Fall/Winter 2002

Criminal Law Section Newsletter

Notes From The Editor

Congratulations to Mike Cranford of Macon on becoming Chairman of the Criminal Law Section. Please support him as he seeks to improve our section. Best wishes Mike on a successful year.

Brooke Stewart of the Gwinnett District Attorney's office has written an article on traffic stops. She gives a thorough analysis of the parameters of police action during traffic stops. Thanks Brooke for your contribution.

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As always, if you have any suggestions for articles, please call.

Tom Jones

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Section News

By Mike Cranford, Section Chair

I attended the State Bar's Annual Meeting at Amelia Island this past summer and having heard Michael Mears' presentation on finger-printing before, I dozed off during the last few minutes of it. When I woke up, I realized I had been elected Chairman of the Criminal Law Section. I can only presume it was because nobody else wanted the job. I will endeavor to stay awake for the next two years and try to do a good job for our section.

I attended a Section Chairmen's meeting on August 29 where we toured the new State Bar building and reviewed pertinent information concerning our association. What was glaringly apparent was all sections are and have been slowly losing members over the last two or three years. Our first rule of business is to try to reverse this trend and encourage everyone to continue to join the Criminal Law Section and participate in the seminars an social activities that we have to offer.

I am sure all of you are members of several various organizations, as I am, and one thing that I have noticed over the years is that organizations tend to get stale without new ideas. So what I would like to ask is that every member take a moment and think about what the Criminal Law Section means to you and either write or email me your ideas and suggestion on how we can improve our section to the benefit of all members.

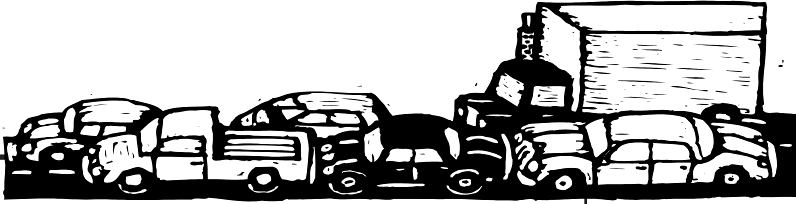
The Criminal Law Section has apparently always had one chairman and the first thing that we did when I was elected was to create the position of a vice chairman and Mr. Patrick McMahon has graciously accepted that position to help me come up with ideas for the next two years. Pat and I would appreciate your input, so please don't hesitate to contact either of us with suggestions.

Mike Cranford
Section Chairperson
Criminal Law Section

Calling All Members!

We need your email address. The Section has the ability to send you notices and advance copies of our newsletter via email. An easy way to check your address with the State Bar and list your email is to go to the State Bar's web site at **www.gabar.org** Proceed to Membership Address Form and make the change/addition there..... Or fax your information to Attn: Membership Department: 404/527-8717 or mail to State Bar of Georgia, Membership Dept., 104 Marietta Street, N.W., Atlanta, GA 30303.

Traffic Stops What Can The Police Say?



When people hear the words "traffic stop," unpleasant thoughts come to their minds. Everyone with a driver's license dreads them, but recently it has been police officers who are having their day in court. A police officer conducting a traffic stop has the daunting task of making sure his decisions made on the side of a busy interstate comply with the most recent Court of Appeals or Supreme Court decisions. He must protect himself and the public, but he must not ask too many questions or detain a driver too long. But, what constitutes too many questions and just how long is too long? The case law in this area indicates that an officer may only ask questions that relate to the traffic stop itself, and without reasonable suspicion any other questions cause an improper delay.

Before determining which questions are permissible, it must be determined whether an officer's action in pulling over a driver is justified at its inception. A traffic stop is reasonable where an officer has probable cause to believe that a traffic violation has occurred[1] or reasonable suspicion that the car's occupants are involved in criminal activity.[2] From a constitutional standpoint, "when an officer sees a traffic offense occur, a resulting traffic stop does not violate the Fourth Amendment even if the officer has ulterior motives in initiating the stop, and even if a reasonable officer would not have made the stop under the same circumstances."[3] Further, it does not matter whether the driver is ultimately cited for the traffic offense.[4]

After initiating a reasonable traffic stop, there are several things that officers are permitted to do during the course of such traffic stop. An officer may order the driver out of the vehicle, order the passenger(s) out of the vehicle[5] , use a flashlight to look inside of the vehicle[6], use a flashlight to look inside of the vehicle[7] and ask questions related to the reason for the stop.

To justify additional questioning of a driver and the search of a vehicle following a routine traffic stop, "an officer must have reasonable suspicion of criminal conduct. In order to meet the reasonable suspicion standard, an officer's investigation during a traffic stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct."[8] Nervous actions alone do not provide a reasonable basis for further detention and questioning of motorists.[9] Likewise, conflicting answers about the nature of the relationship between passenger and driver or conflicting answers concerning itinerary does not produce reasonable suspicion.[10]

If during an investigatory or a probable cause stop the officer, without an articulable suspicion, proceeds to ask questions unrelated to the reason for the stop, the officer goes beyond the permissible scope, and the further detention of the car and the driver is excessive. A court will suppress evidence obtained from an excessive detention and investigation.[11] The Court's concern is that the stop in no way be delayed, extended, or prolonged by questions unrelated to the traffic stop. In fact, the Court of Appeals has stated that "it is not the nature of the questions which offends the Fourth Amendment; it is whether in asking the questions the officer impermissibly detains the individual beyond that necessary to investigate the traffic violation precipitating the stop."[12]

In *State v. Gibbons*,[13] an officer stopped the driver for a seat-belt violation and then immediately asked approximately 20 questions that were unrelated to the reason for the traffic stop. After asking these questions, the driver consented to a search of his vehicle. However, the Court held that the defendant was being impermissibly detained based on the duration and type of the questioning. Therefore, the subsequent drugs that were found were suppressed due to an illegal search.

In *Berry v. State*[14], the officer pulled the defendant over because there was a dealer's drive-out license tag on the car and then proceeded to ask him a series of questions about where he was going and where he had been. After asking for consent to search and being denied, the officer conducted a free air search with his K-9 leading to this discovery of marijuana in the vehicle. The court directed that this evidence be suppressed due to their opinion that the officer illegally detained Berry so that he could conduct a search with his dog. The Court held that the initial stop was impermissible, but even if the initial stop had been justified, that further detention of the defendant to conduct the dog search was not reasonable. The court reasoned that because the "dog search was in no way connected to any problem with the license tag, the officer must have had a reasonable suspicion that Berry was transporting drugs"[15] to justify the further detention.

However, there are certain types of questions that are allowed. In Berry, the court found that questions by the officer concerning the defendant's travel plans are "part and parcel of the questioning routinely done by officers in the course of these traffic stops."[16] The court went further to say that "[w]ithout such questioning, which is rarely if ever directed toward the reason for the initial stop, the officers would have no basis for later testifying about inconsistent or evasive responses, discrepancies in the travel plans, variations between the responses by the driver and passengers, or unwarranted nervousness."[17]

In *State V. Milsap*,[18] the court stated that once a vehicle is lawfully stopped, the officer is allowed to ask for the driver's consent to search the car. The court went even further to say that additional probable cause or articulable suspicion is not required to simply ask the question "as long as police do not convey a message that compliance is required."[19] However, it is important to note that in the instant case the officer had already issued the citation and had given the license back to the driver and the actual language quoted in the opinion was taken from a case in which the car was already stopped when the officer approached.

An officer who has completed a traffic stop may question the driver on another topic and request consent to search so long as the driver is not still being detained, making the encounter consensual. This seems to mean that the officer may ask such questions if he/she has written the citation and has given the driver his/her citation and license and insurance and a reasonable person in the driver's position would feel free to leave.

There is no bright line rule guiding the Court as to when a traffic stop has been completed. For instance, in *State v. Sims*[20], the defendant was pulled over for speeding and it was discovered that his driver's license was suspended and he had no insurance. Therefore, the officer kept the suspended license and the car had to be towed. After all citations had been written, the officer asked for and received consent to search. However, the evidence was suppressed because, according to the Court, the driver did not feel that he was free to leave and thus the detention was excessive.

In *Faulkner v. State*,[21] the Court found that the driver did not feel free to leave when the officer was holding onto the ticket while asking the driver if he could search his vehicle. The Court reasoned "a reasonable person would wait for the ticket which contains the details of the stop, the identity of the officer, and the date and time of the hearing on the matter."[22] Because the

stop was ongoing, the questions did not relate to the original stop, and there was no sufficient reasonable suspicion, the evidence found in the search was suppressed.

Informing drivers involved in a traffic stop that they are free to leave "cannot be a tactical ploy designed to increase the probability that an officer's request for consent to search a vehicle will be granted." [23] In *State v. Hanson*, after the officer told the defendant that he and the vehicle were free to leave, he ordered the defendant to stop when he placed his hand on the door of the vehicle. The Court found this to be a subsequent compelled encounter not supported by probable cause and the evidence that was seized was suppressed.

When there are two officers involved in the stop, the outcome has been different. In *Henderson v. State*[24], two officers pulled over a driver for a seat belt violation. While one officer was actively writing the citation, the other officer asked Henderson if he had any weapons or drugs in the car and then asked for and received consent to search the vehicle. On appeal, the defendant argued that the second officer impermissibly expanded the scope of the traffic stop by asking questions about weapons and drugs and asking for consent to search. The Court disagreed. Here, the Court focused on the fact that when consent to search was given the first officer was still writing out the citation. Therefore, even though the search continued for a few minutes after the citation was handed to Henderson, consent was given before the processing of the traffic violation was complete. The court held that the search "was proper, and the lack of probable cause or reasonable suspicion of drug activity at the time this permission was granted did not invalidate the consent."[25] Thus, if there are two officers involved in the stop, one handling the citation and one asking the questions, there are seemingly no restrictions on the type of questions that the second officer asks.

The case law in this area is not completely clear. However, what is clear is that unless the encounter is consensual, an officer acting alone in a traffic stop needs reasonable suspicion to ask questions that are completely unrelated to the reason for the traffic stop. The current law states that even asking the question, "May I search your vehicle for illegal drugs or contraband," results in an excessive detention, unless there is reasonable suspicion of such activity. Before asking this question without reasonable suspicion, the traffic stop must be over and a reasonable driver must feel free to leave. If officers merely have a hunch, they should write the citation, give it to the driver, give the driver back his license and insurance, take their hands off of the driver's vehicle and then politely ask the question. After all, wouldn't we all agree that the two seconds that it takes an officer to ask the question before the officer does all of the above would result in an excessive delay?

Endnotes

1 Whren v. United States, 517 U.S. 806 (1996)
2 United States v. Hensley, 469 U.S. 221 (1985)
3 Brantley v. State, 226 Ga. App. 872 (1997); Accord Willis v. State, 234 Ga. App. 135 (1998). See also Whren v. Unitee States, 517 U.S. 806 (1996)
4 Hines v. States, 214 Ga. App. 476 (1994); Forsman State, 239 Ga. App. 612 (1999).
5 Pennsylvania v. Mimms, 434 U.S. 106 (1977); Pickens v. State, 225 Ga. App. 792, 793 (1997)
6 Maryland v. Wilson.
7 State v. Hodges, 184 Ga. App. 21, 25 (1987)
8 Gary v. State, 249 Ga. App. 879 (2001)
9 (Edwards v. State, 239 Ga. App. 44 (1999))
10 Migliore v. State, 240 Ga. App. 650, 652 (2000)
11 Almond v. State 242 Ga App 650, 652 (2000)
12 Henderson v. State, 250 Ga. App. 278 (2001)
13 248 Ga. App. 874 (2001)
15 Berry, supra
16 Id.
17 Id.
18 243 Ga. App. 519 (2000)
19 Id.

Endnotes continued on page 8

Recent Decisions Taken From West Georgia Cases

ARREST
II. On Criminal Charges
63.5(4). Reasonableness; reasonable or founded suspicion, etc.
Ga.App. 2002. Nervousness alone is not sufficient to establish reasonable suspicion to detain and investigate for illicit drug activity. U.S.C.A. Const.Amend. 4.–Gonzales v. State, 564 S.E. 2d 552. 255Ga.App. 149

(D) PROCEDURES FOR EXCLUDING EVIDENCE
698(1). In general.
Ga.App. 2002 Hearsay has no probative value, even if admitted without objection. - Poe v. State, 563 S.E.2d 904. 254Ga.App.767

641.4(2). Capacity and requisites in general.
Ga.App. 2002. Although an accused may waive the right to counsel in a prosecution that could result in imprisonment, the waiver is valid only if it is made with an understanding of: (I) the nature of the charges; (2) any statutory lesser included offenses; (3) the range of allowable punishments for the charges; (4) possible defenses to the charges; (5) circumstances in mitigation thereof; and (6) all other acts essential to a broad understanding of the matter. U.S.C.A. Const.Amend. 6.-Middleton v. State, 563 S.E. 2d 543. 254 Ga.App.648

641.3(4). Particular proceedings or occasions.
Ga.App. 2002. A person charged with a felony in a state court has an unconditional and absolute constitutional right to a lawyer which attaches at the pleading stage of the criminal process and may be waived only by voluntary and knowing action. U.S.C.A. Const.Amend. 6.–Ford v. State, 563 S.E.2d 170. 254Ga.App.413.

577.10(8). Delay caused by accused.
Ga. App. 2002. Any affirmative action by a defendant which results in a continuance of the case or a failure to try it within the time fixed by statute after the filing of a demand for speedy trial has the effect of tolling the time. O.C.G.A. § 17-7-170.–Linkous v. State, 561 S.E.2d 128. 254 Ga. App. 43

46(7). As to possession of stolen property.
Ga.App. 2002. In burglary trial, jury instruction on presumption arising from recent, unexplained possession of stolen property is to be used when recent, unexplained possession is the only evidence that defendant committed the burglary.–Martin v. State. 561 254Ga.App. 40

111.–Nature of substance; quantity.
Ga.App. 2002. Illegal drug itself need not be introduced into evidence in order to convict defendant of drug offense.–Garrett v. State 560 S.E.2d 338. 253 Ga.App. 779

460.–Value.
Ga.App. 2002. Value of damage to property of another may be established by the opinion of a lay witness as to the value of the property, provided the witness states the factual predicate upon which his opinion is based.–Harrell v . State, 560 S.E.2d.–Harrell v. State, 560 S.E.2d 295. 253 Ga.App. 691.

8(3). Weight and sufficiency in general
Ga.App. 2002. Mere proximity to stolen property does not establish possession or control, for purposes of offense of theft by receiving stolen property; thus, riding in stolen vehicle as a passenger does not support a conviction for theft by receiving unless defendant also, at some point, acquires possession of or controls vehicle. O.C.G.A.§ 16-8-7(a).–In re D.J., 558 S.E.2d 806. 253 Ga. App. 265

Ga.App. 2001. *Miranda* warnings are not required when an investigating officer conducts preliminary questioning or field sobriety tests; however, after DUI suspenct is arrest, *Miranda* warnings must precede further field sobriety tests in order for evidence of the results to be admissible.Harmon v. State, 558 S.E. 2d 733. 253 Ga. App. 140

339.6.–In general Factors to be considered in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime,, (2) the witnesses degree of attention, the accuracy of the witnesses prior description of the criminal, and (3) the level of certainty demonstrated by the wintess at the confrontation.–Greeson v. State, 558 S.E.2d 749. 253 Ga.App. 161

63.5(9). Duration of detention and extent or conduct of investigation or frisk.
Ga.App. 2002. Police officer's search inside of defendant's pocket resulting in seizure of pill bottles was not justified by reasonable suspicion under "plain feel" doctring, although officer testified that he felt tubular-type round objects in defendant's pocket while conducting pat-down incident to *Terry* stop, where officer did not recognize the objects as contraband, or testify that defendant was known to sell narcotics from prescription pill bottles U.S.C.A. Const.Amend. 4.–Howard v. State 558 S.E. 2d 745. 253 Ga. App. 158.

1379(2). Existence and eligibility of prior confictions.
Ga. App. 2001. No requirement exists which limits the State to a single means of proving prior convictions of a criminal defendant in order to have the recidisim statute applied to the sentencing of the defendant. O.C.G.A. §117-10-7.–State v. Cain, 558 S.E.2d 75. 253 Ga.App. 100.

(M) DECLARATIONS.
412(1). In general.
Ga.App. 2001. When an admission, conversation or declaration previously made by a party or a witness is pertinent, the side tendering evidence as to the same is at liberty to prove such portion only thereof as is deemed material, and the other side may then bring out the whole of the admission, conversation or declaration, so far as so doing may be essential in order to arrive at the true drift, intent and meaning of what was said on the previous occasion.–Evans v. State 558 253 Ga.App 71.

659(1). In general.
Ga. App. 2001. Because "lack of foundation" has no single defined meaning, an objection of "lack of foundation" generally is of little or no use to a trial judge. Worthy v. State, 557 252 Ga. App. 852.

II. DEFENSES IN GENERAL
43.5. Inconsistent defenses.
Ga.App. 2001. Generally, either accident or self-defense will be involved in case, but not both; this is because they are for most part mutually exclusive, in that self-defense involves intentional act and accident does not.–Kilpatrick v. State 557 S.E. 2d 460. 252 Ga. App. 900.

(D) PROCEDURES FOR EXCLUDING EVIDENCE.
698(1). In general.
Ga.App. 2001. Hearsay, even if not objected to, proves nothings.–Baker v. State, 556 252 Ga. App. 695.

419(I.5). Particular determinations hearsay inadmissible.
Ga. App. 2001. Field officer's testimony, that his supervisor called for roadblock on night in question and that purpose of roadblock was to check for drivers under the influence of alcohol, could be admitted as original evidence to explain the officer's conduct, but was inadmissible to evidence truth of thematter contained in hearsay statement. –Baker v. State, 556 252 Ga.App. 695

XV. PLEAS.

286. Special pleas in bar in general.

Ga.App. 2001. The filing of a speedy trial demand is not a prerequisite to a plea in bar for failure to have a speedy trial on constitutional grounds, U.S.C.A. Const.Amend. 6–State v. Allgood, 556 S.E.2d 857. 252 Ga.App. 638.

SEARCHES AND SEIZURES

I. IN GENERAL.

22.–Scent; use of dogs.

Ga.App. 2002. Having a trained dog sniff the exterior of a car is not a search within the meaning of the Fourth Amendment of the United States Constitution or the Georgia Constitution. U.S.C.A. Const. Amend. 4; Const. Art. I, I, Par. 13.–Cole v. State, 562 S.E. 2d 720. 254 Ga.App. 424.

Endnotes (contd.from page 5)

20 248 Ga. App. 277 (2001)
21 2002 Ga. App. Lexis 863
22 Id.
23 State v. Hanson, 243 Ga. App. 532
24 250 Ga. App. 278 (2001)
25 Id.

Andrew Thomas “Tom” Jones Honored

The Criminal Law Section met during the State Bar’s Midyear Meeting in Atlanta January 10, 2003,

Tom Jones was honored for his service to the Section as Editor . Tom has single-handed produced a quarterly newsletter for the Section since 1988 and the Section leaders felt it was high time to honor Tom!

Pictured l-r
Sherell Lewis, newly elected Section Secretary
Michael Cranford, Section Chair
Andrew Thomas Jones, Section Editor
Patrick McMahon, Section Vice Chair