

Traffic Stops

Close Encounters of
the 4th Amendment
Kind

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“Question Authority”

- A person in the U.S. generally has a right to be left alone by law enforcement
- There are circumstances in which law enforcement can intrude into someone’s life for the “greater good”
- **In keeping with the first principle, the degree of intrusion is strictly limited by the necessity for the intrusion.**

Content Summary 1

- Seizure: what it is and what it isn't
- Consensual encounter
- Community caretaking detention
- Temporary detention with reasonable suspicion

Content Summary 2

- Traffic stops
 - The Weaver
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- Scope of Temporary Detention
 - Consent to Search
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Seizure of the Person

What it is and what it
isn't

Seizure = Detention

Occurs when an officer by means of physical force or show of authority terminates or restrains a person's freedom of movement through means intentionally applied

– *Brendlin v. California*, 551 U.S. 249 (2007)

– *State v. Garcia-Cantu*, 253 S.W.3d 236 (Tex.Crim.App. 2008)

No Seizure

- *California v. Hodari*, 499 U.S. 621 (1991)
 - D runs away and officer chases. D does not comply with show of authority; abandoned drug is not product of a detention
- *Michigan v. Chesternut*, 486 U.S. 567 (1988)
 - D takes off on foot; officer drives alongside D and observes him abandon his narcotics

Test for determining whether a seizure has occurred, when the officer is ambiguous about the intent to restrain

- In view of all the circumstances surrounding the incident, a reasonable person would believe s/he is not free to leave
- *United States v. Mendenhall*, 446 U.S. 544 (1980)

Test when the person has no desire to leave for reasons unrelated to police presence

- Would a reasonable person feel free to decline the officer's requests or otherwise terminate the encounter
- *Florida v. Bostick*, 501 U.S. 429 (1991)

Factors that Determine Seizure

- Number of officers present
- Whether officer displays weapon
- Whether officer touches D
- Whether officer uses tone of voice or words indicating compliance is mandatory
 - *U.S. v. Mendenhall*, 446 U.S. 544 (1980)
 - *Russell v. State*, 717 S.W.2d 7 (Tex.Cr.App. 1986)

Seized?

- Officer drives up to D at dead-end, partially blocking in D's truck
- It is 4:00 a.m. on Dec 26
- Officer focuses spotlight on D's truck
- Officer approaches truck in an authoritative manner, with flashlight at shoulder level
- Officer questions D in authoritative tone
- Officer shines flashlight into D's eyes, looking for signs of intoxication
- Officer tells D to get his i/d from the truck
- D testifies he did not feel free to leave

D is seized

Viewing the ***totality of these particular circumstances*** in the ***light most favorable to the trial court's ruling***, we hold that the trial court did not err in concluding that a reasonable person in appellee's position would not have felt free to leave or terminate this encounter.

- *State v. Garcia-Cantu*, 253 S.W.3d 236 (Tex.Cr.App. 2008)

Consensual Encounter

No Detention

No Reasonable Suspicion

Meet and Greet

“[An officer does] not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.”

– *Florida v. Royer*, 460 U.S. 491 (1983)

Airport Encounter 1

Plain clothed agents approach D, ask for ticket and i/d. D complies; the last names differ on the two documents. Upon request, D accompanies officers to nearby room. Agents obtain consent to search D's person and purse after informing D she does not have to consent. A female agent arrives and conducts search in another room. **D is not detained.**

- *U.S. v. Mendenhall*, 446 U.S. 544 (1980).

Airport Encounter 2

Uniformed officers approach D, ask for ticket and i/d. D complies; the last names differ on the two documents. Officers say they suspect D of carrying narcotics. Upon request, D accompanies officers to nearby room. Officers retrieve D's luggage, obtain consent to search. **D is unlawfully detained.**

- *Florida v. Royer*, 460 U.S. 491 (1983)

Bus Encounter

- Armed officers on drug patrol board bus, question D. They obtain consent to search D's luggage. Remanded to determine if D was seized when he gave consent.
 - *Florida v. Bostick*, 501 U.S. 429 (1991).
- Supreme Court notes two things in favor of a consensual encounter:
 - D was informed he did not have to consent
 - “At no time did the officers threaten Bostick with a gun.”

Consensual Vehicle Encounter

- Officer may knock on D's window
 - *State v. Perez*, 85 S.W.3d 817 (2002)
(Knock on D's apartment door)
 - *State v. Bryant*, 161 S.W.3d 758 (Tex.App. Fort Worth 2005, no pet.) (Knock on D's vehicle window)
- Depending on tone and demeanor, officer may ask D questions. No commands allowed
 - *State v. Garcia-Cantu*, 253 S.W.3d 236 (Tex.Crim.App. 2008)

Motorist is Detained if:

- Officer blocks in D's vehicle with patrol car
 - *State v. Garcia-Cantu*, 253 S.W.3d 236 (Tex.Crim.App. 2008)
- Officer uses patrol car's "red & blue" lights
 - *State v. Garcia-Cantu, supra*
- Officer asks D to exit vehicle
 - *State v. Bryant*, 161 S.W.3d 758 (Tex.App. Fort Worth 2005, no pet.)

Encounter in Pflugerville

“A Tale of Two Names”

Failure to Identify

- *Brown v. Texas*, 443 U.S. 47 (1979)
 - Providing i/d is not required during an unlawful temporary detention
 - Questionable whether D would be considered detained under today's cases
- *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004)
 - Providing i/d may be required during a lawful temporary detention
 - D's identity is reasonably related to the purpose of a temporary detention

Penal Code Sec. 38.02

- It is an offense to provide a false identity during a lawful detention
- D may refuse to reveal identity during a consensual encounter or a temporary detention
- D may give a false identity during a consensual encounter
 - *Crutsinger v. State*, 206 S.W.3d 607 (Tex.Cr.App. 2006) (in a bar)
 - *Quick v. State*, 999 S.W.2d 79 (Tex.App. Houston 14th Dist. 1999, no pet.) (front door)

Pflugerville Encounter, Act 1

- In March, 2008, Officer approaches “black male” walking along street at 4:15 a.m.
- D says he is walking to work, has no i/d
- D says he is James Evans, DOB 1/17/55
- D says he is 51, then 52
- Name and DOB checks come back empty
- D cannot produce “work credentials”
- Officer asks D to lead him to house where an i/d can be made; D enters patrol car
- Officer 2 arrives

Pflugerville Encounter, Act 2

- Everyone proceeds to house
- At house, Officer 1 has D ring doorbell, then stand by Officer 2.
- Occupant answers door, is asked to identify D
- D shouts, “My name is James Evans”
- Occupant says D is her husband, J__ E__
- Officer 1 tells Officer 2 to arrest D for failure to identify
- D flees into a wooded area, is not caught

D is not guilty of failure to identify or evading detention

- Both offenses require a lawful detention
- D was unlawfully detained
 - When he entered the patrol car, or
 - When he was told to ring the door bell and stand by officer 2
- D's false identity was not revealed until after these events
- D fled from an attempt to unlawfully arrest him

Community Caretaking Function

A Detention without
Reasonable Suspicion

Community Caretaking Function

As part of an officer's duty to "serve and protect," the officer may stop and assist an individual whom a reasonable person, given the totality of the circumstances, would believe is in need of help.

- *Corbin v. State*, 85 S.W.3d 272 (Tex.Crim.App. 2002), from *Wright v. State*, 7 S.W.3d 148 (Tex.Crim.App. 1998)

Spawn of *Cady*

- *Cady v. Dombrowski*, 413 U.S. 433 (1973)
 - Actually involved non-emergency behavior of police in cleaning up an accident and making sure D's vehicle did not contain a handgun
- Now typically is applied to emergency situations
- Officers are invoking the doctrine more frequently to justify detentions of motorists

Four *Wright/Corbin* Factors

In determining whether the officer's belief is reasonable, we look to:

- **The nature and level of distress exhibited by the person**
- The location of the person
- Whether the person is alone or has access to assistance other than that offered by the officer
- To what extent the person presents a danger to self or others if not assisted

Principles of the Community Caretaking Doctrine

- Community caretaking function is applied narrowly. *Wright, Corbin.*
- Once the emergency is resolved or it is determined there is no emergency, the temporary detention must end

Officer's subjective belief is relevant – must be motivated by a concern for the person's well-being.

- *Swaffar v. State*, 258 S.W.3d 254 (Tex.App. Fort Worth 2008, pet. ref.)
 - If officer is “primarily motivated by a non-community caretaking purpose, then the community caretaking doctrine is inapplicable to justify his intrusion”

Officer's conduct during the detention can shed light on whether officer believed there was an emergency.

- *Swaffar v. State*, 258 S.W.3d 254 (Tex.App. Fort Worth 2008, pet. ref.)
 - Officer follows D's vehicle to gather DWI driving evidence on video before stopping D; this belies officer's belief there was an emergency

Passenger in Distress

Indicates lesser need for police intrusion - driver is there to help

- *Wright v. State*, 7 S.W.3d 148 (Tex.Crim.App. 1998)(vomiting passenger)
- *Andrews v. State*, 79 S.W.3d 649 (Tex.App. Waco 2002, pet. ref.)(vomiting passenger)
- *Wiede v. State*, 157 S.W.3d 87 (Tex.App. Austin 2005, pet. ref.)(driver after accident)

Driver in Distress

- *Hulit v. State*, 982 S.W.2d 431 (Tex.Crim.App. 1998)
 - Detention of D passed out behind the wheel in a turn lane based on concern for his medical condition is reasonable under Art. I Sec. 9 of the Texas Constitution
- Unstated acceptance of community caretaking function as a matter of state constitutional law

Pre-trial Strategy

- Argue that the community caretaking function is to be applied narrowly.
Wright, Corbin.
- Establish that the officer does not behave as if there were an emergency
- Show that the officer resolves the emergency or determines there is no emergency, but extends the detention for other purposes

TCSO Caretaking Stop

- “I saw a vehicle ... that was driving ... on South MoPac with its hazard flashers on. The vehicle was clocked at about 40 mph in a zone marked for 65 mph.
- “The use of hazard lights is used to warn other vehicle operators of a hazard that requires unusual care in approaching, overtaking, or passing.
- “I saw no reason the aforementioned vehicle should be driving with its hazard lights on.
- “I conducted a traffic/assist motorist stop to check the welfare of the driver.”

Video Presentation

TCSO Community
Caretaking Stop

Temporary Detention with Reasonable Suspicion

Terry v. Ohio, 392 U.S. 1 (1968)

- An officer may temporarily detain a person to conduct an investigation if the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion
- The detention must be strictly circumscribed by the exigencies which justify its initiation

Reasonable suspicion is determined by the totality of the circumstances

- “Divide and Conquer” strategy no good
 - *U.S. v. Arvizu*, 534 U.S. 266 (2002)
- Case-by-case analysis
 - *State v. Garcia-Cantu*, 253 S.W.3d 236 (Tex.Cr.App. 2008)
- Factors to consider
 - Officer’s training and experience
 - Local circumstances *other than person’s race*

Reasonable suspicion is determined objectively

- *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (subjective belief or intent of officer is irrelevant to the determination of reasonable suspicion)
- *Garcia v. State*, 827 S.W.2d 937 (Tex.Cr.App. 1992) (Pretext stop and arrest rule is abolished)

Scope of Detention is Limited

- Detention must last no longer than is necessary to effectuate the purpose of the stop
- Investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.
 - *Davis v. State*, 947 S.W.2d 240 (Tex.Cr.App 1997)

No Stalling

- The officer must diligently pursue a means of investigation that is likely to confirm or dispel the officer's suspicions quickly.
 - *U.S. v. Sharpe*, 470 U.S. 675 (1985)
 - *U.S. v. Brighton*, 382 F.3d 500 (5th Cir. 2004)
- *Sharpe*: 20-minute detention of vehicle acceptable, since agents acted diligently

Traffic Stop

A detention based on reasonable suspicion of a traffic offense

Best Viewed as a Temporary Detention, not an Arrest

“The usual traffic stop is more analogous to a [*Terry* stop] than to a formal arrest.”

–*Berkemer v. McCarty*, 468 U.S.
420 (1984)

Standard for Traffic Stop

Traffic stop is justified if the officer has reasonable suspicion or probable cause to believe the motorist has committed a traffic violation

–*Haas v. State*, 172 S.W.3d 42
(Tex.App. Waco 2005, pet. ref.)

Officer must observe a traffic offense

- Officer's honest but mistaken understanding of a traffic law does not provide reasonable suspicion to stop
 - *Fowler v. State*, 266 S.W.3d 498 (Tex.App. Fort Worth 2008, pet. ref.)
- Query: must officer observe all the elements of the traffic offense?

Signal required under TC 545.104 even in turn-only lane?

- No
 - *Trahan v. State*, 16 S.W.3d 146 (Tex.App. Beaumont 2000, no pet.)
- Yes
 - *Wehring v. State*, 276 S.W.3d 666 (Tex.App. Texarkana 2008, no pet.)
- Maybe
 - *State v. Dixon*, 206 S.W.3d 587 (Tex.Cr.App. 2006)

Front License Plate behind Windshield

Killeen officers stymied in their attempt to stop D for narcotics activity. TC 502.404 allows a front license plate to be displayed through the windshield.

- State v. Losoya, 128 S.W.3d 413 (Tex.App. Austin 2004, pet. ref.)

The Weaver

Grounds for DWI Stops

- Failure to Maintain Single Lane under TC 545.060
- Reasonable suspicion of DWI
- Community Caretaking

Failure to Maintain Single Lane under TC 545.060(a)

An operator on a roadway divided into two or more clearly marked lanes for traffic:

- shall drive as nearly as practical entirely within a single lane; and
- may not move from the lane unless that movement can be made safely

No Reasonable Suspicion

- *Fowler v. State*, 266 S.W.3d 498
(Tex.App. Fort Worth 2008, pet. ref.)
 - No reason to stop D who crosses lane divider by tire's width once and touches divider twice without causing a hazard
 - Cites many similar cases
- *State v. Huddleston*, 164 S.W.3d 711
(Tex.App. Austin 2005, no pet.)
 - No reason to stop D who crosses fog line five times in six miles without causing a hazard

Reasonable Suspicion Present

- *Martinez v. State*, 29 S.W.3d 609 (Tex.App. Houston [1st Dist.] 2000, pet. ref.)
 - single drift onto the shoulder of freeway during moderate to heavy traffic
- *Bellard v. State*, 101 S.W.3d 594 (Tex.App.-Waco, 2003, pet. ref.)
 - Crossing lane divider and causing another motorist to slow down or apply brakes

Stay on Right Side of Road – TC 545.051

Griffin v. State, 54 S.W.3d 820

(Tex.App. Texarkana 2001, pet. ref.)

- Crossing the yellow line is an offense separate from failure to maintain single lane, and does not require the showing of a traffic hazard

Reasonable Suspicion of DWI

- Requires driving characteristics erratic and unpredictable enough to indicate an intoxicated driver
- Officer's training and experience is considered
- Time of day (or night) is important

Reasonable suspicion of DWI is present

- *Curtis v. State*, 238 S.W.3d 376
(Tex.Cr.App. 2007)
 - Crossing inside fog line twice and lane divider once over quarter mile in early morning
- *Fox v. State*, 900 S.W.2d 345
(Tex.App. Fort Worth 2005, pet. dis.)
 - Weaving within lane and speed fluctuating 40-55 mph near midnight

Reasonable Suspicion, cont'd

- *Townsend v. State*, 813 S.W.2d 181
(Tex.App. Houston 14th Dist. 1991, pet. ref.)
 - Weaving back and forth across three lanes at 2:00 am
- *Taylor v. State*, 916 S.W.2d 680
(Tex.App. Waco 1996, pet. ref.)
 - Weaving, speeding, almost striking other vehicles

No Reasonable Suspicion of DWI

- *Hernandez v. State*, 983 S.W.2d 867
(Tex.App. Austin 1998, pet. ref.)
 - One swerve across lane divider at 1:30 am
- *State v. Tarvin*, 972 S.W.2d 910
(Tex.App. Waco 1998, pet. ref.)
 - D drifts across right fog line 2-3 times at 2:00 am

No Reasonable Suspicion, cont'd

State v. Arriaga, 5 S.W.3d 804

(Tex.App. San Antonio 1999, pet. ref.)

- D weaves 2-7 times within lane over 1 ½ miles at 1:50 am
- Weaving within lane can only justify a DWI stop “when that weaving is erratic, unsafe, or tends to indicate intoxication.”

No grounds to stop under community caretaking doctrine

- *Corbin v. State*, 85 S.W.3d 272 (Tex.Cr.App. 2002)
 - It is 1:00 am
 - D crosses fog line of isolated highway once
 - D is driving below speed limit
 - No further erratic driving
- *Ehrhart v. State*, 9 S.W.3d 929 (Tex.App. Beaumont 2000, no pet.)
 - Weaving is not enough

Bad Caretaking Stops, cont'd

- *Eichler v. State*, 117 S.W.3d 897
(Tex.App. Houston [14 Dist.] 2003, no pet.)
 - Single crossing of lane divider at 12:30 am, on freeway with light traffic
- *Salinas v. State*, 224 S.W.3d 752
(Tex.App. San Antonio 2007, pet. ref.)
 - D stops in well-lit intersection, turns right; officer cannot see if vehicle has passengers

Strategy for Weaving Stop

- Let officer pick the playing field
- Use classic cross-examination style
 - Lead the officer
 - Use closed-ended questions

On all Fields

- Minimize poor driving
 - Weaving was within lane or involved minimal touches or crosses
 - Short duration of weaving incidents
- Maximize normal driving
 - Driving not that erratic or unpredictable
 - List traffic offenses *not* committed
 - Exclude failure to maintain single lane, so officer won't get any ideas

TC 545.060 Field

- Establish that D caused no safety hazard
 - Light traffic
 - No evasive action taken by others
- Show that D weaved only within the lane - never crossed lane divider or fog line

Community Caretaking Field

- Doctrine not favored under the law
- Establish that officer's actions are inconsistent with an intent to aid or check welfare
- Utilize the four *Wright/Corbin* factors
 - Level of distress not high
 - Officer see passengers who could aid D?

DWI Field

- Toughest field to compete on
- Case law is least helpful here
- “As consistent with innocent activity as with criminal activity” construct no longer available to determine reasonable suspicion for DWI stops
 - *Curtis v. State*, 238 S.W.3d 376 (Tex.Cr.App. 2007)

Reasonable Suspicion
Based on Information
Learned from Private
Persons

Anonymous Tips

- An anonymous tip is insufficient to justify a temporary detention without sufficient “indicia of reliability”
 - *Florida v. J.L.*, 529 U.S. 266 (2000)
- An anonymous tip may suffice if the officer can corroborate details from the tip
 - *Alabama v. White*, 496 U.S. 325 (1990)

Anonymous Tip Insufficient

- *State v. Griffey*, 241 S.W.3d 700 (Tex.App. Austin 2007, pet. ref.)
 - Fast-food manager’s tip about D passed out behind the wheel; D is awake when officers arrive
- *Stewart v. State*, 22 S.W.3d 646 (Tex.App. Austin 2000, pet. ref.)
 - Telephone tip that D is intoxicated; officer observes only normal driving by D
 - Court notes that “caller’s identity remained unknown at the time of trial”

Anonymous Tip Sufficient

- *Mitchell v. State*, 187 S.W.3d 113 (Tex.App. Waco 2006, pet. ref.)
 - Tip describing vehicle and reckless driving is corroborated by officer's observations
- *Dowler v. State*, 44 S.W.3d 666 (Tex.App. Austin 2001, pet. ref.)
 - DWI tip is corroborated by officer's observations of D's weaving and slow driving

Tip by identified informer generally is sufficient

- *Turley v. State*, 242 S.W.3d 178 (Tex.App. Fort Worth 2007, no pet.)
 - Store clerk calls in DWI, gives detailed description of vehicle; stop valid despite officer's observation of normal driving
- *Pipkin v. State*, 114 S.W.3d 649, Tex.App. Fort Worth, 2003, no pet.)
 - Cell phone caller reports crack-smoking D with details about driving and vehicle; stop valid without observation of abnormal driving

Query regarding Identified Informer

- Does the informer's identity have to be established prior to the detention, or can it be established after the fact?
- I have seen Williamson County cases in which the cell phone caller is asked to go to the station and give a written statement; was not clear whether the officer had the caller's name before stopping D.

Scope of Temporary Detention

Permissible Levels of
Intrusion During a Traffic Stop

Officer may ask for D's license and proof of insurance, and inquire about vehicle ownership and registration.

- *Kothe v. State*, 152 S.W.3d 54 (Tex.Cr.App. 2004)
- *Mohmed v. State*, 977 S.W.2d 624 (Tex.App. Fort Worth 1998, pet. ref.) (rental car papers)

Officer may check for outstanding warrants

Kothe v. State, 152 S.W.3d 54
(Tex.Cr.App. 2004)

- It is only after “the officer knows that this driver has a currently valid license, no outstanding warrants, and the car is not stolen, that the traffic-stop investigation is fully resolved.”

Officer may check D's criminal history

- *U.S. v. Purcell*, 236 F.3d 1274 (11th Cir. 2001)
 - “The request for criminal histories as part of a routine computer check is justified for officer safety.”
- *Caraway v. State*, 255 S.W.3d 302 (Tex.App. Eastland 2008, no pet.)
 - Criminal history check is reasonable as part of a general computer check)
- May not unduly prolong the detention!

Officer may ask D to exit the vehicle.

Pennsylvania v. Mimms, 434 U.S. 106 (1977)

- “We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed.”
- “What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.”

Officer may frisk D if has reasonable belief based on articulable facts that D is armed and dangerous

- *Terry v. Ohio*, 392 U.S. 1 (1968)
- *Sikes v. State*, 981 S.W.2d 490 (Tex.App. Austin 1998, no pet.)
 - No grounds for frisk during mid-day stop with innocuous D; officer may not frisk as a matter of routine

Officer may “frisk” D’s vehicle if has an articulable and reasonable belief that D may be dangerous and have access to a weapon

- *Michigan v. Long*, 463 U.S. 1032 (1983)
- *Horton v. State*, 16 S.W.3d 848 Tex.App. Austin 2000, no pet.)
 - No grounds to frisk vehicle where officer responds to EMS call and finds D lawfully parked and asleep at the wheel

Officer briefly may handcuff D if safety demands it

- *State v. Sheppard*, 271 S.W.3d 281 (Tex.Cr.App. 2008)
 - Officer handcuffs D prior to performing protective sweep of D's home; D is not under arrest
- *Morris v. State*, 50 S.W.3d 89 (Tex.App. Fort Worth 2001, no pet.)
 - Officer investigating a complex drug deal handcuffs D, has her on ground for 5-10 minutes; D is not under arrest

Officer may question D about “travel plans”

- *McQuarters v. State*, 58 S.W.3d 250 (Tex.App. Fort Worth 2001, pet. ref.)
 - Officer may inquire into D’s destination, purpose of trip
- *U.S. v. Brigham*, 382 F.3d 500 (5th Cir. 2004)
 - 7-minute questioning of D and passengers regarding travel plans not unduly prolong traffic stop

Officer may question D without reading *Miranda* rights

- *Berkemer v. McCarty*, 468 U.S. 420 (1984)
 - “Non-coercive aspect of ordinary traffic stops” convinces Court that D is not “in custody” for *Miranda* purposes
 - Involves DWI questioning
- *McRae v. State*, 152 S.W.3d 739 (Tex.App. Houston [1 Dist.] 2004, pet. ref.)
 - Post-SFST statement by D about sharing a pitcher of beer with friends is admissible

Officer may inquire about the presence of drugs or contraband

- *Edmond v. State*, 116 S.W.3d 110
(Tex.App. Houston [14th Dist.]
2002, pet ref.)
- *Simpson v. State*, 29 S.W.3d 324
(Tex.App. Houston [14th Dist.]
2000, pet. ref.)

Consent to Search

“There’s a big problem with narcotics on Highway 75. You don’t mind if I take a look in your vehicle for drugs, do you?”

5th Circuit Analysis

Temporary Detention
Extends Beyond
Issuance of Warning or
Citation

Officer may request consent during the traffic stop

- An officer may request consent to search during the pendency of the traffic stop, provided the request does not extend the detention beyond the time necessary to accomplish the objective of the stop
 - *U.S. v. Jenson*, 462 F.3d 399 (5th Cir. 2006)

No Stalling!

- *U.S. v. Jones*, 234 F.3d 234 (5th Cir. 2000)
 - After computer check is completed and warning prepared, officer repeats questions and calls for canine unit; D's consent is the product of an unlawfully prolonged detention
- But see *U.S. v. Brigham*, 382 F.3d 500 (5th Cir. 2004)
 - Seven minutes of travel plan questioning does not unduly prolong stop

Consent given after the completion of the stop may be the product of an unlawful detention

Taint of unlawful detention is dissipated if

- Consent is voluntary, and
- Consent is an independent act of free will
 - Requires a break in the causal chain between the unlawful detention and the consent

U.S. v. Jenson, 462 F.3d 399 (5th Cir. 2006)

Voluntariness of Consent

- Determining factors:
 - Voluntariness of D's custodial status
 - Presence of coercive police procedures
 - Extent of D's cooperation with the officer
 - D's awareness of the right to refuse consent
 - D's education and intelligence
 - D's belief that no incriminating evidence will be found
- *U.S. v. Jenson*, 462 F.3d 399 (5th Cir. 2006)

Consent Involuntary

- *U.S. v. Cavitt*, 550 F.3d 430 (5th Cir. 2008)
 - D may not have felt free to leave
 - Officer not issue warning or return D's i/d before relocating D
 - Deception used to obtain D's consent
 - Officer tells D they need to go to another location to escape the weather, when he actually intends to search D's vehicle
 - D not made aware of right to refuse consent
 - No record on D's education or intelligence

Consent as an independent act of free will

Factors to be considered

- Temporal proximity of the illegal conduct and the consent
- Presence of intervening circumstances
- Purpose and flagrancy of the initial misconduct

U.S. v. Jenson, 462 F.3d 399 (5th Cir. 2006)

Consent not an Independent Act of Free Will

- *U.S. v. Jenson*, 462 F.3d 399 (5th Cir. 2006)
 - Consent is voluntary
 - Consent closely follows unlawful detention
 - D not told he is free to leave
 - D's license not returned to him
- *U.S. v. Santiago*, 310 F.3d 336 (5th Cir. 2002)
 - Consent “contemporaneous with constitutional violation”; no intervening circumstance

Consent given during unlawful detention ordinarily is tainted

Because we affirm the [lower court's] conclusion that Royer was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search

– *Florida v. Royer*, 460 U.S. 491 (1983)

Detention may be extended

“[I]f additional reasonable suspicion arises in the course of the stop and before the initial purpose of the stop has been fulfilled, then the detention may continue until the new reasonable suspicion has been dispelled or confirmed.”

– *U.S. v. Lopez-Moreno*, 420 F.3d 420 (5th Cir. 2005)

Detention Improperly Extended

- *U.S. v. Jones*, 234 F.3d 234 (5th Cir. 2000)
 - D gives contradictory answers to questions about his employment and admits to a previous arrest for possessing crack
- *U.S. v. Santiago*, 310 F.3d 336 (5th Cir. 2002)
 - D is nervous and makes conflicting statements about travel plans

Detention Properly Extended

- *U.S. v. Brigham*, 382 F.3d 500 (5th Cir. 2004)
 - Conflicting statements about travel plans, absence of authorized driver for rental car, presentation of fictitious i/d
- *U.S. v. Gonzalez*, 328 F.3d 755 (5th Cir. 2003)
 - D is nervous, hesitates in responding to travel plan questions, lies about i/d, is on a drug trafficking corridor, has prior arrests for drug offenses

Majority Analysis (Including Texas)

Temporary Detention
Halts with Issuance of
Warning or Citation

Officer may request consent during a traffic stop

Magana v. State, 177 S.W.3d 670
(Tex.App. Houston [1 Dist.] 2005, no
pet.)

- D consents to search during traffic stop; officer has D wait for a Spanish speaker to complete the consent form; detention not prolonged and consent is valid

No Stalling?

- *Lambeth v. State*, 221 S.W.3d 831 (Tex.App. Fort Worth 2007, pet. ref.)
 - Officer detains D for 25 minutes
 - Has D perform SFST's
 - Questions D about warrants, past record
 - Inquires into D's travel plans
 - Checks registration, ownership of car
 - Suddenly smells marijuana on D
- Court: detention not unduly prolonged

Detention may be extended

Powell v. State, 5 S.W.3d 369 (Tex.App. Texarkana 1999, pet. ref.)

- D is nervous during questioning
- Occupants give conflicting travel plans
- Passenger admits to a prior drug arrest
- D lies about not having any prior arrests
- Vehicle is not registered to D or passengers
- Officer knows from experience that the above factors are common to drug dealers

Consent given during unlawful detention ordinarily is tainted

- Factors include:
 - Proximity of the consent to the detention
 - Whether the detention is flagrant police misconduct
 - Whether D's consent is volunteered or requested by the officer
 - Whether D is informed that consent is not required
- *Herrera v. State*, 80 S.W.3d 283 (Tex.App. Texarkana 2002, pet. ref.)

Consent tainted by an improperly prolonged detention

Wolf v. State, 137 S.W.3d 797

(Tex.App. Waco 2004, no pet.)

- D is nervous and “overly cooperative”
- After completion of traffic stop, officer holds D for a dog sniff
- No reasonable suspicion to prolong traffic stop
- Consent is tainted because it is not an independent act of free will

“Conversion to Consensual Encounter” Theory

Once the officer issues the citation and returns D’s driver’s license, the traffic detention ends. From this point forward the encounter is consensual unless the D does not feel free to decline the officer’s requests or otherwise terminate the encounter.

– *United States v. Lattimore*, 87 F.3d 647 (4th Cir.1996)

Don't try this on the road

“A reasonable person would not have believed that [s/he] was being detained following the conclusion of the traffic stop. A reasonable person would have felt free to decline to answer the [officer's] questions, decline the request for a search, or terminate the brief encounter and drive away.”

– *U.S. v. Chan*, 136 F.3d 1158 (7th Cir. 1998)

“Conversion to Consensual Encounter” theory is adopted in Texas

Vargas v. State, 18 S.W.3d 247 (Tex.App. Waco 2000, pet. ref.)

- Officer may ask additional questions and request consent without necessarily detaining D
- Officer may not convey a message to D that compliance with the request to search is required
- If compliance with the request is required, D will not feel free to leave and is detained

Alternate Rendition

- “[P]olice officers may request consent to search an automobile after the purpose of the traffic stop has been accomplished so long as it is reasonable under the circumstances and the police officers have not conveyed ‘a message that compliance with their requests is required.’”
 - *Leach v. State*, 35 S.W.3d 232 (Tex.App. Austin 2000, no pet.)

“*Simpson*” Rule

- An officer may request consent to search a vehicle after a traffic stop but may not detain the occupants or vehicle further if the consent is refused unless reasonable suspicion of criminal activity exists.
 - *Simpson v. State*, 29 S.W.3d 324 (Tex.App. Houston [14th Dist.] 2000, pet. ref.)
- See *Spight v. State*, 76 S.W.3d 761 (Tex. App. Houston [1st Dist.] 2002, no pet.)

Seizure of Person

v.

Voluntariness of Consent

- Two-part analysis
 - Is D seized? If so, determine whether D's consent was tainted by the unlawful detention
 - Is the consent voluntary?
- Texas appellate courts have tended to commingle these separate concepts

Ohio v. Robinette, 519 U.S. 33 (1996)

- Ohio Supreme Court:
 - Before engaging D in a consensual interrogation after a traffic stop, officer must inform D that s/he is free to leave
- United States Supreme Court:
 - The test for a valid consent to search is voluntariness, to be determined from all the circumstances. There is no *per se* rule. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Post-stop consent is invalid

- *State v. Daly*, 35 S.W.3d 237 (Tex.App. Austin 2000, no pet.)
 - D and family go to Hill Country to look at wildflowers
 - Officer issues warning, questions and frisks D, obtains consent to search
- Court: D did not voluntarily remain at the scene to answer questions, and his consent is the product of the unlawful detention

Post-Stop Consent is Valid

- *Leach v. State*, 35 S.W.3d 232 (Tex.App. Austin 2000, no pet.)
 - Daytime stop lasting less than six minutes; no evidence D feels compelled to stay and give consent. Court notes controversy surrounding the “voluntariness of consent” after a traffic stop
- *Levi v. State*, 147 S.W.3d 541 (Tex.App. Waco 2004, pet ref.)
 - D not nervous or intimidated; no weapons are brandished; officer tells D he is free to leave prior to requesting consent

Voluntariness of Consent

- An involuntary consent is the product of duress or coercion
- Voluntary nature of consent is always at issue, whether it is the product of a detention or a consensual encounter
- State must prove voluntariness by clear and convincing evidence
- *Caraway v. State*, 255 S.W.3d 302 (Tex.App. Eastland 2008, no pet.)
 - D consents to the search during the traffic stop, so the only question is whether the consent is voluntary

Pre-trial Strategy in Consent to Search Cases

Show that:

- Officer has continued to detain the D after issuing the warning
- The consent to search is a tainted product of the unlawful detention
- The consent to search is involuntary

A reasonable person would not feel free to leave

- Obtain a video and introduce it
- Put D on stand
 - Circumstances of the stop
 - Did not feel free to leave
- Cross-examine the officer
 - Exploitation of the scope of the *Terry* doctrine
 - Was D free to leave?
 - If yes, did officer inform D of that fact?

Consent is tainted

- Show that the consent is not an independent act of free will
 - Consent is contemporaneous with the detention
 - No intervening circumstances to attenuate taint
 - Officer's conduct is flagrant
 - Length of detention, possible stalling
 - Officer not tell D s/he is free to go

Consent is involuntary

- Difficult to refute voluntariness
- Proof factors are similar to those used in taint analysis
- Show that the officer:
 - Misled, tricked, or lied to D
 - Used intimidating or abusive tactics
 - Failed to give D the warning or citation
 - Failed to return D's license or proof of insurance

Video Presentation

Williamson County Traffic
Stop and D's Consent to
Search

Dog Sniffs

Officer may call for a dog sniff during a traffic stop

Illinois v. Caballes, 543 U.S. 405 (2005)

- An officer may bring in a dog to sniff D's vehicle without reasonable suspicion, so long as the traffic stop is not unduly prolonged
- There is no privacy interest in the possession of contraband

LaFave: Dog sniff is an unreasonable extension of the scope of a traffic stop

- Dogs often are large and intimidating
- Dog sniff is an unsupported accusatory act
- Sniff is an act of public humiliation
- Sniff may unreasonably delay D's journey
- Dog sniffs encourage "stalling" techniques
- False alert will ensnare an innocent D

Pre-*Caballes* authority that a dog sniff requires reasonable suspicion

Walter v. State, 997 S.W.2d 853 (Tex.App. Austin 1999), rev'd on other grounds 28 S.W.3d 538 (Tex.Cr.App. 2000)

- Dog arrives 10-15 minutes after officer's call, and before warrant check is complete
- Dog sniff is unlawful because it is not based on reasonable suspicion and is not reasonably related to the traffic stop

Walter overruled *sub silencio*

- Subsequent Texas cases have approved a dog sniff without reasonable suspicion during a traffic stop
- *Hart v. State*, 235 S.W.3d 858 (Tex.App. Eastland 2007, pet. dis.)
 - Dog arrives while officer is still conducting traffic stop; sniff does not unduly prolong stop and is not unlawful

With reasonable suspicion, the traffic stop may be extended for a dog sniff

Hill v. State, 135 S.W.3d 267 (Tex.App. [14th Dist.] 2005, pet. ref.)

- D does not know name of vehicle's owner
- Inconsistent travel plans by D and passenger
- Travel plans seem implausible
- D is extremely nervous
- Passenger makes no eye contact with officer

Detention Improperly Prolonged

- *Davis v. State*, 947 S.W.2d 240
(Tex.Cr.App.1997)
 - D and his vehicle subjected to an unduly prolonged detention after SFST's clear D of DWI; dog sniff is unlawful
- *McQuarters v. State*, 58 S.W.3d 250
(Tex.App. Fort Worth 2001, pet. ref.)
 - Nervousness, conflicting travel plans, rental car registered to a non-occupant not justify prolonged detention for a dog sniff

Strategy for Dog Sniffs

- Show that call for dog prolongs detention beyond the time necessary to effectuate traffic stop
- Expose officer's stalling techniques
- If officer calls for dog after stop is completed, point out that encounter is no longer consensual and D is detained
- If D consents to dog sniff after the stop, show that D's consent is involuntary or the product of an unlawful detention

The Passenger

A Detention without
Reasonable Suspicion

Passenger is Seized in a Traffic Stop

- *Brendlin v. California*, 551 U.S. 249 (2007)
 - Officer unlawfully stops vehicle in which D is a passenger; D has parole warrant
 - California: D is not seized until warrant is revealed; he cannot challenge stop
 - U.S.S.Ct: D is seized from the outset; he can challenge the traffic stop and the drugs found in the vehicle

Passenger may be frisked if officer has fear for safety

- *Arizona v. Johnson*, 555 U.S. ___, 129 S.Ct. 781 (2009)
 - D is removed from vehicle and frisked prior to being questioned; gun is found
 - Arizona: Detention has converted to consensual encounter; frisk is unlawful
 - U.S.S.Ct: D passenger is just as lawfully detained as driver during traffic stop, and is subject to *Terry* frisk

Driver's Detention is Passenger's Detention

- *Brendlin*: Passenger can challenge the validity of the stop
- *Johnson*: Passenger may be subject to the full scope of traffic stop intrusions
 - Frisk
 - Request for identification
 - False i/d's are criminalized
 - Questioning unrelated to the stop
 - Request for consent to search

Passenger's Detention Unduly Prolonged

- *St. George v. State*, 237 S.W.3d 720 (Tex.Cr.App. 2007)
 - During traffic stop, officer and D passenger are in consensual encounter
 - D is detained for questioning after traffic stop is completed; D not free to leave
 - No reasonable suspicion to detain D based on D's nervousness and providing name that does not check out

Strategy for Passenger D

- When driver's law helps you, use it – driver's detention is passenger's detention
- When driver's law hurts you, argue that passenger's detention lacks reasonable suspicion and officer's intrusion should be more limited than with driver
- Use same techniques as in driver's case:
 - Introduce video
 - Put D on the stand
- Argue Texas Constitution Art. I Sec. 9

Passenger Video

With friends like these,
who needs enemies?

<http://www.youtube.com/watch?v=uj0mtxXEGE8>