

Thursday, August 16, 2007

**Stops premised on a mistake of law are generally held to be unconstitutional.**

Bill of Rights. (From the public domain.) To stop a suspect, a cop merely needs to wait for the suspect to drive a car. Just about every driver will violate one or more rules of the road, thus enabling a traffic stop that will hold up in court, whether it be speeding, not making a full stop at a stop sign, and the list goes on. A Montgomery County, Maryland cop told me he usually will follow a car for awhile to catch multiple moving violations, to minimize the risk of getting the stop suppressed. We have too much of a police state already, and such tailing actions add to such a police state. Of course, if a cop follows a driver for a long time (sometimes cops will get right on driver's tails), the driver can get nervous, whether the nervousness is well-founded or unfounded, is in anticipation of a speeding ticket, or is out of uncertainty whether a police stop will result in racist or dishonest actions by the police. If a cop follows a driver long enough, the driver ultimately will arrive at the driver's destination and get out of the car, or will run out of gas; both approaches are particularly cynical and suspect ways for a cop to try to speak with a driver, and hopefully judges will suppress the second type of stop, as well as the first type if the driver pulls to the side of the road out of the hope that the cop will pass by. I throw such police shenanigans back in their faces. If they get behind my car, I keep my speedometer at least one or two miles per hour below the speed limit. By my doing so, the cops cannot stop me for speeding nor for going too slow. I know a criminal defense lawyer who had (and perhaps still has) a bumper sticker saying "Refuse searches." Whenever cops stopped him for speeding, he would say: "You are mistaken. I do not speed, because I expect stops for my bumper sticker if I speed." Sadly, a cop once stopped me on I-95 in North Carolina to "see if you're tired" merely because I was going slower than the flow of traffic but still at or slightly below the speed limit. I told the cop it was ironic that he would stop me, seeing that my slower speed was in response to seeing his car far ahead of me, after having already received a speeding ticket thirty minutes earlier from another North Carolina cop; I said another stop would have just gotten in the way of my getting to my destination. The second North Carolina cop let me go when I challenged him about whether the stop really was his profiling a black car with D.C. tags driving away from D.C. He seemed like he may have been an otherwise nice person under pressure to make such disingenuous stops. He looked embarrassed that I would point out the stop of a black car with D.C. tags. Because I stay at or under the speed limit when cops are behind me, if cops are not following me, their trip will be slower if we are on a one-lane road, unless the cop wishes to risk passing me over a solid yellow road divider. If the officer stops me, I am ready to be peaceful like Gandhi, calmly aggressive and in control like Cheng Man Ch'ing, and sharp as a whistle like Steve Rench. It also helps to soak up the lessons of the Busted video and, for me, to look at the bigger picture of being able to shine the light of day on any wrongful or abusive police stop of me on this Underdog blog. Many cops seem to love pulling alongside drivers at red lights and stop signs, and talking to them through their open windows. I roll up my window in advance and crank on the air conditioning or heating. If I do not notice the cop until s/he already is speaking to me, I will be happy to roll up the window in the cop's mid-sentence. Cops love to try to divide and conquer their suspects. It is easier to stand firm to a cop when one is alone, or when one is fortunate enough to be with a bird of a feather. However, if a driver or other suspect is trying to impress a date, or just does not want to make waves with scared, conformist or police-loving passengers, the driver may be less willing to drive a mile below the speed limit when in front of a police car, to close the window on a talking officer when the cop has not signaled the car to stop, or to refuse to talk to a cop. For courage and reinforcement, watch the Busted video. Today's blogpost was prompted by a recent, sad federal court decision upholding a stop of a suspect where neither the car nor its suspect driver were in violation of any laws to have justified the stop. The case is *U.S. v. Frederick Booker*, \_\_\_ F.3d \_\_ (D.C. Cir. Aug. 10, 2007), which signals cops that professed ignorance of the law can become bliss. In *Booker*, cops mistakenly thought *Booker* was in violation of District of Columbia motor vehicle regulations when they saw a dealer's temporary tags in his front windshield rather than affixed to the front. In reality, as the court confirmed, Mr. *Booker* was in compliance with D.C. law by having an additional dealer tag properly affixed to the rear of the car; D.C. law does not require any dealer tag to be affixed to the front. Before the police could stop *Booker's* car, which initially was driving in the opposite direction from the cops, he got to his destination and got out of the car, which is when the cops told him and his passenger to stop, his passenger ran, and the cops handcuffed him, claiming it was a Terry stop resulting from suspicion of the flight of the passenger (which the passenger had the full right to do in the first place, not having been a proper suspect about potentially mis-affixed tags, and having already been outside the car when the cops approached). When *Booker* responded to the cops that he had no driver's license, they arrested him for violating the jailable law against driving without a license. The cops searched *Booker* and his car incident to arrest (a car is subject to a search incident to arrest, even when the suspect is arrested far from the car), and found marijuana and cash. *Booker* ultimately pled guilty to marijuana possession, leaving open -- as part of his plea agreement -- his right to appeal the search of him and his car. Sadly, the two-judge majority on *Booker's* three-judge appellate panel found that all was honky dory, finding not only that it was reasonable for the cops to have been ignorant of D.C. regulations on the placement of dealer tags, but also allowing that the cops were too distracted and far from the car to notice whether a dealer tag was in fact attached to the

back of the car, even though no such testimony was presented that the police did not see the rear tag (and the dissent countered that the record indicated sufficient opportunity to observe the rear, properly-placed dealer tag). As a result, the majority allowed the initial stop for the cops' incorrect belief that the dealer tag was incorrectly affixed, which thereby allowed the arrest for having no license, and the search that found the drugs and money. Damaged during all this was the Fourth Amendment. (Of course, in retrospect, Booker would have been wise not to have displayed any tags through a window.)

Praised be dissenting Judge Judith Rodgers for having none of the Booker majority's Fourth Amendment-violating charade. In firmly dissenting, Judge Rodgers relies on her following analysis of the relevant caselaw: "Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional." *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (citing *United States v. McDonald*, 453 F.3d 958, 961-62 (7th Cir. 2006); *United States v. Chanthasouvat*, 342 F.3d 1271, 1277-80 (11th Cir. 2003)); see *United States v. Cole*, 444 F.3d 688, 689 (5th Cir. 2006). But see *United States v. Bueno*, 443 F.3d 1017, 1024 (8th Cir. 2006). A stop is lawful despite a mistake of law, however, if an objectively reasonable valid basis for the stop nonetheless exists. See *United States v. Southerland*, 486 F.3d 1355, 1358-59 (D.C. Cir. 2007); see also *United States v. Delfin-Colina*, 464 F.3d 392, 399 (3d Cir. 2006); cf. *United States v. Bookhardt*, 277 F.3d 558, 56 (D.C. Cir. 2002). "Whether a stop is reasonable turns on whether the facts, "viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion" that a traffic violation has occurred." *Southerland*, 486 F.3d at 1359 (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)); see also *United States v. Hill*, 131 F.3d 1056, 1059 (D.C. Cir. 1997). "[S]tops premised on mistakes of fact . . . generally have been held constitutional so long as the mistake is objectively reasonable." *Coplin*, 463 F.3d at 101 (citing *United States v. Miguel*, 368 F.3d 1150, 1153 (9th Cir. 2004); *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000)).

Judge Rodgers concludes in her dissent: "As Booker argued to the district court, and that court ignored, and as he argues on appeal, 'there is no evidence in the record that supports the district court's speculation about the officers' actions,' as neither of the two officers who testified claimed that they or the third officer were "distracted" as they pulled up behind car.' Appellant's Br. at 20; see Tr. Nov. 18, 2003 at 64. 'Neither [did the officers] testify] that they were unable to determine that the rear tag was also a dealer's tag,' *id.*, much less that they were unable to see a rear tag at all. Because the evidence does not support the conclusion that a reasonable officer, particularly one trained to look for stolen cars and fraudulent tags, would not have glanced at the rear of Booker's car or not had an opportunity to do so at any point during the pursuit to determine whether there was a rear tag, the district court erred in denying Booker's motion to suppress the evidence found in the car. Accordingly, I respectfully dissent." It must be difficult at times for dissenting appellate judges to withhold using cutting words against colleagues whom they believe have rendered completely unjust opinions (and the cutting personal words still fly from time-to-time between disagreeing appellate judges). Hopefully Mr. Booker will obtain and win (including with Judge Rodgers' excellent analysis in her current dissent) an en banc review of this unjust Booker opinion. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:10