



DPS Legal Review

January 2009 Legal Services (404) 624-7423 Volume 8 No. 1

“FRISK” OF A PASSENGER UPHELD

While patrolling near a Tucson neighborhood associated with the Crips gang, three Arizona gang task force officers stopped an automobile. The stop was based upon a license plate check that revealed the vehicle's registration had been suspended for an insurance related violation. Under Arizona law, that violation warrants a citation. In making the stop, the officers had no reason to suspect the car's occupants of criminal activity.

The officers left their patrol car, approached the stopped vehicle, asked the occupants to keep their hands visible, and asked them if there were weapons in the vehicle. All of the occupants responded no. The first officer directed the driver to get out of the car. The second officer dealt with the front-seat passenger (who remained in the car during the stop). The third officer, Officer Maria Trevizo (“Officer Trevizo”), approached the back-seat passenger, Lemon Montrea Johnson (“Johnson”), because of his behavior and clothing.

Specifically, Johnson was wearing clothing, including a blue bandana, known to be consistent with Crips membership. Officer Trevizo also noticed a scanner in Johnson's jacket pocket. This struck her as unusual since most people would not carry around a scanner in that manner unless they planned to engage in some kind of criminal activity or to evade the police. While talking with Johnson, Officer Trevizo also learned that he was from a town with a Crips gang and had been in prison.

She asked him to get out of the car in order to privately ask questions about his gang affiliation. Suspecting that he was armed, she patted him down for safety. When she felt the butt of a gun, Johnson started to struggle. Thereafter, she placed him in handcuffs, and he was charged with possession of a weapon by a

prohibited possessor. At trial, Johnson moved to suppress the evidence as the fruit of an unlawful search.

HOLDING: The United States Supreme Court held that Officer Trevizo's pat-down did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Police must be positioned to act instantly during an investigatory stop based on reasonably grounded suspicion of criminal activity where they have reason to believe the persons temporarily detained are armed and dangerous. Because a limited search of outer clothing for weapons protects both the officer and the public, a pat-down is constitutional.

Once a motor vehicle has been lawfully detained for a traffic violation, an officer may order the driver to get out of the vehicle without violating the Fourth Amendment. Likewise, a passenger is seized from the moment a car stopped by the police comes to a halt on the side of the road. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, where the inquiries do not measurably extend the stop's duration. Thus, there are **two requirements** for an investigatory stop and frisk for weapons to be lawful. **First**, the stop must be based upon reasonable suspicion of criminal activity or a traffic violation. **Second**, to proceed to a frisk, the officer must reasonably suspect that the person stopped is armed and dangerous. Arizona v. Johnson, 555 U.S. ___ (2009).

FLASHING STROBE LIGHTS

A citizen called the police to report that a man was driving a white passenger vehicle with flashing strobe lights built into the rear. The citizen, who was driving behind the suspect on a Roswell city road, provided the dispatcher with a tag number, and he said the driver was

"pretending like he has police lights." An officer was dispatched while the citizen continued to pursue the suspect's vehicle.

Within minutes, the officer approached the citizen's vehicle and observed the suspect's white 2000 model Pontiac Trans Am with clear strobe lights flashing adjacent to its rear tail lights. The officer initiated a traffic stop ¼ mile outside of the territorial limits of Roswell. The suspect consented to a search of the vehicle. The officer found a switch box near the gear shift that turned on clear-colored strobe lights in the front and rear of the vehicle. Since the suspect did not have a permit for a strobe light and he was not a public employee, he was charged with impersonating a public officer under O.C.G.A. § 40-6-395(c).

The charges were later dismissed after the officer resigned from his position and failed to give evidence during the suspect's first appearance hearing. Subsequent to the dismissal, the suspect filed a civil rights action alleging false arrest in the Superior Court of Forsyth County. The action was removed to federal court.

HOLDING: The Court found in favor of the officer. What constitutes probable cause to arrest is the information known to the officer at the time of the arrest, not the facts known to the plaintiff then or those known to a court later. Based upon the information available to the officer at the time of the incident, he had at least an arguable basis to believe that the suspect had committed the crime of impersonating a police officer. This stems from the fact that the suspect activated external automobile strobe lights in traffic, and he falsely held himself out as a peace officer with the intent to mislead another motorist to cause that motorist to yield. Because only arguable probable cause is required, the Court did not seek to determine whether probable cause actually existed. Instead, the Court considered whether the officer reasonably could have believed that probable cause existed in light of the information the officer possessed at the time of the arrest. Baker v. Moskau, 2008 WL 5233868 (N.D. Ga.).

INQUIRING MINDS

QUERY: Should troopers keep file materials and documents related to investigations in their homes?

ANSWER: No. ALL file materials and documents related to investigations should be maintained at the post.

QUERY: Does an officer have discretion with regard to whether to sign a driving permit when issuing a DUI citation?

ANSWER: No. Pursuant to O.C.G.A. § 40-5-67, when a valid driver's license is taken by the officer, the officer shall issue a temporary driving permit. This Section also makes a distinction regarding the circumstances under which a 30 day versus a 180 day permit should be issued.

QUERY: Must an indictment for aggressive driving name a victim to be prosecutable?

ANSWER: Yes. Aggressive driving is a specific intent crime with a targeted victim. State v. Burrell, 263 Ga. App. 207, 587 S.E. 2d 298 (2003).

ALS REMINDER

⊗ When filling out the ALS Plea agreement form, please remember to check the appropriate box on the 1205 withdrawal form (which indicates the basis for the withdrawal.) Please check whether the withdrawal is: 1) the unilateral action of the arresting officer, or 2) based on an agreement between the arresting officer and the Petitioner.

⊗ **Intoxilyzer 5000 cases:** For all ALS Hearings **PLEASE bring:** 1) a copy of your permit to operate the Intoxilyzer 5000 and 2) one of the original printouts of the test results. Always make a copy of your intoxilyzer 5000 permit **prior** to coming to court. Both documents must be provided to the court at the hearing.

QUOTABLE WISDOM WORKS

"I hope I shall always possess firmness and virtue enough to maintain what I consider the most enviable of all titles, the character of an Honest Man."

George Washington

Published with the approval of Colonel Bill Hitchens. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and Dee Brophy, ALS Attorney. Send questions/comments to jbunn@gsp.net.