

"North Carolina Court of Appeals Addresses 'Appearing Nervous' as Constitutional Basis for Search and Seizure of a Vehicle"

On December 18, 2012, the North Carolina Court of Appeals issued its written opinion in the matter of State vs Nathaniel Canty. The North Carolina Court of Appeals reversed the lower court conviction against Canty for possession of a firearm by a convicted felon and unlawfully carrying a concealed handgun.

FACTS:

On April 15, 2011, Sampson County Sheriff's Office Corporals Bass and Pope were stationed along Interstate-40 in Sampson County, North Carolina. Bass testified that he saw a green minivan slow down from approximately 73 miles per hour to 65 miles per hour. Both Pope and Bass' official reports stated that the vehicle in question was going 65 miles per hour before it slowed down. The speed limit on that portion of Interstate 40 is 70 miles per hour. Corporal Pope testified that his attention was drawn to the vehicle because he noted that "it slowed down even though it was not exceeding the posted speed limit." Corporal Pope went on to describe this reduction in speed as "dramatic" since the front of the vehicle dipped from the reduction in speed. Both Bass and Pope went on to testify that the two occupants of the vehicle stared straight ahead and "appeared nervous." These observations apparently took place on the roadway. Corporal Bass then pulled the patrol car from its location and began to follow the minivan. Bass testified that they pulled alongside the minivan and that "the occupants would not make eye contact." At this point the minivan's speed is around 59 miles per hour. After following the vehicle some more Corporal Bass switched on the patrol car's lights after he observed the minivan "completely cross the fog line." Consequently, based on the reduction in speed and crossing of the fog line, Bass initiated a traffic stop for "unsafe movement" on the part of the minivan. The defendant Canty was a passenger. The driver was written a warning for "unsafe movement." While the driver was getting the warning ticket, Corporal Pope talked with the defendant Canty. Pope testified that he asked the defendant about his travel plans and his destination; and that Pope became suspicious based upon Canty's lack of eye contact, evasive answers and "nervous demeanor." Pope also testified that he could see a strong pulse in the defendant's stomach and neck. There was no odor of marijuana or alcohol in the vehicle or on the defendant. After writing the warning ticket, Corporal Bass told the driver to "have a nice day." Subsequently, Corporal Pope asked the driver for permission to search the vehicle. The driver consented to the search of the vehicle which revealed a revolver and a rifle in a suitcase. Upon finding the weapons, Corporal Bass handcuffed the driver and the defendant. After some questioning, Corporal Bass placed the defendant under arrest for carrying a concealed weapon unlawfully and possession of a firearm by a convicted felon.

CASE HISTORY:

The defendant was convicted in a jury trial of the two charges referenced above. The defendant argues that the trial court committed plain error in admitting evidence that resulted from the traffic stop. Additionally, the defendant alleged that his attorney made a mistake in not filing and arguing a "motion to suppress the evidence" that resulted from the unconstitutional traffic stop.

HOLDING:

The North Carolina Court of Appeals agreed with the defendant. In the case at bar, there was a very detailed transcript and a DVD recording of the traffic stop. The record in this case sufficiently establishes that the defendant's attorney failed to file a motion to suppress and that the search or stop that led to the discovery of the evidence was clearly unlawful. A "motion to suppress the evidence" would have been granted had it been filed and argued properly.

A passenger has standing under the 4th Amendment to challenge the constitutionality of a traffic stop. In the case at bar, the defendant Canty challenges the constitutionality of the stop that led to the search, not the search itself. In accordance with the United States Supreme Court, we hold today that a defendant has standing to contest the stop of the vehicle where he was a passenger.

In State vs Styles, the North Carolina Supreme Court held that reasonable suspicion is the standard for all traffic stops. A traffic stop is a seizure for the purposes of the 4th Amendment. "A traffic stop must be based on specific and articulable facts, as well as the rational inferences from those facts as viewed through the eyes of a reasonable and cautious officer being guided by his experience and training. And unparticularized suspicion or hunch" does not pass constitutional muster for the basis of a traffic stop.

"Nervousness, like all other factors, must be taken in light of the totality of the circumstances present. Nervousness can be an appropriate factor to consider when determining whether a basis for reasonable suspicion exists." Critically, nervousness has been considered a factor in prolonging the seizure *after* the traffic stop has been initiated, but nervousness has not been held to be a factor in *initiating* the traffic stop. "Ordinary nervousness" does not amount to reasonable suspicion.

Refusal to make eye contact has not been considered in the past in the context of initiating a traffic stop; again, only prolonging a lawful one.

Based on the totality of the circumstances present in the case at bar, these factors fall short of reasonable suspicion to justify the initial traffic stop. A motion to suppress this evidence in the case against *Canty* would have been granted by the Court.

Summarily, the record shows that there was no underlying traffic violation, the officer's beliefs amounted to nothing more than "unparticularized suspicion", nervousness, slowing down and not making eye contact is nothing unusual when passing a law enforcement vehicle stationed on the side of the highway. While a vehicle's slow speed can be a factor in initiating a traffic stop, the officer's reports in this case state that the vehicle was going 65 miles per hour and slowed to 59 miles per hour which is insignificant in comparison to cases justifying a traffic stop based on excessively slow speed. Accordingly, and based on the totality of the circumstances, these officers lacked reasonable suspicion to initiate the traffic stop that resulted in the search and seizure of the weapons in this case. The verdict of the lower court is reversed; and the matter remanded to the lower court with its specific instructions that any reference to the weapons be suppressed from any future proceedings.