

## Investigation During Traffic Stops

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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 2002 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(a). The Malibu pulls over promptly. The driver is a male in his late 20s. The front-seat passenger is a female of the same age. The rear-seat passenger is a teenage female.

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

*Yes. 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) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers).*

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 the two adults. 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 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, the fact that he does not suspect her of criminal activity would not preclude a frisk. Arizona v. Johnson, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009).*

3. Officer Ogletree asks for, and receives, the driver's license and registration. Still, something about the demeanor of the vehicle's occupants makes Officer Ogletree suspect 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 license and registration, so it doesn't prolong the stop. Is it OK for Officer Ogletree to ask about unrelated matters?

*Yes. Although some commentators have argued that "questioning during a traffic stop must be limited to the purpose of the traffic stop," 4 Wayne R. LaFare, Search and Seizure 391 (4<sup>th</sup> ed. 2004), the United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that the police may question someone who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who*

was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning appears to apply in the traffic stop setting. The United States Supreme Court has recognized as much. Arizona v. Johnson, \_\_\_ U.S. \_\_\_, 129 S. Ct. 781 (2009) (“An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, 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.”). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8<sup>th</sup> Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10<sup>th</sup> Cir. 2007).

4. Even after he finishes looking at the license and registration, Officer Ogletree continues questioning the vehicle’s occupants, for about five minutes. Does the duration of the questioning pose a problem?

*Unclear.* The questioning at issue in Muehler did not prolong the suspect’s detention at all, while in our scenario, Officer Ogletree’s continued questioning does prolong the detention of the vehicle’s occupants. This may be prohibited by State v. Jackson, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 492 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions). However, Jackson is somewhat at odds with the court of appeals’ rulings concerning the use of drug-sniffing dogs, discussed below, which allow a traffic stop to be extended briefly for investigative activity unrelated to the original purpose of the stop. Jackson is also inconsistent with most post-Muehler federal cases, which generally conclude that a de minimis delay is permissible. Compare United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop “did not prolong the stop so as to render it unconstitutional”), and United States v. Turvin, 517 F.3d 1097 (9<sup>th</sup> Cir. 2008) (asking a “few questions” unrelated to the stop that prolonged the stop by a “few moments” was not unreasonable), with United States v. Peralez, 526 F.3d 1115 (8<sup>th</sup> Cir. 2008) (extending traffic stop by ten minutes to ask drug-related questions was unreasonable). See generally United States v. Everett, 601 F.3d 484 (6<sup>th</sup> Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving towards a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions). Of course, even if a de minimis extension of the stop is permissible, it is not clear that a five-minute extension is de minimis.

5. The occupants deny having any drugs and don’t say anything especially suspicious. Officer Ogletree returns to his vehicle to write a citation for the driver. This takes him an additional five minutes. Is there any problem with the total duration of the stop, which is about twelve minutes so far?

*No.* Although there is no bright-line rule regarding the length of traffic stops, courts routinely allow stops longer than twelve minutes. See, e.g., United States v. Rivera, 570 F.3d 1009 (8<sup>th</sup> Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10<sup>th</sup> Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7<sup>th</sup> Cir. 2005) (thirteen minutes). As a rule of thumb, “routine” stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 29 (3<sup>rd</sup> ed. 2003).

6. Officer Ogletree can't shake the idea that something is amiss. So, as he is finishing up the citation, Officer Ogletree asks the dispatcher to send a K-9 unit to the scene. Officer Ogletree ends up sitting in his cruiser for about two minutes after finishing the citation before the K-9 unit arrives. It takes an additional minute for the dog to sniff around the exterior of the vehicle. OK?

*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 it would be unreasonable for Officer Ogletree to prolong the stop for a substantial period of time in order to allow the dog to arrive and sniff, the three-minute delay here is de minimis under State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis). The Brimmer court did not say exactly how long a delay must be before it is no longer de minimis, but it described a 15-to-20 minute delay as "lengthy." Compare United States v. Blair, 524 F.3d 740 (6<sup>th</sup> Cir. 2008) (unreasonable to extend traffic stop by thirteen minutes to allow drug dog to arrive and sniff).*

7. The 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 hesitates for a moment, then says "I guess so." Officer Ogletree searches the car. OK?

*Not clear. 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 probably should be analyzed just like using a drug dog or asking questions about matters unrelated to the purpose of the stop: most courts find such requests to be proper if they do not significantly extend the duration of the stop. 4 Wayne R. LaFave, Search and Seizure 391 (4<sup>th</sup> ed. 2004). However, at least one North Carolina Court of Appeals case has stated, albeit on somewhat shaky authority, that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity," which is not present here. State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that any extension of the stop, no matter how minimal, is otherwise unreasonable, a position that is hard to reconcile with Brimmer, supra.*

*Note that if Officer Ogletree had already handed the citation to the driver, and had returned the driver's license and registration, the traffic stop would be over and 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.*

