

MN S. Ct: State constitution affords greater protection from warrantless automobile searches.

Contributed by James Ostgard

What a pleasure it is to read Minnesota state slip opinions after a steady diet of Eighth Circuit stuff. There is still a bill of rights here, even if it is only in Section 10 of the state constitution.

In *State v. Dontrell Flowers*, No. A05-213, our Supreme Court reverses the Minnesota Court of Appeals and a trial judge over the admissibility of a gun seized by Minneapolis police after multiple lengthy searches of Mr. Flowers and his automobile.

The initial stop was legitimate, presumably based upon an unilluminated license plate. It is also true that Mr. Flowers did not stop immediately, driving through a narrow, dark alley in South Minneapolis after the squad car activated its emergency lights. As Flowers drove very slowly down the alley, the officers sounded their air horn. With the aid of a spotlight, they could see him shifting from side to side as he drove (all of which was captured on the squad car video, activated at the same time the emergency lights were turned on). The air horn was sounded a second time, and Flowers continued to shift around and drive slowly down the alley. These movements lasted about 45 seconds. At some point, the officers activated their siren.

As soon as Flowers got out of the alley, he pulled over to the curb and stopped. Approximately 75 seconds passed between the activation of the emergency lights and this stop. The cops performed a "felony stop", meaning Flowers was ordered from his car at gun point and made to get down on the ground. As he did this, at least 2 more squad cars arrived.

The video shows the cops handcuffing Flowers, searching him, and then searching the interior of the car for about 30 seconds, front seat and back. That ends and several officers are seen consulting each other outside of the car. At some point, another officer shows up and directs her flashlight back inside the car for another 5 seconds. Then someone shuts off the video camera in the first squad car. According to testimony, the police did so because by that time "the situation was under control."

Some time later yet another search was conducted using a drug-sniffing dog. The dog did not alert. It is not known how long after the initial stop this drug search ended because the video was off. In any event, as the Court noted, by this point Flowers had been searched at least once, and his car 3 times. No weapon or drugs or other contraband had been found. The only offense to that point was driving with the license plate light burned out.

Not satisfied, the cops searched the car a fourth time. An officer subsequently testified that in this search, he noticed the panel on the driver's door was loose from its frame. Pulling the panel away from the frame, he saw what appeared to be the butt of a gun. Lifting the power-window control panel up, the cops found a semi-automatic 9mm handgun.

It turns out Flowers was a convicted felon and therefore a prohibited person. There was the usual testimony at the suppression hearing about officers seeing Flowers "lunging" around inside the car before he stopped, and "furtive movements", and so forth. The trial court denied a motion to suppress evidence and Flowers was convicted in a jury trial. The Court of Appeals affirmed the denial of the suppression motion and the conviction.

The Supreme Court concluded that the totality of circumstances did not add up to probable cause to search the vehicle under the "automobile exception" to the warrant requirement. Essentially, in comparing other cases, the Court declared that without more, "furtive movements" and a failure to comply immediately with emergency lights does not amount to enough to support a search for contraband. The majority opinion has a little fun with the dissent's argument that the officers gained grounds for suspicion (and therefore probable cause to search) as the encounter continued: "The dissent next argues that the officers gained probable cause as a result of their failure to discover anything" in the search of Flowers, the 30-second search of the vehicle, and the dog-sniff search of the vehicle. We cannot find any case law that supports the dissent's position, and we find it difficult to understand exactly what rule of law the dissent is advancing by this argument. It is counterintuitive to suggest that a police officer's reasonable suspicions could actually increase to the level of probable cause based on the failure to find anything in three distinct searches conducted as part of an investigation." (Emphasis in the original).

(Actually, we wouldn't be surprised if there were decisions out there based on that kind of logic. Recall the old "drug courier profile" cases, in which searches were justified because: a). the suspect vehicle was driving consistently just under the speed limit; b). the suspect vehicle was driving consistently just over the speed limit; or c). the suspect vehicle was driving consistently at the speed limit. Consider the last drug kingpin trial you were in, where the "expert" testified it was the lack of evidence against your client which actually supported the conclusion he must be the kingpin).

The Court also concluded the discovery of the gun occurred after the justification for a Terry search expired. In this state,

officers may conduct a "protective search of the passenger compartment of the vehicle, limited to those areas in which a weapon may be placed or hidden" if the officer has a "particularized and objective basis for suspecting the particular person stopped of criminal activity" and the officer "possesses a reasonable belief, based on specific and articulable facts, that the suspect is dangerous and may gain immediate control of a weapon." State v. Waddell, 655 N.W.2d 803, 809-10 (Minn. 2003).

The Court refers extensively to State v. Askerooth, 681 N.W.2d 353 (Minn. 2004). The Askerooth 2-step inquiry in automobile/Terry search situations is "first, is the stop justified at its inception? And second, were the actions of the police reasonably related to and justified by the circumstances that gave rise to the stop in the first place." It is that second step that is at issue in Flowers.

"... we have recognized that "Article I, Section 10 of the Minnesota Constitution requires that each incremental intrusion during a traffic stop be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness as defined in Terry." (citing Askerooth, 681 N.W.2d at 365).

Allowing for the special training of police officers, the Court agrees the police had a basis for conducting a Terry search on the basis of the furtive movements over 45 seconds. But the activity of the police exceeded the permissible scope that initial suspicion afforded them. The search for weapons must be "carefully limited", a phrase honored more in the breach than the observance. Here is what the Court said:

"Based on the foregoing general principles, we conclude that the officers did not carefully and appropriately limit their responses to the facts and circumstances of this case. ... [the Court recites the facts of the felony stop and the failure of the subsequent searches to find any weapon, the turning of the officers' attention to drug violations, and the failure of the drug dog to alert to the vehicle] . . . Even if we were to assume that all of the actions taken by the officers to this point were permissible, we conclude that the officers impermissibly exceeded the scope of a Terry stop when — after their search of Flowers, their search of the vehicle, and the dog-sniff search of the vehicle — the officers returned to the vehicle and conducted another search which lasted for an unknown period of time. As a general rule, we note that once a Terry search "has determined that the suspect is not armed, the police may not without probable cause once again search the suspect." . . . The reasonable suspicions the officers had when they searched Flowers and the vehicle had dissipated, and without more, the officers could not conduct another search of the vehicle based upon the same suspicions."

The Court finds support for its rule in other cases, for instance State v. Payne, 406 N.W.2d 511, 513 (Minn. 1987), but in Flowers it is actually enforcing the rule instead of explaining why the rule is inapplicable or satisfied.

The Court believes a federal court analyzing the facts under only the Terry analysis would reach the same conclusion (I think we'll probably get the chance to find out now). The really interesting part is that it did not have confidence the feds would agree about the probable cause analysis. It noted federal cases, including the United States Supreme Court decision in Atwater v. City of Lago Vista, 532 U.S. 318 (2001), which seem to justify full searches incident to minor traffic stops (an arrest is an arrest, to the feds). The state Supreme Court will have none of that:

In Askerooth, we noted Atwater's sharp departure from our traditional understanding of the protections from unreasonable seizure provided a principled basis to interpret our state constitution differently. [citation omitted] We concluded in Askerooth that our state constitution does not allow police officers to arrest and search individuals solely because a minor traffic law has been violated.... Rather, we stated that we follow "the principles and framework of Terry [when] evaluating the reasonableness of [searches and] seizures during traffic stops." Using those principles (as developed in both Minnesota and federal case law) in this case, we have concluded that Flowers' rights under our state constitution were violated, and therefore we need not address the issue of whether Flowers' rights under the federal constitution were violated."

This is good for Minnesota law. But what happens to Mr. Flowers next?

James Ostgard 2007-07-02