

THE RALPH PAGE

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“Everybody Counts or Nobody Counts.”

Of Counsel

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On Today’s Menu:

**Anonymous Tips with Sautéed Onions and Peppers
[No, Wait. Sirloin Tips Come with Sautéed Onions and
Peppers; Anonymous Tips Come with Numerous
Problems and a Small Beverage]**

**Every law enforcement officer has been confronted with a
dispatch to some crime incident or scene where all the
information available has come from a totally anonymous tip.**

**❖ Now, as President Richard Nixon infamously said, “Let me
make this perfectly clear” - very few anonymous tips supply
enough reliability for you to actually take law enforcement
action.**

**Certainly, as you readily see, anonymous tips lack any credibility
simply because we do not know the source of the information.
The call could be from a crank; a mental patient; an angry
neighbor willing to lie outright; a deranged and bearded legal
advisor; or even a “woman scorned,” equally willing to tell a
falsehood.**

**The quote, “woman scorned,” comes from a play called the “The Mourning
Bride” (1697) by William Congreve. The complete quote is**

**Heaven has no rage like love to hatred turned
Nor hell a fury like a woman scorned.”**

Now, you know ... the rest of the story. [And rest in peace, Paul Harvey.]

- ✓ **The Bearded Legal Advisor's Tip to All the Men Out There: Treat your lady as a lady and never raise your voice to her unless the house is on fire. Trust me on this, lads.**

Where were we? Well, I digress. OK. Almost all anonymous tips involve either a person in a vehicle or a person on the street committing some criminal act. [Most all the others involve "drug houses" and we can leave those to our well-trained narcotics agents.]

I am going to present to you two actual cases illustrating each type of call and instruct you on the ways to make an anonymous tip work for you. However, and quite painfully on your part I must happily admit, this will take some mental effort by you. You must read this bulletin/memo in its entirety (yes, all of it), think about it (ponder, deliberate and muse – or meditate, if you prefer), read it again, then remember it and put it into practice.

Attention! The facts of the first case are from one of the 2009 Legal Update Cases for Law Enforcement Officers in North Carolina. It was decided on January 8, 2008 by the Fourth Circuit Court of Appeals and is captioned *United States v. Reaves*.

Facts:

- 1. An anonymous female called a 911 operator.**
- 2. She stated that she saw someone traveling in a car with a gun.**
- 3. She described the driver as a black male and the car as a plum-colored S430 Mercedes with temporary tags. [Plum-colored Mercedes? Pimp? Lawyer? CPA?]**
- 4. She stated that she had been sitting in her car near a local bar and saw the driver of the Mercedes engage in a transaction involving "a bag of something . . . a big sandwich bag of stuff."**
- 5. She reported seeing a small gun with a black top as she witnessed the event.**
- 6. She did not know the driver of the Mercedes, and she twice emphasized that she "wanted to stay anonymous."**
- 7. She stated was following the Mercedes.**
- 8. A detective heard the dispatcher's message and took up the hunt for the Mercedes based on the female's description of the car's location.**

9. **Shortly thereafter, and approximately five minutes after the dispatcher's first message, the detective spotted the plum-colored Mercedes and followed it for a short distance before conducting a traffic stop.**
10. **The detective stopped the car solely on the basis of the dispatcher's message.**
11. **The stop did not occur in a high-crime area.**
12. **The detective walked up to the Mercedes and identified himself. The driver, Torico Reaves, asked why he had been stopped. The detective advised Reaves that the police department had received a complaint that he "possibly had a handgun."**
13. **Reaves immediately raised his hands in the air and said, "I have a gun, man. I have a gun right here in my pocket. Don't shoot me."**
14. **The detective ordered Reaves out of the vehicle, conducted a pat-down search, and placed him in handcuffs. During this process the detective noticed a black handgun on the driver's seat. It turned out to be a loaded Beretta. When the Mercedes was searched, \$2000 in currency was found in the back seat.**
15. **Reaves was, naturally, a convicted felon and was prosecuted federally for possession of a firearm by a felon [18 USC 922(g)] and convicted. He appealed. He won his appeal.**

As you know, the federal Fourth Circuit Court of Appeals (our appellate court for constitutional law) held that there was no credible information establishing a sufficient number of factors creating a reasonable suspicion that a crime had been committed. As they say, where I come from, "Dang." Actually, they don't say that at all where I come from.

Now, there are factors common to all law enforcement situations that enable us to establish reasonable suspicion for a car stop or the detention, for a short period of time, of a person. Let us look at them in light of the Reaves facts.

REASONABLE SUSPICION FACTORS

1. **A LEO's observation of conduct that, in light of his or her training and experience, appears to be criminal.** In our case, there is not one fact observable of any criminal conduct by the detective who stopped the car. Remember, he stopped the car solely on the dispatcher's message. He saw nothing himself about the operation of the vehicle that alone aroused his suspicion.

2. ***Information the officer receives from other officers, citizens and informants.*** When you receive information from another LEO you may always believe what was said even if it is transmitted to you directly or indirectly by voice, email or radio transmission so long as you or the dispatcher knows the reporting officer's name and agency. The same is true for citizens and known informants. Where the informant is confidential, as in most narcotic cases, if the narcotics agent tells you he believes the informant, you too may so believe. **THE PROBLEM COMES, AS HERE, WHEN NOBODY KNOWS THE ANONYMOUS TIPSTER, AND THERE IS NO WAY TO SHOW IF THAT PERSON IS RELIABLE OR CREDIBLE. SIMPLY ACTING ON THE WORD OF AN ANOYMOUS TIPSTER, NOTHING ELSE SHOWING, IS NEVER REASONABLE SUSPICION FOR ANY SEIZURE.**
3. ***The time of day or night.*** This stop occurred at 1030 hours on a December 7th morning. Nothing suspicious about that based on these facts.
4. ***The suspect's proximity to a location, car, home or building where a crime was recently committed or where criminal activity may be taking place.*** Here, there is NO CREDIBLE evidence that a crime had been or was being committed. All we have is a totally anonymous tip.
5. ***Whether the area is a high crime area.*** See Factoid #11 above: the court found that the stop was not in a high crime area. There is no evidence to say if he was in a high crime area when observed by our anonymous tipster.
6. ***The suspect's reaction to the LEO's presence, including flight upon seeing the LEO.*** Here, the suspect stopped his car upon blue lights and/or siren. He cooperated to the extent that he confessed there was a gun in the car and he made what I think is a fairly reasonable request not to be shot. I'd call that pretty much full cooperation.
7. ***The LEO's knowledge of the suspect's prior criminal record and activities if relevant to this stop.*** Here, the detective did not know the man.
8. ***The suspect's flight from the scene of the crime.*** Here, even assuming there was a credible scene of the crime, a "drug deal," the suspect drove away from it apparently obeying all the traffic laws.

Usually, as I have told you, and you have heard me say, it takes two or three of these factors to establish reasonable suspicion for a stop and temporary seizure (and three or four for probable cause to arrest and search).

Here, we have not one credible factor to even begin to establish our reasonable suspicion.

[Had you made this stop on these facts, and brought this case to me when I was an assistant district attorney, I would have broken it down just as I have done here, and probably, all other factors being equal - dismissed it. Sorry, but there you are.]

And if you wonder where I found the above list of factors you need only check page 26, right column about 1/3 of the way from the top, of Bob Farb's Arrest Search and Investigation in North Carolina, Third Edition, School of Government, The University of North Carolina, 2003.

Now, what can you do with an anonymous tip much like the one we have discussed? Well, don't ignore it. Blame nobody. Expect nothing. Do something!

- 1. Drive to the scene if the car is parked. If you see it, park your car some distance away and be patient. Time is on your side.***
- 2. If you have a belief that you just might develop reasonable suspicion for a stop, get a K9 team enroute to your location. Have the unit hold back a block or two.***
- 3. Watch for any activity that is suspicious in light of your training and experience. You have been trained and you know what a drug sale from a parked car looks like. If you see one, be patient – hope for a second sale. Prosecutors really appreciate multiple acts of suspicious behavior when they are arguing cases.***
- 4. Are you in a high crime area? Probably yes as not every street corner is a place where drug deals “go down.” If so, then that factor plus seeing a single drug sale from the car is enough to establish reasonable suspicion; pull your vehicle behind the stopped car and seize it with your blue lights.***
- 5. If the K9 team is close, call the team in to your location as backup.***
- 6. Pull behind an already stopped vehicle with your blue lights or stop a moving vehicle with blue lights – in either case, a seizure that must be based on reasonable***

suspicion. Carefully approach the vehicle on foot. You may order the driver (and/or passenger) out and frisk him and the passenger compartment under Terry & Long because your training and experience indicates that reasonable suspicion of a drug sale made from a car reasonably supposes firearm possession somewhere available to the driver.

- 7. You may ask for an operator's license but the driver is not mandated to supply it unless he was operating the vehicle. A vehicle is operated by a person in actual physical control of a vehicle (a) when the motor is on and it is moving, or (b) when the motor is on and the vehicle is parked, or (c) when the vehicle is moving and the motor is off. If the motor is off and the vehicle is not moving, the person behind the steering wheel is not an operator; he's just the person behind the wheel. [See NCGS 20-4.01(25).]**
- 8. If you recognize the person as one with an outstanding warrant, or discover such while running his name, etc. on your computer or by dispatch, arrest the person if the warrant shows on NCIC/DCI. You may search the person incident-to-arrest but not his vehicle passenger compartment [Arizona v. Gant] unless he is not secured after the arrest (and trust me, you will ALWAYS safely secure an arrestee ASAP, if for no other reason than to keep your Uncle Ralph from having to attend another law enforcement funeral) or you have "reason to believe" that evidence relevant to the crime of arrest might be found in the vehicle. No one really knows what "reason to believe" means yet - I'd say it means "probable cause." Trust me.**
- 9. Now, if you have no warrant to arrest the driver or passenger at least you are constitutionally and legally standing next to the seized vehicle. You may look into the passenger compartment; looking is not a search here. If you see illegal drugs/controlled substances you may arrest the "driver" based on the plain view doctrine ("I saw it!") and search the passenger compartment under the "plain view" exception to the Fourth Amendment's warrant requirement (a Carroll Doctrine search).**

- 10. If you smell the odor of marijuana emanating or wafting from the passenger compartment (“I smell it!”), but see none, you have probable cause under the “plain smell” doctrine and you may search that passenger compartment, again under the Carroll Doctrine (search the passenger compartment of that vehicle based on probable cause without a search warrant.)**
- 11. If you do not see or smell anything that establishes probable cause for an arrest, have the K9 team walk around the vehicle. A K9 sniff is not a search. If the K9 “hits” and alerts to controlled substances, search the vehicle under the Carroll Doctrine.**
- 12. If you do not see or smell anything that establishes probable cause for an arrest and you have no K9 team available, or the K9 does not “hit” on the car, ask for consent to search the vehicle. The consent may be asked while you hold the license and registration or after you hand them back and your seizure is over. However, a recent North Carolina case makes it clear that once you return the items to the person you must ask for consent immediately and not take some other law enforcement action. So, no lollygagging around after the end of the stop. Get with the program: hand back the license; ask for consent. Move it folks.**
- 13. If you receive consent, search. If you develop probable cause for an arrest, make an arrest.**
- 14. If consent is denied, end the stop.**
- 15. Remember: if all fails, and you cannot establish probable cause for an arrest or search, let the guy go. You may give a warning and tell him he is lucky this time, but continued criminal behavior on his part will lead to his arrest on our part (or words to that effect).**
- 16. You can’t catch all criminals; don’t even try. Establish good prosecutable cases and don’t worry about the ones where you lacked sufficient evidence to arrest even with your best investigative efforts. You win some; you lose**

11. J. L., who was at the time of the frisk "10 days shy of his 16th birthday and was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18.

Now, instead of reviewing the "Bob Farb" enumerated factors as we did in Reaves (you know them now or should), let's just see what "The DC Supremes" thought about this case. {Of course, the DC Supremes are that august and judicial body of nine justices of the US Supreme Court, and my paltry attempt at humor where they are concerned is not intended to cast aspersions their way, I don't think.}

- A. An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a law enforcement officer's stop and frisk of that person. And there you are.**
- B. An officer, for the protection of himself and others, may conduct a carefully limited search for weapons in the outer clothing of persons engaged in unusual conduct where, inter alia (Latin for – among other things), the officer reasonably concludes in light of his experience that criminal activity may be afoot and that the persons in question may be armed and presently dangerous. [Terry v. Ohio, 1968 – the famous Supreme Court "Terry reasonable suspicion "stop and frisk 'em if they reasonably appear dangerous" case.]**
- C. Here, the officers' suspicion that J. L. was carrying a weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller.**
- D. Therefore, the tip lacked sufficient indicia of reliability to provide reasonable suspicion to make a Terry stop: It provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. [The word "indicia" is the Latin plural of "indiciu" and means merely "distinctive indications." The sentence could have been written, "Therefore, the tip lacked sufficient distinctive indications of reliability to provide reasonable suspicion to make a Terry stop" – but it wasn't.]**
- E. The contentions of Attorney General of Florida and the Solicitor General of the United States to the effect that the tip was reliable because it accurately described J. L.'s visible attributes misapprehend the reliability needed for a tip to justify a Terry stop. The reasonable suspicion here at**

issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

- F. The Court also declined to adopt the argument that the standard Terry analysis should be modified to license a "firearm exception," under which a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. Therefore, nothing changes simply because the anonymous tip is about a firearm as opposed to a tip about "mere" drug offenses.**
- G. The facts of this case do not require the Court to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great-- e.g., a report of a person carrying a bomb--as to justify a search even without a showing of reliability. The Court leaves open whether it will allow more leeway in anonymous tip cases if the anonymous tip is about a bomb, grenade, hazardous material such as poison or the like. More from me on this point on page 12, at the end of this never ending bulletin.**

Now, once again, what can you do with an anonymous tip much like the one we have discussed? A tip where the person has a firearm or is selling drugs and no vehicle is involved. Well, don't ignore it, pal! Blame nobody. Expect nothing. Do something!

- 1. Drive to the scene where the person is standing around. If you see him, park your car some distance away and be patient. Time is on your side. (Heard all this before, have you?)**
- 2. If you have a belief, hunch or suspicion that you just might develop reasonable suspicion get backup enroute. Have them stay back a ways from your position.**
- 3. Watch for any activity that is suspicious in light of your training and experience. You have been trained and you know what a drug sale, hand-to-hand on a street corner looks like. If you see one, be patient – hope for a second sale. Prosecutors really appreciate multiple**

acts of suspicious behavior when they are arguing cases. If your call is "man with a gun," does he take it out and show it around?

- 4. If so, call in backup and drive to him. You have probable cause for a CCW charge, NCGS 14-269. If he runs, pursue him.**
- 5. If he does not flash the firearm around, do you see a non-anatomical bulge in his clothing? Well, that bulge and the anonymous tip are not enough to establish reasonable suspicion. Even if you add the fact that he is in a high crime area, where drugs are sold, you still do not have enough facts to establish reasonable suspicion for a stop. If you drive to him, and he runs, you may NOT chase him.**
- 6. Whether he has a bulge or not, if he is in a high crime area and you see him make a drug sale to a person in a car or on the street, you have your reasonable suspicion for a stop and a seizure.**
- 7. Approach him. If he runs, you may pursue him.**
- 8. When you catch him, restrain him, place him in cuffs and frisk for a weapon.**
- 9. If you find a weapon you may arrest him for CCW and search him fully incident-to-that-arrest.**
- 10. If you find no weapon during the frisk, but feel an item with the flat of your hand immediately apparent to you as a controlled substance (or a container for such) based on the size and shape of the object, you may seize it under the plain feel doctrine, arrest the suspect, and search him fully incident to your arrest.**
- 11. If you do not establish reasonable suspicion for a stop and seizure of the person, at least approach him. If he runs, let him go. If he stays, and you suspect he has a weapon, just look him in the eye and ask, "Where is your gun?" I promise you that if he has one he will reach to touch it or look where it is on his body. It is a natural reaction; how many times a day do you reach and touch your holstered handgun to ensure you still have it? Ladies and gentlemen of the jury, I rest my**

case. That is enough to seize him, frisk and take the firearm and arrest him for CCW.

12. If you ask the gun question and he does not flinch, ask for consent to frisk. If he gives it, frisk him. If not, you have run out your string; you are at the end of the line, partner.

13. Remember: if all fails, and you cannot establish probable cause for an arrest or search, let the guy go. You may give a warning and tell him he is lucky this time, but continued criminal behavior on his part will lead to his arrest on our part (or words to that effect).

14. You can't catch all criminals; don't even try. Establish good prosecutable cases and don't worry about the ones where you lacked sufficient evidence to arrest even with your best investigative efforts. You win some; you lose some; some get rained out. Do not take it personally.

Bombs and grenades and poison and terrorists and danger, Oh My! Now, *Florida v. J.L.* was decided a year before 9/11. The Supreme Court left open in *J.L.* the question about what you could do if the anonymous tip concerned a man with a bomb. In the age in which we now live, *an anonymous tip about a suspected terrorist act must be taken more seriously than, and I despise having to put it this way, a "mere" 'man with a gun' tip.* If the anonymous tip you get is about terrorist activity, and is supposed to occur shortly:

- 1. Answer the call.**
- 2. Get back-up.**
- 3. Talk to your supervisors by radio/cell phone. They will involve your Command Staff.**
- 4. Law enforcement must and shall be more aggressive than usual in investigating terrorist matters.**

It is one thing to have a weapon that can kill a handful of people and another thing altogether to possess a bomb or poison dispenser that can harm thousands.

Think about it and use the law and your common sense.



We must save our future and our hairy friends, too.

See the next page, please.

***BLAME
NOBODY.***

***EXPECT
NOTHING.***

***DO
SOMETHING.***

- Uncle Ralph