

Shhhh! Whisper Stops and U.S. v. Bowman

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I recently summarized a Fourth Circuit traffic stop case arising out of western North Carolina, [U.S. v. Bowman](#), 884 F.3d 200 (4th Cir. 2018). It's an interesting case in its own right as an application of *U.S. v. Rodriguez*, 135 S. Ct. 1609 (2015) (holding that extensions of a traffic stop must be supported by reasonable suspicion). In short, the Fourth Circuit reversed the trial court's denial of the defendant's motion to suppress, finding that the trooper lacked reasonable suspicion to extend the stop after the traffic stop was completed and vacating the defendant's drug conviction. There are interesting issues in the case about when a seizure occurs and about whether the defendant consented to the extension of the stop, and readers are encouraged to check out the case, or at least the summary [here](#) (you can read all of the Fourth Circuit case updates [here](#)).

What caught my eye about it was a footnote in the opinion. Before the state trooper encountered the defendant, the Drug Enforcement Administration ("DEA") passed along a tip to the local authorities in N.C. that the defendant's vehicle was suspected of trafficking meth. That tip provided the vehicle's license plate number and a description ("a red, older model Lexus"). According to the footnote, "The government agrees that the DEA tip should not be considered in any way in our legal analysis." Slip op. at 3 n.1. Why would that be? After some digging and help from attorneys in the Charlotte Office of Federal Public Defender (thanks again to Ann Hester, Kevin Tate, and Mary Ellen Coleman from that office for talking about the case with me), I was able to determine that this was an instance of a so-called "whisper" stop. Although not exactly a new practice, its application in the digital age raises interesting questions. The tip aspect of the case is not discussed in *Bowman* beyond the brief mention in the footnote, but the case is a clear sign that the practice is occurring in North Carolina and elsewhere, so I wanted to cover it in today's post.

What's a Whisper Stop?

A whisper stop occurs when one law enforcement agency (usually a federal agency) passes along information to local authorities to use in identifying a suspect traveling in a vehicle. Once identified, the local authorities find an independent reason to stop the vehicle, without relying on the tip to justify the traffic stop. After the vehicle is stopped for a purportedly neutral reason (usually a minor traffic violation), the stopping officer then tries to develop independent reasonable suspicion to conduct what is typically a drug investigation, again without relying on the tip. These are also known as "walled-off" stops or "parallel construction" stops—the stopping officer doesn't directly rely on the tip as justification for the stop, so the tip is "walled-off" from the grounds supporting the actual stop; the local authorities construct reasons to stop and investigate the vehicle "parallel" to (but independent of) the information in the tip, such that the tip presumably becomes less relevant (or irrelevant altogether) in the overall analysis. *National Public Radio* ("NPR") recently ran a story about the practice [here](#), and notes that among the federal law enforcement agencies, the DEA is the most prolific in using this method—apparently drug cases are where this type of stop is most likely to arise.

Why the Secrecy?

These types of tips are not intended to be used as a justification for a stop. Why? Presumably, either the tip does not rise to the level of justifying a stop or arrest—after all, if the DEA lawfully and reliably knows a suspect is trafficking drugs at a certain time and place, it seems likely they would have probable cause to arrest the suspect directly—or, the federal agency is unable or unwilling to disclose the details surrounding the tip for some other reason. When the

information is part of an ongoing, larger law enforcement investigation, the federal agency often wants to protect the investigation. This is the traditional justification for these types of stops and the secrecy surrounding the tip—the government knows some drugs are passing through an area but doesn't want to blow the bigger investigation yet.

But another potential reason for the secrecy is somewhat more nefarious—since revelations about the use of surveillance programs by U.S. intelligence services against citizens on a large scale, there have been concerns (at least among privacy advocates) that information swept up in mass surveillance programs may be leaked or shared with law enforcement agencies improperly. Don't take my word for it; in addition to the NPR article linked above mentioning this concern, [this Washington Post](#) story on parallel construction stops notes the use of such surveillance in exactly this way, and *Reason* covered the same issue [here](#), among other mainstream media accounts. Indeed, restrictions on intelligence sharing between surveillance agencies and law enforcement have been *loosened* in recent times according to [this New York Times](#) story. All conspiracy theory aside, there is apparently at least some legitimate concern that such tips may originate from mass surveillance programs, independent from any law enforcement investigation. But as long as the tip information is undisclosed, there just isn't a clear way to know what the government's motivation may be in keeping the information secret.

Does the source of the tip matter since the tip isn't being used as evidence? It does for my comfort level at least, and there may be instances where it has some impact on the case.

The Fourth Amendment and Whisper Stops

How do these stops comport with the Fourth Amendment? In a sense, they can be seen as just another type of pretextual stop—it's not a new phenomenon that one law enforcement agency would tell another to check out a vehicle, have the local authorities initiate a traffic stop based on an observed traffic violation, and allow any subsequent investigation to proceed as it may, or that an officer wanting to stop a suspect for one reason may find some other reason to justify the stop. Under established U.S. Supreme Court precedent, the officer's subjective motivations in stopping a vehicle are irrelevant so long as there was an objectively reasonable justification for the stop. *Whren v. U.S.*, 517 U.S. 806 (1996). North Carolina adopted *Whren* under the state constitution in *State v. McClendon*, 350 N.C. 630 (1999). *Whren* has been the subject of considerable criticism (for instance, [this law review article](#)), including most recently by Justice Ginsburg in her concurring opinion in the recent case of *D.C. v. Wesby*, 538 U.S. ____ (2018) (as Shea noted in a recent post [here](#)). But like it or not, *Whren* is the law of the land, and under *Whren*, the practice is generally permissible as a matter of Fourth Amendment law. So does that mean that for purposes of analyzing the stop it's simply irrelevant whether a whisper stop occurred in a case? Not necessarily.

Do Whisper Stops Need to be Disclosed to the Defense?

One concern is whether tips of this kind are disclosed to the defense at all and, if so, how much information is provided. According to the trial attorneys in the *Bowman* case, the information regarding the tip was provided to the defense attorneys on the morning of the suppression hearing. In some instances, the tips aren't disclosed at all until post-conviction—that's what happened in a 9th Circuit case in 2014, according to an Arizona news report [here](#). I'm not sure how a court would rule on the issue, but the idea the tip might be withheld from the defense makes me uncomfortable. Such information may be required to be disclosed as *Brady* material or as a matter of due process generally. Whether or not disclosure is constitutionally required, the tip information presumably would be discoverable in a state prosecution as a matter of North Carolina's statutory open-file discovery scheme (under which the State is obligated to provide "the complete files of all law enforcement agencies").

Aside from the question of discoverability, there's the separate issue of how the tip bears on the testimony of the law-enforcement witness. Secrecy surrounding the origin and use of the tip during sworn testimony could amount to a misrepresentation or willful omission. *Napue v. Illinois*, 360 U.S. 264 (1959), held that the knowing use of false testimony at trial can violate due process. Along with potential due process concerns, attorneys of course owe a duty of candor toward the tribunal as a matter of professional ethics, and all witnesses of course have a duty to be truthful

under oath. At the end of the day, a court could find it fundamentally unfair that in a proceeding to determine the lawfulness of a stop under the totality of the circumstances, information directly resulting in law enforcement focusing on a vehicle was withheld from both the defense and the court.

How the Court in *Bowman* Viewed the Whisper Stop

In theory, disclosure of the tip shouldn't hurt the government's case if the arresting officer developed independent grounds both to stop the target and investigate further. But is it realistic for the stopping officer to put aside any "whispered" tip information and objectively investigate? If you listen to the oral argument in the *Bowman* case (available [here](#), although fair warning, the player was a little fickle on my computer), the government faced some skepticism from the panel on just this point (the government's argument begins at 14:40, if you're interested). Right out of the gate during the government's argument, the court noted that this wasn't exactly a normal traffic stop—in a more routine traffic stop, any suspicions arise more or less naturally—the officers observe what they observe and filter the information as they normally would in determining if something arouses suspicion. The suspicions of the officers are then either confirmed or dispelled. With a whispered tip, however, the officer needs to manufacture his or her own "clean" reasons for the stop and investigation. But as a judge on the panel pointed out, it's not like the officer on the roadside forgets about the tip. In this sense, the officer "has his thumb on the scale" in the reasonable suspicion analysis, again to borrow the words of one of the judges at argument. Does the tip affect the way the officer is processing the information observed? Does the officer remain a reliable narrator in light of the "extra" information he or she has? Is the officer really dispelling independent suspicions? Or only looking to confirm them? The court pointed out that the officer likely never would have been following this vehicle in the first place without the tip—the trooper was looking for a reason to stop Bowman's car. Additionally, the court expressed suspicion about the grounds for the traffic stop (speeding and weaving), but that issue was not challenged in district court and wasn't before the panel.

One judge also expressed concern about the impact of the tip on how officers approach and interact with the occupants of a stopped vehicle—is it possible that the officer brings a more aggressive or suspicious bearing and tone to the situation? And if so, could that behavior by the officer result in increased nervousness of the occupants, which in turn is used to support reasonable suspicion? Consider how it played out in *Bowman*: The nervousness of the occupants was a major factor alleged by the government in support of reasonable suspicion to extend the stop, a factor the court ultimately rejected. The questions by the court above ultimately did not make their way into the written decision, but some of the court's concerns may have affected the way it interpreted the evidence in conducting the fact-specific reasonable suspicion analysis.

Discovery and Litigation of Whisper Stops

Defenders concerned about the use of this technique have a few options. To determine whether a whisper stop has occurred, consider adding a line to the initial discovery request asking about whisper, walled off, or parallel construction stops. Be on the lookout for this type of stop in officer reports and discovery—which is tricky because it's unlikely to be explicitly spelled out in discovery—but if there is a reference to outside information or an unsubstantiated tip, consider following up with a more specific discovery request. According to the *Reason* article linked above (as well as [this](#) article on DEA training in this area), information from federal agencies concerning whisper stops has been obtained by way of Freedom of Information Act requests ("FOIA"). A public records request on the state level may be an option for obtaining general information on whisper stops.

When litigating a motion to suppress, consider asking testifying officers whether they received any outside information or tips from other law enforcement agencies about the vehicle in question. If such information was given to the officer, consider whether it bears on the credibility of the officer's observations in light of the tip. The questions posed by the court in *Bowman* to the government, above, seem to me a good place to start in addressing the factors alleged in support of reasonable suspicion. In many instances, it won't be a close call—where there is an abundance of independent reasonable suspicion to detain a driver, the tip may not have affected the officer's course of action. But in a close case, it may "tip" the scales.

Have you seen a whisper stop case in your jurisdiction? Have other ideas about how to find out about them and challenge them? Post a comment and share your thoughts!