

FILED

June 13, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Ketchum, C.J., dissenting:

I dissent because the initial traffic stop was lawful. I also write separately to point out an important constitutional error not raised by the defendant: the detention of the defendant after the initial traffic stop was an illegal seizure.

A. THE TRAFFIC STOP WAS LAWFUL

The police officer saw that the defendant's vehicle was missing the passenger side mirror. The mirror was a piece of safety equipment placed on the car by the manufacturer. W.Va. Code, 17C-15-1(a) [1951]¹ prohibits vehicles from being driven in an "unsafe condition." The officer had an "articulable reasonable suspicion"² that the defendant's

¹W. Va. Code § 17C-15-1(a) provides as follows:

It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, or which is equipped in any manner in violation of this article, or for any person to do any act forbidden or fail to perform any act required under this article.

²"Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has
(continued...)

vehicle was in an unsafe condition in violation of W.Va. Code, 17C-15-1(a). Consequently, the officer was within his rights to stop the vehicle because of its defective equipment.

In *Terry v. Ohio*, 392 U.S. 1, 21 (1968), the Supreme Court stated that a police officer must have an “articulable reasonable suspicion” in order to pursue an investigatory stop. This *Terry* standard has since been applied to traffic stops. In *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), the Supreme Court reiterated the standard and held that “a policeman . . . whose observations lead him to reasonably suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person *briefly* in order to investigate the circumstances that provoke suspicion.” Therefore, based on the *Terry* investigatory traffic stop standard, the missing mirror provoked the officer’s reasonable suspicion that the driver was in violation of W.Va. Code, 17C-15-1(a). Hence, the police officer lawfully stopped the vehicle in order to investigate the missing equipment.

B. THE DETENTION AFTER THE INITIAL STOP CONSTITUTED AN ILLEGAL SEIZURE

After the police officer stopped the vehicle for the missing passenger side mirror, the police officer did not issue a ticket or give the defendant a verbal warning about the missing equipment. Instead, the police officer detained the defendant and called for a K-9 drug unit.

²(...continued)
committed, is committing, or is about to commit a crime[.]” Syllabus Point 1, in part, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

The officer did not have any cause to believe that the vehicle contained drugs. The officer testified that his reason for detaining the vehicle and its occupants was due to “basic police instinct; a hunch” that the defendant possessed illegal drugs. A “hunch” falls far short of the “articulable reasonable suspicion” standard that an officer must demonstrate to prolong a traffic stop. *Terry*, 392 U.S. at 27. The defendant failed to raise this issue on appeal, but I believe this is a substantial issue that needs to be addressed.

When a police officer stops a vehicle for a traffic violation, the stop amounts to a seizure within the meaning of the Fourth Amendment. *Whren v. U.S.*, 517 U.S. 806, 809-10 (1996). During the traffic stop, an officer may only detain the vehicle’s occupants long enough to request a driver’s license, vehicle registration, run a computer check and issue a ticket or a warning. *U.S. v. Digiovanni*, 650 F.3d 498, 507 (4th Cir., 2011). In order to extend a traffic stop beyond this scope, a police officer must either obtain the driver’s consent or possess some articulable evidence to support a reasonable suspicion that illegal activity is afoot. *U.S. v. Branch*, 537 F.3d 328, 336 (4th Cir., 2008). The officer must have “at least a minimal level of objective justification” and “must be able to articulate more than an ‘inchoate and unparticularized suspicion or **hunch** of criminal activity.’” *Illinois v. Wardlow*, 528 U.S. 119, 123-124 (2000). Courts assess whether the officer had an articulated reasonable suspicion for a stop under the totality of the circumstances, giving “due weight to common sense judgments reached by officers in light of their experience and training.” *U. S. v. Perkins*, 363 F.3d 317, 321 (4th Cir., 2004).

In the present case, the officer lacked any evidence of possible illegal activity in order to constitutionally detain the vehicle other than his “hunch” that there may be criminal activity. Without reasonable suspicion or consent, the prolonged traffic stop to allow the K-9 unit time to reach the site constituted an illegal seizure in violation of the Fourth Amendment. A traffic stop that lasts longer than necessary to effectuate the purpose of the stop amounts to a *de facto* arrest that must be supported by probable cause, to be constitutionally valid. *See, U.S. v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir., 2011); *People v. Gomez*, 117 Cal. App. 4th 531, 538 (2004).

The traffic stop was initially lawful. However, when it was extended beyond its permissible scope and duration to effectuate the officer’s “hunch,” it became an unlawful seizure.

In summary, I dissent because the investigatory traffic stop was lawful. If the defendant had raised the obvious illegal seizure resulting from the unlawful detention, I would have agreed with the result reached by the majority opinion.