

Forcing Vehicles to Stop

Tim: Hi. I'm Tim Miller. I'm back with Officer Greg Coffel.

This is Part IV of our series on investigative traffic stops. In our last podcast, I played the role of a drug trafficker traveling down *make-believe* Highway 66. According to our story, Officer Coffel was told to be on the look-out for me. He followed me to the "Gas and Go" gas station. Greg did not have sufficient facts to seize me (at least not when I initially pulled into the gas station). He conducted what we call a voluntary contact. But during that voluntary contact he gathered facts rising to a reasonable suspicion that I was trafficking narcotics. With those facts, Officer Coffel seized me under the Fourth Amendment.

Greg, I bet you didn't do a lot of voluntary contacts while patrolling the roads and highways of Georgia.

Greg: That's right. It's hard to do a voluntary contact, when someone is speeding down the road at 60 or 70 miles per hour.

I have followed motorists. In a few cases, they voluntarily pulled-over and asked me why I was following them. In those cases I didn't activate my overhead lights or otherwise signal for them to stop. They chose to stop for their own reasons – maybe because they were curious, nervous, or felt guilty. These types of stops are still considered voluntary or consensual. Again, I didn't trigger the Fourth Amendment because a reasonable person in the driver's shoes would not feel seized.

Tim: A police officer that turns on his overhead blue lights signaling for the motorist in front of him to stop, seizes the driver and any passengers in the vehicle – assuming the driver stops. When an officer turns on his overhead blue lights signaling for someone to stop, a reasonable person would feel like "I've got to stop." And if the person actually stops, he's seized. The Fourth Amendment requires any seizure to be objectively reasonable. And facts make seizures reasonable.

Greg, when is it objectively reasonable to stop someone on the highway?

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Greg: A Terry Stop is one way. A patrolman on the highway has the same authority to conduct a Terry Stop (or investigative detention) as an officer on foot. The Fourth Amendment allows a police officer to conduct an investigative detention, when he has a reasonable suspicion to believe that criminal activity is afoot.

The officer does not have to know *with absolute certainty* that the person he's stopping is trafficking. Reasonable mistakes are ok.

Tim: The reasonable suspicion standard is less demanding than probable cause. Nevertheless, the Fourth Amendment DOES requires some minimal level of objective justification. The officer must be able to articulate something more than "This guy looks suspicious" or "This guy looks like a drug trafficker to me." The officer needs facts to turn mere suspicion, into reasonable suspicion.

A court will look at the totality of the facts and circumstances to determine whether someone is trafficking. Officers may draw on their own experience and specialized training and make deductions about the information available to them. The same facts may elude an untrained eye.

Greg: Reasonable suspicion can be based on innocent behavior, either in whole or in part. Notice that many of the facts I relied on were perfectly innocent:

- Traveling on Highway 66 - even if it is a major drug corridor;
- Driving a rental car;
- Air fresheners in the car;
- Nervousness upon the approach,... and questioning of a police officer;
- No luggage in the car;
- And, no definite plans or destination.

Tim: Good fact articulation goes hand-in-hand with good report writing. In interdiction cases, officers must be able to articulate and later write a report that clearly establishes a factual basis for their law enforcement actions.

Greg: Telling a young patrolman "reasonable suspicion is based on the totality of the facts and circumstances" does not provide a lot of guidance for report writing.

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A new officer may find it useful to keep a couple of things in mind, as he writes his report.

- First, consider the source of the information. Is the source of information reliable? If so, explain why. Maybe the source has provided reliable information in the past.
- Second, what's his basis of knowledge? In other words, what did he see? What did he hear? What did he smell, ---taste, ---or touch?

Tim: The facts may make a person reliable. For example, an officer may state in his report that a certain informant is reliable because the officer has known the informant for several months; that the informant has provided certain information to the officer about drug trafficking; and that the officer confirmed that information to be true.

Greg: Witnesses or victims who give their name and address to police officers are considered reliable, absent evidence to the contrary. But during the interview, keep the interviewing officer should keep this question in the back of his mind: "What's this guy's basis of knowledge? How does this witness know this information? Did he see it? Or did someone else tell him?"

Tim: Absent evidence to the contrary, witnesses and victims are credible sources of information because they identify themselves. By identifying herself, a witness can be held accountable if she lies.

Not so for anonymous sources of information. An anonymous tip, alone, is not sufficient to seize someone under the Fourth Amendment. Imagine an officer receiving an anonymous tip that "Tim Miller has narcotics in his car." A tipster who refuses to identify himself may simply be making the story up -- perhaps to harass me.

Greg: The officer, however, may be able to *corroborate* that tipster's information. The corroboration makes the tip reliable. With the anonymous tip and other corroborating facts, the officer may develop reasonable suspicion or even probable cause for an arrest.

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Tim: The officer must corroborate an anonymous tip's assertion of illegality. To illustrate, let's use our story. Let's go back to the Gas and Go and assume that an anonymous informant informed Greg's police department that "Tim Miller has controlled substances in his car; that he's driving a late model grey Chevrolet; and, that he is presently – right now - at the "Gas and Go." Greg, based on those facts alone, would you seize me?

Greg: No; I would not seize you under those facts.

Tim: Even if you see me in front of the Gas and Go, or corroborate that much of the anonymous tip?

Greg: No; I don't have enough to corroborate the tipster's *assertion of illegality*. In other words, I don't have any *corroborating facts* that you're trafficking dope.

Tim: What more would you need?

Greg: I may do a voluntary contact at the Gas and Go and find the same facts that I found before.

- First, that you were driving on Highway 66, known to be a major drug corridor;
- That you were driving a rental car with several air fresheners hanging from the rear-view mirror;
- That you were nervous;
- That you were evasive in answering questions;
- That you said you were on vacation, but did not have any luggage in the car;
- That you didn't have any definite plans or a destination;
- And that you had a prior arrest and conviction for possession of narcotics. I believe those addition facts sufficiently corroborate the anonymous tip's assertion of illegality.

Tim: Anonymous tips are certainly not worthless. But there are additional factors to consider.

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First, the devil is in the details. A tip may be sufficiently particularized and accurate to demonstrate that the anonymous informant has a special familiarity with the subject. Moreover, the informant may predict information that comes true.

Greg: The more *facts* the officer can corroborate --- and the more *predictive events* that the officer can verify as coming true --- the more likely he has a reasonable suspicion that criminal activity is afoot.

Tim: Greg, we've discussed voluntary contacts. Again, voluntary contacts do not trigger the Fourth Amendment because a reasonable person would not feel seized. We've discussed Terry Stops. A Terry Stop *is a* seizure, and the Fourth Amendment requires the officer to articulate facts rising to a reasonable suspicion that criminal activity is afoot. What's another legal basis for seizing someone?

Greg: The easiest way to stop a suspected drug trafficker is through a pre-textual traffic stop.

Tim: Explain that -- pre-textual traffic stop.

Greg: The officer has probable cause to believe that the driver committed a traffic offense,... and uses the motor vehicle violation as an excuse to stop the car. The officer's motive for stopping the car is really to investigate for drug trafficking, but he uses the traffic violation as a pre-text for the stop.

Tim: So give me an example.

Greg: Sure. Go back to our story. It began with me standing in the medium of the highway. I was looking for you, someone driving a late model grey Chevy Malibu. A car meeting that description drove by. According to our story, you were the driver of the Chevy and our eyes met as you sped by.

If I observed you committing a traffic violation, I could stop you. Many times, the driver in that situation will make an erratic lane change upon observing the officer. He may also be speeding.

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Tim: Pre-textual traffic stops do not violate the Fourth Amendment. The subjective beliefs of the officer (or his personal reasons for seizing someone) are not relevant in a Fourth Amendment analysis. The Fourth Amendment requires the seizure to be objectively reasonable. The courts examine the facts. The examination is made through the lens of a reasonable officer. And establishing probable cause, rising to a probable cause that a driver is committing a traffic violation, is an objectively reasonable basis for seizing someone. Again, the subjective beliefs of the officer – or the officer's intent for the stop – are not relevant under the Fourth Amendment.

This creates some confusion in class. Students may confuse pre-textual traffic stops with Equal Protection violations. Pre-textual traffic stops are ok, unless they are based solely on race or religion.

Greg: For example, stopping a vehicle for speeding is ok; and stopping the same speeding vehicle -- as a pre-text to investigate for drug trafficking is ok. But as Americans, we know that there is something fundamentally wrong with law enforcement actions that single people out based solely on some -- pre-determined notion -- that a person of one race is more likely to commit a crime than someone of another race.

Stopping a vehicle – even one that's speeding -- solely because it's being driven by a person of a particular race violates Equal Protection. The same holds true for a patrolman who stops all speeders, but only asks people of a certain race for consent to search.

Tim: If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, then a violation of the Equal Protection Clause has occurred.

The Federal Law Enforcement Training Center follows DOJ's policy entitled, "Guidance Regarding the Use of Race By Federal Law Enforcement Agencies." DOJ's policy places heightened requirements – above and beyond what the constitution requires – for domestic law enforcement actions. In making routine or spontaneous law enforcement decisions, such as traffic stops, Federal officers

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may not use race or ethnicity to any degree other than to identify someone reasonably believed to have committed a crime.

Greg: Tim, I did that all the time, after receiving a BOLO. Dispatch might tell me: “Be on the lookout for Tim Miller. He’s identified as a white male; age 54; 6’1; 185 pounds; and driving a silver pick-up truck.”

Tim: What about investigations? In conducting activities in connection with a specific investigation, federal officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time, which links person of a particular race or ethnicity to an identified criminal incident, scheme, or organization.

As an example for class, I use the 1964 murders of three civil rights workers, James Chaney, Michael Goodman, and Michael Schwerner. The FBI had trustworthy information that those three young men had been abducted in Neshoba County, Mississippi by the KKK. The FBI had reliable information, relevant to the locality or time, which linked Caucasian to an identified crime. Had DOJ’s policy been in effect in 1964, DOJ would have complied with it. The FBI focused their investigation on the race linked to the KKK.

For more information, you can find DOJ’s policy on race in our Student Handbook and Reference Book at our website: www.fletc.gov/legal.

Greg: Pre-textual traffic stops have other limitations. Like any seizure, they must be reasonable. Part of the reasonableness requirement is that they also be reasonable in *duration*.

Tim: Greg is right. Many times officers ask, “How long can I hold a suspect during a Terry Stop?” My answer is, “What’s your reasonable suspicion?” In other words, what do you reasonably suspect that person of doing? Your facts dictate how long you can hold the suspect.

During a pre-textual traffic stop, for example, the officer only has facts to believe that the person stopped committed a traffic offense. So Greg, how long can

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officer hold someone – assuming the officer only has facts that driver committed a traffic offense?

Greg: About 20-minutes. That's about how long it takes to issue a citation or warning and complete an NCIC.

Tim: What happens after 20-minutes?

Greg: Ordinarily, when a citation or warning has been issued --- and all record checks have been completed -- and come back clean --- the traffic stop is over. The officer should return the driver's license and other documents and let the person leave.

Tim: Why not just prolong the questioning?

Greg: Delaying a simple traffic stop beyond the time necessary to effectuate the legitimate or reasonable purpose of the stop will result in an unreasonable seizure.

Tim: And the evidence we seize during an unreasonable seizure is suppressible under the exclusionary rule.

How can a suspect be held longer,... *lawfully*?

Greg: A couple of ways. First, during that 20-minutes or so the officer may be able to establish reasonable suspicion that the suspect is trafficking. For example, the officer may stop the driver for a traffic offense and ask the same questions -- and get the same answers --- that I did in front of the Gas and Go.

Tim: In that situation, the factual basis for the stop would turn from a simple motor vehicle violation to something more serious – possession of narcotics.

Greg: That's right. In our case in front of the Gas and Go, I developed reasonable suspicion that you were trafficking narcotics.

But even with reasonable suspicion that you are trafficking, my detention must still be temporary. It may last no longer than necessary to effectuate the purpose of confirming or denying that suspicion.

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Tim: How long would you hold me at the Gas and Go?

Greg: No longer than necessary to confirm or deny my suspicion. That's probably going to no longer than necessary to get a drug dog to my location. I have to hustle, too. Back at the Gas and Go, I'm going to alert the other officers of my task force that I've detained you. Hopefully, they are going to hustle, too.

I'm going to keep notes on when I started this detention; when I alerted an officer with a drug dog; when the dog handler started to my position; and, how long it took the other officer to drive safely to my location. That may be 30 or 40 minutes.

Tim: You said that there might be another way to prolong this stop, lawfully?

Greg: Yes. Let's assume that I've not developed enough evidence during the 20-minute stop to seize the suspect for trafficking. I can ask the suspect to consent to additional questioning. If the suspect consents to additional questioning he's not seized under the Fourth Amendment. A reasonable person should feel free to leave.

Tim: Tell me how you might do that...ask for consent.

Greg: Sure. If we were back at the Gas and Go and I didn't have enough to hold you, I would first return your license and registration to you. After returning those documents I might say, "Mr. Miller - would you mind to answer some more of my questions?"

Tim: And if I didn't consent and you didn't have reasonable suspicion to hold me?

Greg: As a citizen of the United States you are afforded the protections of our constitution and you are free to go.

Tim: Thanks, Greg. When we come back we will talk more about consent and that it must be given voluntarily. Consent to search is also a way an officer can search a car. We will talk about the various search tools an officer has at his disposal to search a suspect and his property lawfully under the Constitution.