



CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

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Forward: In this issue we review a United States Supreme Court decision that clarifies reasonable suspicion and the weight to be given to individual facts under the totality of the circumstances test. We also review two North Carolina Court of Appeals decisions concerning search of vehicles incident to arrest of a passenger and a guest's standing to challenge the search of his host's residence.

HIGHLIGHTS:

UNITED STATES SUPREME COURT

**Fourth Amendment/
Reasonable Suspicion/
Totality of the
Circumstances:** In *United States v. Arvizu*, 122 S.Ct. 744 (2002), the United States Supreme Court reversed the Ninth Circuit's divide-and-conquer approach to the totality of the circumstances test. The Court held that the officer's observations, when viewed together were sufficient to establish reasonable suspicion that the defendant was engaged in illegal activity.

NORTH CAROLINA COURT OF APPEALS

**Fourth Amendment/Search
& Seizure/ Vehicles/
Passengers:** In *State v. Logner*, ___ N.C. App. ___ (2001), the Court of Appeals held that the search of a vehicle incident to the arrest of a passenger who had just

entered the vehicle in an attempt to get away was a lawful search incident to arrest.

**Fourth Amendment/
Search & Seizure/
Investigatory Detention/
Frisk For Weapons/
Reasonable Expectation
of Privacy/ Common
Area:** In *State v. Sanchez*, ___ N.C. App. ___ (2001), the Court of Appeals held that an investigatory detention did not last longer than necessary where officers drew their weapons and the defendant was only handcuffed for approximately 5 minutes. The Court also held that although the defendant was temporarily residing in the residence that was searched, he did not have a reasonable expectation of privacy in a stairwell in a laundry room because that was a common area of the residence accessible to all occupants.

BRIEFS:



UNITED STATES SUPREME COURT

Fourth Amendment/
Reasonable Suspicion/
Totality of the
Circumstances: United
States v. Arvizu, 122 S.Ct.
744 (2002).

Facts: Agent Stoddard worked as a border patrol agent at a checkpoint in Douglas, Arizona. The checkpoint is located on an unpaved road that connects with the main highway (Hwy 191). Only two highways lead north from Douglas. Sensors are located on the only other northbound road from Douglas, Leslie Canyon Road.

Agent Stoddard received a radio report that one of the sensors on Leslie Canyon Road had been triggered, suggesting to him that a vehicle might be trying to evade the checkpoint. The sensor was triggered at a time that coincided with a shift change, meaning the area would be unpatrolled. Agent Stoddard knew that smugglers were most active during shift changes. Another border patrol agent reported to Stoddard that the same sensor had triggered a few weeks before, that he had stopped a minivan using

that route and that he had observed the occupants throwing bundles of marijuana out the door.

While en route to the area, Agent Stoddard was advised that another sensor had triggered. Shortly thereafter, he saw the dust trail of an approaching vehicle. He had not seen any other vehicles on the road and, based on the timing, believed the approaching vehicle was the one that had triggered the sensors. He pulled off to the side of the road so that he could get a good look at the vehicle as it passed. The vehicle was a minivan, the type of vehicle many smugglers used. As it approached it slowed from 50 to about 25-30 miles per hour. An adult male was driving, an adult female was in the front passenger seat and there were three children in the back. Stoddard observed that the knees of the children in the back seat appeared very high as if their feet were resting on something. As the vehicle passed, the driver appeared stiff and did not look at Stoddard.

Stoddard began to follow the vehicle and shortly thereafter, all of the children put their hands up at the same time and began to wave at him in an odd pattern, as if they were being instructed to do so. This continued for 4-5 minutes. The driver then signaled for a turn, turned the signal off and then abruptly put it back on and turned north at the last

place that the minivan could turn to avoid the checkpoint. The road that the minivan turned onto was rougher than other roads in the area and not a likely destination for a family outing. Stoddard radioed for a registration check and learned that the vehicle was registered at an address located in an area known to border patrol agents for smuggling activity.

Stoddard stopped the vehicle and asked the defendant, Ralph Arvizu, for consent to search the vehicle. Arvizu consented and Stoddard found a duffel bag containing marijuana under the feet of the two children in the back seat and another bag of marijuana behind the rear seat. Defendant moved to suppress the marijuana arguing that Stoddard did not have reasonable suspicion to stop the vehicle. The District Court denied the motion and the Ninth Circuit reversed holding that 7 of the 10 factors considered by the District Court carried little or no weight in the reasonable suspicion analysis.

Issue: Whether the Ninth Circuit applied the correct standard by evaluating each of the officer's observations in isolation?

Rule: No. Courts must look at the totality of the circumstances when determining whether reasonable suspicion exists.

Discussion: While noting that the concept of reasonable suspicion is somewhat abstract, the Supreme Court criticized the approach taken by the Ninth Circuit stating that it "departs sharply" from the teachings of the Court's previous decisions. The Court held that the appellate court's evaluation and rejection of 7 of the officer's 10 observations in isolation from each other was not appropriate. This type of divide-and-conquer analysis did not take into account the fact that a series of acts that are innocent when viewed in isolation may warrant further investigation when considered together.

The Supreme Court then addressed each of the factors considered by the Court of Appeals and concluded that giving due weight to the factual inferences drawn by Agent Stoddard and considering the totality of the circumstances, the officer had reasonable suspicion to believe that respondent was engaged in illegal activity. "It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that [defendant] had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint." The Court noted that each of the factors, individually, was susceptible to innocent explanation and that some factors carried more weight than others. However, a

determination that reasonable suspicion exists need not rule out the possibility of innocent conduct. When taken together, the factors "sufficed to form a particularized and objective basis for stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment."

NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Search & Seizure/ Vehicles/ Passengers: *State v. Logner*, ___ N.C. App. ___ (2001).

Facts: Four Durham police officers responded to a disturbance on Guthrie Avenue at 5:00 a.m. Upon arriving at the scene, Officer Clayton observed two vehicles parked one behind the other. Defendant was in the driver's seat of the second vehicle. When Officer Clayton shined her flashlight into the passenger area of the first vehicle, she saw a tan, rock-like substance on the floorboard which she believed was an illegal substance. She also recognized the driver of the first vehicle, Gurley, and knew there were outstanding warrants for his arrest. She asked both the driver and the passenger, Parker, to exit the first vehicle. Parker began yelling at Officer Clayton in an attempt to distract her while Gurley began fighting the other officers and trying to run away. As the officers began to chase Gurley, a

Officer Clayton realized she had not secured the substance in the first vehicle. When she turned around to retrieve the substance she saw Parker getting into the second vehicle driven by the defendant. Defendant attempted to pull off in the second vehicle, but was stopped by Officer Clayton. She then removed Parker from the back seat of the vehicle, took her to the patrol car and secured her in the back of the patrol car. Officer Clayton then returned to the vehicle and asked for consent to search. Defendant refused and Officer Clayton searched the vehicle anyway, finding a rock of crack cocaine, a film canister with cocaine residue, two crack pipes under the floor mats of the front driver's and passenger's seats and a filter used in crack pipes between the driver's seat and door.

Defendant was charged with possession of cocaine and possession of drug paraphernalia. She moved to suppress all the evidence obtained during the search of her vehicle arguing that the search violated her federal and state constitutional rights. The motion to suppress was denied and defendant was convicted. She appealed.

Issue: Whether the search of the defendant's vehicle was lawful?

Rule: Yes. An officer may search a vehicle incident to the arrest of the driver or an

occupant of the vehicle.

Discussion: In order to determine if the search of the defendant's vehicle was lawful, the Court of Appeals reasoned that it must first determine (1) whether Parker was lawfully arrested prior to the search of the vehicle, and (2) whether Parker was an occupant of the defendant's vehicle at the time of her arrest.

The test for determining whether a person is in custody or under arrest is whether their freedom of action is curtailed to the degree associated with formal arrest. The subjective intent of the officer may provide some evidence that a person is under arrest, but is not controlling on that issue. The officer must also have probable cause to believe that the person committed or is committing an offense at the time the person is placed in custody.

In the present case, Officer Clayton had ordered Parker and Gurley out of the first vehicle after observing what she believed to be an illegal substance in the vehicle. Parker then tried to distract the officer while Gurley fled. At this point the officer had probable cause that Parker had committed a criminal offense. Parker then got into the defendant's vehicle and attempted to leave the scene. Officer Clayton then removed her from the defendant's vehicle, secured her and paced her in the patrol car. Although she did not tell Parker she was under

arrest, Officer Clayton's actions curtailed Parker's freedom to a degree associated with formal arrest. Clayton also testified that it was her intention, by these actions, to place Parker under arrest. Thus, Parker was under arrest at the time that Officer Clayton searched the defendant's vehicle.

The Court then turned to the question of whether Parker was a passenger in the defendant's vehicle at the time of her arrest. The Court noted that "an arrestee is an occupant of a vehicle if the police arrest or make initial contact with the [arrestee] while the [arrestee] is in the vehicle. In the present case, Officer Clayton saw Parker get into the defendant's vehicle and the officer removed Parker from that vehicle in order to arrest her. "When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Because Parker was physically inside the defendant's vehicle at the time she was arrested, the search of the defendant's vehicle incident to Parker's arrest was lawful.



Fourth Amendment/ Search & Seizure/ Investigatory Detention/ Length/Reasonable Expectation of Privacy/ Common Area: *State v. Sanchez*, ___ N.C. App. ___ (2001).

Facts: In October 1995, Detective Walls received information from an informant identified as Robert Segura. Segura admitted using and dealing cocaine and told Detective Walls that the defendant, Angel Sanchez, would either fly into the Greensboro airport with cocaine or that the cocaine would arrive via next day mail. Segura also told Walls that the cocaine would be hidden in blueprint tubes, that Frank and Mary Ann Devita would meet the defendant at the airport and that Frank did not have a valid driver's license. He described their vehicles and stated that the Devitas possessed weapons and that the defendant had possessed plastic explosives in the past. He also identified several people who would receive cocaine from the defendant

Detective Walls verified the information given by Segura. Two days later, the Devitas met the defendant at the Greensboro airport. Detective Walls and other officers stopped the Devita's car shortly before they arrived at their home. The officers removed all the occupants of the vehicle, placed them on the ground and handcuffed them while another officer covered them with his weapon. The officers then frisked the occupants and the interior of the vehicle for weapons.

When no weapons were found, the officer removed the handcuffs and Detective Walls began speaking with each occupant separately. Frank Devita consented to a search of the vehicle and the defendant consented to a search of his briefcase. The officers did not find any cocaine, but found several items that corroborated Segura's information that the cocaine would arrive by mail, including a receipt for a post office box at Mailboxes Etc., a check stub showing payment to Mailboxes Etc. for a Federal Express package and a ledger showing several of the names provided by Segura. The officers made copies of the items before returning them to the occupants of the vehicle. Detective Walls asked for and obtained Frank Devita's consent to search his home. The officers did not find cocaine, but did discover several handguns and assault rifles.

The following day, Federal Express delivered a package to the Devita home. Detective Walls immediately secured the scene while he obtained a search warrant. Officers remained inside the home, but did not search the house. While inside, officers observed several empty Federal Express boxes and a plate of white powder residue. Detective Walls returned with the search warrant and the

officers searched the house. Officers found two blueprint tubes containing 496 grams of cocaine in a closet at the bottom of the stairs. The defendant moved to suppress the evidence recovered from his briefcase and from the Devita residence. The trial court denied the motion and the defendant appealed.

Issue 1: Whether the detention of the occupants of the Devita's vehicle exceeded the permissible scope of an investigatory detention?

Rule: No. An investigatory detention should last no longer than is necessary to effectuate the purpose of the stop. However, officers may take steps reasonably necessary to protect their safety, including frisking the person detained and drawing their weapons.

Discussion: An informant's tip may provide the reasonable suspicion necessary to justify an investigatory detention. In this case, the officers had verified most of the information provided by the informant and therefore, had reasonable grounds to suspect the occupants of the car were engaged in criminal activity. The officers also had reasonable grounds to believe that the occupants of the vehicle were armed and dangerous. Consequently, they were entitled to frisk the occupants in order to protect the officers' safety and were also permitted to draw their weapons and handcuff the occupants while they conducted a frisk of the vehicle for weapons. Once the officers were assured that

there were no weapons accessible to the occupants, they released them from handcuffs, holstered their weapons and continued the investigation. The Court of Appeals noted that the defendant and the other occupants were handcuffed for no more than five minutes. Based on the circumstances, the Court concluded that the detention did not exceed the permissible scope of an investigatory detention.

Issue 2: Whether the defendant had standing to challenge the search of the Devita's residence?

Rule: No. Although an overnight guest has an expectation of privacy in their temporary residence based on societal standards, a defendant must still show that he, *personally*, had an expectation of privacy in the place searched.

Discussion: The test for determining whether a person has standing to contest a search is whether the person has a reasonable expectation of privacy in the place searched. This includes both an objective expectation that society is prepared to accept as reasonable, and a subjective expectation of privacy.

Noting that the cocaine was found under the stairwell in the laundry room in the basement of the house, the Court of Appeals reasoned that the defendant could not have had an expectation of privacy in that area. The defendant was temporarily residing in a living

area in the basement that was connected to the garage and the laundry room. However, the laundry room was not part of that living area and was separated from the basement and garage area by a door. The Court concluded that the defendant did not have a reasonable expectation of privacy with respect to cocaine hidden under the stairwell because that was a common area in the Devita home that was accessible to anyone. Thus, he had no standing to challenge the search of this area and the motion to suppress was properly denied.

Note: This case does not change the general rule that officers must obtain a warrant before searching a residence. The only exceptions to this requirement are when officers obtain consent or officers have established probable cause to search and the officer establishes exigent circumstances to enter. The consent must be obtained by someone who has a reasonable expectation of privacy in the residence such as the homeowner or lessee.



Did You Know . . .

N.C.G.S. §14-290 makes possession of any tickets used in the operation of any

lottery a criminal offense punishable as a Class 2 misdemeanor. This may include a fine up to \$2,000.

The District Attorney's Office has taken the position that possession of South Carolina lottery tickets is a violation of the statute. However, they will not routinely prosecute all such cases, but will evaluate on a case-by-case basis, giving more emphasis to those situations where an individual in possession of lottery tickets is also charged with other offenses. Therefore, officers should use discretion in charging individuals where the only offense involved is the possession of lottery tickets.