July - August 2015 Volume 20.4

Police Law Bulletin

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In this issue:

Below is a re-print of an email distributed to all sworn officers April 22, 2015 regarding Rodriguez v. United States. This information is being provided again due to the impact the decision will likely have on the manner in which routine traffic stops may be conducted. Following the Rodriguez summary and analysis are additional recent cases, previously undistributed, related to reasonable suspicion for, and extended detentions of, traffic stops.

UNITED STATES SUPREME COURT

Supreme Court Rejects "De Minimus" Extension of a Traffic Stop

Rodriguez v. United States, No. 13-9972 (21 April 2015).

Just after midnight on March 27, 2012, Officer Struble, a K-9 officer with the Valley Police Department in Nebraska, saw a vehicle veer onto the shoulder of a state highway and then pull back onto the road. Nebraska law prohibits driving on the shoulder, so the officer stopped the vehicle. The driver, Rodriguez, provided the officer with his license, registration and proof of insurance. The passenger provided his license as well. After license and warrants checks on both men apparently came back clean, the officer returned the documents obtained from the driver and passenger and issued a warning ticket to Rodriguez for the traffic offense. Suspecting that the driver might be involved in drug activity, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, the officer continued to detain him (ordering him to turn off the ignition and exit the vehicle) until a second officer arrived. The officer then retrieved his dog and led it twice around the vehicle. The dog alerted to the presence of drugs. The alert led to a search which revealed a large bag of methamphetamine. A total of 7-8 minutes had passed from the time the officer had issued the written warning until the dog indicated the presence of drugs.

Rodriguez was charged in federal court with one count of possession with intent to distribute 50 grams or more of methamphetamine. He moved to suppress the evidence seized from his car on the grounds that the officer had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The judge found that there was no reasonable suspicion to support the continued detention of Rodriguez once the officer issued the warning ticket. However, in the Eighth Circuit, there was case law holding

that "dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimus intrusions." The judge then concluded that, in this case, extension of the stop by 7-8 minutes for the dog sniff was only a "de minimus" intrusion and was therefore not of Constitutional significance. Consequently, the District Court denied the motion to suppress. Rodriguez entered a conditional guilty plea and appealed the suppression issue. The Eighth Circuit affirmed noting that the 7-8 minute delay was an acceptable "de minimus" intrusion. The United States Supreme Court agreed to review the case because courts across the country have divided regarding the permissibility of brief extensions of traffic stops to conduct investigations unrelated to the original basis for the stop.

Previously, in *Illinois v. Caballes*, 543 U.S. 405 (2005), the United States Supreme Court held that a dog sniff conducted *during* a lawful traffic stop does not violate the Fourth Amendment. This case presented the question of whether the Fourth Amendment allows a dog sniff conducted *after* completion of a traffic stop.

The Court held that, absent reasonable suspicion, a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's protections against unreasonable seizures. The tolerable duration for a stop is determined by the seizure's "mission," in other words, to address the violation that warranted the stop. Thus, on a routine traffic stop, authority for the seizure ends when tasks tied to the traffic violation are – or reasonably should have been – completed. On a routine traffic stop, beyond determining whether to issue a citation, an officer's "mission" includes ordinary inquiries incident to the traffic stop. Typically, such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the roadway are operated safely and responsibly, and making it possible to determine if a traffic violator is wanted for one or more previous offenses. By contrast, a dog sniff is not a task "tied to the traffic infraction," rather, it is "aimed at detecting ordinary criminal wrongdoing." Therefore, to the extent it prolongs a stop at all, it violates the Fourth Amendment. *There is no exception for "de minimus" delays*.

In accordance with this holding, the United States Supreme Court vacated the judgment of the Eighth Circuit. The determination of the Federal District Court that detention for the dog sniff was not independently supported by reasonable suspicion was never reviewed by the Eighth Circuit. That particular question, therefore, was sent back to Eighth Circuit for consideration.

Effect on North Carolina Law: *Rodriguez effectively overrules State v Brimmer, 187 N.C. App. 451 (2007) and State v Sellars, 222 N.C. App. 245 (2012), two North Carolina Court of Appeals cases approving of "de minimus" delays. But, it is important to note that the impact of Rodriguez extends far beyond dog sniffs. As Jeff Welty, Associate Professor of Public Law and Government with the UNC School of Government, cautions, absent additional specific and articulable suspicion, "if an officer can't extend a stop to deploy a dog, he or she can't extend the stop to ask drug-related questions" or other inquiries about matters unrelated to the basis of the stop. And while Rodriguez is mostly about what officers cannot do, as Professor Welty notes, it also makes clear that certain activities are related to the "mission" of an ordinary traffic stop and so, a reasonable amount of time may be spent on them:*

- *Checking the driver's license, insurance and registration*
- *Checking for outstanding warrants against the driver*
- *Taking actions necessary to address safety concerns, such as ordering occupants out of the vehicle*

Furthermore, even without additional reasonable suspicion, officers may undertake investigative activities unrelated to the original basis of the stop so long as the activities do not extend – at all – the duration of the stop. Professor Welty predicts that some officers may respond to Rodriguez by multitasking, for example, deploying a drug dog while waiting for a response on a license check, or asking investigative questions while filling out a citation. However, officers should be cautious and note that in determining the reasonable duration of a stop, courts will likely examine carefully whether the police diligently pursued the investigation or instead "dragged their feet" in order to accomplish tasks unrelated to the purpose of stop. Finally, it should be noted that once a stop is complete, the driver's paperwork has been returned, and a reasonable person would otherwise believe that he or she was free to leave, nothing in Rodriguez prohibits an officer from pursuing further investigation as a consensual encounter.

United States Supreme Court Reviews North Carolina Case: Holds Officer's Stop Was Based on Reasonable Mistake of Law and Therefore Did Not Violate the Fourth Amendment

State v. Heien, 574 U.S. ___ (Dec. 15, 2014).

In 2011, the North Carolina Court of Appeals issued a decision in *State v. Heien, ___ N.C. App. ___ (August 16, 2011)*. In case you do not recall the facts, an officer stopped the car in which the defendant was a passenger after observing that when the driver applied the brakes, the vehicle's left side brake light illuminated, but the right brake light did not. The officer subsequently searched the vehicle with the defendant's consent and found cocaine. At his trial on drug trafficking charges, the defendant moved to suppress evidence of the cocaine on the basis that the stop of the vehicle violated his Fourth Amendment rights as the officer had no reasonable suspicion that the driver violated the state's traffic laws. The trial court denied the motion. Defendant pled guilty but reserved the right to appeal. The North Carolina Court of Appeals reversed the denial of the motion to suppress and vacated the defendant's conviction. The Court of Appeals began its analysis by stating that a traffic stop based on an officer's mistake of law is not reasonable, citing *State v. McLamb, 186 N.C. App. 124 (2007)* as support. In *McLamb*, the officer mistakenly believed that the driver was speeding based on his inaccurate belief that the speed limit was 20 mph when, in fact, the speed limit was 55 mph. The *McLamb* court held that the stop of the defendant's vehicle, which was traveling at an estimated 30 mph, was *not* objectively reasonable and violated the Fourth Amendment. The Court of Appeals then proceeded to analyze whether the malfunctioning of a single brake light when a functioning brake light is present is a violation of North Carolina traffic laws. The court concluded that N.C.G.S. §20-129(g) requires only *one* stop lamp—or brake light—on a vehicle. Once the Court of Appeals concluded that there was no traffic violation, it found the stop objectively unreasonable and in violation of the defendant's Fourth Amendment rights.

The State sought review by the North Carolina Supreme Court. That Court assumed that the Court of Appeals was correct in that the statute only required one working brake light but determined (1) that an officer might reasonably think otherwise, given the ambiguous language in the statute, and (2) that reasonable suspicion may be based on a *reasonable* mistake of law. Conclusion (2) was the subject of a split of authority across the country, so the United States Supreme Court agreed to review the case.

The United States Supreme Court affirmed the North Carolina Supreme Court. Addressing the Fourth Amendment's prohibition on unreasonable searches and seizures, Chief Justice Roberts wrote for the majority that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some

mistakes on the part of government officials." At another point in the opinion, the Chief Justice offered an example: if an officer sees a motorist, apparently alone, in a High Occupancy Vehicle lane, the officer may stop the vehicle. Even if it turns out that two small children are sleeping, slumped over in the back seat, so that the vehicle was entitled to be in the lane, the officer's factual mistake was reasonable and the stop would not violate the Fourth Amendment.

The officer in the *Heien* case made a mistake of law by misinterpreting the brake light statute, not a mistake of fact. But the Court reasoned that reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Applying its principles to the facts of the case, the Court had little difficulty concluding that the officer's error of law was reasonable. Although the . . . statute at issue refers to "a stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," [G.S.] 20–129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional. Thus, the stop was consistent with the Fourth Amendment.

Note: *The North Carolina Court of Appeals' interpretation of the current brake light statute remains authoritative, thus, only one working brake light is required under the current statute. Since our courts have now clarified the current statute's requirements, presumably a stop at this point for one burned-out brake light would involve a mistake of law that is no longer reasonable and therefore, in violation of the Fourth Amendment. Note, however, that the North Carolina General Assembly has passed a bill (Session Law 2015-31, Senate Bill 90) which, effective October 1, 2015, amends current N.C.G.S. §20-129(g) and §20-129.1 to clarify that motor vehicles (other than a motorcycle) must be equipped on each side of the rear of the vehicle with stop lamps, commonly known as brake lights. Once this bill goes into effect, it will for practical purposes overrule State v. Heien. Therefore, until October 1, 2015, only 1 brake light is required on the back of a motor vehicle; on October 1 and afterwards, two brake lights – one on each side of the rear of a motor vehicle – will be required (unless the motor vehicle is a motorcycle in which case only one brake light will continue to be required).*

NORTH CAROLINA COURT OF APPEALS

Taking Driver's License to Patrol Vehicle During Consensual Encounter Created Unlawful Seizure

State v. Leak, No. COA14-591 (2 June 2015).

At 11:30 p.m. on April 30, 2012, Lilesville Police Chief Bobby Gallimore was on patrol. He noticed a parked car in a gravel area near Highway 74 and stopped to see if the driver needed assistance. Before approaching the vehicle, Chief Gallimore ran the vehicle's license plate and learned that the car was owned by Keith Leak. When the Chief spoke with the driver, the driver advised that he did not need assistance; that he had pulled off the road to return a text message. Chief Gallimore then asked for the driver's license. The name on the license was Keith Leak. Chief Gallimore then took the license to his patrol car to investigate the status of defendant's driver's license. Although the license was valid, the check revealed an outstanding arrest warrant from 2007. Chief Gallimore asked Leak to step out of the vehicle, at which point, Leak informed the Chief that he had a .22 pistol in his pocket. Leak was arrested for possession of a firearm by a convicted felon.

Defendant was indicted for possession of a firearm by a convicted felon and carrying a concealed weapon (the record does not discuss if any prosecution occurred arising out of the 2007 arrest warrant). Defendant filed a motion to suppress on the grounds that the evidence used against him had been obtained as a result of an unlawful seizure. The trial court denied defendant's motion. Defendant entered a guilty plea after reserving the right to appeal the denial of his motion to suppress. Defendant received a suspended sentence of 9-20 months imprisonment and was placed on supervised probation for 12 months. He then appealed.

Defendant argued that he was seized when Chief Gallimore took his driver's license to the patrol car in order to conduct a computer search and that, because Chief Gallimore had no articulable reasonable suspicion that defendant was engaged in criminal activity, the seizure violated his rights under the Fourth Amendment.

The Fourth Amendment protects individuals against unreasonable searches and seizures. Not every police encounter, however, warrants Fourth amendment scrutiny. Under Terry v. Ohio, and its progeny, a three-tiered standard has developed by which to measure the need to investigate possible criminal activity against the intrusion on individual freedom which the investigation may entail: (1) Communication between police and citizens involving no coercion or detention are outside the scope of the Fourth Amendment; (2) Investigatory stops or detentions must be based on reasonable suspicion; (3) Arrests must be based on probable cause.

The Court of Appeals found Chief Gallimore's initial contact with the defendant to be consensual. A seizure does not occur simply because a police officer approaches an individual and asks a few questions so long as a reasonable person would feel free to disregard the police and go about his business. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. Chief Gallimore required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing the examination of his driver's license.

However, an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave or terminate the encounter. The Court of Appeals has previously held that a reasonable person would not feel free to drive way while a law enforcement officer retains possession of his driver's license. In this case, there is no dispute that Chief Gallimore did not have reasonable suspicion that defendant was engaged in criminal activity. Accordingly, the Court of Appeals held that defendant was seized in violation of the Fourth Amendment and any evidence discovered as a direct result of that illegal seizure should generally be suppressed.

Note: *The officer could have requested consent to retain the license briefly for the purpose of running a license and warrants check, or, since physical possession of the license was not needed to run the driver's name, he could have returned the license, ended the encounter, and then subsequently performed a license and warrants check after returning to his patrol vehicle.*

Officer Continued to Detain Defendant After Completing Original Purpose of Stop Without Having Reasonable, Articulable Suspicion of Criminal Activity

State v. Cottrell, No. COA13-721(1 July 2014).

At 11:37 p.m. on May 28, 2012, Officer Payne of the Winston-Salem Police Department observed defendant driving with his car's headlights off. Officer Payne initiated a traffic stop, and defendant pulled into a nearby parking lot. Officer Payne approached defendant's car and asked defendant for his license and registration. Officer Payne then returned to his patrol car, ran defendant's identification, and learned that defendant's license and registration were valid. Officer Payne also checked defendant's criminal history and learned that defendant had a history of "drug charges and various felonies." Officer Payne returned to defendant's car and asked defendant to keep his music down since the officer had heard loud music coming from either defendant's car or the car in front of defendant's car as they drove down the street. While Officer Payne spoke to defendant, he smelled an extremely strong odor coming from defendant's car that the officer described as "like a fragrance, cologne-ish," but "more like an incense than what someone would wear." Officer Payne believed the odor was a "cover scent" -- a fragrance released in a vehicle to cover the smell of drugs like marijuana. Officer Payne asked defendant about the odor, and defendant showed him a small, clear glass bottle with some liquid in it and a roll-on dispenser. Defendant stated it was an oil he put on his body. Officer Payne told defendant that fragrances were typically used to mask the odor of marijuana, but defendant claimed he was not trying to hide any odors. Officer Payne, who still had possession of defendant's license and registration, then asked for consent to search defendant's car. When defendant refused to give consent, Officer Payne said defendant was not being honest with him and indicated he could call for a drug-detection dog to sniff defendant's car. Defendant replied that he did not want the officer to call for a dog and that he just wanted to go home. When Officer Payne insisted he was going to call for the dog, defendant then consented to a search of the car.

Officer Payne had defendant step out of the car and frisked defendant for weapons, finding none. Officer Payne began searching defendant's car at 11:41 p.m., roughly four minutes after he first observed defendant's car driving down the street. He looked first in the driver's side and then went around to the passenger's side. He removed the key from the ignition and unlocked the glove box with it. When the officer opened the glove box, a handgun and a baggy containing a white powdery substance, later determined to be cocaine, fell out. Officer Payne then placed defendant under arrest. After defendant was arrested, he admitted to Officer Payne that he had a small baggie of marijuana in his sock. The officer never returned defendant's license and registration to defendant.

Defendant was indicted for possession of a firearm by a felon, possession of a schedule II controlled substance, possession of up to one-half ounce of marijuana, and being a habitual felon. Defendant filed a motion to suppress. After the trial court denied the motion, defendant pled guilty to the charges and admitted being a habitual felon. The trial court sentenced defendant to a term of 76 to 104 months imprisonment. After entry of the judgment, defendant gave notice of appeal.

Defendant's sole argument on appeal was that the trial court erred in denying his motion to suppress. Defendant contends that, while the traffic stop was valid, Officer Payne violated the Fourth Amendment

when he detained defendant further after determining that defendant's license and registration were valid and defendant had no outstanding warrants. Defendant argued that Officer Payne had no reasonable, articulable suspicion of criminal activity sufficient to justify detaining defendant once the purpose of the traffic stop was completed.

The court first addressed whether the initial purpose of the stop was completed prior to the time defendant gave consent to search. Officer Payne stopped defendant for both the headlights infraction and the potential noise violation. The court held that once Officer Payne told defendant to keep his music down, the officer had completely addressed the original purpose for the stop. Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, Officer Payne was then required to have defendant's consent or grounds which provide a reasonable and articulable suspicion in order to justify further delay *before* asking defendant additional questions.

Turning next to whether Officer Payne had a reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope, the court found that as of the time Officer Payne told defendant about the noise ordinance, the officer knew that defendant's license and registration were valid, defendant had no outstanding warrants, defendant had turned his headlights back on prior to being stopped and had apologized, defendant had no odor of alcohol or glassy eyes, defendant was not sweating or fidgeting, and defendant did not make contradictory statements. While Officer Payne knew defendant "had a history of drug charges and various felonies" and the officer "noticed an extremely strong odor coming from the vehicle," the court held that a strong incense-like fragrance, which the officer believes to be a "cover scent," and a known felony and drug history are *not*, without more, sufficient to support a finding of reasonable suspicion of criminal activity.

Since Officer Payne did not have reasonable suspicion to extend the stop, the court next addressed whether defendant consented to further detention after Officer Payne had fully addressed the initial purpose of the stop. Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration. Indeed, at times, even the return of documentation is not sufficient to make further detention during a traffic stop consensual. Since defendant was not given his license back; defendant was not told he could leave; defendant was continuously questioned by the officer after the original purpose for the stop had been addressed until defendant ultimately consented to a search, despite defendant's statements that he wanted to go home and that he did not want a drug dog called; and defendant was told the officer was going to call a drug dog to sniff defendant's car, the court found that defendant's detention never became consensual in this case.

Because this case was decided prior to *Rodriguez v. United States* (summarized above), the State further argued on appeal, that this case was controlled by then valid precedent allowing for a "*de minimis*" extension of a traffic stop for the purpose of conducting a drug dog sniff even without reasonable suspicion or consent. The Court of Appeals rejected this argument though and refused to extend the *de minimis* analysis to situations when, as here, a drug dog was not already on the scene. In any event, the "de minimus" detention argument under any circumstances is now moot and inapplicable in light of *Rodriguez v. United States.*

In sum, after Officer Payne had addressed the original purpose for the traffic stop, he continued to detain defendant without either (1) defendant's valid consent or (2) reasonable, articulable suspicion of criminal activity. Accordingly, the officer's continued detention of defendant violated defendant's Fourth Amendment right against unreasonable seizures and defendant's subsequent consent to a search of his car was involuntary as a matter of law. Because defendant's consent to search his car was the product of an

unconstitutional seizure, the trial court erred in denying defendant's motion to suppress. Accordingly, the Court of Appeals reversed.