



Police Law Bulletin



City Attorneys' Office

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NORTH CAROLINA SUPREME COURT



Middle Finger Gesture From Passing Car Did Not Create Reasonable Suspicion of Disorderly Conduct

State v. Ellis, ___ N.C. ___, ___ S.E.2d ___ (May 1, 2020).

On January 9, 2017, a trooper was assisting a stranded motorist on the side of a highway when a SUV passed by. The defendant stuck his arm out of the passenger window of the SUV, waved, and then shot the bird in the trooper's direction, though the trooper testified that he "was unsure at whom Defendant was gesturing." Believing that the defendant was committing the crime of disorderly conduct, the trooper pursued the SUV and pulled it over. The defendant's wife was driving, and she provided her ID to the trooper. The defendant refused to provide his, and the trooper cited him for resisting a public officer.

At trial, the defendant moved to suppress the trooper's testimony, arguing that the stop was not supported by reasonable suspicion. The trial judge denied the motion. The defendant pled guilty but then appealed. Despite a substantial amount of case law holding that flipping off an officer is not criminal conduct, a divided panel of the Court of Appeals concluded that there was reasonable suspicion for the stop and affirmed the trial court's denial of the defendant's motion. Defendant appealed. On appeal, the State conceded that the trooper lacked reasonable suspicion and the North Carolina Supreme Court agreed.

The trooper saw the defendant waving from the car, and then begin "flipping the bird," perhaps vigorously. The trooper did not know for whom the gesture was intended, and otherwise observed no traffic violations or other suspect activities. This failed to establish reasonable suspicion of a crime. The fact that the trooper was unsure of whether defendant's gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver. There were no facts in the record to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Therefore, the North Carolina Supreme Court unanimously reversed the decision of the Court of Appeals denying the defendant's motion to suppress. The North Carolina Supreme Court sent the matter back to the Court of appeals for further consideration consistent with its decision.

After Lawful Duration of Traffic Stop Concluded, Defendant Unlawfully Detained

State v. Reed, No. 365A16-2 (February 28, 2020).

On the morning of September 9, 2014, Trooper Lamm stopped Defendant for traveling 79 mph in a 65 mph zone on I-95. Defendant was operating a rented Nissan Altima. Defendant's fiancé, Usha Peart, was in the front passenger seat of the vehicle holding a pit bull. Trash, energy drinks, air fresheners and dog food were scattered on the floorboard of the car. Pursuant to Trooper Lamm's request, Defendant produced his New York driver's license and an Enterprise rental car agreement. The rental agreement listed Peart as the renter and Defendant as an authorized driver.

Trooper Lamm told Defendant to come back to his patrol car. After Defendant exited the vehicle, Trooper Lamm asked if he had any guns or knives on his person and then proceeded to frisk him. The frisk revealed a small pocket knife. Defendant then 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. When 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." Following Trooper Lamm's orders, Defendant closed the front passenger door.

Trooper Lamm ran Defendant's license through record checks on his mobile computer. While doing so, Trooper Lamm asked Defendant where they were headed. Defendant said he was visiting family in Fayetteville. Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past, when he was in the military. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan.

After noticing that the rental agreement was drafted for a Kia Rio not a Nissan Altima, Trooper Lamm exited the patrol car, approached the front passenger side of the Nissan, and asked Peart for the correct rental agreement. While she was looking for it, he asked about her travel plans with Defendant. She said they were visiting family in Fayetteville. She then explained the first rental car they had, the Kia, was struck by another car and the rental company gave them the Nissan as a replacement. When Peart could not find the rental agreement for the Nissan, Trooper Lamm told her he was going to issue Defendant a speeding ticket and the two would "be on [their] way."

Trooper Lamm returned to the patrol car and, after contacting the rental car company who confirmed that everything was fine with the rental, told Defendant he was going to receive a warning ticket for speeding. Trooper Lamm issued the ticket, returned all of Defendant's paperwork including his license 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 some additional questions. Trooper Lamm did not tell Defendant he was free to leave. At this point, an additional officer, Trooper Ellerbe, was present on the scene. Trooper Ellerbe parked his patrol car behind Trooper Lamm's and left his blue lights on. He stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat. Trooper Lamm asked Defendant if he was carrying any controlled substances, firearms, or illegal cigarettes. Defendant responded, "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. Trooper Lamm responded, "Well let me go talk to her then, sit tight," and

walked to the front passenger side of the Nissan. 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. Cocaine was found under the back passenger seat and Defendant was arrested.

Defendant filed a motion to suppress the cocaine arguing that the stop was not properly tailored to address the speeding violation. The trial court denied the motion. Defendant pleaded guilty to trafficking. Defendant appealed to the North Carolina Court of Appeals. A divided Court of Appeals held that the trial court erred by denying Defendant’s motion to suppress. The State appealed to the North Carolina Supreme Court. The North Carolina Supreme Court vacated the judgement of the Court of Appeals and sent the case back to them to reconsider in light of its decision in *State v. Bullock*, ___ N.C. ___, ___ S.E.2d ___ (2017) (See January/February 2018 Police Law Bulletin for a summary of the *Bullock* decision). After reviewing *Bullock*, the North Carolina Court of Appeals nonetheless again found the trial court erred by denying Defendant’s motion to suppress. The State appealed to the North Carolina Supreme Court.

This case is controlled by *Rodriguez* in which the United States Supreme Court, in addressing the reasonableness of the duration of a traffic stop, explained: A seizure for a traffic violation justifies a police investigation of that violation. The extent of police inquiries during the traffic stop is determined by the seizure’s mission – inquiries are allowed to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, the stop may last no longer than is necessary to effectuate that purpose. Authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed. While an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, he may *not* do so in a way that prolongs the stop, unless there is reasonable suspicion to justify further delay.

Since *Rodriguez*, trial and appellate courts have struggled with how to appropriately apply the ruling to various factual scenarios. In *State v. Bullock*, our Supreme Court addressed a situation similar to the one at hand. There, the Supreme Court held an officer may require a driver to exit his vehicle, without unlawfully extending the traffic stop. In *Bullock*, after the officer required the driver to exit his vehicle, he frisked the driver for weapons. The Supreme Court held this frisk was lawful, due to concerns of officer safety, and the very brief duration of the frisk. The officer then required the driver to sit in the patrol car, while he ran database checks. The court determined this did not unlawfully extend the stop either. Being bound by the Supreme Court’s holdings in *Bullock*, the Court of Appeals therefore concluded that Trooper Lamm’s actions of requiring Defendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned Defendant, did not unlawfully extend the traffic stop.

Yet, this case is distinguishable from *Bullock* because after Trooper Lamm returned Defendant’s paperwork and issued the warning ticket, Defendant remained unlawfully seized in the patrol car. Ordinarily, a traffic stop concludes and the encounter becomes consensual after an officer returns the detainee’s driver’s license and registration. Yet, the governing inquiry is whether under the totality of the circumstances a reasonable person in the detainee’s position would have believed that he was not free to leave. In the case at hand, a reasonable person in Defendant’s position would not believe he was permitted to leave. When Trooper Lamm returned Defendant’s paperwork, Defendant was sitting in the patrol car. Trooper Lamm continued to question Defendant as he sat in the patrol car. When the trooper

left the patrol car to seek Peart's consent to search the rental car, he told Defendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat. Moreover, at trial Trooper Lamm admitted at this point Defendant was not allowed to leave the patrol car. Therefore, even after Trooper Lamm returned Defendant's paperwork, Defendant remained seized.

To detain a driver by prolonging the traffic stop, an officer must have reasonable articulable suspicion that illegal activity is afoot. Trooper Lamm did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop. The facts suggest Defendant appeared nervous, Peart held a dog in her lap, dog food was scattered across the floorboard of the vehicle, the car contained air fresheners, trash, and energy drinks—all of which constitute legal activity consistent with lawful travel. While Trooper Lamm initially had suspicions concerning the rental car agreement, the rental company confirmed everything was fine.

The North Carolina Supreme Court therefore agreed with the determination of the Court of Appeals that the trial court erred in denying Defendant's motion to suppress.