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PO Box 4803
Greensboro, NC 27404-4803
Telephone (336) 691-7058
fax (336) 969-1879
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State v. Holley

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Resisting or Just Rude?

By Brian Beasley,
Legal Adviser, High Point PD

You might think me rude, but I think that it's a good day for a pop quiz![1] So get your #2 pencils sharpened and ready as you pay careful attention to the following factual scenario:

A police officer receives a call from an informant from whom he had previously received information two or three times. The informant reports that a drug deal has just happened at a particular corner store and the dealer and purchaser have left on foot walking down a particular street. The informant describes the men as "two black males" and states that one is wearing a black T-shirt and one has on a white shirt. The officer is familiar with the area described and knows that there have been "several arrests at that location for narcotics" and he himself has made three narcotics arrest in that area.

The officer sends out a radio transmission stating only that there is reported suspicious activity near the store but does not communicate the identity or reliability of the informant or the contents of what the informant reported. An officer in the area observes two black males, one wearing a white shirt and one wearing a black shirt, walking away from the store. This officer is also aware of previous issues at that store, having responded to complaints ranging from loitering and loud music to shots fired at a vehicle. The officer sees the men notice his arrival in his marked patrol car. He then observes white shirt guy walk to the driveway of a home and go "to the first door that was available." As white shirt guy touches the door handle of the home, the officer yells "Stop!" at which time, you guessed it, white shirt guy looks at the officer and takes off running.

As the officer gives chase, he sees the defendant (white shirt guy) throw something and then loses sight of him. Another officer soon comes across the defendant in the area and notices that he is "very sweaty" and has "a lot of grass on him from head to toe." He is finally able to persuade the defendant to stop and the initial officer confirms that it is the same person he had been chasing. The defendant is charged with Resist, Delay, and Obstruct an Officer. A K-9 is called in to do an article search along the "flight path" of the defendant and a black firearm is found "tucked up underneath a shed" with "foliage overtop of it." The defendant is then charged with Possession of a Firearm by a Felon.

THREE QUESTIONS:

1. Did the defendant commit the crime of Resist, Delay, and Obstruct by running or was he just being incredibly rude?[2]
2. At what point in this story was the defendant "seized" for purposes of the Fourth Amendment?

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[1] Now that I am a sophisticated world traveler, I thought I would share some of the things that Americans do that are considered rude in other countries. I won't deal with hand gestures here because I covered those in a previous update, but did you know that laughing with your mouth open is considered impolite in Japan? Now you do.

[2] It's considered rude in countries like France, Italy, Spain, and Japan to make adjustments to food ordered in restaurants (for instance, changing the side dishes or asking to add or leave off ingredients.) Some of you picky eaters would NOT do well with this one.

3. Is the firearm admissible as evidence?

Okay, pencils down. These facts are taken from the recent N.C. Court of Appeals case of State v. Holley,[3] with one significant exception that I will discuss later. The issue in the case is one that comes up fairly often, so it gives us a good chance to review some legal principles. Let's see how we did on the quiz.[4]

1. Did the defendant commit the crime of Resist, Delay, and Obstruct by running or was he just being incredibly rude?
   Answer: He was just being incredibly rude.[5]

The key question here is whether the officer had reasonable suspicion to justify a brief investigative stop at the time when the defendant took off running. If the officer did, the defendant has committed RDO. If the officer did not, the defendant has no legal obligation to stick around and talk to the officer and can leave as slowly or as quickly as he desires. In Holley, the court held that reasonable suspicion did not exist at that moment based on the facts known to the officer.

There were two technical problems with this case that probably made the difference on this question. First, there was little testimony about the reliability of the initial informant. If the officer was able to testify that the informant's information given in the past had proven to be reliable, this would have bolstered the argument that reasonable suspicion existed. Instead, the court treated this call more as an anonymous tip.[6] Second, although the officers testified that they were aware of the area and had previously made arrests or responded to calls there, the testimony was too vague to really prove that this was a high crime or high drug area. For example, the initial officer testified that he had personally made three drug arrests there, he did not specify a timeframe for these and he had been employed there for seven years. The other officer testified that his "very first call" was to investigate a car being shot up in the area but since that time, he had responded for calls such as loitering and loud music.

Based on the facts presented, the court found no reasonable suspicion existed at the moment the defendant started to run and the flight by itself was not enough to generate reasonable suspicion. This is another example of how important it is to be specific when testifying about things like informants and "high crime areas" rather than making blanket assertions without supporting details. If officers were able to show that this was a high crime area and that the defendant fled upon the sight of a police officer, that should be enough for reasonable suspicion under the U.S. Supreme Court's Illinois v. Wardlow[7] rule.

2. At what point was the defendant "seized" for purposes of the Fourth Amendment?

Although as we discussed above, it matters whether there was reasonable suspicion at the time the officer tried to conduct the stop for purposes of charging resist, delay, and obstruct based on the defendant's flight, a Fourth Amendment seizure doesn't occur until the defendant actually submits to the officer's show of authority or the officer applies physical force to the defendant. This rule comes from the famous U.S. Supreme Court case of California v. Hodari D,[8] which had facts similar to today's case. Applying that rule to this defendant, the seizure did

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[3] COA 18-1089 (3 September 2019).
[4] Actually, let's see how YOU did. I got them all correct, of course.
[5] Tipping is considered rude behavior in some countries, including South Korea and Japan. It implies that you think the staff is not doing well financially. I'm doing my part to avoid this misunderstanding here in the states as well. No more tipping for me!
[6] The N.C. Court of Appeals in their opinion (actually in a footnote and you know how important those are) stated they were not considering the tip at all because the initial officer never communicated that information to the officer who tried to stop the defendant. But I'm not sure why they would say that because it is fairly well established that the collective knowledge of several officers working together on an investigation may justify an investigative stop by one of the officers even if not specifically communicated to one another. See State v. Coffey, 65 N.C. App. 751 (1984); State v. Battle, 109 N.C. App. 367 (1993).
[7] 528 U.S. 119 (2000), which held that "unprovoked flight from an officer in a high crime area" is enough for reasonable suspicion.
[8] 499 U.S. 621 (1991). This case is famous mainly because "Hodari D" rolls off the tongue, sounds like a dope rapper, and is easy to remember.

not occur until he actually gave up and stopped for the third officer. But why does it matter when the seizure actually occurred? Well let's look at answer #3.[9]

3. Is the firearm admissible as evidence?

In the Hodari D case I just mentioned, police officers observed "four or five youths huddled around a small red car." When the youths saw the officers, they ran down the street. One of the officers chased Hodari D. on foot and when he was about to catch him, Hodari D. tossed what appeared to be a small rock just before being tackled and handcuffed. The rock was found and determined to be crack cocaine.

When Hodari D. argued that the crack cocaine should be suppressed because no reasonable suspicion existed for the seizure, the Court disagreed. Because Hodari D. was not yet "seized" at the time that he threw the crack cocaine, the Court deemed the contraband to be "abandoned property" that was not obtained as a result of an unlawful seizure. As a result, it was admissible as evidence.

The same rule applies in today's case. When the defendant took off running, he had not submitted to the officer's show of authority and was not seized. Since he threw the gun away prior to being seized, the gun is considered abandoned property and is therefore admissible. As a result, the conviction for possession of a firearm by a convicted felon was upheld.

One Last Note on This Case

The Resist, Delay, and Obstruct charge was dismissed by the prosecutor in this case prior to trial for reasons that are not given in the court's opinion. Because of that, I believe that the court and the parties were not particularly concerned with arguing about whether reasonable suspicion or probable cause arose sometime AFTER the defendant started running because it didn't really have any bearing on the admissibility of the gun. However, the court makes a statement in the introduction to this opinion that the "Defendant's arrest was . . . unlawful and in violation of the Fourth Amendment." I don't think that is really the case here.

In the facts given at the beginning of this update, I left out one that is pretty significant to the later arrest.[10] As the defendant was running, the initial officer didn't just see him throw something, but actually saw the defendant remove a handgun from his waistband and carry it in his right hand. The officer then lost sight of the defendant and when the defendant was later stopped by another officer, the handgun was no longer in his possession.

Assuming (as the court ruled) that reasonable suspicion did not exist when the chase started, I believe the officer clearly had reasonable suspicion and most likely had probable cause for the crime of carrying a concealed weapon when he saw the defendant pull out the firearm. As a result, that would make the subsequent seizure and arrest legitimate. I also think a good argument could be made that from that point on, the defendant was also resisting, delaying, and obstructing the officer, although maybe the officer would have to yell "stop" again after seeing the gun for that to be the case. In any event, I don't believe the parties spent much time arguing over this point since it didn't matter to the outcome so the court didn't have the benefit of researched positions on this. It would have mattered, however, if additional contraband had been found on the defendant after arrest.

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[9] Opening a gift in front of the person who gave it to you is thought to be rude in some parts of India and Egypt and chewing gum in public is rude in Luxembourg, France, Switzerland, and Singapore. Singapore has banned chewing gum altogether without a prescription (I am not making that up) because of the potential of people leaving their chewed gum in undesirable places.

[10] Eating anywhere that doesn't serve food, such as on-the-go, is impolite in Japan. Actually, I'm starting to think that the Japanese might be a BIT too sensitive.

The real point of this story is that with good articulation of the facts that support reasonable suspicion from the beginning, you don't have to rely on the defendant to foolishly try to discard the evidence as he is running away.[11] Because if he doesn't, your seizure will be unlawful, and we will all be in for a rude awakening.[12]

Brian Beasley
Police Attorney
High Point Police Department

ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith Rodgers, PLLC but he thinks they're pretty cool guys.

[11] Kind of like if the Heels win the football game at the end of regulation like they should have, they don't have to be upset that a blatant holding and facemask call is missed in the overtime period, costing them the game. But I'm not bitter.
[12] If all of this talk about "rudeness" has you on edge, one website suggests that you deal with rudeness by "putting negative vibes in an imaginary box." I don't really know what that means, but let me know how it works for you and then we'll get you some counseling.