TENTH CIRCUIT

Legal Advisor

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MAKING LEGAL STOPS

BY MIKE CUSICK

While we have dealt with this issue in the past, one of the most common problems with drug cases is the legality of the initial contact that the officer had with the defendant. Often an officer is acting based upon good instinct, but the facts are not there to justify a legal search. In that situation, we cannot justify filing the case.

I want to divide up this topic into two types of stops, vehicles and pedestrians, since the basis of the stop is normally different for each type.

Vehicle Stops

In a vehicle stop, the typical basis for the stop is a traffic violation of some sort. Several years ago, the United States Supreme Court eliminated the requirement that the prosecution prove that the traffic infraction was not just a pretext to stop the vehicle to search for drugs or other contraband. While this ruling gave officers greater flexibility to stop vehicles to search for drugs, some judges are concerned that officers are abusing their authority to make traffic stops. As a result, it might be wise to avoid traffic stops for violations which appear to be very minor. Three infractions immediately come to mind. They are improper window tinting, obstructed view, and failure to signal turn. If there is another basis upon which to stop the vehicle, please avoid traffic stops based upon these infractions. While there may or may not be a problem with stopping a vehicle for one of these infractions, it would be wiser to stop the vehicle based upon a more straight forward traffic violation.
Once the traffic stop has been made, the length of the detention is limited to

the amount of time necessary to issue a citation. If a drug dog is used, it is important to note in the report the time of the stop, the time the dog arrived, and the time that the issuance of the citation(s) was completed. If there is a motion to suppress filed in the case, you can expect to be questioned in detail about this time sequence.

Please remember to distinguish between the driver and the passengers. If you develop legal grounds to arrest the driver, you cannot proceed to search the passengers as a search incident to the arrest of the driver. In order to search a passenger, you must develop a separate legal basis to search that passenger. Passengers are free to leave at any time unless you develop a legal basis to detain them.

When in doubt about the legal basis for a search, always attempt to obtain consent. If you do obtain consent, make sure to document that fact in your report. Consent may always be withdrawn. For instance, if you obtain permission to search a purse, and during the search the owner snatches the purse back, that is an obvious sign that consent is being withdrawn. Actions often speak louder than words.

Pedestrian Stops

When an officer stops a person walking down a sidewalk, this is not a citizen encounter but rather a detention. When a detention occurs, you must either have a reasonable suspicion that criminal activity is afoot or you must have probable cause to believe that the defendant has committed a crime. Walking down a public sidewalk, by itself, even at three o'clock in the morning, is not a legal basis to stop someone. Your instincts may tell you that the suspect is up to no good, but you need more than that to stop an individual. There is no law in existence which states that you may detain a person to conduct a field interview report. Again, it may be good police work but it isn't legal. If you do not have a legal basis for a stop, you may try to obtain consent, but if the person ignores you and continues walking or communicates to you that he doesn't want to talk to you, you can't legally stop the individual.

Just as with the consensual search, in a consensual encounter the person can

decide at any time to end the encounter and move on. The fact that the person appears nervous when talking with you does not of itself create probable cause or reasonable suspicion to justify a search or detention. The person is under no obligation to identify himself. Failure to do so is not a crime. Even if you develop grounds to arrest the suspect, the courts have said that it is not a crime for the individual to refuse to identify himself.

If you have a consensual encounter with the defendant, make sure to document that fact in your report. Before we file charges, we are looking for the legal basis to justify the stop, search, and arrest. Knowing that this is an issue in contraband cases, please cover these facts in your report.

The law in this area might seem routine to many officers. We see enough cases, however, where either these legal issues are not covered or there are legal problems with the stop and search such that it is necessary to remind officers about the law on these issues.

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

OFFICER'S TRAINING AND OBSERVATIONS MADE CHEMICAL ANALYSIS UNNECESSARY

The defendant was charged with possession of marijuana. At his trial, the arresting officer testified that based on his training, his four years of experience handling marijuana, the form, odor and appearance of a cigar found in the defendant's car, and the defendant's admissions, the cigar contained marijuana. The court then admitted the cigar into evidence over the defendant's objection. The defendant was convicted as charged, and on appeal, the Fifth District affirmed, holding that chemical or scientific evidence is not always necessary to prove that a particular substance is an illegal drug. *Robinson v. State*, 27 FLW D968 (Fla. 5th DCA Apr. 26, 2002).

OFFICERS' TESTIMONY MADE CRITICAL EVIDENCE ADMISSIBLE

The defendant was charged with aggravated battery with a deadly weapon. At his trial, the evidence established that he hit his wife with a beer bottle. Over defense objection, the state introduced a 911 call made by his wife about an hour after the attack in which she said her husband was beating up on her. Deputies who responded to the call testified that they found her running down a road with a bloody towel held to her head. They described her as visibly frightened, upset, and crying. The defendant was convicted as charged. On appeal, the First District affirmed, holding that under the circumstances of the case, the excited utterance exception to the hearsay rule applied even though the declarant's statement was made an hour after the attack. *Werley v. State*, 27 FLW D862 (Fla. 1st DCA Apr. 16, 2002).

LOCATION OF FINGERPRINTS MADE THEM SUFFICIENT EVIDENCE TO PROVE DEFENDANT'S GUILT

The defendant, a juvenile, was charged with armed burglary and grand theft of a firearm. At his trial, the only evidence which connected him to the burglary was a fingerprint that belonged to him which was found on a kitchen window of the burglarized residence. The window was on the back side of the house and was seven feet above the ground. Its lock was broken as was a soap dispenser beneath it. The court found the defendant to be guilty as charged, and on appeal, the Fifth District affirmed, holding that the location of the fingerprint at the burglar's point of entry and in a place not generally accessible to the defendant made the print sufficient evidence to support the finding of guilt. *K.S. v. State*, 27 FLW D905 (Fla. 5th DCA Apr. 19, 2002).

TAKING AND RUNNING LICENSE TURNED ENCOUNTER INTO DETENTION

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 was dispatched to check out a report of a person asleep in a van parked in an industrial area. When the officer located the van, he tapped on the window and woke the defendant. The defendant got out of the van and produced his driver's license at the officer's request for identification. The officer ran the license and discovered an outstanding warrant for the defendant. He arrested the defendant and later found cocaine on the seat of the patrol car in which he placed him. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District reversed, holding that although the officer's initial contact with the defendant was a consensual encounter, the officer's action of keeping and running the license turned the contact into a detention which was not justified by a reasonable suspicion of criminal activity. *Baez v. State*, 27 FLW D839 (Fla. 4th DCA Apr. 10, 2002).

VICTIM'S REFUSAL OF TREATMENT DID NOT LET THE DEFENDANT OFF THE HOOK

In this Polk County case, the defendant was charged with DUI manslaughter. At his trial the evidence established that after the accident on which the charge was based, the victim was taken to a hospital where he refused to have a blood transfusion because of his religious beliefs. Thereafter he died. The defendant was convicted as charged, and on appeal the Second District affirmed, holding that a victim's failure to seek treatment is not an intervening cause which excuses a defendant from responsibility for a criminal act. *Klinger v. State*, 27 FLW D852 (Fla. 2d DCA Apr. 12, 2002>

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