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TRAINING BULLETIN

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Prolonged Pretextual Traffic Stops are a Violation of the Fourth Amendment

CASE LAW

- Pretextual Traffic Stops
- Prolonged Detentions and Traffic Stops
- Use of Police Body Cameras

RULES

Using a minor traffic offense as a pretext for making a traffic stop so that a more serious criminal offense can be investigated is lawful. However, absent developing at least a reasonable suspicion to believe that a more serious offense is being committed, a traffic stop **cannot** be prolonged past the amount of time it would normally take to complete the mission of a simple traffic stop.

FACTS

Defendant Ernesto Ayon was the target of an investigation spearheaded by Officer Scott Williams of the San Jose Police Department's Metro Unit, which specializes in narcotics investigations. On June 19, 2018, at about 9:00 p.m., Officer Williams (in plain clothes) and other officers were following the defendant as he drove down West Taylor Street in San Jose. The officers were watching for a traffic violation that would justify a "pretextual traffic stop." It didn't take long. As defendant approached the intersection of North San Pedro Street and prepared to make a right turn, he drove into the right-hand-side bicycle lane too early, traveling in the bike lane for about 50 to 70 feet before the start of the broken painted lane line that marks the point where it is legal to move over the line and closer to the curb. He then failed to use his turn signal until actually reaching the corner. Both are violations of the Vehicle Code, albeit relatively minor ones.

As a result, a patrol unit effected a traffic stop within the next couple of blocks. Body cameras from several of the officers at the scene recorded the events that followed, marking the exact time of each step of the contact, and described in excruciating detail by the Appellate Court. But as is relevant to the issues here, it was noted that defendant's documentation (license and registration) were obtained by the first officer to contact him. As a warrant check was being run, defendant was approached by Officer Williams (who before contacting him had "donned a department-approved uniform") and another officer at about three and a half minutes into the contact. Defendant was asked by Officer Williams to step out of his car. As he did so, defendant appeared to be nervous. He was immediately patted down for weapons with negative results. Officer Williams then began talking with defendant, explaining to him why he'd been stopped, describing the traffic infractions.

Officer Williams later testified that defendant was sweating, even though it was not a "really hot night." The Court noted in a footnote (fn. 4), however, that the body camera failed to show any sweat on defendant. At the four minute and 20 second mark into the stop, Officer Williams asked defendant if they could "take a quick look" into his car. Defendant responded by questioning whether they had the authority to do so based upon no more than a traffic infraction. A short legal debate resulted between defendant and Officer Williams, during which defendant suggested that he just "get a ticket and get on my way." Officer Williams later testified that defendant was "getting very hostile" and "very confrontational." However, Officer Williams' body camera showed that "at no time during the stop did defendant act angrily, raise his voice, make any aggressive movement, or behave in any objectively hostile manner."

At the six-minute mark, Officer Williams asked again for consent to search defendant's car. Upon defendant declining once more, he was immediately handcuffed. Officer Williams told defendant that the handcuffing was "for my safety because of the way you're acting," and "because you're being very aggressive;" accusations not supported by any body camera evidence.

At about eight minutes into the traffic stop, Officer Williams asked over his radio for the assistance of a "narco dog." Officer Diep, the narcotics dog's handler, testified later that he had been informed in advance of defendant's detention that his presence would be required. As they waited for Officer Diep's arrival, Officer Williams began questioning defendant about whether he had been using drugs. Defendant denied any such drug use. Officer Williams conducted two quick tests, examining defendant's eyes with a flashlight and checking his pulse, completing both of them at the nine minute and 45 second mark. Officer Williams later testified that he was "concerned" because defendant kept opening his eyes despite being told to keep them closed for approximately 30

seconds. The Court noted in a footnote (fn. 6) that this did not occur; i.e., that defendant kept his eyes closed as instructed.

For the next three minutes, Officer Williams continued to talk with defendant, telling him that he (the officer) suspected he (defendant) was under the influence of drugs because he was “acting strange.” Officer Williams continued talking to defendant, explaining to him at length his reasons for the traffic stop and the procedures that police follow during a traffic stop. Officer Diep and his narcotics dog finally arrived at the scene some 12 minutes and 45 seconds into the stop. After briefing Officer Diep about the situation, Officer Williams asked him to “just run the dog by the car real quick.” It was now 13 minutes into the stop. At the 14-minute mark, Officer Williams made a request over the police radio to run defendant’s name “statewide for any convictions.” The dog sniff continued until about 18 minutes and 45 seconds into the stop, after which (at 19 minutes) Officer Diep told Officer Williams that the dog had alerted at the rear passenger area on the driver’s side. Officer Williams shut off his body cam at this point and began searching defendant’s car. As he did so, another officer at the scene—Officer Burnett—explained to defendant how pretext stops worked, telling him that as a member of the department’s Metro Unit: “I generally don’t make traffic stops to give tickets. I don’t. That’s not my intent. That’s not why I’m making the stop. My intent is to make traffic stops and then in turn prevent crime from happening. Which is, i.e., guns, gangs, narcotics. I mean, warrants, parolee, probation, making sure they’re doing all their things right.” (Why Officer Burnett felt it necessary to give defendant a free education on the theory of pretextual stops is unknown.)

The search of defendant’s car resulted in the discovery of \$6,200 hidden in a compartment under the driver’s side of the dashboard. A secret compartment under the back seat was also found, but couldn’t be opened. The car was impounded with the secret compartment later being forced open. Inside this compartment, officers discovered some 1,132 grams of cocaine, 73.5 grams of methamphetamine, and another \$10,000 in currency. No warrants were ever obtained. Once the search was initiated, Officer Williams never did anything further to investigate whether defendant was in fact under the influence of a controlled substance. No blood or urine test was ever conducted. Defendant was charged in state court with a pile of drug possession-related offenses. Prior to trial, his motion to suppress the evidence obtained from his car was denied. Defendant pled guilty to all charges and was sentenced to a year in county jail and five years of probation. Defendant appealed.

HELD

The Sixth District Court of Appeal reversed. The primary issue on appeal was whether defendant’s detention was unlawfully prolonged beyond the time it should have taken

the officers to complete the “mission” of a stop based upon an observed traffic violation. In this case, it is clear that the officers did not have the necessary reasonable suspicion to believe that defendant was engaging in a narcotics-related offense sufficient to justify a detention. They therefore instead chose to base a detention on an observed traffic violation. Such a detention is commonly referred to as a “*pretextual* (or ‘*pretext*’) stop,” and has been held by the U.S. Supreme Court to be lawful. (*Whren v. United States* (1996) 517 U.S. 806.) Pursuant to *Whren*, when conducting a pretext stop, an officer’s subjective intentions are irrelevant to the lawfulness of the detention. In other words, the fact that the officers stopped defendant in this case solely because they were interested in discovering evidence of some illegal drug activity is irrelevant so long as they had *some* legal cause justifying the detention. Defendant’s observed traffic offenses supplied the necessary legal basis for defendant’s detention in this case. However, absent developing at least a *reasonable suspicion* to believe that defendant was violating some other law (i.e., a drug offense in this case), the officers are limited to holding onto defendant only as long as it would normally take to complete the “*mission*” of a traffic stop. The law is well settled on this issue:

“Because the traffic violation is the purpose of the stop, the stop may “last no longer than is necessary to effectuate that purpose.” “The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s “mission”—to address the traffic violation that warranted the stop, . . . and attend to related safety concerns.” (*Rodriguez v. United States* (2015) 575 U.S. 348, 354.) “Beyond determining whether to issue a traffic ticket, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop.” Typically such inquiries involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. . . .”

Although there is no specific time limit for a traffic offense-based detention, other case law not cited in this decision has indicated that for the average traffic stop, about 10 minutes is sufficient (See *People v. Carter* (2005) 36 Cal.4th 1114, 1139-1142.) It is also a rule, however, that while acting within the allotted time necessary to conduct a traffic stop, should the officers develop a reasonable suspicion that the person stopped is engaging in some other criminal offense, the detention may be prolonged for a reasonable amount of time in order to investigate these newly developed suspicions. In this case, defendant was stopped for traffic violations only, although the officers were looking to develop enough evidence of a narcotics offense in order to justify holding onto him longer. The issue here is whether they held him too long before the necessary reasonable suspicion of a narcotics offense was developed. It wasn’t until the narcotics dog alerted on defendant’s vehicle that the officers had a reasonable suspicion (or, in actuality, full probable cause) to believe defendant was engaging in some other criminal offense. The time expended between the traffic stop and the dog alert, as determined

by the officers' body cams, was some 18 minutes and 45 seconds. This, the Court found, was excessive and a violation of the Fourth Amendment. Defendant should have been released at least 8 minutes earlier. The Court rejected the Attorney General's attempts on appeal to justify the excessive time between the initial traffic stop and the development of the necessary reasonable suspicion to believe defendant was committing a narcotics offense by defendant's alleged hostile attitude and lack of cooperation. This argument didn't fly because, despite Officer Williams' attempts to portray defendant as uncooperative and perhaps under the influence, the body camera footage did not support such a claim. Because the narcotics dog's alert on defendant's vehicle—providing the necessary evidence to support the lawful extension of the detention beyond the time it would have reasonably taken to complete the mission of the traffic stop—did not occur until after that point in time when defendant should have been released, the discovery of the evidence of an on-going drug offense should have been suppressed. The Court therefore reversed the trial court's judgment and remanded the case for the purpose of granting defendant's motion to suppress the resulting evidence.

AUTHOR NOTES

Despite the Court's concession that "pretextual traffic stops do not violate the Fourth Amendment" (citing *Whren*), it is apparent that this particular set of appellate court justices are not hot on this concept. The Court cites comments made by the officers (See Officer Burnett's comments to defendant Ernesto Ayon about never intending to write him a ticket, as related above), reflecting these justices' apparent opinion that pretext stops are something to be discouraged. The Court in fact specifically held that in this case; "The existence of a preexisting drug investigation is nonetheless relevant here." The apparent relevance relates to Officer Williams' credibility as it concerns his reasons for attempting to draw out the stop beyond the time it should have taken to complete the mission of a simple traffic stop. Specifically, the Court commented on Officer Williams' assertions concerning defendant's lack of cooperation and overt hostility, as well as his alleged (but never proven) drug influence, as excuses to prolong the detention and initiate a narcotics investigation. As noted by the Court, such assertions were not supported by what was depicted by the body camera footage that the defense attorney so appropriately got entered into evidence. Indeed, the whole idea of pretextual traffic stops appears to be under siege despite the Supreme Court's stamp of approval on the concept. For instance, it has been alleged by some agencies (the Los Angeles Police Commission, specifically) that pretextual traffic stops are being used as a vehicle to target racial minorities. As a result, the LAPD has developed a policy (effective March 1, 2022) whereby pretextual stops are allowed only if an officer has "articulable information . . . regarding a serious crime" *before* conducting a pretextual traffic stop. This policy does not explicitly define the type or amount of information an

officer must have to justify a stop, but does indicate that LAPD officers must be able to point to specific information related to a criminal offense of some type, known to exist before the stop is made. Mere speculation that the target of the stop looks like a crook (or, more importantly, is a member of some racial or ethnic minority) is not enough. But setting aside for the moment the issue of whether or not pretextual stops are used as a tool to racially discriminate, LAPD's policy on this issue is indicative of a mounting trend to sidestep the rule of *Whren v. United States* and someday, perhaps, make pretextual traffic stops illegal altogether.