



LGIT'S ROLL CALL REPORTER JULY 2008

POLICE OFFICER'S ABILITY TO FORCIBLY DETAIN A PASSENGER FOR THE DURATION OF A TRAFFIC STOP

QUESTION: May an officer lawfully order a passenger who has exited and/or attempted to walk away from a lawfully stopped vehicle to re-enter and remain in the vehicle until the traffic stop is completed?

ANSWER: UNCERTAIN

CASES: *Brendlin v. California*, United States Supreme Court, Decided June 18, 2007; *Dennis v. State*, Court of Appeals of Maryland, Decided May 19, 1997

In *Brendlin v. California*, decided in June 2007, the United States Supreme Court decided that when a police officer makes a traffic stop, he seizes for the purposes of the Fourth Amendment not only the driver, but also any other occupant in the car. As we know, whenever an officer accosts an individual and restrains his freedom to walk away, he has seized that person. Although it had long been established that a driver is constitutionally seized during a traffic stop, the open question was whether the passenger was similarly seized. That question was answered in the affirmative over a year ago in the *Brendlin* case. As a result of *Brendlin*, passengers, as well as drivers and owners, have standing to challenge the validity of the traffic stop through a motion to suppress.

A critical issue remains after *Brendlin*. The issue is whether a passenger who wants to leave the scene of a routine traffic stop can be forcibly detained for the duration of the stop. In previous cases, the Supreme Court had held that an officer may order the driver of a lawfully stopped vehicle out of the vehicle during a traffic stop (*Pennsylvania v. Mimms*) and may also order the passengers to step out of the vehicle (*Maryland v. Wilson*). However, the issue of whether a passenger who chooses to leave the scene of the traffic stop is free to do so has never been squarely before the Supreme Court. The issue has been before many State courts, including Maryland's appellate courts, with differing results. How the issue would be decided by the Supreme Court is anyone's guess. Although the passenger in the *Brendlin* case never expressed his intention to leave the scene, the Court made the following statements in passing: "It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. . . ." This comment was derived from the Court's earlier statement that " '[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.' " The question remains whether this "exercise of command" includes the ability to forcibly detain passengers until the traffic stop is completed.

Ten years before *Brendlin* was decided by the Supreme Court, the Maryland Court of Appeals held in *Dennis v. State* that to justify detaining a passenger in a motor vehicle that has been stopped for a traffic violation, the officer must have a reasonable suspicion that the passenger engaged in criminal behavior and must intend to conduct further investigation based on that suspicion. In the *Dennis* case, an officer attempted to make a traffic stop of a vehicle that had been driven through a red light. The driver increased the vehicle's speed and ignored the flashing lights of the police car. Finally, the vehicle pulled into a driveway in a residential neighborhood and stopped. The driver remained in the vehicle but the passenger got out. Ignoring the officer's commands to get back inside, the passenger began to walk away. The officer continued to yell for him to return to the vehicle, to no avail. The officer chased and tackled the passenger, who struck the officer and fought with him. The passenger was convicted of disorderly conduct and battery.

The Court of Appeals of Maryland reversed, ruling that the record disclosed that the officer did not intend to make an investigatory *Terry* stop. Rather, he intended to make only a routine traffic stop and justified his detention of the passenger on the basis of officer safety. At trial, however, the arresting officer did not offer any articulated reason why he and his partner were made safer by detaining the passenger rather than simply allowing him to walk away. The Court of Appeals concluded that the officer's forcible detention of the passenger amounted to an illegal arrest that the passenger was legally entitled to resist. In reaching this decision, the Court observed that, ordinarily, there is no reason to believe that a passenger in a vehicle is guilty, as an accessory or abettor, of the traffic offense with which the driver may be charged. The Court commented further that it is "only when the passenger's actions are consistent with those of an accessory or aider or abettor that a police officer has a basis for focusing on and/or charging the passenger." Consequently, in light of *Dennis* and similar Maryland cases, in order to detain a passenger who wants to leave, an officer needs, at a minimum, reasonable suspicion that: (1) the passenger acted as an aider and abettor of the traffic offense; (2) the passenger is engaged in criminal activity unrelated to the traffic stop; or (3) the passenger may be armed and dangerous.

Dennis v. State was decided more than ten years ago, and long before *Brendlin* determined that passengers as well as drivers are seized under the Fourth Amendment when a traffic stop is made. In light of the *Brendlin* case, it is valid to question the continued legitimacy of *Dennis v. State* and other out of state decisions reaching the same result. For example, in an unpublished opinion in March 2008 (*Vadimsky v. City of Melbourne*), the United States Court of Appeals for the Eleventh Circuit questioned whether the Florida cases with outcomes similar to *Dennis* survive the *Brendlin* decision. The rationale for concluding that *Brendlin* trumps *Dennis* and all similar state cases rests upon the belief that requiring a passenger to remain at the scene of a traffic stop merely maintains the *status quo*. Just as in *Wilson* and *Mimms*, little is changed upon the passenger's compliance with the officer's order to remain at the scene. The contrary view would continue to urge that officer safety, standing alone, is an insufficient justification for depriving the passenger of the ability to leave. One thing is certain: the

law is in flux and officers must be guided by sound departmental policy when this situation presents itself. This is why it is imperative that each department, without delay, consult its legal advisor and State's Attorney.

It is important to point out that in the years since the *Dennis* case was decided, numerous state and federal courts have held that an officer may detain a passenger during a traffic stop without violating his or her Fourth Amendment rights. These cases have generally focused on an officer's ability to order a passenger to remain inside a motor vehicle or to get back into a motor vehicle that he or she voluntarily exited. The cases include: *United States v. Williams*, 419 F. 3d 1029 (9th Cir. 2005); *United States v. Clark*, 337 F. 3d 1282 (11th Cir. 2003); *United States v. Holt*, 264 F. 3d 1215 (10th Cir. 2001); *United States v. Moorefield*, 111 F. 3d 10 (3d. Cir. 1997); *Coffey v. Morris*, 401 F. Supp. 2d 542 (W.D. Va. 2005); *Rogala v. District of Columbia*, 161 F. 3d 44 (D.C. Cir. 1998); *Commonwealth v. Pratt*, 930 A. 2d 561 (Pa. Super. 2007); and *Tawdul v. State*, 720 N.E. 2d 1211 (Ind. App. 1999).

The rationale given by the Court in *United States v. Williams* is compelling: "Giving officers the authority to control all movement in a traffic encounter is sensibly consistent with the public interest in protecting their safety. Allowing a passenger, or passengers, to wander freely about while a lone officer conducts a traffic stop presents a dangerous situation by splitting the officer's attention between two or more individuals, and enabling the driver and/or the passenger to take advantage of a distracted officer. Balancing the competing interests does not require us to ignore real dangers to officers, especially in light of the minimal intrusion." It can be strongly argued that the result should be the same even if other officers are present at the scene of the stop. The purpose of allowing officers to control the traffic stop should not be dependent upon the ratio between officers and vehicle occupants. As stated above, however, it is critical that this issue be promptly discussed with departmental legal advisors and with those responsible for prosecuting violators of State law. Until further guidance is provided by the Supreme Court or Maryland's appellate courts, informed departmental policy is the key.

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