Litigating the Fourth Amendment in DUI and Dog Sniff Cases

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Some initial thoughts

- Historically, it seems the defense bar has heavily litigated its DUI cases when it comes to challenging the initial stop and whether an officer has probable cause to make a DUI arrest, whereas dog sniff cases tend to focus on whether police had reasonable suspicion to extend the stop to do dog sniff
- The same principles that apply to whether police have reasonable suspicion to extend a stop to conduct a dog sniff also apply to whether police have reasonable suspicion to commence a DUI investigation
- Generally speaking, the recent trendline on reasonable suspicion to commence a DUI investigation has been helpful to our arguments (see, e.g., *State v. Mosier*, 492 P.3d 1205 (Kan. Ct. App. 2021) (unpublished)

Foundational principles

- *Rodriguez v. United States*, 575 U.S. 348 (2015) – "Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures."
- *Rodriguez* has been held to apply within the DUI context
  - But note there's language in *Rodriguez* that somewhat calls into question whether it should be used in the DUI context

11 A dog sniff, by contrast, is a measure aimed at "detect[ing] evidence of ordinary criminal wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 40–41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). See also *Florida v. Jardines*, 569 U.S. 1, ––––, 133 S.Ct. 1409, 1416–1417, 185 L.Ed.2d 495 (2013). Candidly, the Government *356 acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. See Tr. of Oral Arg. 33. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

Foundational principles (cont'd)

- *Rodriguez* cites to *Arizona v. Johnson*, 555 U.S. 323 (2009), "an officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries to do not measurably extend the stop's duration."
- Kansas essentially had a *Rodriguez*-like precedent already from *State v. Damm*, 246 Kan. 220 (1990), where the KS SC held that a routine traffic stop "exceeded reasonable scope and duration when, in the absence of any reasonable suspicion, the passengers' licenses were taken and their records checked."

The exact moment the officer begins a DUI investigation

- As is the case with almost all Fourth Amendment issues, the question is what the officer knew, *and when the officer knew it*
- Information gathered *after* the officer has already began a DUI investigation doesn't matter
- For example, the government can't use your client's poor performance on SFSTs in support of its argument that the cop had reasonable suspicion to begin a DUI investigation
- As such, we as defense lawyers want to move up the moment the cop begins the DUI investigation to as early of a moment as possible

When the DUI investigation begins (cont'd)

- The obvious moment a DUI investigation begins = "I'm going to have you exit the car for me"
- But what about the moment the cop asks a question that's clearly aimed at DUI concerns? Perhaps most commonly, "have you had anything to drink tonight?"
- Could simply asking about alcohol consumption be the moment a DUI investigation begins? And if so, is a suspect's incriminating response admissible?

Why the initial stop matters

- If the initial stop itself suggests impairment, the Fourth Amendment is going to give police wider latitude in asking questions about impairment
- But if the initial stop does not suggest impairment, consider *Jimenez*, 308 Kan. 315 (2018) (SHOUTOUT TO KASPER SCHIRER!):

25 To be clear, we are not suggesting *Rodriguez* and its progeny instruct that all travel plan questioning will be outside an officer's traffic stop mission. The circumstances will determine that. Such inquiries could be within a particular stop's mission if it were shown they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez*, 135 S.Ct. at 1615. For example, and without prejudging specific scenarios, consider when a vehicle is noticed veering off the roadside. Asking how long the driver has been behind the wheel reasonably could be seen as exploring fatigue issues, which relates to the initial infraction and safe vehicle operation. Similarly, asking whether the driver is under the influence could be related to that same infraction. In both instances, the responses may explain the erratic driving and might arguably be **476 related to the officer's decision "whether to issue a traffic ticket ...." 135 S.Ct. at 1615. But such inquiry would be much harder to justify when the stop is "for a loud muffler, a burned-out license plate light, or a just-ended parking violation." 4 Search & Seizure § 9.3(d).

What constitutes a “measurable” extension?

- Webster’s definition: “able to be measured”
- How the KS Court of Appeals recently ~~bastardized~~ construed it in *Sweeney v. KDOR*, 2022 WL 18037752:

> Even if this court were to assume for the sake of Sweeney's argument that every second that transpired between when Deputy Rector decided to walk back to Sweeney's vehicle instead of preparing a citation and when the deputy reached Sweeney's vehicle for their second encounter constituted a prolongation of the traffic stop, that only amounted to approximately 17 seconds according to Deputy Rector's bodycam footage. Even a more generous characterization of the elapsed time—measured from the moment Deputy Rector remarks in his patrol car that he wants to “find out what [Sweeney is] doing” to the moment he returns to Sweeney's vehicle and begins speaking with him—is only 1 minute and 18 seconds, during which Deputy Rector is properly processing Sweeney's information and pursuing the purpose of the traffic stop. **Such a small amount of time—during which Deputy Rector was still appropriately processing the traffic violations—cannot reasonably be characterized as *measurably* extending the duration of the traffic stop.**

What constitutes a “measurable” extension?

- But the KS SC in *Jimenez*:

21 22 Starting with *Rodriguez*, as explained, a plain reading shows the Court's intention to clarify that any traffic stop extension without reasonable suspicion or consent—by even a *de minimis* length of time—amounts to an unreasonable seizure when the delay is based on anything but the articulated components of the stop's mission.

What other courts have said, RE: "measurable" extensions

- Under *Rodriguez*, "a stop is unlawfully prolonged when an officer, without reasonable suspicion, diverts from the stop's purpose and *adds time* to the stop in order to investigate other crimes." *United States v. Campbell*, 26 F.4th 860 (11th Cir. 2022) (emphasis added)
- *Idaho v. Karst*, 170 Idaho 219, 227 (2022):

> 7 Here, after making the traffic stop and initially contacting Karst and the driver, Sergeant Hyle began walking back towards his patrol vehicle. However, instead of continuing activities related to the traffic stop's mission, Sergeant Hyle spent approximately nineteen seconds on his radio with dispatch to request a drug-dog unit. That detour added time to, or prolonged, completing the original purpose for the stop. **The fact that Karst was held for a *mere* nineteen seconds more than she should have been matters not for Fourth Amendment purposes—there is no exception for unjustified de minimis intrusions.** *See Linze*, 161 Idaho at 608, 389 P.3d at 153; *Rodriguez*, 575 U.S. at 356–57, 135 S.Ct. 1609.

Fishing expeditions that do not add time are expressly endorsed in *Rodriguez*

The State is likely to cite case law establishing that "[a]n officer is not required to disregard information which may lead him or her to suspect independent criminal activity during a traffic stop." *Id.* at 473. To be clear, though, this motion does not argue that officers must turn a blind eye to their duties. Instead, this motion advances the bedrock Fourth Amendment principle that routine traffic stops – as with all police-citizen encounters – must be conducted in accordance with the Constitution. This motion makes no argument that law enforcement can never ask a driver how much alcohol he has consumed without violating the Constitution.

To the contrary, this motion recognizes that the Supreme Court of the United States has expressly endorsed the practice of allowing police to pursue investigations unrelated to the initial traffic infraction, but only if such investigation does not prolong the stop. *Rodriguez*, U.S. 575 at 355 ("An officer … may conduct certain unrelated checks during an otherwise lawful traffic stop. But … he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded").

Fishing expeditions (cont'd)

- Hypo 1: officer conducts traffic stop for traffic violation that does not itself suggest impairment (e.g., expired tag, tail light out, speeding). While speaking to driver, cop asks, "how much have you had to drink tonight?" in a way that prolongs the stop (even if only by a second or two). Under *Johnson, Rodriguez,* and *Jimenez*, cop must have reasonable suspicion of DUI to even ask this question.
- Hypo 2: officer conducts traffic stop for traffic violation that does not itself suggest impairment (e.g., expired tag, tail light out, speeding). While speaking to driver, cop asks, "how much have you had to drink tonight?" *while waiting to hear back from dispatch regarding wants and warrants*. Under these facts, officer does not need reasonable suspicion of DUI to ask this question, as asking it does not add time to the stop because it is asked while the officer is waiting to hear back from dispatch
- Hypo 3: officer conducts traffic stop that ***does*** suggest impairment (e.g., failing to maintain lane, headlamps not on while driving at night, stopping in the middle of an intersection). While speaking to driver, cop asks, "how much have you had to drink tonight?" Not a Fourth Amendment violation, even if unsupported by reasonable suspicion, because it is within the scope / mission of the traffic stop.

So what constitutes reasonable suspicion to begin a DUI investigation?

- KS SC has declined to rule that an odor of alcohol, by itself, is enough to establish reasonable suspicion of DUI; *State v. Pollman*, 286 Kan. 881 (2008) (State explicitly asked KS SC to rule that an odor of alcohol, by itself, constitutes reasonable suspicion to commence DUI investigation, but KS SC declined to do so); see also, *City of Hutchinson v. Davenport*, 30 Kan.App.2d 1097 (2002) (the smell of alcohol on defendant's breath, without more, did not establish a reasonable suspicion of DUI)
- Odor of alcohol paired with an admission to having "had a few" or "had a couple" is insufficient to establish reasonable suspicion to begin a DUI investigation; *State v. Mosier*, 492 P.3d 1205; *Chambers v. Kansas Dept. of Revenue*, 2017 WL 1035442
- From *Mosier*: "It is not illegal to drink alcoholic beverages and then drive a vehicle; in fact, law-abiding citizens combine these two activities routinely. It is only illegal for a person to drive with a blood-alcohol level above the legal limit or to drive under the influence of alcohol to a degree that renders the person incapable of safely driving. Anyone who stops at a tavern for a couple of beers or drinks moderately at any social gathering may have a slight odor of alcohol on their breath on the drive home. But this is not a sign of illegal activity without any evidence of impaired driving."

Public safety stops

- Just by way of review - four categories of police-citizen encounters: investigative detention (AKA, *Terry* stop), voluntary encounters, public safety stops (sometimes called welfare checks), and arrests
- Within the context of traffic stops, why do we like public safety stops?
- Public safety stops "must be totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Messner*, 50 Kan. App. 2d 630, 635 (2018).

Public safety DUI cases

- Consider *City of Salina v. Dahl*:

In *Dahl*, an officer pulled over a vehicle at 4 AM after observing the car had a flat tire. *City of Salina v. Dahl*, 432 P.3d 107 (2018). The officer would later testify that he stopped the car due to the flat tire and described the stop as a welfare check. *Id.* at *5. Despite the stop being a welfare check, the officer asked the driver for her driver's license and insurance just 30 seconds after first contacting her. *Id.* In analyzing this, the Kansas Court of Appeals held, "the district court correctly found [the officer] exceeded the scope of the public safety stop because he immediately shifted the purpose of the stop – within 30 seconds – away from addressing Dahl's need for help by asking for her driver's license and insurance card to begin his investigation for driving under the influence of alcohol and drugs." *Id.* at *5.

In so ruling, the court noted that a public safety stop "must be totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at *4 (citing to *State v. Messner*, 55 Kan. App. 2d 630, 635 (2018)). The Court of Appeals further held that "[t]he factual circumstances presented here support the district court's finding that Dahl required assistance" and said that appropriate assistance could have included "inquiring if she had a spare, offering to change the flat tire, or calling roadside assistance." *Id.* Because the officer never provided such assistance but instead abandoned the public safety stop when he exceeded the scope by requesting the driver's license, the Court of Appeals affirmed the district court's grant of a motion to suppress on the grounds that the DUI investigation was not totally divorced from the public safety stop. *Id.* at *5.

See also, *Weaver*, 440 P.3d 631 (2019) (unpublished) (per curiam, Arnold-Burger, Pierron, and Malone)

Another case that illustrates the Fourth Amendment's rigid demand that public safety stops be completely divorced from unrelated police investigations is *Weaver*[3]. In *Weaver*, a concerned citizen, Dennis Trent, noticed a vehicle stopped in a lane of traffic in Johnson County. *Id.* at *1. After pulling up to the side of the stalled car, Trent saw the driver "slumped over with his head resting on the steering wheel," so Trent exited his car and checked on the driver, who was later identified as Ralph Weaver. *Id.* After Trent knocked on the Weaver's door window and asked Weaver if he was okay, Weaver did not respond, so Trent called 911. *Id.* As sirens could be heard approaching, Weaver "snapped out of it," telling Trent that he was simply tired and that he needed to leave. *Id.* Just as Weaver then attempted to drive away, Deputy Cory Neal also arrived on scene. *Id.* After Trent explained to Neal that Weaver was the person Trent had called 911 about, Neal then pulled Weaver over to determine why he passed out in his car. *Id.*

Upon coming into contact with Weaver, Neal asked Weaver "what seems to be the issue?" and Weaver replied, "I was sitting there and – next thing you know – I was just sitting there and all of a sudden – and I'd had a late night and, you know, I was getting ready to go up and get cigarettes and I come back and that's what was going on." *Id.* Neal would later testify that Weaver's speech appeared slurred, he had bloodshot eyes, and was slow to answer questions. *Id.* Neal informed Weaver that he was concerned because people had reported that Weaver was passed out in his car. *Id.* at *2. Weaver told the officer that while he had not had anything to drink since the previous evening, he had taken a series of prescription medications that morning. *Id.*

After four or five minutes passed as Neal and Weaver conversed, an ambulance and a backup deputy, Timothy Purdin, arrived on scene separately. *Id.* Neal walked toward Purdin and explained the situation. *Id.* Purdin then spoke with Weaver and noticed that Weaver's eyes were "bloodshot, watery, extremely droopy" and that "[i]t looked like he could barely keep his eyes open." *Id.* Like Neal, Purdin also further noticed that Weaver's speech was "thick and slightly slurred." *Id.*

With ambulance personnel still on scene and standing near Weaver's vehicle, Purdin told the EMTs, "I'm going to go ahead and test him." *Id.* Purdin would later confirm this in his testimony, telling the court that he began the alphabet and counting tests prior to when ambulance medics left the scene. *Id.* After completing the alphabet and counting tests, the medics then left the scene and Purdin told Weaver that he wanted to conduct field sobriety tests to make sure Weaver was safe to drive. *Id.* Over the next eight minutes, Purdin attempted to administer several field sobriety tests, but Weaver maintained that his shoddy knees made it impossible for him to comply with the physical requirements of the tests. *Id.* Approximately 23 minutes into the stop, Purdin asked Weaver to submit to a PBT. *Id.* When Weaver refused, Purdin arrested Weaver for driving under the influence. *Id.*

Once charged, Weaver filed a motion to suppress arguing that the deputies unlawfully detained him when they began a DUI investigation that was not divorced from the initial public safety stop. *Id.* In affirming the district court's grant of Weaver's motion to suppress, the Kansas Court of Appeals stressed that "a safety stop must be divorced from the detection, investigation, or acquisition of evidence relating to the violation of the criminal statute." *Id.* at *7. The court further noted that a public safety stop is just like any other police-citizen encounter in that "the scope of the detention during a public safety stop cannot exceed the justifications for the stop." *Id.*

The State argued that the deputies did not impermissibly "commingle[] the safety stop with the DUI investigation, asserting that Purdin and Neal were justified in shifting gears toward a possible DUI investigation as the public safety stop progressed." *Id.* In rejecting this argument, the Kansas Court of Appeals noted that the district court found that medical personnel were still finishing up with Weaver by the time Purdin had already began his DUI investigation by starting the alphabet and counting tests. *Id.* at 8. With that factual finding by the district court in mind, the appellate court elaborated that the "investigation into possible DUI r[an] contrary to the purpose of a safety stop, which is for an officer to take appropriate action to render assistance if a citizen is in need of aid." *Id.*

Just as police did not totally divorce their DUI investigation in the *Weaver* case when they began a DUI investigation prior to Weaver being medically cleared, so too did police in the instant case begin a DUI investigation without doing anything about the tire-less front driver's side wheel on Emily's car. As noted by the *Dahl* court, appropriate measures in such a situation could include assisting a driver in putting on a spare tire or calling for roadside assistance, neither of which happened here.

Important language from *Weaver*:

*9 The State's brief argues that "[a]n officer responding to a public safety dispatch is not required to ignore obvious indications of criminal activity until the public safety investigation is concluded before he begins considering whether reasonable suspicion of criminal activity is present." We take no issue with the State's assertion. But the district court did not grant Weaver's motion to suppress simply because the deputies began "considering" whether there was reasonable suspicion of criminal activity before the public safety stop had ended. Instead, the district court found that Purdin started the in-car field sobriety testing before the medics had cleared Weaver and left the scene. Moreover, the evidence shows that Purdin requested and obtained Weaver's driver's license before Weaver refused medical treatment and the medics left the scene.

These findings support the district court's ultimate conclusion that the deputies began conducting a DUI investigation before the public safety stop had ended, contrary to well-settled Kansas law that a safety stop must be divorced from a criminal investigation. See, e.g., *Messner*, 55 Kan. App. 2d at 631. As a result, we conclude the district court did not err in granting Weaver's motion to suppress based on what became an unlawful safety stop not sufficiently divorced from the DUI investigation. **Because this conclusion resolves the State's appeal, we need not address the district court's alternative finding that the deputies did not have articulable reasonable suspicion to support a DUI investigation.**

Affirmed.

All Citations

440 P.3d 631 (Table), 2019 WL 2147678

Consider the following hypothetical, purely for illustrative purposes

- A cop sees a car parked on railroad tracks with a man inside the car. In response, the cop approaches the car and speaks with the person in the front seat to make sure the car doesn't remain on the tracks. When the cop contacts the man in the car, the cop sees drugs in plain view.

- Under this hypo, the cop has way more than mere reasonable suspicion to believe a crime has been committed, but can the cop do anything about the drugs ***prior to*** taking measures to address the cop's initial public safety concerns (i.e., the vehicle parked on railroad tracks)

- The highlighted language on the previous slide from Weaver seems to dictate that it doesn't matter if a cop has only reasonable suspicion or even if a cop has proof beyond a reasonable doubt – the Fourth Amendment requires police to do something about the actual public safety concern justifying their contact with a citizen prior to shifting gears to a criminal investigation

A final point, RE: public safety stops

- Police seem all too comfortable to admit that a traffic stop was pretextual, presumably because they're aware of the SCOTUS decision, *Whren v. United States*, 517 U.S. 806 (1996)
- However, "the primary motivation of a valid public safety stop must be for community caretaking purposes," therefore "permitting public safety rationale to serve as a pretext for an investigative detention runs the risk of emasculating our Fourth Amendment protections." *State v. Marx*, 289 Kan. 657, 663 (2009).
- If you're able to get a cop to admit during cross-x that the public safety concerns were a pretext for pursuing a criminal investigation, you'll have a strong argument for suppression
- ^ I understand this sounds daunting, but police sometimes seem to relish in the fact that they are allowed to make pretextual stops. A cop who doesn't know the law well enough might make the same concession even within the context of a public safety stop. If they do, argue for suppression while citing to *Marx*.

The biggest takeaway I'll leave you with:

- Let's be litigating our DUI cases! Especially if you're representing someone on a felony DUI, because your preliminary hearing can be used as a way to set officer testimony up for your subsequent motion to suppress – that is a MASSIVE advantage.
- The advent of body cameras allow us to know exactly what happens during traffic stops, which means we can hyper-scrutinize whether a given police action added time to a stop