



CAN AN OFFICER QUESTION A DRIVER REGARDING HIS CRIMINAL HISTORY ON A TRAFFIC STOP?

December 2017

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

Article Source: http://www.llrmi.com/articles/legal_update/2017_us_v_cone.shtml

©2017 [Brian S. Batterton](#), J.D., Legal & Liability Risk Management Institute

On August 24, 2017, the Tenth Circuit Court of Appeals decided *the United States v. Cone*ⁱ, in which serves as an excellent review of the law regarding whether, on a traffic stop, it is reasonable under the Fourth Amendment for an officer to question a driver regarding his criminal history. The relevant facts of *Cone*, taken directly from the case, are as follows:

On November 29, 2015, Tulsa Police Officer Peter Maher was driving on patrol. About 10:30 p.m. he noticed a white pickup truck crossing through an intersection on 41st Street without a functioning license-plate light, in violation of Oklahoma law.

Without activating his emergency lights, Maher turned around to pursue the truck. He found the truck in a motel parking lot, near another motel well known for criminal activity. In recent months he and his partners had made numerous arrests for narcotics trafficking and firearms offenses in the immediate area. Maher parked his vehicle, approached Defendant's parked truck by foot, and knocked on the driver's side window. About two minutes had passed since Maher first observed the traffic violation.

When Defendant lowered his window, Maher asked for his driver's license and informed him that his car's tag light was not functioning. Defendant acknowledged that he was the person who had been driving on 41st Street. Maher asked if Defendant had "ever been in trouble before" (to which Defendant replied yes), R., Vol. III at 20, and whether he had "been to prison before" (to which Defendant again replied yes), *id.* at 21. Maher asked "For what?" and Defendant falsely claimed that it was for money laundering. *Id.* Maher testified that "the vast majority of the time" he would question those he has pulled over "[t]o assess somebody's criminal history, to determine if they have any violent history in their past that might pose a safety risk to me . . . or my partners during the course of an encounter." *Id.* at 21.

Maher also asked a question along the lines of "What are you doing here?" or "Who are you visiting here?" about which he and Defendant spoke "very, very briefly." *Id.* at 46. Planning to run a warrant inquiry and status check of Defendant's license, Maher followed

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: http://www.llrmi.com/articles/legal_update/2017_us_v_cone.shtml
<http://www.llrmi.com> | <http://www.patctech.com>

his typical practice of requesting drivers to step out of their vehicles while he ran the computer check. He said that he makes the request for his own safety, a particular concern here because he was alone. As Defendant got out, Maher noticed the butt of a pistol protruding from underneath the truck's center console. Maher drew his pistol and told Defendant to get on the ground. After a brief exchange Defendant attempted to flee but Maher apprehended him. Officer Kristi Score soon arrived and secured Defendant's truck, where she found the pistol to be loaded. As she unloaded the firearm, she detected the odor of marijuana emanating from the passenger side of the truck. She opened the passenger-side door and found a backpack containing drugs, including marijuana and methamphetamine, as well as small bags and digital scales.

Defendant was charged with one count of being a felon in possession of a firearm; one count of possessing methamphetamine, cocaine, oxycodone, and MDMA with intent to distribute; and one count of possessing a firearm in relation to a drug-trafficking crime.ⁱⁱ

Cone filed a motion to suppress and argued, among other things, that the officer exceeded the permissible scope of the traffic stop for no tag light when he asked questions regarding his criminal history and his travel plans. The district court denied the motion and Cone pleaded guilty with a right to appeal the denial of his motion to suppress. He then filed a timely appeal to the Tenth Circuit Court of Appeals.

On appeal, he argued that the evidence discovered during the stop should be suppressed because the officer's questions related to his criminal history and his travel plans were unrelated to the reason for his stop, which was not having a functioning tag light.

The Tenth Circuit first noted the rule regarding traffic stops and questioning. The court stated

A traffic stop must be justified at its inception and, in general, the officer's actions during the stop must be reasonably related in scope to "the mission of the stop itself." *Rodriguez*, 135 S. Ct. at 1616; see *United States v. Davis*, 636 F.3d 1281, 1290 (10th Cir. 2011). **In particular, questioning on matters unrelated to that mission is improper if it "measurably extend[s] the duration of the stop."** *Rodriguez*, 135 S. Ct. at 1615 (internal quotation marks omitted).ⁱⁱⁱ [emphasis added]

The court of appeals then first set out to determine whether the questions regarding Cone's criminal history violated the Fourth Amendment by measurably extending the duration of the stop. In Cone's case, the officer asked him if he had "ever been in trouble before," "for what," and if he had "been to prison before." Cone argued that these questions were unrelated to his inoperable tag light.

The court of appeals first discussed the law related to criminal history checks during traffic stops and stated

[A]n officer's mission during a traffic stop is not limited to determining whether to issue a ticket. See *Rodriguez*, 135 S. Ct. at 1615. The Supreme Court has declared that this mission "includes ordinary inquiries incident to the traffic stop." *Id.*

(brackets and internal quotation marks omitted). **And recognizing that "[t]raffic stops are especially fraught with danger to police officers,"** *id.* at 1616 (internal quotation marks omitted), **the Court has included among such inquiries "negligibly burdensome" inquiries that an officer needs to make "in order to complete his mission safely,"** *id.* As the Court stated, **"[T]he government's officer safety interest stems from the mission of the stop itself."** *Id.* Notable for our purposes, the one case cited by the Court as providing an example of a proper inquiry was this court's en banc decision in *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc), abrogated on other grounds as recognized in *United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007). As described in *Rodriguez*, **our Holt decision "recogniz[ed] [an] officer safety justification for criminal record and outstanding warrant checks."** 135 S. Ct. at 1616; *see also United States v. Burleson*, 657 F.3d 1040, 1046 (10th Cir. 2011) ("**[A]n officer may run a background check on a motorist to check for warrants or criminal history even though the purpose of the stop had nothing to do with the motorist's history.**"); *United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) ("**While a traffic stop is ongoing . . . an officer has wide discretion to take reasonable precautions to protect his safety. Obvious precautions include running a background check on the driver and removing the occupants from the vehicle.**" (citations omitted)); *People v. Cummings*, 46 N.E.3d 248, 252 (Ill. 2016) (recognizing approval of *Holt* in *Rodriguez*).^{iv} [emphasis added]

The court of appeals then opined that if actually conducting a computer check of a person's criminal history is reasonable, then likewise asking the driver questions regarding his criminal history would also be reasonable under the Fourth Amendment. In fact, they noted that while questioning would be less reliable than a computer check it would also be faster than a computer check and afford an opportunity for a officer to observe clues pertaining to officer safety. Specifically, the court stated

If running a computer check of a driver's criminal history is justifiable as a "negligibly burdensome" inquiry useful for officer safety, we fail to see how asking the driver about that history could be unreasonable under the Fourth Amendment. The information requested by Maher did not exceed the scope of what a computer check would reveal. A driver's answer may not be as reliable as a computer check but the time involved is much shorter. And just "allowing the officer to ask the question may provide important clues pertaining to safety," such as nervous or evasive responses.^v [emphasis added]

Thus, the court held that it was not unreasonable under the Fourth Amendment to ask questions related to the Cone's criminal history.

Practice Pointer:

Officers should be careful not to allow such questioning to extend the length of the stop in an unreasonable manner. The questions in this case were brief.

Authors Note:

The court did not decide the issue of whether the questions regarding travel plans were unreasonable because they held that the evidence should not be suppressed because, even if those questions were

unreasonable, the questions did not lead to the discovery of the evidence. Rather, the evidence was discovered after the officer asked Cone to exit the vehicle, and he observed a gun in the process.

ⁱ No. 16-5125 (10th Cir. Decided August 24, 2017)

ⁱⁱ Id. at 2-4

ⁱⁱⁱ Id. at 4-5

^{iv} Id. at 6-7

^v Id. at 7