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January 15, 2008

Opinion No. 08-05

Revenue Agent's Use of Observations Made Outside the State to Establish Probable Cause for Subsequent Warrantless Search of an Automobile in Tennessee

QUESTION

1. Can agents of the Tennessee Department of Revenue travel outside of Tennessee to establish probable cause for a subsequent warrantless search of an automobile in Tennessee?

2. If agents of the Tennessee Department of Revenue can travel outside of Tennessee to establish probable cause, would doing so violate the Commerce Clause of the United States Constitution?

OPINION

1. Yes, provided that the Department agents gather evidence only through the use of their own senses or through the voluntary cooperation of citizens.

2. No. Interstate travel is a fundamental right recognized and guaranteed by the United States Constitution and includes the right of a citizen of one state to travel to another, even while pursuing state government business.

ANALYSIS

1. Pursuant to Tenn. Code Ann. § 67-4-1002 (2007), the General Assembly has designated as a taxable privilege the sale of "cigarettes and tobacco products" by "every dealer and distributor of tobacco products." The Department of Revenue and the Commissioner administer, collect, and enforce the tax. Tenn. Code Ann. § 67-4-1010 (2007). The Commissioner may appoint agents to enforce the tax and these agents "shall be cloaked with and have the duty, power and authority as police officers to enforce the provisions of [Tenn. Code Ann. §§ 67-4-1001 *et seq.*] and in the illegal traffic of unstamped tobacco products." Tenn. Code Ann. § 67-4-1014 (2007).

Because a Revenue agent has authority as a police officer, it follows that the agent's authority would be similar to that of an officer when outside of the officer's jurisdiction. With regard to collecting evidence and observing illegal acts, an officer outside of his or her jurisdiction is a private citizen. Therefore, the officer's collection and observance must not be performed "under the color of office."

The "under color of office" doctrine has been adopted or recognized by several courts.[1] Pursuant to this doctrine, "law enforcement officials" located outside of their jurisdictions may not use "the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen." *Phoenix v. State*, 455 So. 2d 1024, 1025 (Fla. 1984) (*citing United States v. Hernandez,* 715 F.2d 548 (11th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984)). As private citizens, officers are limited to "gather[ing] evidence only through the use of their own senses and through the voluntary cooperation of citizens." *Phoenix v. State*, 428 So. 2d 262, 266 n.2 (Fla. Dist. Ct. App. 1982), *approved and remanded*, 455 So. 2d 1024 (Fla. 1984). The doctrine's purpose "is to prevent officers from improperly asserting official authority to gather evidence not otherwise obtainable." *Id.* at 266.

Officers can perform covert surveillance outside of their jurisdiction and make observations without violating the doctrine, even when the officers are in uniform or use marked vehicles. *See Phoenix,* 428 So. 2d at 266 (officers perform surveillance on a ranch, including the use of a surveillance aircraft); *Hernandez*, 715 F.2d at 551 (officers on a state marine patrol smell marijuana and see several bales of the drug in plain view on another vessel); *State v. Gustke,* 516 S.E.2d 283, 286 (W. Va. 1999) (officer in uniform and driving a marked police cruiser observes erratic driving); *Wilson v. Commonwealth*, 609 S.E.2d 612, 618 (Va. Ct. App. 2005) (deputy sheriff observes erratic driving and behavior indicating insobriety); *Hudson v. Commonwealth*, 585 S.E.2d 583, 584 (Va. 2003) (officer in uniform driving unmarked police car observes erratic driving). Furthermore, if the officer informs a person that the officer is outside of his or her jurisdiction, the evidence thereafter collected from the person is not collected "under the color of office." *Wilson*, at 618.

A Revenue agent outside of the State's boundaries is a private citizen. The agent can still collect evidence and observe illegal activity, but must do so as a private citizen would. Therefore, the agent may travel outside of Tennessee to collect evidence and observe illegal acts as long as the collection and observance are not performed "under the color of office."

2. Interstate travel is a "fundamental right recognized and guaranteed by the United States Constitution." 16A C.J.S. *Constitutional Law* § 690 (2007); *King-Bradwell Partnership v. Johnson Controls, Inc.*, 865 S.W.2d 18, 21 (Tenn. Ct. App. 1993). The right of travel includes, among other things, "the right of a citizen of one state to enter and to leave another state." 16A C.J.S. *Constitutional Law* § 690. Therefore, the United States Constitution, including the Commerce Clause, does not prohibit an agent of the Tennessee Department of Revenue from entering another state in the course of state employment, so long as he or she does not purport to exercise any special powers as a state officer there.

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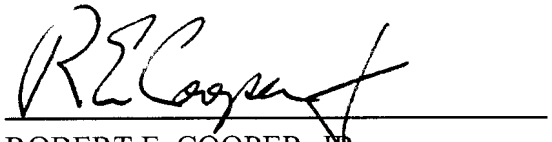
[1]*See Phoenix v. State*, 455 So. 2d 1024 (Fla. 1984); *Brown v. State*, 752 A.2d 620, 624 (Md. Ct. Spec. App. 2000) (*citing Stevenson v. State*, 413 A.2d 1340 (Md. 1980)); *State v. Mingus*, 1981 WL 5602 (Ohio Ct. App. May 22, 1981); *State v. Barber*, 596 A.2d 337 (Vt. 1990); *Hudson v. Commonwealth*, 585 S.E.2d 583 (Va. 2003); *State v. Gustke*, 516 S.E.2d 283 (W. Va. 1999); *State v. Slawlek*, 338 N.W.2d 120, 121-22 (Wisc. Ct. App. 1983); *United States v. Hernandez*, 715 F.2d 548 (11th Cir. 1983), *cert. denied,* 465 U.S. 1009 (1984).



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