The Second Look Doctrine, Part II

Author : Jeff Welty

Categories : Search and Seizure, Uncategorized

Tagged as : edwards, second look

Date : June 8, 2010

Last week, I posted about the second look doctrine. (You can read that post here.) Recall that the basic idea is that if the police have custody of an object -- like a wallet, or a purse, or a cell phone -- that they could have searched incident to a defendant's arrest and booking, they can go back and search the object later without a warrant. I promised to do a follow-up post addressing some of the interesting questions that arise in connection with the doctrine, and now I'm making good.

1. Do the police need probable cause to take a second look? No. The cases say that a second look is "not another search subject to Fourth Amendment proscriptions." *State v. Nelson*, 298 N.C. 573 (1979). In essence, our appellate courts have ruled that once the police have lawfully taken custody of an object, the defendant's reasonable expectation of privacy in the object is extinguished. *See*, *e.g.*, *State v. Motley*, 153 N.C. App. 701 (2002). Because the second look *is not a search at all*, for Fourth Amendment purposes, it follows that neither probable cause, nor any other level of Fourth Amendment justification, is required. Accordingly, the leading commentator notes that most courts have concluded that "the police [may] conduct a [second look] upon the mere hunch" that they will find something of interest. 3 Wayne R. LaFave, *Search and Seizure* § 5.3(b) (4th ed. 2004).

2. Can the police take a second look to investigate a crime other than the crime of arrest? This is the question with which I ended my earlier post. The answer is yes, under *State v. Steen*, 352 N.C. 227 (2000). In *Steen*, the defendant was arrested for possession of drug paraphernalia and stolen credit cards. His clothes were taken from him and he was issued jail clothes. The police quickly came to suspect that he had committed a murder, so they tested the clothes for blood and other evidence. On appeal, the defendant argued "that the warrantless search and seizure [was] not valid because it was not closely related to the reason [he] was arrested," but the state supreme court rejected his argument, relying on *Edwards*.

My earlier post drew a couple of skeptical comments -- which are always welcome -- and I admit that there isn't complete agreement nationally on the proper scope of the second look doctrine. (Professor LaFave's treatise provides a good starting point for those who want to look at the landscape in other jurisdictions.) But North Carolina's appellate courts have adopted a very robust interpretation of the doctrine, and the opinions of those courts support the conclusions of the original post, and of course, the conclusions above.