horton v. State, 660 So.2d 755 (Fla. 2nd DCA 1995) a police officer observed a car with three occupants legally parked in front of a burned out house. He approached the car and saw the back seat passenger dropping several items onto the floorboard. He then tried to open the door but it was locked, so he ordered the driver to unlock it and then he pulled the passenger out. While this may have created a suspicion of criminal activity, it did not rise to the level necessary to detain a person.

Noticing a passenger who is in a car parked in an alley make a quick movement with his head and hand as officers approached, is not enough to detain the passenger. G.J.P. v. State, 469 So.2d 826 (Fla. 2nd DCA 1985). Neither is observing needle marks on a passenger's arm. Heller v. State, 576 So.2d 398 (Fla. 5th DCA 1991). In addition, the First District Court of Appeal held that a state trooper lacked an articulable well-founded suspicion of criminal activity to justify his attempt to detain a juvenile who was a passenger in truck that went into ditch and who fled upon sight of trooper. S.G.K. v. State, 657 So.2d 1246 (Fla. 1st DCA 1995).

Whether or not the prerequisite reasonable belief of criminal activity exists will be determined by the totality of the circumstances. Hopefully this article has given you some insight on what it takes to legally detain a passenger. Don't forget, although an officer may not legally have the right to detain a passenger during a traffic stop solely for safety reasons, you can always ask for consent to search.

**********FROM THE COURTS**********

LAW PROHIBITING SALE OF CONTROLLED SUBSTANCES NEAR CONVENIENCE STORES IS CONSTITUTIONAL

The defendant was charged with selling a controlled substance within 1000 feet of a convenience business in violation of section 893.13(1)(e), Florida Statutes, and filed a motion to dismiss, asserting that the statute was unconstitutional. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fifth District affirmed, holding that the statute is not unconstitutionally vague. *Dickerson v. State*, 26 FLW D884 (Fla. 5th DCA Mar. 30, 2001).

OFFICER'S CONTACT WITH DEFENDANT WAS CONSENSUAL

The defendant was charged with possession of cocaine and filed a motion to suppress. The facts on which the motion was based were that an officer observed the defendant riding his bicycle slowly on a roadway so as to impede traffic. As a result, he said to the defendant, "Come here a minute. Can I talk to you?" The defendant complied with his request but appeared to become increasingly nervous as he and the officer talked.. As a result, the officer asked if he could search the defendant. The defendant gave his permission, and the officer found cocaine. The trial court denied the motion to suppress, and the defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that the interaction between the defendant and the officer was a consensual encounter. *Chapman v. State*, 26 FLW D923 (Fla. 4th DCA Apr. 4, 2001).

ANOTHER EXAMPLE OF A CONSENSUAL ENCOUNTER

The defendant was charged with possession of a controlled substance and filed a motion to suppress. The facts on which the motion was based were that an officer stopped the defendant and gave him a ticket for pulling a trailer without taillights or license plate. After issuing the citation the officer asked the defendant who was standing beside him if he could search the car. The defendant gave permission, and the officer conducted a search which produced twenty white pills containing hydrocodone. The trial court granted the motion, but on appeal the Fifth District reversed, holding that at the time he asked for consent to search, the officer had finished the traffic stop and was engaged in a consensual encounter with the defendant. *State v. Kindle*, 26 FLW D1006 (Fla. 5th DCA Apr. 12, 2001).

CIGARETTES MAY BE SEIZED FROM MINORS

The defendant, a juvenile, was charged with possession of cocaine and filed a motion to suppress. The facts on which the motion was based were that during a consensual encounter, an officer seized cigarettes from the defendant. In the package he found crack cocaine. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Second District affirmed, holding that cigarettes in the possession of a minor are contraband and thus subject to seizure by law enforcement. *B.W. v. State*, 26 FLW D1040 (Fla. 2d DCA Apr. 18, 2001

COCAINE RESIDUE ON A BOX CUTTER DID NOT JUSTIFY POSSESSION CHARGE

The defendant was charged with possession of cocaine and filed a motion to dismiss, asserting that the state could not establish a *prima facie* case of guilt. The facts on which the motion was based were that when the defendant was arrested for another offense, police seized a box cutter from her on which they found cocaine residue. The trial court denied the motion to dismiss, and the defendant was convicted as charged. On appeal, the Second District reversed, holding that a box cutter is an object with a common legitimate use so that the finding of a trace of amount of cocaine on it is insufficient to prove a knowing possession of cocaine. *Davis v. State*, 26 FLW D1042 (Fla. 2d DCA Apr. 18, 2001).

OFFICER APPROPRIATELY RESPONDED TO DEFENDANT'S QUESTION DURING INTERROGATION

The defendant was charged with murder and filed a motion to suppress statements he gave to the police. The facts on which the motion was based were that during a custodial interview the defendant confessed to his involvement in a murder. An officer then asked if the defendant would agree to put his statement on tape at which point the defendant asked the officer if the officer thought he needed an attorney. The officer replied that it was the defendant's choice. After speaking with his mother, the defendant gave a taped statement. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Supreme Court affirmed, holding that the response given by the officer was a good faith effort to give a simple straightforward answer to the defendant's question. *State v. Glatzmayer*, 26 FLW S279 (Fla. May 3, 2001).

FACTS DID NOT SUPPORT BURGLARY CONVICTION

The defendant was charged with burglary of a dwelling. At his trial, the evidence established that when police attempted to arrest him for a violation of community control, he fled. During his flight from the police and from three large neighborhood dogs who took up the chase he spent a few seconds on a neighbor's porch. He then continued to run but was apprehended by the police. He was convicted as charged. On appeal, the Second District reversed and reduced the conviction to trespass, holding that the use of the porch as a temporary safe haven did not amount to a burglary. *Wilborn v. State*, 26 FLW D1079 (Fla. 2d DCA Apr. 25, 2001).

SEEING SUSPECT DRINK FROM A BOTTLE IN A PAPER BAG GAVE OFFICER FOUNDED SUSPICION OF CRIMINAL ACTIVITY

The defendant was charged with possession of cocaine and filed a motion to suppress. The facts on which the motion was based were that an officer observed the defendant drinking from a bottle in a brown paper bag and driving a car. Based on his training and experience, this led the officer to believe that the defendant was drinking alcohol, and accordingly he stopped him. This stop led to the search which produced the cocaine. The trial court denied the motion, and on appeal, the Fourth District affirmed, holding that the sight of the defendant drinking from a bottle in a brown paper bag while driving gave the officer a well founded suspicion of criminal activity. *Dixon v. State*, 26 FLW D1113 (Fla. 4th DCA Apr. 25, 2001).

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