June 12, 2014

Hello, APDs!

This Race Judicata Eblast is brought to you by our guest columnist Alyson Grine from the School of Government.  Her post dovetails the previous eblast regarding discriminatory traffic stops and provides additional basis for litigating race as a factor in traffic stops.

I read with interest the May 22, 2014 E-Blast about how a defense attorney might respond if there is evidence that an officer conducted a traffic stop based on the client’s race. I agree with the author that, despite the U.S. Supreme Court's holding in *Whren*, courts have an obligation to ensure that law enforcement decisions like this one are not influenced by race, and that defenders are often best positioned to bring the matter to the judge’s attention. I have been considering issues like this one while working on the forthcoming manual on *Raising Issues of Race in North Carolina Criminal Cases* in collaboration with Research Attorney Emily Coward. One point I wanted to add to the E-Blast is that defenders may bring a selective enforcement challenge under the Equal Protection Clause of US and NC constitutions in this context, and that doing so may reinforce the challenge under the 4th Amendment. Below is an excerpt from the chapter on Police Investigation: Stops, Searches, and Arrests. Sections that follow will discuss the elements of a selective enforcement claim, gathering evidence to support it, burden of proof, and remedies. This is a “sneak peek” at a draft. You are welcome to send suggestions to me at [agrine@sog.unc.edu](mailto:agrine@sog.unc.edu). The full manual will be released late this summer.

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The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the N.C. Constitution recognize the right to equal protection under the law. Both provisions prohibit “selective enforcement of the law based on considerations such as race.” *State v. Ivey,* 360 N.C. 562, 564 (2006), *quoting Whren v. United States*, 517 U.S. 806, 813 (1996). In reviewing an equal protection challenge to the selective enforcement of traffic laws, the North Carolina Supreme Court has stated that it “will not tolerate discriminatory application of the law based upon a citizen’s race.” *Ivey,* 360 N.C. at 564. Our Supreme Court has recognized that the principle of the equal protection of the law was “inherent in the Constitution of this State” even before its express incorporation in Article I, Section 19, which became effective on July 1, 1971. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660 (1971). Interpretations of the Equal Protection Clause by federal courts, while persuasive, do not control the North Carolina Supreme Court’s construction of rights guaranteed by the N.C. Constitution’s Equal Protection Clause. *See McNeill v. Harnett County*, 327 N.C. 552 (1990).

An equal protection challenge to police action “does not fit neatly into the various stages of Fourth Amendment search and seizure analysis,” as “the central intention behind the Equal Protection Clause is the prevention of official conduct discriminating on the basis of race.” *United States v. Avery*, 137 F.3d 343, 353-55 (6th Cir. 1997) (the Equal Protection Clause “does not contain a seizure requirement”; the “right to equal protection of the laws . . . does not magically materialize when he [the defendant] is approached by the police”). If law enforcement officers engage in racial discrimination at any point in the criminal process, including during the adoption of a policy or the development of an informal police practice, a challenge may be brought on equal protection grounds. *Id.*

Equal protection challenges to racially-motivated police action and challenges under the Fourth Amendment to the State’s assertion of reasonable suspicion or probable cause are often mutually reinforcing, and defense attorneys may benefit by raising them in tandem. Generally, evidence of an officer’s racially-motivated purpose cannot be considered in the Fourth Amendment context. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”). However, such evidence is appropriate and even necessary to an equal protection claim. A defendant raising an equal protection violation may introduce evidence such as:

•     an officer’s racially derogatory statements;

•     statistical evidence of an officer’s pattern of targeting minorities for traffic stops; and

•     results from internal police investigations of the officer in question.

Such evidence, when introduced in connection with an equal protection claim, may cast doubt on whether the officer had the necessary legal justification to make a seizure under the Fourth Amendment. In particular, a judge who is faced with compelling evidence of discriminatory intent by an officer may be inclined to find that the officer’s purported reason for a traffic stop is not credible. For example, in *State v. Villeda*, 165 N.C. App. 431 (2004), a Latino defendant charged with impaired driving presented extensive evidence in support of his equal protection claim, casting doubt on the trooper’s race-neutral explanations for the traffic stop—including the trooper’s statement “that Hispanics are more prone that other races to get in a car after they’ve been drinking.” The defendant’s equal protection and Fourth Amendment claims succeeded in the trial court. The N.C. Court of Appeals reviewed the evidence of racial profiling before upholding the trial court’s finding that the stop was not supported by reasonable suspicion because the trooper could not have observed whether the driver was wearing his seat belt, as the trooper had claimed. Even though the appellate court did not reach the equal protection claim, evidence of the trooper’s subjective motivations for traffic stops undermined his credibility and strengthened the defendant’s Fourth Amendment claim.

In another case involving both equal protection and Fourth Amendment claims, the N.C. Supreme Court concluded that, while it could not determine whether the stop of a car driven by a black male was “selective enforcement of the law based upon race,” which would be a violation of the defendant’s right to equal protection, the officer lacked reasonable suspicion for the stop because there were no grounds to stop the defendant for failure to use a turn signal. Noting concerns over stops for “driving while black,” the court declared that it “will not tolerate discriminatory application of the law” based on race. While the court found that it could not determine whether the stop constituted selective enforcement based on race, those concerns appeared to influence the Court’s approach to the case. *State v. Ivey*, 360 N.C. 562 (2006).

These cases suggest that, even when a defendant does not prevail on an equal protection claim, litigating it may provide the key to getting evidence suppressed on Fourth Amendment grounds.

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