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Roadside consent goes only so far thanks to 3rd District ruling

I want to start the New Year with a quick review of Fourth Amendment issues surrounding traffic stops.

A recent case from the 3rd District Appellate Court provides the perfect vehicle (pun intended) for discussing a variety of search and seizure issues on the highway. The case is *People v. Pulido*, 83 N.E.2d 1111 (2017).

The story begins on an evening in 2013. While patrolling Interstate 80, Illinois state trooper Josh Korando received information that a Dodge minivan with Washington plates was carrying illegal narcotics.

Korando subsequently spotted a vehicle matching that description. He then activated his LIDAR device to check its speed. When he determined that it was traveling 7 mph over the speed limit, he initiated a traffic stop.

Let's stop the story right here. There are several categories of traffic stops. First, it is possible that police could have probable cause for some reason to stop a car and arrest a driver. See, e.g., *U.S. v. Robinson*, 414 U.S. 218 (1973). Second, it is also proper for police to make a *Terry* stop of a car based merely on reasonable suspicion of a violation. *Prado Navarette v. California*, 134 S.Ct. 1683 (2014); *Terry v. Ohio*, 392 U.S. 1 (1968).

But the run-of-the-mill traffic stop is often a hybrid. Police can possess probable cause to make the stop, but plan only to give a ticket and then let the driver go. So despite the existence of probable cause, the lack of an arrest means the limited stop is governed by *Terry* principles.

Thus, similar to a *Terry* stop, police may only detain the driver for the reasonable amount of time necessary to process the ticket. This generally includes checking the driver's license, running a check for outstanding warrants and inspecting the vehicle's registration and proof of insurance.

Let's assume Korando merely used the speeding violation as a pretext for stopping Javier Pulido to check the driver and car for drugs. (The stop of an out-of-state car traveling a mere 7 mph over the limit might certainly suggest this.)

It is clear that Korando's subjective reasons for the stop are irrelevant under the Fourth Amendment. Since the speeding violation provided an objective reason for the stop, the stop was constitutional. *Whren v. U.S.*, 517 U.S. 806 (1996).

The problem here is that two minutes into the stop, another officer arrived with Rico the drug-sniffing dog. Rico went around the car and alerted on the driver's side door.

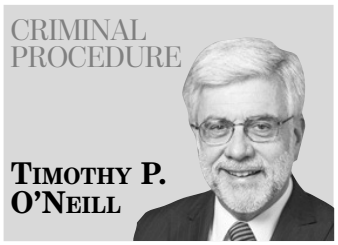
Can this action be justified?

First, the dog sniff outside the car does not constitute a "search" under the Fourth Amendment. The dog did not enter the car, so the sniff is a search only if it impinges on Pulido's reasonable expectation of privacy. *Katz v. U.S.*, 389 U.S. 347 (1967).

The dog sniff can only reveal one of two things: That there is evidence of contraband or no information whatsoever. Since no one can have a reasonable expectation of privacy about either alternative, the sniff is not a search. *Illinois v. Caballes*, 543 U.S. 405 (2005).

So the only issue is whether the dog sniff unreasonably prolonged the traffic stop to cause it to become an improper seizure under *Terry*. The 3rd District held that it was not, and that the sniff was proper.

At this point, the police proceeded to search the car for contraband drugs. The court held that the dog sniff alone provided probable cause to search the car for drugs because there was sufficient evidence that Rico was a properly trained drug-sniffer. *Florida v. Harris*, 568 U.S. 237 (2013). And the "automobile exception" justifies the search of a vehicle on the road without a warrant as long as there is probable cause. *U.S. v. Ross*, 456 U.S. 798 (1982).



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However, the 15-minute hand search of the vehicle by the police revealed no evidence of any drugs. At this point, the traffic stop had lasted 27 minutes and 17 seconds. The police then decided to transport Pulido and his car to the Channahon Police Department. Once there, Pulido agreed to sign a form consenting to a further search of the car. The resulting search recovered tubes of methamphetamines in the vehicle's air filter.

The state attempted to justify the police activity by showing that Pulido had first consented to the search on I-80 after Rico alerted on the vehicle. The court held that even if this were true, the issue is what the scope was of Pulido's consent to search. The scope of consent is what the reasonable person would have thought he was agreeing to. *Florida v. Jimeno*, 500 U.S. 248 (1991).

The court held that a reasonable person would have believed that he was only agreeing to a search of the car where it currently was located on I-80; no reasonable person would have believed that such consent also involved the police moving the car and continuing the search later.

Alternatively, the state contended that the probable cause they had through the dog sniff continued to operate at the second search at the police station. The court disagreed. Unlike diamonds, probable cause is not "forever." Once the police finished their 15-minute search of the car on I-80, the probable cause "dissipated." The probable cause established by the dog sniff was no longer operative later at the police station.

The state had one final argument. It relied on a separate consent to search allegedly given by Pulido at the police station. Generally, a voluntary consent to a search is the ultimate trump card used to justify a search. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

There is one exception, however.

If an otherwise voluntary consent is made during an illegal search or seizure, it is void. Since the police violated the Fourth Amendment by seizing the car and taking it to the police station after probable cause had dissipated, any consent by Pulido was "fruit of the poisonous tree." See *Florida v. Royer*, 460 U.S. 491 (1983).

Pulido breaks no new ground. But it does an excellent job of taking apart a complex traffic stop and correctly analyzing a half dozen search and seizure issues. It's definitely worth a look.