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Police Law Bulletin

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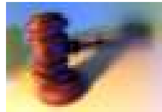

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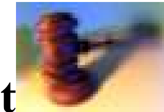

Defendant's Fourth Amendment Rights Not Violated by Taking of DNA Cheek Swab as Part of Booking Procedures

Maryland v. King, 569 U.S. ___ (June 3, 2013).

When the defendant, King, was arrested in April 2009 for menacing a group of people with a shotgun and charged in state court with assault, he was processed for detention in custody at a central booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to the Maryland DNA Collection Act (Maryland Act). His DNA record was uploaded into the Maryland DNA database and his profile matched a DNA sample from a 2003 unsolved rape case. He was subsequently charged with that crime.

King moved to suppress the DNA match, arguing that the Maryland Act violated the Fourth Amendment. The trial court found the law constitutional and King was convicted of rape. King appealed and the Maryland Court of Appeals set aside the conviction finding unconstitutional the portions of the Maryland Act authorizing DNA collection from felony arrestees. Maryland appealed to the United State Supreme Court and the Supreme Court reversed.

The Court began by noting that using a buccal swab on the inner tissues of a person's cheek to obtain a DNA sample was a search. The Court noted that a determination of the reasonableness of the search requires a weighing of "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." "[I]n the balance of reasonableness . . . , the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court noted in particular the superiority of DNA identification over fingerprint and photographic identification. Addressing privacy issues, the Court found that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one." It noted that a gentle rub along the inside of the cheek does not break the skin and involves virtually no risk, trauma, or pain. And, distinguishing special needs searches, the Court noted: "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen." The Court further determined that the processing of the defendant's DNA was not unconstitutional. The information obtained does not reveal genetic traits or private medical information; testing is solely for the purpose of identification.

Additionally, the Maryland Act protects against further invasions of privacy, by for example limiting use to identification. Therefore, the Court concluded:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

NORTH CAROLINA COURT OF APPEALS

Probable Cause and Exigent Circumstances Supported Roadside Search of Defendant's Underwear

State v. Johnson, COA12-827 (5 February 2013).

On June 15, 2011, defendant was travelling south on I-95 in Johnston County. Trooper Hicks with the North Carolina Highway Patrol observed defendant's car following the car in front of him too closely and saw defendant hold up a cell phone without putting it to his ear. Trooper Hicks pulled defendant over for following too closely and texting while driving. When he approached defendant's vehicle he noticed the strong odor of marijuana coming from defendant's vehicle. Trooper Hicks asked defendant to step out and sit in the front passenger seat of his patrol car. Trooper Hicks asked if he could frisk defendant for weapons and defendant agreed. In the course of his frisk, Trooper Hicks did not find anything that appeared to be a weapon, though he felt a blunt object in the inseam of defendant's pants. After the frisk, defendant sat in the front seat of Trooper Hicks' patrol car while Trooper Hicks ran defendant's license information. While in the patrol car, Trooper Hicks still smelled a strong odor of marijuana coming from defendant.

Trooper Hicks advised defendant that he had noticed the strong odor of marijuana both on defendant and in defendant's car. Defendant gave Trooper Hicks permission to search his pockets and his car. In his initial search, Trooper Hicks found nothing in defendant's pockets and found only some receipts, a parking ticket, a scale of the type typically used by drug dealers, and an open package of boxer briefs in the trunk. A K-9unit arrived with a dog trained in drug detection. The troopers ran the dog through the car and he alerted to the odor of contraband in the car's trunk and on the driver's seat. Trooper Hicks proceeded to search defendant's person, but found nothing in defendant's outer clothing. Trooper Hicks then placed defendant on the side of his vehicle, so that the vehicle was between defendant and the travelled portion of the highway.

Other troopers stood around defendant to prevent passers-by from seeing him. Trooper Hicks then pulled the front waistband of defendant's pants away from his body and looked inside. Defendant was wearing two pairs of underwear—an outer pair of boxer briefs and an inner pair of athletic compression shorts.

Between the two pairs of underwear Trooper Hicks discovered a cellophane package containing several smaller packages. When Trooper Hicks saw the package, defendant turned, hit another trooper in the face and fled for the nearby woods. The troopers quickly apprehended defendant. Trooper Hicks cut open the package and found that the smaller packages contained a green, leafy substance that, in his opinion, was marijuana; a tan, rock-like substance, later identified by chemical testing to be heroin; and a white powdery substance later identified by chemical testing to be cocaine.

Defendant moved to dismiss all charges against him. The trial court granted defendant's motion as to driving without a license, but denied his motion as to all other charges. The jury found defendant not guilty of assaulting a government officer and guilty of the remaining offenses. Defendant was sentenced to 225-279 months for trafficking in heroin, and a consecutive sentence of 35-42 months confinement for trafficking in cocaine, possession of marijuana, resisting a public officer, and possession of drug paraphernalia. Defendant gave notice of appeal in open court.

Defendant argued, in part, that the trial court should have granted his motion to suppress the cocaine, heroin, and marijuana found in his boxers because the search was neither incident to arrest nor pursuant to exigent circumstances justifying a strip search.

For the following reasons, the Court of Appeals held that the trial court correctly concluded that the troopers had probable cause to search defendant for contraband, exigent circumstances to search him without a warrant, and conducted the search of defendant's person reasonably.

The governing premise of the Fourth Amendment is that a governmental search and seizure absent a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement. One such exception exists when there are exigent circumstances justifying a warrantless search. In the present case, there was evidence not only that defendant smelled of marijuana, but that the troopers had discovered in his car a scale of the type used to measure drugs, a drug dog had alerted in his car, including on the driver's seat, and during a pat-down the troopers had noticed a blunt object in the inseam of defendant's pants. The Court of Appeals held that these facts supported the conclusion that the troopers searched defendant's person with probable cause and that they did so in exigent circumstances sufficient to justify a warrantless search.

After concluding that the initiation of the search was valid, the court then considered whether the conduct of the search was reasonable. First, the court reasoned that the officer had a sufficient basis to believe that contraband was in the defendant's underwear, including that although the defendant smelled of marijuana a search of his outer clothing found nothing, the defendant turned away from the officer when the officer frisked his groin and thigh area, and the officer felt a blunt object in the defendant's crotch area during the pat-down. Next, the court concluded that when conducting the search the officer took reasonable steps to protect defendant's privacy. The troopers placed defendant on the side of Trooper Hicks's vehicle so that the vehicle blocked them from the travel lanes of the highway and formed a wall around defendant as he was being searched so that he could not be seen by passers-by. The troopers never actually removed or pulled down his pants and never examined any of his "private parts". Defendant was wearing two layers of clothing underneath his pants. The first layer was a pair of boxer-briefs of the type found in the passenger compartment of his car. Underneath the boxer-briefs, defendant was wearing athletic-style compression shorts with a compartment for a protective cup. The only private areas subjected to search by the troopers remained covered by defendant's compression shorts and they did not remove his pants or outer underwear to retrieve the package from his pants.

Therefore, the Court of Appeals affirmed the trial court's order denying defendant's motion to suppress the evidence seized from his person.

Prolonged Detention for Canine Sniff Was De Minimus and Therefore Did Not Violate Defendant's Constitutional Rights

State v. Sellars, Jr., No. COA11-1315 (7 August 2012).

Detective McKaughan and Officer Jones of the Winston-Salem Police Department stopped a vehicle operated by defendant on Interstate 40 because defendant's vehicle weaved out of his lane of travel on two occasions. After Detective McKaughan activated his blue lights, defendant pulled over to the shoulder of the highway within a few seconds. Detective McKaughan and Officer Jones had a drug dog present in their car at the time of the stop. After stopping defendant, Detective McKaughan was immediately able to determine that defendant was not suffering from any impairment that would inhibit his ability to safely operate his motor vehicle. Detective McKaughan asked for defendant's driver's license. The detective noticed that defendant's hand was shaking as he handed the license to the detective, but defendant did not display "extreme nervousness." Detective McKaughan informed defendant he would not receive a traffic citation. Detective McKaughan asked defendant to accompany him to the police vehicle. While defendant and Detective McKaughan engaged in "casual conversation" in the police car, Officer Jones stood outside defendant's vehicle. Defendant was polite, cooperative, and responsive to Detective McKaughan's questions. Upon entering defendant's identifying information into his on-board computer, Detective McKaughan found an "alert" posted by the Burlington Police Department indicating that defendant was a "drug dealer"and a "known felon." After discovering the alert, Detective McKaughan determined that he would have the drug dog conduct an open-air sniff of defendant's vehicle. He then returned defendant's driver's license and issued defendant a warning ticket. With defendant still sitting in the police car, Detective McKaughan asked defendant whether he had any drugs or weapons in his car and defendant denied having any. Detective McKaughan asked for consent to allow the officers to conduct an open-air drug dog sniff of the vehicle. Defendant refused. Detective McKaughan directed defendant to stand near Officer Jones while the drug dog sniff was nonetheless conducted. The dog alerted to the presence of narcotics in the vehicle. Detectice McKaughan searched defendant's vehicle and found a bag of cocaine.

Defendant was indicted for trafficking in cocaine, 200–400 grams, and for possession with intent to sell or deliver cocaine. Defendant filed a motion to suppress the evidence discovered in his motor vehicle. The trial court granted defendant's motion to suppress, concluding that the police lacked reasonable suspicion to detain defendant after issuing the warning ticket and returning defendant's license. Therefore, the search of defendant's vehicle was improper and in violation of defendant's rights under the Fourth Amendment. The State appealed.

In the 2007, the Court of Appeals decided the case of *State v. Brimmer*. In this case, the court first discussed and applied the "*de minimis*" rule, holding that, "[I]f the detention is prolonged for only a very short period of time, the intrusion is considered *de minimis*. As a result, even if the traffic stop has been effectively completed, the sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop." 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007). In the case at hand, the record contains a video recording of the traffic stop. The canine was clearly present at the scene when the traffic stop was initiated. The video also reveals that after the police issued the warning ticket and returned defendant's license, four minutes and thirty-seven seconds elapsed before the canine alerted on defendant's vehicle. The Court of Appeals held that under the rationale of *State v. Brimmer*, any prolonged detention of defendant for the purpose of a drug dog-sniff of defendant's vehicle was *de minimis*, and did not violate defendant's constitutional rights. Therefore, the court reversed the trial court's grant of defendant's motion to suppress.

Canine's Alert at Front-Side Driver's Door of a Motor Vehicle Does Not Provide Probable Cause to Conduct a Warrantless Search of a Recent Passenger Standing Outside the Vehicle

State v. Smith, NO. COA11-1335 (7 August 2012).

On September 11, 2010 at 11:02 p.m., Corporal McDonald of the Winston-Salem Police Department heard loud music emanating from a 1972 Chevrolet automobile in a gas station parking lot. The officer observed three persons standing outside the vehicle. The driver, Mr. Leach, stood at the rear of the vehicle, pumping gas, while Curtis Smith, Jr. (defendant) stood next to the right front passenger door, and Mr. McCray stood outside the rear passenger door. Officer McDonald approached Leach and informed him that the music was too loud. McCray apologized, reached into the vehicle, and lowered the volume. Officer McDonald requested a driver's license and vehicle registration. Officer McDonald returned to his patrol car, requested an additional unit, and verified Leach's license and vehicle registration via his on-board computer. Officers Canup and Singletary arrived and requested identification from the two passengers. Officer McDonald checked defendant's past criminal history through his computer and found "an extensive local record which included numerous drug offenses," including possession of marijuana in June 2010. Based upon the criminal histories of Leach, McCray, and defendant, Officer McDonald requested the assistance of K-9 Officer Jones. Officer McDonald decided to cite Leach for a noise ordinance violation. While Officer McDonald was preparing the citation, McCray and Leach became verbally aggressive with the officers, and Officer Canup warned them about their conduct. Defendant remained calm during the entire incident. McCray left the gas station**.** After preparing the citation, Officer McDonald returned Leach's license and registration and began to explain the citation. Officer Jones arrived with the drug dog while Officer McDonald was still explaining the citation to Leach. After Officer McDonald finished explaining the citation, he asked Leach if he had anything illegal in his motor vehicle. Leach replied "no." Officer McDonald asked if he could search the motor vehicle. Leach responded that he was in a hurry, but the officers could look in through the windows. Officer McDonald had the drug dog sniff the exterior of the motor vehicle. The dog alerted to a controlled substance at the driver's door. Following this alert, Officer McDonald searched the vehicle and found no contraband other than an open container of alcohol in the rear seat area. Officer Jones advised Officer Canup to search Leach and defendant. Officer Canup searched defendant and found contraband. Defendant grabbed the cocaine and threw it across the police vehicle. Defendant was indicted for felony possession of cocaine and for resisting a public officer.

Defendant filed a motion to suppress evidence of the contraband found on his person. The trial court granted defendant's motion, concluding that "there was no indicia of evidence as it relates to Mr. Smith" which would subject him "to a search without a warrant." The State appealed.

In the instant case, the sole issue is whether a drug dog's positive alert to a motor vehicle while defendant, a former passenger within the motor vehicle, was outside the vehicle constitutes probable cause to search defendant's person without a search warrant. The Court of Appeals noted that this is a question of first impression for North Carolina. The Court of Appeals found that probable cause to arrest and/or search an individual must be particularized to that individual; mere proximity to the criminal activity alone is insufficient to establish probable cause. In the instant case, the drug dog "hit" on the vehicle while no one was inside, and the drug dog hit at the driver's door, but that defendant was a passenger. The court held that the fact that defendant was formerly a passenger in a motor vehicle as to which a drug dog alerted, and a subsequent search of the vehicle found no contraband, is not sufficient, without probable cause more particularized to defendant, to conduct a warrantless search of defendant's person. Therefore, the court affirmed the trial court's suppression of the evidence.

*Note that this decision was fact-specific and the Court suggested that relevant considerations in future cases with different facts would include: whether the alert took place while the suspect was inside the vehicle (search more likely to be justified) or outside (less); whether the suspect was the owner of the vehicle (search more likely to be justified) or not (less); and whether the dog alerted near the suspect's seat (search more likely to be justified) or at a more remote location on the vehicle (less).