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ROLL CALL REPORTER

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An Officer's False Assertion of Authority and the Fourth Amendment

QUESTION: **Is a search or seizure based on a law enforcement officer's misstatement of his or her authority unconstitutional?**

ANSWER: **Yes. A search or seizure is unreasonable if its justification is grounded in police officers engaging in or threatening to engage in conduct that violates the Fourth Amendment.**

CASE: ***United States v. Dawud Ali Saafir*, United States Court of Appeals (Fourth Circuit) Decided June 11, 2014**

This case concerns a vehicle search based upon an officer's false assertion of the existence of probable cause.

The Traffic Stop: A Durham, North Carolina law enforcement officer pulled over Dawud Ali Saafir in a residential area for speeding and driving a vehicle with excessively tinted windows. The officer requested Saafir's license and registration. Saafir produced a valid state identification card, but told the officer that his license had been revoked. The officer ran Saafir's name through the Durham Police Department's databases, which confirmed that Saafir's license had been revoked. Based on the information retrieved in the check, the officer, in his words, "determined that Mr. Saafir was considered an armed and dangerous person, a validated gang member, a S.T.A.R.S. offender, that he flees," and had an order to stay away from any property of the Durham Public Housing Authority. The officer described S.T.A.R.S. offenders as ex-offenders who are also on their "last chance." He explained that "if they are caught selling drugs, caught with guns, caught committing any more crimes,… the state is not going to tolerate it any longer, and…they will be prosecuted to the maximum extent of the law, whether …at the state …or federal level." After running the check, the officer radioed for back-up. Although he did not write a ticket for speeding, the officer wrote warning tickets for driving with a revoked license and tinted windows. After instructing Saafir to exit the car so that he could explain the tickets, the officer noticed a hip flask commonly used to carry alcohol in the pocket of the driver-side door. The officer, however, took no action to confirm what, if anything, the flask contained. Once Saafir got out of the car, the officer explained the warning tickets to Saafir and returned his identification documents.

The Post-Traffic Stop Frisk: With the traffic stop now complete and Saafir still standing beside his car, the officer asked if he could "frisk" him. The officer explained that there had been shootings and violence in the area and that is why he wanted to conduct a frisk. Saafir consented and the frisk revealed nothing. By this point, a second uniformed officer in a marked car had arrived. The officer who made the traffic stop then asked Saafir if he could search his car. Saafir said no, explaining that the car did not belong to him. The officer persisted, however, stating that a temporary user of the car could give consent, but Saafir still refused. In short, the officer was trying to talk Saafir into letting him search the car.

The Vehicle Search and the Gun: A North Carolina law makes it an infraction for any person to "possess an alcoholic beverage other than in the opened manufacturer's original container." Relying on this law, combined with Saafir's refusal to consent, the officer instructed Saafir that he had probable cause to search the car based on the presence of the hip flask. Saafir put his head down when he heard this, but he still refused his consent to search. Both officers then asked Saafir if there was anything in the car that they should know about. Saafir said there "might" be something. When pressed, Saafir said there "might be a gun" in the car. The officers searched the car but did not find a weapon. They did find a very small amount of dried up marijuana in the pocket of the driver-side door. Neither officer touched the flask and there was no odor of alcohol on Saafir or in the car. Upon request, Saffir gave the officers the key to the glove box, where the pistol was found.

The Criminal Charge and Disposition: Saafir was indicted for being a felon in possession of a firearm. He moved to suppress the gun and his statements relating to the gun. The trial court denied his motion to suppress. Saafir then entered a conditional guilty plea and was sentenced to 23 months in custody and three years' probation. Saafir appealed.

The Appeal and the Decision: On appeal, Saafir argued that his motion to suppress should have been granted. He contended that the officer was only able to obtain the probable cause to conduct the search (Saffir's admission that there "might" be something in the car) after falsely asserting that he had probable cause to search it. The Court of Appeals for the Fourth Circuit agreed with Saffir. The court held that the officer's assertion that the mere presence of the hip flask provided him with probable cause to search the car (which was a misstatement of the law) was an independent, antecedent threat to violate the Fourth Amendment that tainted the subsequent search of the car and seizure of the gun. The court further found the causal connection between the "threat" to search and the incriminating statements was clear: Saafir made his incriminating statements shortly after the officer's false assertion of the existence of probable cause to search the car. For these reasons, the conviction was overturned.

NOTE: The outcome may have been different if the officer had checked to see if the flask contained alcohol or if there were other evidence suggesting that Saffir had consumed alcohol. Absent any evidence of an alcohol related crime, the search and seizure could not be upheld. This case enforces the principle that a law enforcement officer may not misstate his lawful authority in order to gain advantage. Just as an officer may not manufacture exigent circumstances to justify a warrantless search by means that violate the Fourth Amendment, an officer may not manufacture probable cause by unlawful means, including by way of a false claim of legal authority that constitutes a threat to violate the Fourth Amendment. In other words, "flexing" false authority is a sure way to damage a criminal prosecution.

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