



The Tenth Circuit reminds officers to keep their searches short and limited in scope



July 2018

For duplication & redistribution of this article, please contact Public Agency Training Council by phone at 1.800.365.0119.
PATC 5235 Decatur Blvd Indianapolis, IN 46241

Article Source : http://www.patc.com/weeklyarticles/2018_us_v_saulsberry_chapman.pdf

In *United States v. Saulsberry*, 878 F.3d 946 (10th Cir. 2017), the United States Court of Appeals for the Tenth Circuit was asked to review a District Court's denial of Defendant Walter Saulsberry's motion to suppress. Saulsberry argued that the District Court erred in denying his motion to suppress the evidence of more than fifteen unauthorized credit cards that law enforcement officers discovered during a search of his vehicle. Saulsberry claimed that law enforcement officers unlawfully detained him after an anonymous informant reported that he was smoking marijuana in his car and that the search of his car was unlawfully expanded beyond a search for marijuana to include the inspection of credit cards that were found in a bag inside of his car.

Upon review, the Tenth Circuit held that there was reasonable suspicion to detain Saulsberry for the initiation of a traffic stop of his vehicle. However, the Tenth Circuit reversed the District Court's denial of Saulsberry's motion to suppress because the Tenth Circuit concluded that there was not probable cause to expand the search of Saulsberry's vehicle for evidence of marijuana. The relevant facts are as follows.

At approximately 10:30 p.m., on August 15, 2015, a police dispatcher informed Sergeant Christopher Eastwood of the Oklahoma City Police Department that a caller had reported someone smoking marijuana in a black Honda with Texas license plates parked at an Arby's parking lot. Although the caller did not identify himself, he said that he was an Arby's employee.

Within two minutes of receiving this information, Sgt. Eastwood drove to the Arby's parking lot. Sgt. Eastwood was familiar with the location and knew the employees generally parked in the west end of the lot, where he saw several cars. There was only one vehicle on the north end, a dark green Honda with Texas license plates. Sgt. Eastwood parked his vehicle behind the Honda and approached it. During his approach, Sgt. Eastwood noticed that Saulsberry was "doing something in the center console area." Sgt. Eastwood went up to the driver's window and tapped on it to get Saulsberry's attention. Saulsberry, then, opened the car door, and Sgt. Eastwood immediately detected the scent of burnt marijuana.

Accordingly, Sgt. Eastwood asked Saulsberry for his license and insurance information. Saulsberry provided his name, but he did not provide the requested documentation, nor did he explain why he could not provide it. Sgt. Eastwood offered the following testimony at the suppression hearing on Saulsberry's motion to suppress regarding his verbal exchange with Saulsberry:

[Saulsberry] wasn't listening real well. He kept reaching over. There was a bag in the passenger floorboard area. He kept reaching over there, reaching in the bag, which, again, is just extremely uncomfortable for me. I mean, I don't know what's in the bag and I don't know who he is, we've never met before. So I kept telling him, just kind of keep your hands in your lap, if you would.

©2018 Online Article: 800.365.0119

Link to article online: http://www.patc.com/weeklyarticles/2018_us_v_saulsberry_chapman.pdf
<http://www.patc.com>

Sgt. Eastwood, however, could not provide a description of the bag, but he thought that there may have been a laptop inside of the bag. Specifically, Sgt. Eastwood testified: "I don't even remember if it was a duffel bag or a backpack or what kind of bag it was."

At some point, Sgt. Eastwood called for assistance. After another officer arrived, Sgt. Eastwood asked Saulsberry to step out of the Honda and requested permission to search the car. Saulsberry granted consent to check the vehicle for marijuana. Sgt. Eastwood found a marijuana cigarette in the car's center console and arrested Saulsberry.

While another officer searched Saulsberry's person, Sgt. Eastwood began a search of the car. Sgt. Eastwood first looked in the bag that Saulsberry had been reaching into. Inside the bag, Sgt. Eastwood discovered a stack of cards. At some point, Sgt. Eastwood (1) determined that there were "a lot of credit cards," not a "normal amount," and (2) found (on the front passenger seat of the car) a device that looked similar to a machine used in credit-card fraud that Sgt. Eastwood had seen in a recent investigation. Sgt. Eastwood then took the cards from the bag to examine them more closely, and he noticed that all of the cards were Capital One credit cards and that none had Saulsberry's name on them. The officers then searched the car for further evidence of credit-card fraud.

Saulsberry was eventually indicted on a single count of possession of fifteen or more counterfeit or unauthorized access devices with intent to defraud. Saulsberry moved the District Court to suppress the evidence discovered during his detention at the Arby's parking lot. The District Court tentatively excluded statements made by him to officers other than Sgt. Eastwood but denied the rest of the motion. Accordingly, Saulsberry entered a conditional plea that reserved his right to challenge on appeal the District Court's denial of his motion to suppress.

The Tenth Circuit began its opinion by concluding that Sgt. Eastwood's initial detention of Saulsberry in the Arby's parking lot was supported by reasonable suspicion. The Tenth Circuit stated that the reasonable suspicion necessary to support Saulsberry's detention needed to have been based upon the anonymous tip that the Oklahoma City police dispatcher received regarding someone smoking marijuana in the Arby's parking lot. The Tenth Circuit explained: "Whether a tip provides reasonable suspicion to make a traffic stop is case-specific. Although no single factor is dispositive, relevant factors include: (1) whether the informant lacked 'true anonymity' (i.e., whether the police knew some details about the informant or had means to discover them); (2) whether the informant reported contemporaneous, firsthand knowledge; (3) whether the informant provided detailed information about the events observed; (4) the informant's stated motivation for reporting the information; and (5) whether the police were able to corroborate information provided by the informant." *United States v. Chavez*, 660 F.3d 1215, 1222 (10th Cir. 2011).

The Tenth Circuit concluded that these factors supported the reasonable suspicion necessary for Sgt. Eastwood to initiate a stop of Saulsberry's vehicle. The tipster identified himself as a concerned citizen, which carries a greater degree of trustworthiness as opposed to a criminal who has been paid or is trying to make a deal with the prosecution. Moreover, the tipster provided sufficient detail to identify Saulsberry and the crime that he was allegedly committing.

However, the Tenth Circuit held that the Oklahoma City police officers did not possess probable cause to prolong and to expand the search that led to the discovery of the credit cards. Saulsberry did not contest the fact that the officers had probable cause to search his car for evidence of marijuana; he instead argued that the officers had no independent basis to expand or to prolong the search for evidence of other criminal offenses, such as evidence of credit card fraud, because Sgt. Eastwood could readily see that the bag in which the credit cards were found contained no evidence relating to marijuana. The Tenth Circuit agreed.

As the Tenth Circuit noted, probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence of a crime. Once the officers' suspicions rise to the level of probable cause, they are empowered to search the entire vehicle, including the trunk and all containers therein that might contain contraband.

Here, the Tenth Circuit noted that it could not rely upon Sgt. Eastwood's observation of the credit card machine on Saulsberry's car's front seat because the Government did not make such an argument to the District Court or to the Tenth Circuit. The prosecutor represented to the Tenth Circuit that the Government chose not to make such an argument because it was unsure as to the timing of Sgt. Eastwood's observation of the credit card machine. As a result, the Tenth Circuit stated that its review of the evidence with which to establish probable cause was significantly limited.

The Tenth Circuit then rejected the Government's argument that Sgt. Eastwood possessed probable cause based upon the sheer number of credit cards that he found in Saulsberry's car. In the Tenth Circuit's view, a police officer's observation alone that a suspect possesses a number of cards (about fifteen) does not provide probable cause to believe that the suspect has been or is committing a crime.

Finally, the Tenth Circuit held that Saulsberry's movement towards the bag was insufficient to establish probable cause. The Tenth Circuit conceded that, even in hindsight, it was hard to explain why Saulsberry was reaching for the bag, particularly since there was no gun inside. But, the Tenth Circuit determined that it could not derive a chain of inference that begins with Saulsberry's reaching into the bag and ends with the conclusion that the cards must be involved in criminal activity. The Tenth Circuit hypothesized that, perhaps one could view the reaching as a nervous (and foolish) reaction by a criminal who simply cannot restrain himself from pointing to the evidence of his own guilt, but the Tenth Circuit, recognizing the stress inherent in any interaction with law enforcement and the ambiguity of nervous reactions, has consistently expressed concern about giving too much weight to nervous behavior in assessing probable cause. According to the Tenth Circuit, such behavior is certainly a factor to be considered, but it cannot do the job that would be necessary to establish probable cause in this case.

In short, The Tenth Circuit held that the Government did not establish probable cause justifying Officer Eastwood's examination of the credit cards. Accordingly, the Tenth Circuit held that the evidence obtained from that Officer Eastwood's examination of Saulsberry's car that led to the discovery of the credit cards must be suppressed.