



# The Advocate

*"Protectors of Your Rights"*

VOLUME 8, NO. 2 • JUNE 2003



## **STOP AND FRISK,** **WILLIAMS AND BUTLER**

By Jim Brown

*"Yes I am a pirate, two hundred years too late  
The cannons don't thunder, there's  
nothin' to plunder  
I'm an over-forty victim of fate  
Arriving too late, arriving too late"*

Jimmy Buffet, "A Pirate Looks At  
Forty"

Well, I am not a pirate or over forty,  
but sometimes in the criminal defense practice  
I get the feeling I am a victim of fate, arriving  
too late. Forty years ago, the High Court  
ushered in the due process revolution with  
such monumental decisions as Mapp v. Ohio,  
Gideon v. Wainwright, and Miranda v.

Arizona.<sup>1</sup> In my lifetime, these gains have  
been washed out by decisions such as United  
States v. Leon, Bell v. Cone, and Oregon v.  
Elstad.<sup>2</sup> With this in mind, two decisions  
from the South Carolina Court of Appeals  
refreshingly reaffirm that the liberty our  
country is founded upon must be found in  
actions, not the hollow words of a despot.

In State v. Williams, the South  
Carolina Court of Appeals reviewed the  
decision of the circuit court judge in  
suppressing evidence seized following a

---

<sup>1</sup> 367 U.S. 643 (1961), 372 U.S. 335  
(1963), and 384 U.S. 436 (1966);  
respectively.

<sup>2</sup> 468 U.S. 897 (1984), 535 U.S. 685  
(2002), and 470 U.S. 298 (1985);  
respectively.

traffic stop of an automobile. 571 S.E.2d 703 (SC Ct. App. 2002). Briefly, the defendant in Williams was passenger in an automobile stopped for a license plate violation. Following the issuance of a citation to the driver, the officer (and eventually other law enforcement) continued the roadside questioning of both the driver and the passenger which led to a consent search of luggage and the discovery of marijuana.

In a unanimous opinion, the Court of Appeals affirmed the lower court ruling suppressing marijuana found in the automobile because the evidence was the product of an illegal search. The defendant, in Williams, conceded that the traffic stop was valid. From that concession, the Court framed the question as whether law enforcement again seized Williams following the completion of the traffic stop or whether the questioning was merely a consensual encounter. The Court stated that the test for determining the consensual nature of an

encounter is whether “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Williams, at 708 citing Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (further citations omitted). The Court reiterated that simple questioning of a subject by law enforcement does not constitute a seizure.

The Court noted the fact-specific nature of the reasonableness inquiry and stated a list of probative factors identified by the courts. These factors include the time and place of the encounter, the number of officers present and whether they are uniformed, the amount of time involved in the detention, whether a person was moved to a different location or isolated, whether the suspect was informed that he was free to leave, whether the person was informed by the officer that he was suspected of a crime, whether the person’s documents were retained by law enforcement, and whether law enforcement

exhibited threatening behavior or physical contact. Williams, at 708.

Next, the Court remarked that detentions associated with roadside searches are more analogous to an investigatory stop than a “field interrogation,” which requires no suspicion of wrongdoing. Williams, at 708-709. The Court explained that the traffic stop situation is more coercive than an encounter where law enforcement approaches an individual in some public place such as a street or mass transit terminal.

The Court then analyzed the specific facts and found that the continued questioning of the auto’s occupants amounted to a seizure. The Court relied on the following facts to support this conclusion. First, the driver was moved away from the other occupant of the auto and separated to prevent any eavesdropping during questioning. Next, the officer did not inform the motorist that he was free to leave. In fact, the officer specifically stated that he wished to ask questions before

the driver left. Williams, at 709.

Other factors supporting the Court’s conclusion that a seizure occurred are the roadside location of the traffic stop; the presence of two uniformed officers in vehicles with the blue lights activated; one officer was involved with the K-9 unit; the length of the detention was twenty five to forty minutes (more than double the normal stop for this officer); and the “seemingly innocuous but immediate transition” between the roadside stop and the questioning and invalid detention. Williams, at 709.

Having determined that a second seizure occurred, the Court looked for reasonable suspicion to justify the officer’s actions. The officer’s proffered justification was a prior driver’s license suspension related to a controlled substance conviction. The Court found no probative value in this reason and found the second seizure invalid, even though following a valid traffic stop.

Then, the Court reviewed the validity of the consent, given by defendant Williams, to allow the officers to search his personal belongings. The test, applied by the Court, is whether consent provided following an invalid seizure is voluntary and not a product of the exploitation of the illegal detention. Williams, at 710. If consent was either involuntary or an exploitation of the illegal detention, then the consent is per se invalid. Applying this test, the Court found the consent provided by Williams to be the product of the exploitation of the illegal detention. Primarily, the Court noted that a small amount of time passed between the illegal detention and the consent. Further, the Court identified no intervening or attenuating circumstances. Finally, the Court did not need to address the voluntariness of the consent because of the finding of the improper exploitation. Williams, at 710-711.

Less than six months following the Court of Appeals opinion in Williams, the

Court of Appeals again visited the subject of roadside searches and seizures. In State v. Charles Butler, the Court of Appeals issued a *per curiam* opinion reversing Butler's convictions for trafficking in cocaine and unlawful possession of a pistol because the evidence was obtained in violation of the defendant's rights under the Fourth Amendment. 577 S.E.2d 498 (SC Ct. App. 2003).

The defendant, in Butler, was a passenger in a vehicle stopped for having no rear taillights. After questioning the driver, including questions about Butler's identity, the officer became suspicious because of the odor of alcohol coming from the inside of the vehicle. When the officer patted Butler down, he felt a pistol in the defendant's pocket and the defendant began to run away. The officer also testified he found cocaine in Butler's pocket when he was caught in the woods.

In reversing the ruling of the trial court, the Court of Appeals agreed with Butler

that the evidence failed to show reasonable suspicion to justify the “Terry”<sup>3</sup> pat-down of the defendant which led to the discovery of the contraband in question. The Court began its analysis by discussing the powers conferred to law enforcement in conducting roadside investigations. The Court noted that an officer may detain and question a subject, briefly, without violating the Fourth Amendment when reasonable suspicion of criminal activity exists and this suspicion is based upon articulable facts. Further, the Court noted that the scope and duration of this detention must be strictly tied to the circumstances which justify the government intrusion into the suspect’s privacy.

Next, the Court observed the dangerous nature of roadside encounters for law enforcement. The Court summarized judicial opinions recognizing the dangerousness of these encounters and explained the parameters of law enforcement

powers under these decisions. Specifically, the Court noted that law enforcement may order all passengers out of an automobile during a lawful traffic stop. Butler, at 501 (citing Maryland v. Wilson, 519 U.S. 408, 412-415 (1997)). However, the Court noted that pat-down type searches are limited to circumstances where the officer is justified in believing the individual suspect is presently armed and dangerous. Butler, at 501. Further, the purpose of the pat down is to allow the officer to be free from fear of violence and is not conducted with the goal of general evidence discovery in mind. Butler, at 501.

When the Court applied these rules to the case at issue in Butler, the Court found it was undisputed that the Officer had the authority to stop the vehicle based upon the traffic violation. Id., at 501. Further, the extension of the scope and duration of the stop was reasonable given the suspicion that open containers of alcohol were within the vehicle. Id.; Cf. State v. Williams, 571 S.E.2d 703 (SC

---

<sup>3</sup> Terry v. Ohio, 392 U.S. 1 (1968).

Ct. App. 2002), discussed above. However, the Court found that “the trial judge failed to make any determination that the officer had the necessary apprehension of danger to justify a pat-down search of Butler.” Butler, at 503. The Court noted that the trial court found the investigation involved the matter of open containers of alcohol and that the officer had no fear of Butler. Id.

Also, the Court found the officer failed to demonstrate any articulable reasons for believing Butler was armed and dangerous. Butler, at 503. While suspicious, the officer could not indicate any specific suspicion regarding Mr. Butler and the only general suspicions involved the open container issue and the driver giving incorrect information regarding the name of a passenger. Finally, the Court noted that there was no heightened apprehension based upon suspicion of drug activity; foreshadowing a different legal conclusion to a scenario involving suspicion of drug activity. See U.S. v. Sakyi, 160 F. 3d

164, 169-170 (4<sup>th</sup> Cir. 1998), cited in Butler, at 502.

Practitioners should note that the State has petitioned for review of the Williams decision and that this petition is still pending at the time of the publication of this article. Further, other helpful cases involving search and seizures are State v. Green, 532 S.E.2d 896 (SC Ct. App. 2000) (reversing drug convictions because of improper “Terry” stop) and Florida v. J.L. 529 U.S. 266 (2000) (affirming a lower court’s reversal of a gun possession conviction because of an improper “Terry” stop).

*Jim Brown practices law in Beaufort, South Carolina and currently serves as the editor for the South Carolina Association of Criminal Defense Lawyers.*