

## Traffic Stop Scenario

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Officer Ollie Ogletree is on patrol one Saturday night at about 10:00 p.m. He's driving along a major commercial road in a lower-middle-class section of town when he sees a 2004 Chevrolet Malibu with three occupants turn without signaling, causing a following car to brake suddenly. Although an accident does not result, Officer Ogletree activates his blue lights and pulls the Malibu over for unsafe movement in violation of G.S. 20-154. The Malibu pulls over promptly. The driver is a male in his late 20s. The front-seat passenger is the only other occupant. She is a female of the same age.

1. Officer Ogletree orders both of the occupants out of the vehicle. OK?

*The answer to this question used to be yes, but the best answer now is maybe. The United States Supreme Court has ruled that, in the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (ruling that an officer may order a driver out of the driver's vehicle during a traffic stop; this is "at most, a mere inconvenience" that is reasonable under the Fourth Amendment because it "diminishes the possibility . . . that the driver can make unobserved movements" preparatory to assaulting the officer); Maryland v. Wilson, 519 U.S. 408 (1997) (describing Mimms as holding that an "officer may as a matter of course order the driver of a lawfully stopped care to exit his vehicle," and extending the same rule to passengers; the presence of passengers makes a stop more dangerous and the intrusion on passengers is "minimal"). More recently, in Rodriguez v. United States, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1609 (2015), the Court ruled that a traffic stop must end when "tasks tied to the traffic infraction are – or reasonably should have been – completed." Thus it held that a traffic stop may not be extended, even briefly, to allow a drug dog to sniff the stopped vehicle absent reasonable suspicion of criminal activity justifying the continued detention. The majority opinion in Rodriguez mentions Mimms, distinguishing the slight intrusion associated with ordering an occupant out of a vehicle from the slight intrusion associated with a brief extension of a traffic stop by noting that the former is based on officer safety and so is inherent to the "mission of the stop," while the latter is based on officers' "general interest in criminal enforcement" and is not inherent to a traffic stop.*

*Although Rodriguez itself did not directly criticize or question Mimms, the North Carolina Court of Appeals has issued several opinions that read Rodriguez as undermining, or at least limiting, Mimms. In State v. Bullock, \_\_\_ N.C. App. \_\_\_, 785 S.E.2d 746 (2016), an officer asked/ordered a motorist out of his vehicle and into the officer's vehicle. The court of appeals noted that the officer's purpose in doing so was, according to the officer, not to protect the officer's safety but to give the officer a better opportunity to observe the defendant's conduct. In light of that purpose, the court questioned whether Mimms applied, or whether, by contrast Rodriguez prohibited the order as entailing a delay not justified by the mission of the stop. Without fully resolving that question, the court ruled that the officer's decision to frisk the defendant and to order the defendant into the officer's vehicle were inconsistent with*

*Rodriguez* because they prolonged the stop without reasonable suspicion. Then, in *State v. Reed*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2016 WL 5030389 (N.C. Ct. App. Sept. 20, 2016), the court similar facts. It acknowledged that “[p]rior to *Rodriguez*, it was well settled that an officer may ask a driver to exit a vehicle during a traffic stop.” However, citing *Bullock*, the court stated that “an officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle.” And, it continued, “[t]he same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down.” Somewhat by contrast, in *State v. Castillo*, \_\_\_ N.C. App. \_\_\_, 787 S.E.2d 48 (2016), the court considered another similar stop, and without focusing in detail on the officer’s decision to order the driver out, generally determined that the extension of the stop was properly supported by reasonable suspicion. Further review in *Bullock* and *Reed* is possible and hopefully the courts will clarify the circumstances under which an officer may order a motorist out of his or her own vehicle, and into the officer’s vehicle.

2. The occupants comply with Officer Ogletree’s order to exit the vehicle. Although they are compliant, he is concerned for his safety. A fellow officer was shot the week before during a traffic stop, it is nighttime, and the vehicle has multiple occupants. Officer Ogletree decides to frisk them for weapons. OK?

*No, unless the subjects consent. A frisk does not follow automatically from a valid stop, or from an officer’s subjective safety concerns. In order for a frisk to be justified, Officer Ogletree needs objectively reasonable suspicion that the subjects to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). Officer Ogletree’s concerns here are general in nature, and provide no reason to believe that the driver or the passenger is armed or dangerous. Note that if Officer Ogletree did have reason to believe that the passenger was armed and dangerous, he could frisk her even without suspecting her of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).*

3. Officer Ogletree asks for, and receives, the driver’s license and registration. He asks the driver where he is coming from, where he is going, and who the other occupants of the car are. Is it OK for the officer to engage in brief general conversation of this nature?

*Almost certainly yes. After the Supreme Court’s decision in Rodriguez v. United States, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1609 (2015), ruling that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog, courts must scrutinize conversation that is not directly related to the purpose of the stop to determine whether it constitutes an unnecessary extension of the stop. Still, brief rapport-building and a few general travel-related inquiries at the outset of a stop are traditional and likely appropriate components of a stop. See United States v. Moore, 795 F.3d 1224 (10<sup>th</sup> Cir. 2015) (stating, in a discussion of post-Rodriguez traffic stop principles, that “[a]n officer may also generally inquire about the driver’s travel plans”); United States v. Iturbe-Gonzalez, 100 F.Supp.3d 1030 (D. Mont. 2015) (ruling, after Rodriguez, that an officer may make “traffic safety-related inquiries of a general nature [including about the driver’s] travel plans and travel objectives,” and that “any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation, as opposed to human beings”); Fisher v. State, 481 S.W.3d 403 (Tex. Ct. App. Texarkana 2015)*

*(discussing the issue extensively; stating that “[i]n the course of a routine traffic stop, the detaining officer may . . . question the vehicle’s occupants regarding their travel plans”; noting that that “cases from the federal courts demonstrate that questions about a driver’s origination, destination, and travel purpose are related to the general purposes for a traffic stop because of their potential to determine the existence of an extenuating circumstance [e.g., that the driver was speeding to take a pregnant woman to the hospital] or driver impairment”; and concluding that such questions are permissible of both drivers and passengers, and whether the basis for the stop is a moving violation or an equipment malfunction).*

4. Something about the demeanor of the vehicle’s occupants gives Officer Ogletree a hunch that they are up to no good. He decides to ask the occupants a few questions unrelated to the traffic stop itself, including whether there are any drugs in the car. He does this while he’s examining the driver’s license and registration, so it doesn’t prolong the stop. OK?

*Yes. The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that “mere police questioning does not constitute a seizure.” Therefore, the police may question someone who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion about the subject of the questions. Although Muehler did not involve a traffic stop, its reasoning applies in the traffic stop setting, as the United States Supreme Court recognized in Johnson, supra (“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 those inquiries do not measurably extend the duration of the stop.”).*

5. After he finishes looking at the license and registration, Officer Ogletree continues questioning the vehicle’s occupants about their possible involvement in the drug trade or other criminal activity. This does prolong the stop, but very briefly – for about two minutes. OK?

*No. In Rodriguez v. United States, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1609 (2015), the United States Supreme Court ruled that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog. The Court reasoned that a stop may not be extended beyond the time necessary to complete the “mission” of the stop, which is “to address the traffic violation that warranted the stop . . . and attend to related safety concerns.” That is, “[a]uthority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” The Court expressly rejected the idea that a brief delay of a few minutes was “de minimis” and did not rise to the level of a constitutional concern. The same reasoning clearly would apply to prolonging a stop to ask questions unrelated to the “mission” of the stop. See, e.g., State v. Bedient, \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 319 (2016) (stating that an officer “needed reasonable, articulable suspicion that criminal activity was afoot before he prolonged the detention by asking additional questions”); Matthews v. Com., 778 S.E.2d 122 (Va. Ct. App. 2015) (concluding that an officer “did not have a reasonable articulable suspicion that [a motorist] possessed illegal drugs to justify the extension of the stop by inquiring into his criminal record [and] discussing his tattoos”).*

6. The occupants deny having any drugs and don't say anything incriminating. Officer Ogletree returns to his vehicle to write a citation for the driver. This takes him an additional five minutes. Any problem with the total duration of the stop, which is about ten minutes so far?

*No. Although there is no bright-line rule regarding the length of traffic stops, courts routinely allow stops longer than ten minutes.*

7. As Officer Ogletree is writing the citation, Officer Duncan arrives on the scene. Officer Duncan is a K-9 officer. May Officer Duncan's dog sniff the vehicle while Officer Ogletree completes the paperwork?

*Yes. Having the dog sniff the car is not a search and so requires no quantum of suspicion. Illinois v. Caballes, 43 U.S. 405 (2005). Although Rodriguez, supra, prevents prolonging the stop in order to allow the dog to arrive and sniff, in this case the stop is not extended because Officer Duncan is able to deploy the dog during the time that Officer Ogletree is diligently working on the citation.*

8. What if Officer Duncan hadn't arrived until after Officer Ogletree had completed the citation? Could Officer Ogletree have detained the vehicle and the occupants a few minutes to wait for a K-9 unit to arrive and then for the dog to sniff the exterior of the vehicle?

*No, under Rodriguez. Officer Ogletree could have completed the stop and asked for the driver to wait for a consent dog sniff, but he could not require the driver to remain.*

9. Officer Duncan's dog doesn't alert. But Officer Ogletree is nothing if not thorough. As he is about to hand the citation to the driver, he asks if the driver would consent to a search of the vehicle. The driver consents. Officer Ogletree searches the car. Is this OK?

*No. Because Officer Ogletree has not yet handed the citation to the driver, the traffic stop is ongoing. Requests to search made during a traffic stop should be analyzed just like using a drug dog or asking questions about matters unrelated to the purpose of the stop: if seeking consent requires an extension of the stop, it is prohibited by Rodriguez. Here, although the delay is no longer than the few seconds required to ask for consent (the time it takes to complete the search is probably immaterial as any associated delay would be supported by the driver's consent), it is still a delay. Cf. Bedient, supra (asking driver whether she "had anything in the car" improperly extended stop); Bullock, supra ("We need not decide, however, whether defendant consented [to a frisk of his person], because the moment [an officer] asked if he could search defendant's person, without reasonable suspicion that defendant was armed and dangerous, he unlawfully prolonged the stop.").*

*Note that if Officer Ogletree had already handed the citation to the driver, and had returned the driver's license and registration, a court would likely find that the traffic stop was over and that any further interactions between Officer Ogletree and the driver would be, legally, a consensual encounter. Jackson, supra ("Generally, an initial stop concludes and the encounter becomes consensual only after an officer*

returns the detainee's license and registration." ). In that case, it would be entirely proper for Officer Ogletree to ask for consent to search the vehicle.

10. Forget about the second officer and the dog. Suppose that (1) Officer Ogletree noticed three cell phones on the console; (2) the driver's hands shook as he retrieved his license and registration; (3) the car was a rental that had been rented by someone else; and (4) the driver's description of where he was going was inconsistent with his location and direction of travel. Would Officer Ogletree have reasonable suspicion such that he could extend the stop to pursue a drug investigation?

No, under State v. Bullock, \_\_ N.C. App. \_\_, 785 S.E.2d 746 (2016) (so holding, in light of all the above factors and the fact that the defendant was on I-85, "an interstate used for the transport of drugs"). Note that Bullock has been stayed pending review by the state supreme court.

11. Forget about the facts in the previous question. Suppose that the stop was proceeding normally when Officer Ogletree smelled the odor of burned marijuana coming from somewhere near the driver. Which of the following may Officer Ogletree search based on the odor: the passenger compartment of the vehicle; the trunk; the driver; the passenger.

The odor provides probable cause to search the passenger compartment under the vehicle exception to the warrant requirement. See, e.g., State v. Greenwood, 301 N.C. 705 (1981). It is less certain, but still likely, that the odor provides probable cause to search the trunk under the vehicle exception. See State v. Cash, 89 N.C. App. 563 (1988) (ruling briefly that a search based on the "odor of marijuana" properly extended to the search of "plastic garbage bags found in the trunk of the car" because marijuana could be located in the trunk). Because the odor is localized to the driver, it provides probable cause to search the driver and the ready destructibility of drug evidence likely satisfies the exigent circumstances exception to the warrant requirement. See, e.g., State v. Yates, 162 N.C. App. 118 (2004). Absent additional evidence inculcating the passenger, the odor does not provide probable cause to search her. State v. Malunda, 230 N.C. App. 355 (2013).