DPS Legal Review

July 2022|Volume 21 No. 7

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

11th Circuit Court of Appeals

FOURTH AMENDMENT NOT IMPLICATED IN CONSENSUAL ENCOUNTER

Detective Carswell with the City of Opelika (Alabama) Police Department was patrolling in an unmarked police car when another officer radioed over the main police channel regarding a burglary suspect fleeing on foot. The suspect was described as "a black male wearing a black hat, black shirt, and gray pants" who was "run[ning] across I-85 on foot toward the housing authority area." Moments later, another officer broadcasted that "a black male driving a silver car with a Georgia license plate [was] heading from a dead-end street toward W.E. Morton Avenue." Detective Carswell spotted a vehicle that fit the description, got behind it, and noticed that the car had a Georgia tag.

Among the factors that led Carswell to suspect that the silver car may have been tied to the burglary were: (1) the Georgia tag; (2) the lack of a close-by interstate exit; (3) the car was traveling from the general vicinity in which the fleeing burglary suspect was last observed; and (4) the car "made several turns in dead-end streets, and he suspected that the driver was possibly trying to avoid police."

Detective Carswell "pulled up at an angle less than four feet behind the silver car without blocking it in, activated his lights, and approached the car." Clark, the driver, stepped out of the silver car without being asked to do so, and Carswell "immediately smelled a strong odor of marijuana when Clark opened his car door." Clark was ordered to get back in his vehicle because Carswell was going to perform an investigation due to the odor of marijuana. Carswell asked Clark if he had any marijuana in the vehicle. Clark said that there was and passed the detective a small bag of marijuana. The strong marijuana smell emanating from Clark's vehicle was inconsistent with the small bag Clark had already produced. Therefore, Carswell asked Clark to give him a bookbag that Carswell could see in plain view in the vehicle's backseat, so that the detective could check it for "any weapons or contraband[.]"

Clark handed the bookbag to Carswell, who found two large bags of marijuana, one small bag of marijuana, methamphetamine, crack and powder cocaine, two digital scales and other drug paraphernalia in the bag. Carswell then handcuffed Clark and placed him under arrest.

Clark was indicted in federal court on one count of possession with intent to distribute 50 grams or more of methamphetamine. **Clark filed a motion to suppress, alleging that both his incriminating statements and the drugs seized by police were illegally obtained, in violation of his Fourth Amendment rights. Clark contended that:** (1) "Detective Carswell's interaction with him became a Fourth Amendment seizure the moment Detective Carswell parked his police car behind Clark's already-parked car and activated his emergency lights" and (2) "Detective Carswell did not have the requisite reasonable suspicion to warrant a *Terry v. Ohio*, 392 U.S. 1 (1968), stop because Detective Carswell did not smell marijuana until after the moment of the seizure."

After a hearing on the issues, a magistrate judge issued a report and recommendation ("R&R") that Clark's motion to suppress should be denied. The federal district court adopted the magistrate's R&R. Clark pled guilty to the drug charge, reserving "his right

to challenge the order denying his suppression motion." He was sentenced to 120 months in prison to run concurrent with sentences from other cases, followed by five years of supervised release. Clark appealed to the Eleventh Circuit Court of Appeals.

The Court of Appeals noted that there are three types of police-citizen encounters, "each with varying degrees of Fourth Amendment scrutiny: (1) consensual encounter; (2) brief investigatory stops; and (3) full-scale arrests." The Court only addressed a consensual encounter and brief investigatory stops as Clark claimed that he was seized at the beginning of the stop.

The Court reviewed 2006 precedent in *U.S. v. Perez*, which looked at factors a district court weighs to decide whether a police-citizen encounter is consensual:

> (1) whether the individual's path was blocked; (2) whether identification was retained; (3) the individual's age, education, and intelligence; (4) the length of the detention and questioning; (5) the number of police officers present; (6) whether weapons were displayed, (7) any physical touching of the suspect; and (8) the language and tone of the officers.

(Citation omitted.)

In its 2002 decision in *U.S v. Drayton*, the United States Supreme Court held:

> As long as officers do not coerce an individual to cooperate, officers may approach individuals in public places and pose questions, ask for identification, or request consent to search, even if there is no basis for suspecting that individual…If a reasonable *innocent* person would feel free to decline the officers' requests or terminate the encounter, then it is consensual.

(Citation omitted.)

The Court of Appeals then reviewed its Eleventh Circuit precedent to contrast a consensual encounter from a brief investigatory (*Terry*) stop, the latter of which is a Fourth Amendment seizure for which the police "must have legal grounds to initiate the stop. We determine whether an investigatory stop was legal under the Fourth Amendment by ascertaining (1) whether the stop was justified at its inception, and (2) whether the stop was reasonably related in scope to the circumstances that justified the stop." (Citation omitted.)

In United States v. Lindsey, a 2007 case, the 11th Circuit Court held: "An investigatory stop is justified at its inception if, based on the 'totality of the circumstances,' the officer conducting the stop had 'a reasonable, articulable suspicion based on the objective facts that the person has engaged in, or is about to engage in, criminal activity.'"

In its decision to affirm the district court's denial of Clark's motion to suppress, the Court wrote:

> The district court did not clearly err in its factual findings that Clark voluntarily stopped and parked his car, that Detective Carswell did not activate his police car's lights or sirens when approaching Clark's car, and that Detective Carswell did not block Clark's vehicle into the spot where it was parked, as these findings were supported by the officer's testimony and the dashboard camera video. Finally, we note that, during the encounter, Detective Carswell did not ask for identification from Clark, did not say Clark was not free to leave, did not brandish his weapon, did not touch Clark, and did not otherwise coerce his cooperation. These facts also support that the initial encounter was consensual, which, again, does not implicate the Fourth Amendment.

United States v. Clark, No. 21-12331, 2022 WL 2288684 (11th Cir. June 24, 2022).

DOES DRIVER OF RENTAL CAR HAVE STANDING TO CHALLENGE VEHICLE INVENTORY SEARCH?

On February 16, 2020, Tampa Police Department officers saw a car run a stop sign. Officers flagged down Cohen, the driver, who pulled into an apartment parking lot. Cohen got out of his vehicle, but was quickly ordered to get back in. Cohen "repeatedly refused" and was arrested. Officers then discovered that Cohen's license was suspended. The vehicle that Cohen was driving was a rental, registered to Enterprise Rent-A-Car. Cohen's girlfriend's mother, Sheila Brewer, had rented the car.

Despite the fact that the apartment complex that Cohen parked in did not enforce towing until 10:00 PM, officers planned to have the car towed to Enterprise. During an inventory search of the car prior to turning it over to the tow service, officers found a firearm in the glove compartment. Cohen conceded that he knew the firearm was in the car.

Cohen was initially charged by the state with resisting arrest and driving on a suspended license, but the U.S. Attorney's Office sought federal charges against him for being a felon in possession of a firearm. The state dismissed its charges against Cohen, who was indicted in federal court and charged with one count of possession of a firearm and ammunition.

Cohen filed "a motion to suppress evidence obtained from the inventory search." He maintained that "because the police returned the car to Enterprise, the vehicle was not in police custody and there was no legal justification to conduct an inventory search." He also pointed out that the police neither attempted to contact Ms. Brewer, who rented the car from Enterprise, nor his cousin, who lived in the apartments where Cohen parked the car.

The district court found that Cohen "did not have standing to challenge the search of the car because he was an unlicensed and unauthorized driver of the rental vehicle." The court also found that even if Cohen **did** have standing, "the inventory search was lawful and reasonable under the circumstances." According to the district court, the Tampa officers adhered to department policies "to prevent the car from becoming a nuisance, being stolen or damaged, or becoming illegally parked at the end of the day." Further, the district court cited a lack of any evidence to show "that the officers did not act in good faith or acted solely for the purpose of investigation by having the car towed to Enterprise." Therefore, the district court denied Cohen's motion to suppress.

During a bench trial in Cohen's case, the prosecution and the defense stipulated that the officers discovered a loaded pistol in the vehicle's glove compartment during an inventory search prior to the car being towed. Cohen was found guilty and sentenced to 60 months in prison followed by 3 years of supervised release. Cohen appealed.

The Eleventh Circuit Court of Appeals first addressed "whether the district court erred in finding that Cohen lacked Fourth Amendment standing to challenge the constitutionality of the vehicle search":

> To have Fourth Amendment standing to challenge a search, a person must have a reasonable expectation of privacy in the place searched. The Supreme Court has explained that '[o]ne of the main rights attaching to property is the right to exclude others,' and that, on the whole, 'one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.' However, even if an individual has a subjective expectation of privacy, his possession could be such that 'his expectation is not one that society is prepared to recognize as reasonable.' For example, '[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified

subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'

(Internal citations omitted).

The government argued that, based on the "*combination*" of Cohen driving on a suspended license and driving a vehicle not rented to him, he did not have a reasonable expectation of privacy in the rental car. The Eleventh Circuit Court disagreed: "[T]he fact that Cohen was not listed on the rental agreement does not defeat his reasonable expectation of privacy, so long as he was otherwise in lawful possession and control of the vehicle."

The Eleventh Circuit pointed to Ms. Brewer's testimony that she allowed Cohen to drive the vehicle but did not know his license was suspended. The Court found that Cohen "was in sole possession of the rental car and could have excluded third parties, such as carjackers." The Court additionally found that Cohen's suspended license alone did not deprive him of his right to privacy in the vehicle. Thus, the Court held that Cohen had a reasonable expectation of privacy under the Fourth Amendment and had standing to contest the search.

The Eleventh Circuit then turned its attention to Cohen's argument that the Tampa Police Department's search of his vehicle was invalid because they did not follow the department's impoundment procedures as outlined in its policy. The department's policy outlined two types of impoundments, "police impoundments" and "rotation impoundments." Cohen contended that the tow of the vehicle to Enterprise was not performed under either procedure.

The Court noted that Tampa Police Department's policy ***did not bar the officers from performing any other type of impound***. Rather, the policy stated that "[p]roper disposition [of the vehicle] depends on the nature of the law enforcement interest in the vehicle and the circumstances of each individual situation." Additionally, the policy required that officers "take reasonable precautions to protect vehicles and the contents thereof from damage or theft when the vehicle owner is unable to do so for any reason."

Since there was no indication that the Tampa officers did not follow the department's vehicle impoundment procedures, the Eleventh Circuit Court found "that the district court did not clearly err in its factual findings or in denying Cohen's motion to suppress." Therefore, the Court affirmed the district court's judgment. *United States v. Cohen*, No. 21-10741, 2022 WL 2444441 (11th Cir. July 6, 2022).

ALS REMINDER

1205 Form – Issue a 1205 Form to a DUI defendant in the following situations:

1. Defendant refuses to submit to the state administered chemical test **(blood, breath, or urine)**; or

2. Defendant submits to the state administered breath test and the breath test results meet the per se statutory requirements (0.08 grams or more if 21 years of age or over; 0.02 grams or more for a person under 21 years of age; 0.04 grams or more if operating a commercial motor vehicle). (See O.C.G.A. § 40-5-67.1).

Published with the approval of
Colonel Christopher C. Wright

Legal Services
Joan Crumpler, Director
Clare McGuire, Deputy Director
Dee Brophy, ALS Attorney
Nkenge Green, Open Records Attorney Manager
Jacob Taylor, Legal Services Officer

Send questions/comments to jtaylor@gsp.net