



POLICE / PROSECUTOR UPDATE

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Last month we reviewed two cases which addressed the scope of a police officer's authority during routine traffic stops. One case ruled that an officer may not as a matter of *routine practice* ask a driver legitimately stopped for a traffic violation if he has a weapon in the vehicle or on his person. Does this prohibition extend to *routinely* asking a driver to consent to a search of the vehicle? The answer is, not yet but probably yes eventually. A recent Court of Appeals case gives some indication in this direction.

The facts are, to say the least, unusual. The defendant's vehicle was stopped because it had improperly tinted windows. The officer issued a warning ticket to the defendant and told the defendant he was free to go. However, the officer asked the defendant if he would like to exit the car and stretch his legs, which the defendant did. The two of them engaged in conversation. The officer said that he was a drug interdiction officer with a canine unit. He also told the defendant (and the court at a suppression hearing) that his purpose was to watch for minor traffic offenses and then ask the driver to consent to a search of the vehicle in order to stem the transport of illegal narcotics. The officer told the defendant that he did not have to cooperate but that the officer would like to look in the vehicle for drugs or weapons. The defendant said, "You can search the inside of my car as much as you like." The officer found a small amount of marijuana in a film canister. He then asked the defendant's consent to letting his dog sniff the vehicle, again telling the defendant he did not have to cooperate. The defendant consented, and the dog alerted at the rear of the car. The officer then asked if he could look at the spare tire carrier under the rear of the car where the dog had alerted. Again the officer said he didn't have to cooperate, but the defendant consented. In the carrier was found a large quantity of marijuana.

The law is that when the State seeks to rely on consent to justify a warrantless search, it has the burden of proving that the consent was freely and voluntarily given. Voluntariness is a question of fact to be determined from the totality of the circumstances. The "totality of the circumstances" from which the voluntariness of a consent is to be determined includes

- but is not limited to - the following considerations: (1) whether the defendant, if in custody, was advised of his *Miranda* rights prior to the request to search; (2) the defendant's degree of education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the defendant has previous encounters with law enforcement; (5) whether the officer made any express or implied claims of authority to search without consent; (6) whether the officer engaged in any illegal action prior to the request; (7) whether the defendant was cooperative previously; and (8) whether the officer was deceptive as to his true identity or the purpose of the search.

The court said that the defendant's consents were voluntary in this case. The officer testified that the defendant seemed to be a person of normal intelligence and did not appear to be under the influence of drugs or alcohol. He was not under arrest or in custody, so *Miranda* warnings were not necessary. After being given the warning ticket, he was told he was free to leave. And at each step where the defendant was asked for consent, he was clearly told he did not have to cooperate. Finally, the officer said his purpose was to make traffic stops to stem the drug traffic.

Clearly, the traffic stop in this case was pretextual. However, a lawful traffic stop is not converted into an unreasonable search and seizure just because it is pretextual. The troubling part of the opinion in this case was a request by the defendant and the Court of Appeals' response. The defendant asked the court to adopt a rule to require *independent reasonable suspicion of some illegal activity* apart from the traffic stop in order for an officer to *even seek* consent to search. The court's response was, "Although we, too, are troubled by the increasingly common practice of police stopping vehicles for minor traffic offenses and seeking consent to search with no suspicion whatsoever of illegal contraband, all in the name of the war on drugs, we are unwilling *under the facts of this case* to say that our state constitution prohibits police from doing so."

Callahan v. State, 719 N.E.2d 430 (Ind. Ct. App. 1999).

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