DPS Legal Review

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READING OF IMPLIED CONSENT NOTICE

On June 1, 2013, a police officer arrested the defendant for driving under the influence of alcohol in violation of O.C.G.A. §40-6-391. The officer read the defendant the implied consent warning applicable to suspects over the age of 21 pursuant to O.C.G.A. §40-5-67.1(b)(2). The officer read the implied consent notice twice to the defendant. Upon the first reading, the officer recited the fifth sentence of the notice as follows with the officer's additional wording italicized: "After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances *for the purposes of determining* at your own expense and from qualified personnel of your own choosing." Upon the second reading, the officer inserted the phrase "for the purpose" in the same part of the sentence where he had used the phrase "for the purpose of determining." The defendant submitted to a state-administered breath test and the results indicated a blood alcohol concentration of .165 grams.

The defendant filed a motion to suppress the evidence of the results of the state-administered chemical test of his breath following his arrest for driving under the influence of alcohol. The trial court found the officer's inclusion of certain words during his reading of the implied consent notice altered the substance of the notice and affected the defendant's consent to testing and the motion was granted. The State appealed the trial's court decision.

HOLDING: The Court reversed the grant of the defendant's motion to suppress the evidence. The Court distinguished its holdings in Kitchens v. State, 258 Ga.App. 411 (2002) and State v. Terry, 236 Ga.App. 248 (1999) from this case. In Kitchens, the officer overstated the legal limit of alcohol concentration that may result in the license revocation and he implied to the defendant that her out of state license would be suspended if she refused the state test. The Court held that the results of the defendant's breath test should be excluded because the inaccurate information by the officer likely affected the defendant's decision to consent to testing. In Terry, the officer implied that obtaining bond was a pre-condition to independent testing. The Court upheld the suppression of evidence of the driver's refusal to take a blood test due to misinformation by the officer which could have affected the defendant's decision to refuse testing. The facts in this case are distinguishable from Kitchens and Terry in that there was no misinformation given to the defendant.

O.C.G.A. §40-5-67.1(b) provides that the applicable implied consent notice "need not be read exactly so long as the substance of the notice remains unchanged." The purpose of the testing is to determine whether the defendant is under the influence of alcohol or drugs and that the defendant has the right to independent testing after submitting to the state-administered test. The Court reasoned the officer's additional wording was a partial reference to the underlying purpose of the testing. The Court also concluded that the officer's use of additional wording did not alter the substance of the implied consent notice. State v. Fedrick, 2014 WL 4549017 (Ga.App.).

REASONABLE SUSPICION OF CRIMINAL ACTIVITY IN CHECKING FIREARM CARRYING PERMIT

On August 3, 2012, the claimant entered a convenience store through a side entrance. He was carrying a handgun in a holster at his side covered by his suit jacket. When the defendant entered the store, a breeze blew his jacket open revealing the handgun. The claimant grabbed his jacket and closed it concealing the handgun. Three officers were in the convenience store at the time the claimant entered. The officers discussed making contact with the claimant to determine whether he had a license to carry the firearm. The claimant left the store in his vehicle. One of the officers followed him and initiated a traffic stop. The officer asked to see the claimant's driver's license in which he complied.

The officer asked the claimant if he had a weapon with him and the claimant asked whether he had to answer. The officer gave a generally affirmative response and the claimant told the officer that he had a Florida concealed weapons permit. The officer asked to see the permit and the claimant asked whether he had to comply. The officer gave an affirmative response and the claimant gave the officer the permit. The officer checked the claimant's driver's license and determined it was valid. The officer visually inspected the claimant's permit and determined it appeared to be valid. The officer returned the claimant's documents and told him he was free to go. The claimant asked the officer for their location and identification of the officer. The officer gave the information to the claimant. They discussed the nature of the stop and the officer informed the claimant he could ask to see his permit any time he were to see him carrying a firearm. The stop lasted eight minutes and fifty seconds.

The claimant filed a complaint asserting claim under 42 U.S.C. §1983 that the officer violated his constitutional rights by subjecting him to an unreasonable seizure. The district court ruled the officer did not violate the claimant's constitutional rights and even if he did, he was entitled to qualified immunity. The claimant appealed.

HOLDING: The Court determined the officer was entitled to qualified immunity. In such cases, the court must determine whether an officer had reasonable suspicion of criminal activity sufficient to overcome the claimant's Fourth Amendment right to be free from unreasonable seizures by government officials. As the officer was a government official acting within his discretionary authority, the Court's inquiry must be analyzed through the qualified immunity doctrine. The qualified immunity doctrine immunizes such a government official from liability unless his conduct violated clearly established federal law. Through this analysis, the Court's inquiry is whether a reasonable officer in the officer's position could have had reasonable suspicion of criminal activity. The officer argued there was reasonable suspicion in that the incident occurred late at night at a convenience store, a combination of time and place for which armed robberies are particularly problematic and the defendant entered the store through a side entrance. The officer also argued that the claimant's attempt to cover up his weapon after his jacket opened and revealed it in the vicinity of the officers could indicate his possession of the firearm was unlawful. The Court concluded a reasonable officer could have believed that the totality of these circumstances was sufficient to establish a reasonable suspicion justifying the ensuing traffic stop.

The Court noted **O.C.G.A. §16-11-137(b) became effective on July 1, 2014 which prohibits law enforcement officers from detaining a person carrying a weapon solely to determine whether the person is carrying a weapons permit.** The Court did not analyze the claimant's request for relief relating to the officer's statement that he could require the claimant to show his weapons permit any time he was seen carrying a weapon due to the unlikelihood of such a request after the enactment of O.C.G.A. §16-11-137(b). Georgia Carry Org. Inc. v. Kabler, 2014 WL 4252288 (C.A.11 (Ga.)).

ALS REMINDERS

- The Office of State Administrative Hearings (OSAH) has moved from 230 Peachtree Street, Suite 850, to 225 Peachtree Street NE, 4th Floor, Atlanta, GA 30303. Beginning in November, the Atlanta ALS Hearings will be held at the 225 Peachtree Street address which is located in Peachtree Center. Due to Atlanta ALS Hearings being cancelled in September and October, the Atlanta ALS Hearings will be held twice in November which will be November 4th and November 18th.

A defendant must be under arrest for DUI before the implied consent card is read (unless the case involves a wreck with a serious injury or fatality). In a DUI case that involves a wreck with a serious injury or fatality, the defendant does not have to be under arrest before the implied consent card is read. However, there must be probable cause to believe that the defendant was DUI of alcohol or drugs. The serious injury must be one of the following injuries: one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness. See Hough v. State, State v. Handschuh, 279 Ga. 711 (2005).

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, Christina Calloway, Legal Officer, and Dee Brophy, ALS Attorney. Send questions/comments to ccalloway@gsp.net.