



Police Law Bulletin



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NORTH CAROLINA COURT OF APPEALS



Contraband Inadmissible When Found Pursuant to Consent Search Which Occurred During Unlawfully Prolonged Traffic Stop

State v. Reed, No. COA16-33 (20 September 2016).

At 8:18 a.m. on September 9, 2014, Defendant was stopped by Trooper Lamm for traveling 78 mph in a 65 mph area of Johnston County. Defendant was driving a rented Nissan Altima. His fiancée, Usha Peart, was in the front passenger seat holding a pit bull in her lap. As Trooper Lamm approached the passenger side of the Nissan, he saw energy drinks, coffee, trash, air fresheners, and dog food scattered on the floor of the vehicle. Upon the Trooper's request, Defendant produced his New York driver's license, a registration card, and a rental car agreement. The agreement listed Peart as the renter and Defendant as an authorized driver. Trooper Lamm told Defendant "come on back here with me," motioning towards his patrol car. Defendant exited the Nissan and Trooper Lamm asked if he had any guns or knives on his person. Trooper Lamm then proceeded to frisk Defendant discovering only a pocket knife. Trooper Lamm opened the passenger door of his patrol car. When Defendant sat in the front passenger seat with the door open and one leg outside of the car, Trooper Lamm told Defendant to close the door. Defendant hesitated and said he was "scared" to close the door. Lamm replied, "Shut the door. I'm not asking you, I'm telling you to shut the door. I mean you're not trapped, the door is unlocked. Last time I checked we were the good guys." Defendant said, "I'm not saying you're not," and Trooper Lamm said, "You don't know me, don't judge me." Defendant said he was stopped before in North Carolina, but was never taken to the front passenger seat of a patrol car during a stop. Following Trooper Lamm's orders, Defendant closed the front passenger door. Trooper Lamm ran Defendant's license. While doing so, Trooper Lamm asked Defendant about New York, and "where are y'all heading to?" Defendant said he was visiting family in Fayetteville. Trooper Lamm noted the rental agreement restricted travel to New York, New Jersey, and Connecticut, but told Defendant the matter could likely be resolved with a phone call to the rental company. Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan. Trooper Lamm noticed the rental

agreement was drafted for a Kia Rio not a Nissan Altima. Trooper Lamm exited the patrol car to ask Peart for the correct rental agreement, and told Defendant to “sit tight.”

Trooper Lamm approached the front passenger side of the Nissan and asked Peart for the correct rental agreement. He asked about her travel plans with Defendant and the nature of their trip. She said they were visiting family in Fayetteville but might also travel to Tennessee or Georgia. She explained the first rental car they had, a Kia Rio, was struck by another car and the rental company gave them the Nissan as a replacement. She could not find the rental agreement for the Nissan but continued to look for it. Trooper Lamm told Peart he was going to issue Defendant a speeding ticket and the two would “be on their way.”

Trooper Lamm returned to the patrol car, explained Peart could not locate the correct rental agreement, and continued to question Defendant about the purpose of the trip to Fayetteville. Then, Trooper Lamm called the rental company and the rental company confirmed everything was fine with the rental, but informed Trooper Lamm that Peart just needed to call the company to correct the restricted travel condition concerning use of the car in New York, New Jersey, and Connecticut. After the call, Trooper Lamm told Defendant that his driver’s license was okay and he was going to receive a warning ticket for speeding. Trooper Lamm issued a warning ticket and asked Defendant if he had any questions. Then, Trooper Lamm told Defendant he was “completely done with the traffic stop,” but wanted to ask Defendant additional questions. Defendant nodded his head. Trooper Lamm did not tell Defendant he was free to leave. Trooper Lamm asked Defendant if he was carrying a number of controlled substances, firearms, or illegal cigarettes in the Nissan. Defendant responded, “No liquor, no nothing, you can break the car down.” Trooper Lamm continued questioning Defendant and said, “I want to search your car, is that okay with you?” Defendant hesitated, mumbled, and told Trooper Lamm to ask Peart. Defendant stated, “I’m just saying, I’ve got to go to the bathroom, I want to smoke a cigarette, we’re real close to getting to the hotel so that we can see our family, like, I don’t, I don’t see a reason why.” Trooper Lamm responded, “Well let me go talk to her then, sit tight.”

By this time, two additional officers were present at the scene. Trooper Lamm told Peart everything was fine with the rental agreement and asked her the same series of questions he asked Defendant, whether the two were carrying controlled substances, firearms, or illegal cigarettes. Trooper Lamm asked Peart if he could search the car. Peart hesitated, expressed confusion, and stated, “No. There’s nothing in my car, I mean . . .” Trooper Lamm continued to ask for consent, Peart acquiesced and agreed to sign a written consent form. Trooper Lamm searched the Nissan and found cocaine under the back passenger seat.

Defendant was charged with, and pled guilty to, trafficking more than 200 grams but less than 400 grams of cocaine by transportation, and trafficking more than 200 grams but less than 400 grams of cocaine by possession. Prior to the plea, Defendant filed a motion to suppress the evidence found during the traffic stop which the trial court denied. Defendant appealed the denial of his motion arguing that the detention was not properly tailored to address the speeding violation.”

“The tolerable duration of police inquires in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop, and attend to related safety concerns.” *Rodriguez v. United States*, ___ U.S. ___, ___, 135 S.Ct. 1609, 1614 (2015). In addition to deciding whether to issue a traffic ticket, a law enforcement officer’s “mission” includes ordinary inquires incident to the traffic stop. These inquiries typically includes checking the driver’s license, determining if the driver has any outstanding warrants, inspecting the vehicle’s registration and proof of insurance, or a rental agreement for a rental car. To detain a driver beyond this time requires an officer to have reasonable articulable suspicion that illegal activity is afoot.

The Court of Appeals found that the facts did not support a conclusion that Trooper Lamm had reasonable suspicion of criminal activity to extend the traffic stop by making numerous inquiries unrelated to the mission of the stop. The degree of suspicion attached to Defendant's possession of a pit bull, dog food, coffee, energy drinks, trash, and air fresheners is minimal, as it is consistent with innocent travel.

Further, the Court of Appeals found the facts of this case similar to those of *State v Bullock* ___ N.C. App. ___, 785 S.E.2d 746, in which the Court of Appeals purported to apply the United States Supreme Court's direction in *Rodriguez*. Relying upon *Bullock*, the Court of Appeals stated that prior to *Rodriguez*, it was well settled that an officer may ask a driver to exit a vehicle during a traffic stop. Historically, the *de minimis* intrusion of asking a driver to exit a vehicle was outweighed by the government's "legitimate and weighty interest" in officer safety. *Rodriguez*, ___ U.S. at ___, 135 S.Ct. at 1615 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977)). However, "under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission." *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 752. Therefore, an officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle. The same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down. It is also possible for an officer to unlawfully extend a traffic stop by telling a driver to close the patrol car's front passenger door, while the officer questions the driver about matters unrelated to the traffic stop. Further, the Court noted officer safety is put at risk an increased number of times when an officer adds additional steps to delay the traffic stop, such as ordering the driver to step out of the vehicle, patting the driver down, having the driver sit in the patrol car, and sitting next to the driver to ask them questions and observe their demeanor.

Because the Court of Appeals found that the traffic stop procedures described above unnecessarily prolonged the stop, any additional factors discovered after the tolerable duration of the stop had expired, (such as defendant's fear about closing the patrol vehicle's door, his admission to prior criminal history, etc.), could not be used in any reasonable suspicion analysis.

For these reasons, over a dissenting opinion, the Court of Appeals reversed the trial court's denial of defendant's motion to suppress.

So What Does This Mean? May an Officer Still Order Occupants Out of Their Vehicles During a Traffic Stop? May an Officer Order an Occupant Into a Patrol Vehicle During a Traffic Stop?

For appropriate analysis and guidance on these issues, see the below blog post from Jeff Welty, North Carolina Criminal Law, A UNC School of Government Blog, September 26, 2016

Ordering Occupants Out of Their Vehicles -- And Into Officers' Cruisers

May an officer, during a traffic stop, order an occupant out of the stopped vehicle? Into the officer's vehicle? The law on this question has become unsettled.

Mimms: officers may order occupants out. The United States Supreme Court has ruled that, in the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (ruling that an officer may order a driver out of the driver's vehicle during a traffic stop; this is "at most, a mere inconvenience" that is reasonable under the Fourth Amendment because it "diminishes the possibility . . . that the driver can make unobserved movements" preparatory to assaulting the officer); *Maryland v. Wilson*, 519 U.S. 408 (1997) (describing *Mimms* as holding that an "officer may as a matter of course order the driver of a lawfully

stopped car to exit his vehicle,” and extending the same rule to passengers; the presence of passengers makes a stop more dangerous and the intrusion on passengers is “minimal”).

Rodriguez: officers can’t extend stops without reasonable suspicion. Recently, in *Rodriguez v. United States*, __ U.S. __, 135 S.Ct. 1609 (2015), the Court ruled that a traffic stop must end when “tasks tied to the traffic infraction are – or reasonably should have been – completed.” Thus, a traffic stop may not be extended, even briefly, to allow a drug dog to sniff the stopped vehicle absent reasonable suspicion of criminal activity justifying the continued detention. The majority opinion in *Rodriguez* mentions *Mimms*, distinguishing the slight intrusion associated with ordering an occupant out of a vehicle from the slight intrusion associated with a brief extension of a traffic stop by noting that the former is based on officer safety and so is inherent to the “mission of the stop,” while the latter is based on officers’ “general interest in criminal enforcement” and is not inherent to a traffic stop.

North Carolina Court of Appeals: does *Rodriguez* undermine *Mimms*? Although *Rodriguez* itself did not directly criticize or question *Mimms*, the North Carolina Court of Appeals has issued several opinions that read *Rodriguez* as undermining, or at least limiting, *Mimms*:

- In *State v. Bullock*, __ N.C. App. __, 785 S.E.2d 746 (2016) [*discussed previously in the July-August 2016 Police Law Bulletin*], the court considered a speeding stop that turned into a drug investigation. During the traffic stop, the officer “asked defendant to step back to his patrol car” while the officer ran a computer check, and “asked if he could briefly search defendant for weapons” before he got in the officer’s vehicle. The Court of Appeals later characterized the officer as “requiring” that the defendant “submit” to these measures. The court noted that the officer’s purpose in ordering the defendant out of his own vehicle and into the officer’s was, according to the officer, not to protect the officer’s safety but to give the officer a better opportunity to observe the defendant’s conduct. In light of that purpose, the court questioned whether *Mimms* applied, or whether, by contrast *Rodriguez* prohibited the order as entailing a delay not justified by the mission of the stop. Without fully resolving that question, the court ruled that the officer’s decision to frisk the defendant and to order the defendant into the officer’s vehicle were inconsistent with *Rodriguez* because they prolonged the stop without reasonable suspicion.
- In *State v. Reed*, __ N.C. App. __, __ S.E.2d __, 2016 WL 5030389 (N.C. Ct. App. Sept. 20, 2016) [*discussed above*], the court considered another speeding stop that turned into a drug investigation. Early in the stop, the officer ordered the defendant out of his own vehicle and into the officer’s vehicle. The Court of Appeals stated that “prior to *Rodriguez*, it was well settled that an officer may ask a driver to exit a vehicle during a traffic stop.” However, citing *Bullock*, the court stated that “an officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle.” And, it continued, “the same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down.”

Somewhat by contrast, in *State v. Castillo*, __ N.C. App. __, 787 S.E.2d 48 (2016) [*discussed previously in the July-August 2016 Police Law Bulletin*], the court considered yet another speeding stop that turned into a drug investigation. Partway through the stop, the officer “asked defendant to exit his vehicle, submit to a pat down for weapons, and sit in his patrol vehicle.” Although the Court of Appeals did not

focus specifically on that aspect of the stop, it generally determined that the extension of the stop was properly supported by reasonable suspicion.

Analysis and predictions. Both *Bullock* and *Reed* were divided opinions, and further review by the North Carolina Supreme Court seems likely. To the extent that those cases question whether an officer may, in the officer's discretion, order an occupant out of a vehicle during a traffic stop, my guess is that further review will reaffirm *Mimms*. Only the Supreme Court can overrule *Mimms*, and it is hard to argue that *Rodriguez* did that. Furthermore, the court's argument in *Bullock* emphasized that the officer admitted that his purpose in ordering the driver out of the vehicle was to advance the drug investigation rather than to ensure his own safety. But the subjective motivations of officers generally are irrelevant in determining their status under the Fourth Amendment. *See generally Whren v. United States*, 517 U.S. 806 (1996) (ruling that pretextual stops are permissible and stating that "subjective intentions play no role in ordinary Fourth Amendment analysis"). In other words, if the order could have been justified by officer safety concerns – and *Mimms* seems to say that it could have been – the fact that it wasn't actually motivated by such worries is likely irrelevant.

The practice of ordering vehicle occupants into an officer's vehicle without reasonable suspicion of anything more than a traffic infraction strikes me as much more vulnerable. This practice has never been clearly supported by existing law, and if anything, *Rodriguez* calls it further into doubt. There may be limited circumstances in which such an order is appropriate, but officers are advised against doing so on a routine basis.

Officer Unlawfully Extended Traffic Stop

State v. Miller, No. COA16-424 (December 20, 2016)

On March 18, 2014, Officer Harris was patrolling "problem areas" with the Vice and Tactical Narcotics Team of the Greensboro Police Department. He observed a vehicle turn left from Darden Road onto Holden Road, and decided to follow the car onto Interstate 85. After running its license plate through the DMV database, the officer discovered that a "hold" had been placed on the tag because the owner had not paid the insurance premiums. Officer Harris, who was wearing a body-mounted camera, pulled the vehicle over and approached the passenger-side window.

The owner of the vehicle, Derick Sutton, was in the passenger's seat; defendant was in the driver's seat. Officer Harris asked defendant for his driver's license before informing the two occupants that he had stopped them for speeding and a potential tag violation. When he learned that Sutton was the registered owner of the vehicle, Officer Harris inquired about the status of his insurance. Sutton handed Officer Harris an insurance card to show that he had recently purchased insurance. At Officer Harris's request, Sutton also produced his driver's license and told the officer that they were "coming from a friend's house on Randleman Road." Officer Harris testified that this "piqued his interest" because he "knew they did not get on the interstate from Randleman Road, and Holden Road is a little distance away from Randleman." He then ordered Sutton to step out of the vehicle. As Sutton complied, Officer Harris asked Sutton if he had any weapons or drugs on him. Sutton said he did not, and was then motioned to stand with another officer who had arrived on the scene. Officer Harris proceeded toward the driver's side and asked defendant to step out of the vehicle. As defendant complied, Officer Harris asked defendant if he had any weapons or drugs on him. Defendant also said he did not. According to Officer Harris's testimony, he then asked defendant, "Do you mind if I check?" to which defendant responded, "No," and placed his hands on the trunk of the vehicle. Officer Harris searched defendant and found a plastic corner bag of cocaine in his left pocket.

Defendant was found guilty of possession of cocaine. On appeal, defendant argues that Officer Harris unlawfully extended the traffic stop and evidence of the cocaine should have been excluded as the fruit of an unconstitutional seizure.

The Supreme Court explained in *Rodriguez* that “the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop and attend to related safety concerns.” *Rodriguez*, 135 S. Ct. at 1614. This may include certain incidental inquiries such as checking the driver’s license, determining whether there are outstanding warrants against the driver, inspecting the automobile’s registration and proof of insurance, and ordering occupants out of a vehicle during a lawful traffic stop to complete the mission safely. Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. Measures designed to detect evidence of ordinary criminal wrongdoing are not part of the officer’s mission. Therefore, the appropriate question in the case at hand is whether Officer Harris diligently pursued a means of investigation designed to address the reasons for the stop.

After reviewing footage of the traffic stop, the Court of Appeals concluded that “it is wholly evident that Officer Harris was more concerned with discovering contraband than issuing traffic tickets.” He readily accepted Sutton’s insurance card as proof that Sutton had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, Officer Harris took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered Sutton and defendant out of the vehicle and began an investigation into the presence of weapons and drugs. Such a detour, albeit brief, can hardly be seen as a means of facilitating the mission of the stop as much as a measure aimed at detecting evidence of ordinary criminal wrongdoing. Under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission.

The only lawful means for extending a traffic stop beyond its original purpose is additional reasonable and articulable suspicion, or the encounter must have become consensual.

In this case, the State did not allege—nor did the evidence show—that the encounter had become consensual. A consensual encounter is one in which a reasonable person would feel free to disregard the police and go about his business. Defendant could not reasonably have felt that he was free to leave while Officer Harris still had his driver’s license.

Instead, the State argued that Officer Harris had reasonable suspicion to extend the stop because he observed the vehicle while patrolling “problem areas,” defendant gave “incongruent” answers to his coming and going questions, defendant “raised his hands in the air” as he stepped out of the vehicle, and defendant was driving the vehicle instead of Sutton, the registered owner.

The Court disagreed that these factors established reasonable suspicion. Officer Harris’ observation of the vehicle in a high-crime area was not sufficient, either by itself or in conjunction with the other “factors” identified by the State, to establish reasonable suspicion of criminal activity. There was nothing “incongruent” about defendant’s travel plans. Officer Harris found it suspicious that Sutton said they were “coming from a friend’s house on Randleman Road” not because they were traveling in the opposite direction, but because Harris saw them merge onto the interstate from Holden Road—“which is a *little distance away* from Randleman Road.” As Officer Harris then approached the driver’s side of the vehicle, defendant kept his hands in plain view above the steering wheel—a far cry from a signal of surrender and a gesture the court declined to construe as an indicator of culpability. And while the State noted that it was not clear why the defendant was driving the vehicle when it was registered to the passenger, it failed to elaborate on how this is more indicative of criminal activity than innocent travel.

Even if one were to assume that the traffic stop was lawful up to the point when defendant consented to the search, the court concluded that his consent was not valid. Officer Harris testified that defendant verbally agreed to the search and placed his hands on the trunk of the vehicle, but the footage from the body camera revealed a different version of the interaction. Officer Harris had defendant turned around, facing the rear of the vehicle with his arms and legs spread *before he asked for defendant's consent*. In the court's opinion, this was "textbook coercion." If defendant did respond to Officer Harris's request—and it was not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights.

Describing the violations in this case, apparent from the body camera footage, as "egregiousness," the Court of Appeals granted Defendant a new trial.