



DPS Legal Review

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PROBABLE CAUSE FOR DOG SNIFF AFTER COMPLETION OF TRAFFIC STOP

Just after midnight on March 27, 2012, a K-9 officer observed a vehicle veer slowly onto the shoulder of the highway for one to two seconds and then jerk back onto the road. The officer initiated a traffic stop because Nebraska law prohibits driving on highway shoulders. The officer observed two men in the vehicle. The officer approached the passenger's side and the driver identified himself. The officer asked the driver why he had driven onto the shoulder and the driver replied that he did so to avoid a pothole. The officer gathered the driver's license, registration, and proof of insurance. The officer asked the driver to accompany him to his patrol car. The driver asked if he was required to do so and once the officer answered that he was not the driver chose to wait in his vehicle.

The officer ran a records check, returned to the vehicle, and asked the passenger for his driver's license. The officer questioned both men about where they were coming from and where they were going. The officer ran a records check on the passenger and called for a second officer. By 12:27 or 12:28 a.m., the officer wrote a warning, explained it to the driver, and returned the documents to the driver and passenger. The officer asked for permission to walk his dog around the vehicle and the driver said no. The officer asked the driver to turn off the vehicle, exit, and stand in front of his patrol car to wait for the second officer. The driver complied. At 12:33 a.m., the second officer arrived and the officer retrieved his dog and led him twice around the vehicle. The dog alerted to the presence of drugs halfway through the second pass. A search of the vehicle revealed a large bag of methamphetamine. Seven to eight minutes had elapsed from the time of the issuance of the warning until the dog indicated the presence of drugs.

The driver was indicted on one count of possession with intent to distribute 50 grams or

more of methamphetamine. The driver moved to suppress the evidence arguing that the officer had prolonged the traffic stop without reasonable suspicion in order to conduct a dog sniff. The lower court found that the extension of the stop was only a *de minimis* intrusion on the driver's Fourth Amendment rights. The driver entered a conditional guilty plea and was sentenced to five years in prison. The driver appealed.

HOLDING: The United States Supreme Court held absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures. The Court reasoned that a routine traffic stop is more analogous to a brief *Terry* stop than an arrest and that the tolerable duration of police inquiries is determined by the seizure's "mission" to address the traffic violation that warranted the stop. An officer's mission includes ordinary inquiries incident to the traffic stop such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. The Court provided that these checks serve to ensure that vehicles on the road are operated safely and responsibly. A dog sniff however, lacks the same close connection to roadway safety as the ordinary inquiries and is not fairly characterized as part of the officer's traffic mission. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket but whether conducting the sniff prolongs the stop. Thus, if a traffic stop is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket it is a violation of the Constitution's shield against unreasonable seizures under the Fourth Amendment. Rodriguez v. United States, 2015 WL 1780927 (U.S.).

PROBABLE CAUSE FOR SEARCH WARRANT BASED ON SMELL OF MARIJUANA

On February 6, 2013, officers assigned to a narcotics unit went to the defendant's residence to conduct a "knock and talk" after receiving a complaint that the residence was being used to manufacture marijuana. Two of the officers knocked on the front door while three other officers remained out of sight. A female came to the door and told the officers to go to the garage. The officers entered the garage and detected the odor of raw marijuana. The defendant's mother greeted the officers in the garage. The officers explained to her that they received a complaint about marijuana manufacturing taking place at the residence and they asked about the whereabouts of the defendant. She told them the defendant was not there and that she was the owner of the residence. The officers requested to come inside and she consented. Upon entering, the officers detected a stronger "overwhelming" odor of raw marijuana.

Based on the odor and without venturing further into the residence, the officers decided to seek a search warrant. No search of the residence was conducted without the search warrant. The affidavit for the search warrant indicated the probable cause for the warrant was based solely on the officers' detection of the strong odor of raw marijuana in the residence. The affidavit also indicated the odor was detected during a "knock and talk" investigation concerning possible drug activity at the residence and the training and experience of the officers. The judge issued a search warrant for the residence. Upon execution of the warrant, the officers found marijuana at the residence.

The defendant was charged by accusation with possession of marijuana with intent to distribute and manufacturing marijuana. The defendant filed a motion to suppress the evidence contending that the search was illegal because it was conducted under a search warrant that was issued solely based on the strong odor of marijuana that police detected in the residence. The trial court granted the motion. The State appealed the decision.

HOLDING: The Court held that the detection of odor of marijuana alone could provide a legal basis for issuance of a search warrant. The Court acknowledged that it had issued opinions that misapplied or misinterpreted the law in the area. The Court's prior decisions established one standard that allows for a warrantless search

of a vehicle where the presence of such odors alone would be sufficient probable cause and another standard for the issuance of a search warrant where the presence of such odors alone would be insufficient to establish probable cause in other contexts such as residences. The Court believed its prior decisions created a double standard that did not hold the presence of odors to the same degree in other contexts as it is held in the automobile exception.

The Court relied on persuasive authority from federal and other state jurisdictions' decisions holding that the odor of marijuana by itself can provide sufficient probable cause for the issuance of a search warrant. In determining whether probable cause exists to issue a search warrant based on the presence of an odor, the magistrate judge is still required to consider all circumstances set forth in the affidavit specifically, whether the affidavit establishes that the officer was qualified to recognize the odor based on his or her training and experience, whether the officer was able to determine the particular location where the odor was emanating from, and whether the officer detected the odor from a place where he or she was legally entitled to be. State v. Kazmierczak, 2015 WL 1432195 (Ga.App.).

ALS REMINDERS

⚠ When a DUI defendant submits to a state administered blood test pursuant to a request under the implied consent law, complete the 1205-S form when the results are received from the crime lab if the statutory requirements for issuing a 1205-S form are met. A 1205-S form shall be completed if the blood test results indicate an alcohol concentration level as follows: 1) .08 grams or more if 21 years of age or over; 2) .02 grams or more for a person under 21 years of age; 3) .04 grams or more if operating a commercial motor vehicle. Send the completed 1205-S form to the Department of Driver Services (DDS). DDS notifies the DUI defendant that the arresting officer is requesting suspension of his driver's license.

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, Christina Calloway, Legal Officer, and Dee Brophy, ALS Attorney. Send questions/comments to ccalloway@gsp.net.