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Vehicle Stops - Is probable cause now required?

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ROLL CALL TRAINING

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As some of our long-time agencies may know, back in 2003 the firm produced two *Roll Calls* on the case of *State v. Wilson* and whether or not officers needed to articulate probable cause to stop a vehicle here in North Carolina.

While we flatly denied that *Wilson* said anything on those lines in 2003, we are sorry to report that due to a recent court case, things may have changed. The North Carolina Supreme Court has come out with a new case that may cause some headaches in court.

Here's what you need to know:

Case: *State v. Ivey,* August 18, 2006

This recent case by the North Carolina Supreme Court has presented a holding that could be problematic for officers if not analyzed carefully. As your attorneys, we strongly recommend that you read this memo carefully and share it with your prosecutors as we anticipate that this new case will become a quick headache in court.

Facts:

A North Carolina law enforcement officer was on patrol and saw the defendant driving a Chevy Tahoe with "tinted windows and expensive, fancy chrome wheels" on a city street. The officer saw the defendant come to a complete stop at a T-intersection and then make a right turn without signaling. There was no evidence presented that there was other vehicular or pedestrian traffic in the area. The officer's testimony indicated that he was "some distance" behind the defendant's vehicle. The officer also testified that due to a concrete median, the defendant could only turn right at the intersection.

The officer stopped the defendant for unsafe movement for failure to signal and cited him for the traffic offense. A consent search was conducted during which the officer found a firearm and charged the defendant with possession of a firearm by a convicted felon and carrying a concealed weapon. The trial court and the North Carolina Court of Appeals found that the stop of the car was based on probable cause.

The Problem:

The North Carolina Supreme Court appears to have placed a higher standard on traffic stops than is required by the United States Supreme Court (i.e., probable cause rather than mere reasonable suspicion).

The *Ivey* court says: "As a general rule, 'the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'" Citing *Whren v. United States* 517 U.S. 806, 810 (1996). The court continues and says that "the United States and North Carolina Constitutions require an officer who makes a seizure on the basis of a perceived traffic violation to have probable cause to believe the driver's actions violated a motor vehicle law." (Emphasis added by this author) The *Ivey* court relies on *Whren* (cited above) and *State v. McClendon* 350 N.C. 630 (1999).

It appears that our state Supreme Court has decreed that law enforcement officers now need to articulate probable cause for "perceived traffic violations."

Please be assured that your legal staff at SR&S strongly disagrees with this decision as it does not follow any of the United States Supreme Court tenets of Fourth Amendment search and seizure law (we also disagree with our court's citations to *Whren* and *McClendon* in support of this ruling). [NOTE: Professor Bob Farb states in his *Arrest, Search and Investigation 3rd Edition,* page 261, "It is extremely unlikely that the United States Supreme Court would rule that probable cause is required for a readily observed traffic violation. Reasonable suspicion is the standard under the Fourth Amendment for *any* investigative stop – probable cause is not required."]

However, we must play the hand that we are dealt. So, here is the most practical advice we can provide to our agencies to avoid *Ivey* problems in court:

• "PERCEIVED" TRAFFIC VIOLATION STOPS versus "INVESTIGATIVE" TRAFFIC VIOLATION STOPS

This is the key distinction. SR&S believes that an argument can be made in court that the Ivey case only applies (as the case states) to "perceived traffic violations." The common definition of "perceived" is to become aware through one's senses, especially sight. So, perceived traffic violations are ones officers readily observe with their eyes as having been actually committed (and with no further investigation necessary-only enforcement action remaining). It is only *that* category of stop for which officers must have probable cause to justify the stop. "Investigative" traffic stops will continue on the legal threshold of reasonable suspicion, as before.

This line of thinking is similar to a North Carolina Court of Appeals decision, *State v. Wilson,* 155 N.C. App. 89 (2002), in which the judge wrote: "While there are instances in which a traffic stop is also an investigatory stop, warranting the use of the lower standard of reasonable suspicion, the two are not always synonymous. A traffic stop made on the basis of a readily observed traffic violation such as speeding or running a red light is governed by probable cause ... On the other hand, a traffic stop based on an officer's [reasonable] suspicion that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop, also known as a *Terry* stop." [NOTE: This *Wilson* ruling was harshly criticized when decided, by both Bob Farb, and by SR&S. See, "Roll Call Training" Vol. II No. 8 (March 31, 2003) at www.policehelp.net.]

With the foregoing distinction in mind, The *Ivey* case does not seem so bad. Officers will have to articulate probable cause for readily observed ("confirmed on sight") traffic violations. And naturally, where an officer sees a "clear" traffic violation, he or she is already at the probable cause level anyway.

Under this argument, the *Ivey* case by no means eliminates reasonable suspicion stops altogether. This is because an investigative stop (*Terry* stop) will continue to be made for *suspected* violations, but will no longer be made for *perceived* violations for which our court will require probable cause.

To overcome defense arguments that are sure to be made with the *Ivey* case now "on the books," we believe the prosecutor will need to be prepared to effectively argue the "perceived/suspected" distinction in open court.

Two Final Points:

1. The officer lost this case because the court found that the officer did not have probable cause for the stop. The officer charged the defendant under N.C.G.S. § 20-20-154(a) (2005) which states:

   "The driver of any vehicle upon a highway or public vehicular area before starting, stopping, or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and *whenever the operation of any other vehicle may be affected by such movement,* shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic." (Emphasis added)

   The court found that no other vehicle was going to be affected by the defendant's right hand turn (including the approaching officer's vehicle), and therefore, the defendant was not required to give a signal.

   What this boils down to is that the officer was not able (to the court's satisfaction) to articulate probable cause for every element of the offense. **This case serves as an important reminder that probable cause does not exist until every element of the offense is met.**

2. There was discussion during oral arguments before the court that this may have been a case of "driving while black." This phrase refers to a discriminatory practice of stopping vehicles. While the court did not find that the officer used this discriminatory practice, the court was clear that this type of practice would not be tolerated. Any law enforcement decision based on un-Constitutional factors, such as race, gender, ethnicity, etc. is a clear violation of the Fourteenth Amendment. Naturally we will all continue to counsel officers to not engage in such a practice.

Now, about those two *Roll Calls* from 2003 . . .

While we still feel that those memos are correct, we advise all of you to follow the legal analysis in this memo.

And remember,

"The law isn't justice. It's a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show up in the answer. A mechanism is all the law was ever intended to be." (Raymond Chandler, author of several crime stories and novels)

We either didn't push the right buttons, or we weren't very lucky. Keep your heads up and stay safe.

As always, we will keep you informed of any changes on this matter.

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