

# **Case and Legislative Update**

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District Court Judges Conference

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# Taking the *Crawford* Bull by the Horns





# Test for Police Interrogation

- Statements are **NONTESTIMONIAL** when the circumstances objectively indicate:
  - the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency
- Statements are **TESTIMONIAL** when the circumstances objectively indicate:
  - there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution

# Danger, Will Robinson, Danger



# ***Davis and Hammon Compared***

- Speaking about facts as happening
- 911 call was for help against bona fide physical threat
- Q & A was to resolve present emergency rather than to learn what had happened
- Even Q as to D's identity could be to assist police in determining if he was violent felon
- Investigation was into past conduct
- No emergency in progress
- No arguments or crashing or breaking or throwing
- Amy said things were fine, and there was no immediate threat to her person
- Questioning of Amy was to determine what had happened, not what is happening

# 1. Person Questioned

- Defendant is charged with assault and attempted murder. Defendant's wife, a witness and potential suspect, is questioned by police.
- Officers talk to the victim about what happened after the alleged attempt on his life.

## 2. Formality of Questioning

- Defendant is charged with assault and attempted murder. Defendant's wife, a witness and potential suspect, is questioned by police at station house after being given *Miranda* warnings.
- Defendant's wife is questioned at her house. She is not in custody and is not given *Miranda* warnings.
  - She gives a written affidavit.
  - Officer records interview.
  - Wife makes oral statements to officer, and officer takes notes.
  - Officer doesn't write anything down but remembers what wife said.



# 3. Preliminary Questioning

- Officer Cashwell, a patrolman, arrived at an apartment building at 5:43 pm in response to a call. The Officer talked to the caller, a resident, who said that since 5:00 pm the phone was off the hook at the apartment of her elderly neighbor, Mildred Carlson. The neighbor had gone to Carlson's apartment and found her sitting in a chair in a room that was "tore up." The neighbor then called the police.

# Preliminary Questioning (cont'd)

- Officer Cashwell went into the apartment and saw Carlson sitting in a chair, her face and arms badly bruised and swollen. He spoke with Carlson to determine whether she needed assistance and to find out what had happened. Carlson complained of pain in her head, but seemed coherent and cognizant of her surroundings. Carlson told the officer what had happened (assault and robbery) and showed him the walking stick and flashlight with which the assailant had hit her, as well as the drawers the assailant opened while looking for money. She briefly described her assailant. The neighbor was present during the exchange between Carlson and Officer Cashwell.

# The Demise (probably) of *Lewis*

- Police questioning has to be structured to have formality required for testimonial statements.
- Preliminary questioning generally does not have necessary structure or formality, and information obtained is generally not testimonial.
- Initial responding officers are usually engaged in preliminary questioning.

# Danger, Will Robinson, Danger



# 4. Blended Questioning

- Recall the 911 call in *Davis*.
- In the course of the 911 call by McCrotty, the operator learned that Davis ran out the door and was leaving in a car with someone else. McCrotty began talking, and the operator cut her off, saying STOP TALKING AND ANSWER MY QUESTIONS. She then gathered more information about Davis and learned why Davis had come to the house and the context of assault.



# 5. No Questioning

- Police arrive and observe V being held at knifepoint on her porch by D.
  - As V breaks free, she shouts, “He’s trying to kill me.”
- D is restrained by police, and V leaves porch with another officer and goes to another part of the house.
  - V is nervous, shaken, and crying. She tells the officer, without any questioning that D had detained her in her house, taken her from place to place with a knife at her throat, cut her arm when she attempted to escape out the front door, and possessed numerous knives while she was held captive.

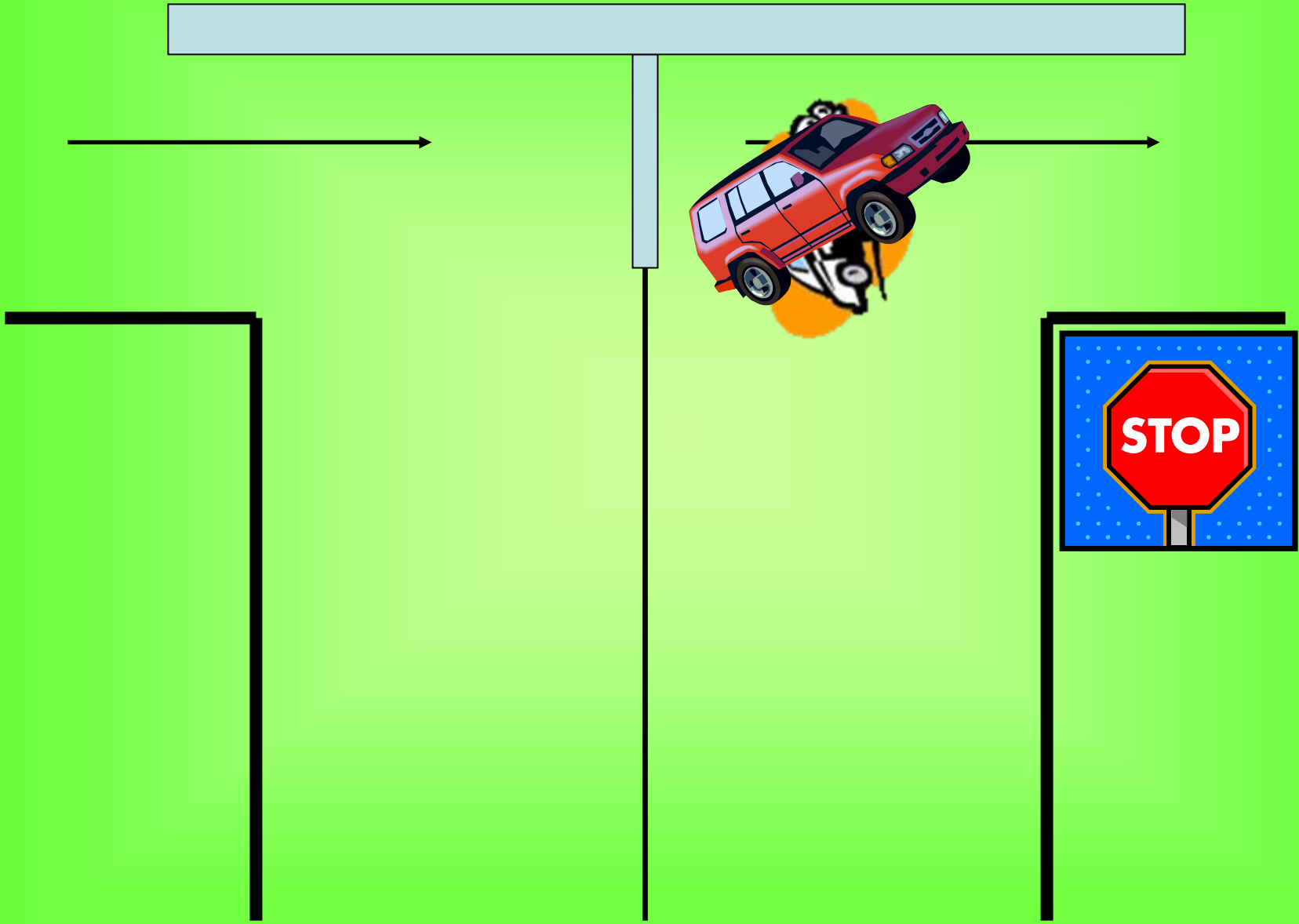
# 6. It's Been Easy Up to Now

- Who are police agents and thus subject to the “primary purpose” test?
- Are non-agents subject to the “primary purpose” test?
  - What do we do about *Brigman's* treatment of the statements to (a) the foster parents and (b) medical personnel?
- Does the “primary purpose” test apply to other types of evidence
  - *Ferebee*, p. 2 of handout
  - Tests, reports, and the like
- Keep your eye out for forfeiture!



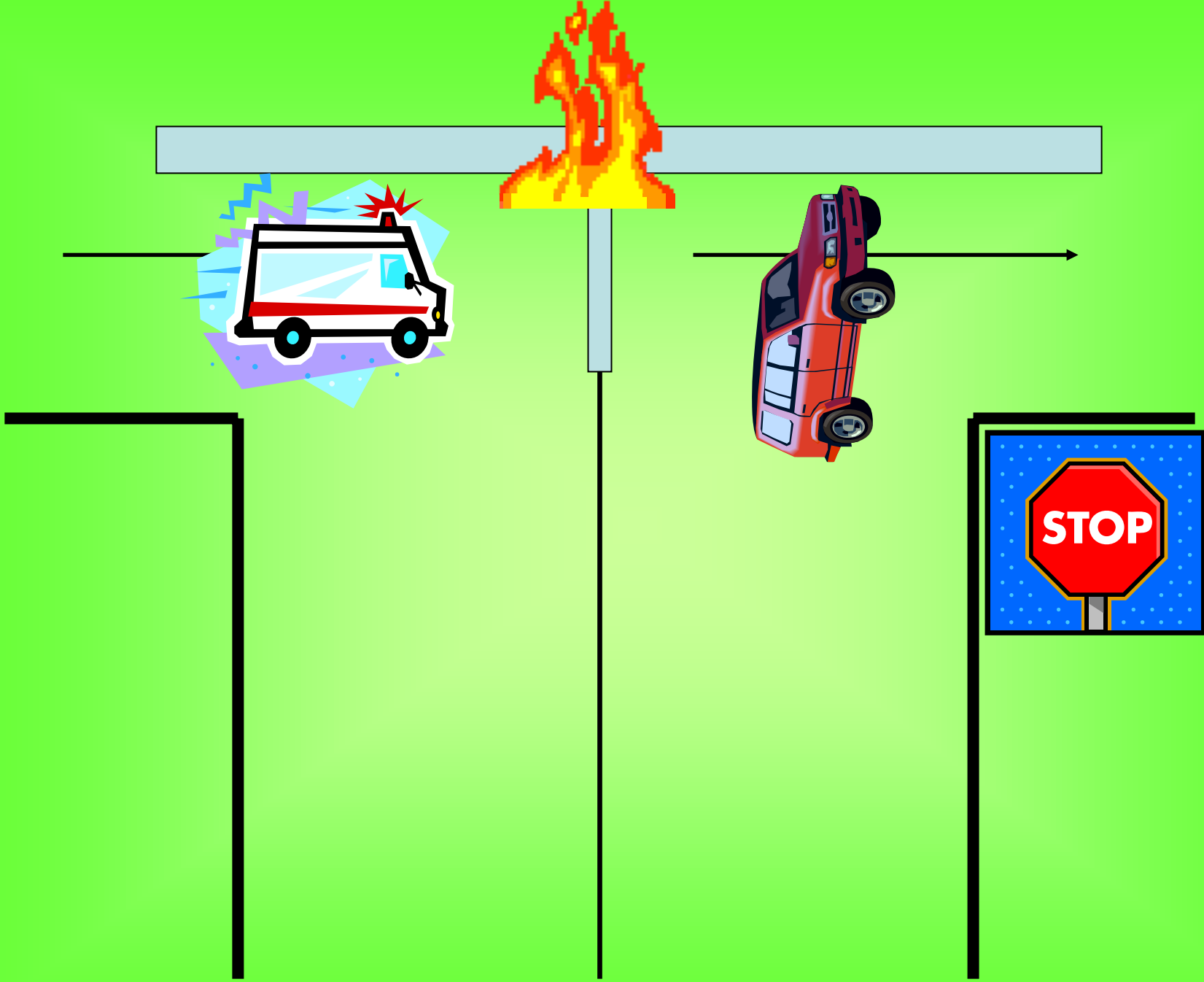
# Back on Firm Ground: Traffic Stops





# The *Ivey* Holding

- The officer did not have probable cause to stop for failure to signal
- G.S. 20-154(a) states:
  - The driver of any vehicle upon a highway or public vehicular area before . . . turning from a direct line shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.



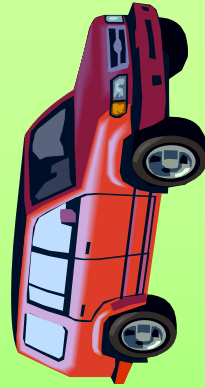
# *Ivey's Observations about P/C*

- An officer must have probable cause to stop for a “perceived” traffic violation
  - Tracks court of appeals requirement of p/c for “observed” traffic violation
- An officer must have p/c to stop for any traffic violation?
  - “In examining the legality of a traffic stop, the proper inquiry is not the subjective reasoning of the officer, but whether the objective facts support a finding that probable cause existed to stop the defendant.”

# *Ivey's* Observations about Race

- Although not briefed, court said that some of oral argument concerned whether traffic stop was for “driving while black.”
- Court said it could not determine from record whether the stop was selective enforcement based on race.
- **“Regardless, this Court will not tolerate discriminatory application of the law based upon a citizen's race.”**
- Court states that Constitution prohibits selective enforcement of law based on race because such enforcement violates Equal Protection
- Other recent appellate decisions have been influenced by suspicions of selective enforcement based on race

# Turning Away from License Checkpoints: What's the Law?



# Scope of Consent

- I didn't agree that you could examine that package, Officer!
  - S v Stone, p. 3 of handout
  - One judge dissenting
- Who's going to pay for that?
  - S v Johnson, \_\_\_\_ N.C. App. \_\_\_\_, 627 S.E.2d 488
  - *Vacated in part on other grounds*, \_\_\_\_ N.C. \_\_\_\_ (June 29, 2006)



# Crime Against Nature (CAN)

- *Lawrence v. Texas* held that sex acts that are CPAF (consensual, private, adult, and free) are constitutionally protected
- How does this apply to NC law?
  - NC clearly may enforce laws that prohibit sex acts that are CPUC (coerced, public, underage, or commercial).
    - Ex., forcible rape, indecent exposure, statutory sexual acts, and prostitution
  - NC courts have upheld general CAN statute by restricting it to acts that are CPUC
    - Is that what legislature intended?

# ***In re R.L.C.***

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# ***In re R.L.C.***

- Dissent argues that legislature did not intend for CAN to apply.
  - Dissent argues that more recent statute on indecent liberties between children reflects legislative intent to regulate sex acts between children only if there is three year age difference.

# The Unfortunate Mr. Sink

- Don't do it!



# Interpreters

- Officer A wants to testify as follows:
  - I do not speak Spanish so I asked Officer B to ask D how many beers he had. Officer B said something in Spanish to D, and D said something back in Spanish. Officer B told me that D said he had 11 beers.
- Officer B is not present at trial.
- May Officer A testify to what Officer B told him that D said?
  - See *S v. Felton*, 330 N.C. 619 (1992)

# Video Gaming Machines

- I know it when I see it:
  - Video machine
  - Of type listed
    - E.g., video poker, video bingo
  - Offering any credit, replays, prizes, or coupons that may be exchanged for prizes
- Arcade games offering credit, prizes, etc., remain lawful

# Dog vs. Animal



# Other Legislation

- Now an infraction for a rear seat occupant of a vehicle not to wear a seatbelt.
  - But, the “failure of a rear seat occupant of a vehicle to wear a seat belt shall not be justification for the stop of a vehicle.”
- No PJC for passing stopped school bus
- New offense of disorderly conduct at funeral
- No mobile phones by driver under 18
- Class A1 misdemeanor to assault handicapped person
- Class 1 misdemeanor to threaten or intimidate person because of participation in neighborhood watch program



# More Legislation

- No impaired vesseling



# And More Legislation

- Pseudoephedrine restrictions
- Larceny pursuant to B & E of place of worship
- Passing stopped school bus and causing serious bodily injury
- No DL if no SS or visa
- Involuntary commitment appeals