State v. Ellis:

August 16, 2019
Volume 18, Number 15

The Fickle Finger of Free Speech

By Brian Beasley,
Legal Adviser, High Point PD

SMITH RODGERS
ATTORNEYS AT LAW, PLLC
LEGAL CONSULTANTS TO LAW ENFORCEMENT

ROLL CALL TRAINING

From North Carolina's 24/7 Police Attorney Law Firm

PO Box 4803
Greensboro, NC 27404-4803
Telephone (336) 691-7058
fax (336) 969-1879
www.policehelp.net

Just a few months ago, I wrote to you about the case of State v. Brown,[1] where the N.C. Court of Appeals rejected the argument that a vehicle stop which was based on an occupant yelling the word "Mother-Fu****"[2] in the direction of several deputies was valid based on the community caretaking exception to the Fourth Amendment. The court in that case held that this activity was not enough of an indication that someone might be in danger to justify a stop. The state had not even tried to argue that reasonable suspicion would justify the stop based on the profanity, because even if directed specifically at a deputy it would most likely be constitutionally protected speech. All of this seemed to make sense.

The case we will look at today, decided last week by the same three judges less than four months later, dealt with a very similar set of facts. However, the ruling was . . . well, . . . it was surprising. And so I am going to do something in this legal update that I'm not sure that I have ever done before. I'm going to tell you NOT to listen to the Court of Appeals – at least for this particular case. But first, a story!

In January of 1968, about 15 years after the signing of the Armistice Agreement in the Korean War and just as the United States was ramping up their involvement in Vietnam, forces from North Korea attacked and captured the *USS Pueblo*, a U.S. Naval environmental research ship with orders to gather intelligence from North Korea and conduct surveillance of Soviet Navy activity. The crew was taken to a North Korean prisoner of war camp where the North Korean military reportedly starved and tortured them. The crewmembers were forced to participate in staged photo ops for propanganda purposes but would discreetly "give the finger"[3] in the pictures. The North Koreans did not know what that gesture meant and believed the crew when they explained that it was a "Hawaiian good luck sign." When their captors found out the true meaning, the crewmembers were subjected to extremely severe beatings.[4] Eventually, in December of that year, after lengthy negotiations, the prisoners were released.[5]

Which serves as a nice lead-in to today's case. In State v. Ellis,[6] a trooper was assisting a stalled motorist on the side of U.S. Highway 52 in Albemarle County. While doing so, he observed an SUV drive by and a male passenger stick his arm out of the passenger window. What began as a "hand-waving gesture" changed quickly to

---

[1] 827 S.E.2d 534 (2019).
[2] The occupant didn't yell a bunch of asterisks, of course, but this is a family friendly newsletter (except for all the stuff about obscene gestures that is coming up in today's edition.)
[3] You know, "the finger," as in "the middle finger," as in "flipping someone off" or "giving someone the bird."
[4] After torture which included being put through a mock firing squad, the captain of the *Pueblo* agreed to write a confession of his and the crew's transgression. In the "confession," Commander Bucher wrote, "We paean the DPRK [North Korea]. We paean their their great leader Kim Il Sung." As he read it, he pronounced "paean" as "pee on," but the North Korean translators missed the pun since "paean" translates to "a song of praise." Those "word of the day" calendars can really come in handy!
[5] The "finger," of course, has a much longer history than this. In fact, the gesture dates back to at least ancient Greece as symbolic of, um, a part of the male human anatomy. In Latin, the middle finger was the "digitus impudicus," meaning the "shameless, indecent or offensive finger." In unrelated news, I've found that after the Harry Potter books and movies, most Latin phrases now sound like magic spells to me. "Digitus Impudicus!"
[6] COA 18-817 (August 6, 2019). The finger gesture made its way to America in the 1890s and probably came via Italian immigrants according to anthropologist Desmond Morris (who was not of Italian descent, by the way.)

"an up-and-down pumping motion with his middle finger extended." Although the trooper was unsure at whom the passenger was gesturing, he "returned to his patrol car, pursued the SUV, and pulled the SUV over."

As the trooper approached the passenger's window and knocked on it, he observed the passenger (our defendant) and his wife who was the driver, take out their cell phones and start to record the traffic stop. He asked them both for their identification which they initially refused to provide, instead asking why they had been stopped and claiming that the trooper had no right to do so. Eventually, the driver gave the officer her license, but the defendant did not. The trooper got the defendant to step out of the vehicle, placed him in handcuffs, seated him in his patrol car, ran him for warrants, and eventually issued him a citation for Resist, Delay, and Obstruct an Officer for failing to provide his identification and allowed him and his wife to leave.

On appeal, the defendant argued that the stop was invalid. Much like the Brown case I mentioned earlier, the state did not argue that reasonable suspicion existed but instead argued that the stop fell under the "community caretaking exception" and was therefore valid. The N.C. Court of Appeals wasted little time rejecting the community caretaking justification[7] but then determined that the stop was justified based on reasonable suspicion grounds.

The court acknowledged that "it is not a crime for one to raise his middle finger at a trooper, as such conduct is simply an exercise of free speech protected by the First Amendment of the United States Constitution." However, the court pointed out that reasonable suspicion does not require proof of a crime but only reasonable suspicion that "criminal activity was afoot." The court pointed to the crime of disorderly conduct,[8] which is commited when a person "makes or uses any . . . gesture . . . intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." Based on this, the court reasoned that the defendant's waving and middle finger gesture taken together and aimed at an unknown target "could alert an objective officer to an impending breach of the peace" and as a result, they concluded that this constituted reasonable suspicion to stop the vehicle. Since the stop was valid, the court also held the continued detention of the passenger was also justified by his refusal to identify himself, which, in the court's view, constituted the crime of resist, delay and obstruct an officer (RDO).

Now that we have covered the court's ruling and justification, I want you to do something for me. I want you to, with all respect and deference to the court, completely ignore what the court says in this opinion. I am going to advise you NOT to stop a vehicle based solely on an obscene gesture or profane word directed at you or anyone else by any of the occupants of that vehicle. Even if it really ticks you off, don't do it. A profane word or obscene gesture by itself almost certainly does not constitute disorderly conduct. It is protected speech and taking law enforcement action in retaliation for the exercise of a protected constitutional right is what we generally call a "civil rights violation."[9] Those are bad.

There was a dissenting opinion in this case, which means the defendant has the right to appeal to the N.C. Supreme Court. I do not know whether the N.C. Supreme Court will overturn this decision, but whether they ultimately do that or not, I want you to act as if this case does not exist.[10] If the N.C. Supreme Court issues an opinion that makes me think otherwise, I will certainly let you know.

One other aspect of this case deserves discussion and that is the court's opinion that the passenger/defendant committed RDO when he refused to identify himself. Clearly if there is no reasonable suspicion to stop the car, the defendant cannot be required to provide identification. But remember that even

---

[7] In a great quote, the court noted that "Indeed, the middle finger is, universally, not a sign of distress."

[8] G.S. 14-288.4.

[9] Speaking of violations, gestures similar to the finger in other countries take various forms from raising your index and middle finger (like you are signaling the number two) but having the back of your hand to the receipient, which is the equivalent of the finger in the U.K, Ireland, and Australia. In Islamic countries, simply giving a thumbs-up is used to express the same sentiment. I'm guessing the show "Happy Days" is seen completely differently in those countries. (You young people will have to google that reference.)

[10] This will be easiest for those of you who claim to read these updates but really never open them. If you are reading this, I'm not talking to you.

when the traffic stop is justified, passengers are not generally required to provide their identification to you. G.S. 20-29 requires the driver/operator to show a license but not the passenger. State v. Friend,[11] which was cited by the court, upheld a charge of RDO when a passenger refused to give his name when the officer was trying to write him a citation for a seatbelt violation. But unless you have reasonable suspicion specific to the passenger, there is no law that requires them to produce identification to you so it is not delaying your performance of official duties when they refuse.

So, keep moving, nothing to see here. And please accept this Hawaiian good luck sign from me as you leave, given in love!

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] 237 N.C. App. 490 (2014). Long time readers may remember this as the "Watermelon Festival" case out of Murfreesboro, N.C.