DPS Legal Review

October 2014 Legal Services (404) 624-7423 Volume 13 No. 10

SEIZURE BY SUBMISSION TO SHOW OF AUTHORITY UNDER FOURTH AMENDMENT

At 12:12 a.m. on February 23, 2011, an officer was patrolling an area near an elementary school. The officer had been advised to be on the lookout for a black male in dark clothing who was a suspect in the attempted theft of a motorcycle. The officer saw the defendant walking on the grounds of the school wearing a hooded blue sweatshirt and light-colored pants. The officer approached the defendant and told him to remove his hands from his pockets. The defendant did not comply and became verbally combative, yelling that he was "just trying to get home." The defendant "took off running through backyards and tossing stuff as he ran." The officer gave chase and caught the defendant. The defendant's discarded items included crack cocaine and a pipe for smoking crack cocaine.

The defendant was convicted of possession of cocaine with intent to distribute and obstruction of a law enforcement officer. He appealed and claimed that the evidence should have been suppressed. The Court of Appeals reversed the convictions. In this case, the Supreme Court of Georgia reviewed the Court of Appeals' decision.

HOLDING: The Supreme Court reversed the Court of Appeals' decision. The Court clarified that the *seizure* of a person must be supported by articulable suspicion under Terry. Under the Fourth Amendment, a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Accordingly, the defendant was not seized physically by the officer until after he discarded his items; the officer did not touch the defendant or display a weapon upon stopping the defendant; and there were no other officers there such as might constitute a "threatening presence."

The defendant argued that the officer telling him to remove his hands from his pockets was an assertion of the officer's authority. The Court rejected this argument reasoning that absent physical force for an encounter with a police officer to be considered a seizure under the Fourth Amendment, there must be "*submission* to the assertion of authority." In this case, the defendant did not submit to the officer's command before abandoning the items that were used as evidence against him. State v. Walker, 2014 WL 5313860 (Ga.).

PROBABLE CAUSE FOR BLOOD TEST AND CHAIN OF CUSTODY

On June 28, 2011, a Georgia State Patrol Trooper was called to investigate an accident. The trooper determined that the defendant was driving a pickup truck, he was attempting to turn left, he failed to yield to traffic, and his truck was struck by a deputy's patrol car. The deputy's blue lights and siren were activated at the time of the collision. The trooper attempted to speak with the defendant at the scene but the defendant was "a little hysterical" and did not provide any information to the trooper. The trooper did not gain any information at the scene to suggest that the defendant was under the influence of drugs or alcohol.

The defendant was taken to the hospital and the trooper questioned him again. The trooper observed that the defendant was "a little slow in responding," that his speech was slurred, that he was "a little withdrawn," and that his eyes were "very bloodshot and watery." The trooper asked the defendant whether he was taking any medication. The defendant responded that he took Lorcet and Soma on a daily basis and that "it makes [me] sleepy…just like I am now." The trooper conducted the horizontal gaze nystagmus test on the defendant and observed four clues. The trooper testified at the trial that any more than two clues "indicates a certain level of impairment." The trooper concluded that the defendant was under the influence of drugs. The defendant was arrested for driving under the influence of drugs and was read the Georgia Implied Consent notice. The defendant

consented and his blood was tested. The trooper instructed the defendant to turn himself in upon his release from the hospital. The defendant's blood was tested and retested and the test showed the presence of the cocaine metabolite benzoylecgonine.

The defendant was convicted of driving under the influence of a controlled substance. The defendant appealed contending the trial court erred by denying his motion to suppress the blood test results and overruling his chain-of-custody objection to the blood test results. The defendant argued that his blood was seized in violation of the Fourth Amendment because the trooper had no probable cause to arrest and seek a blood test.

HOLDING: The Court held the trooper had probable cause to arrest the defendant for driving under the influence of a drug. Sufficient probable cause to conduct a DUI arrest only requires that an officer have knowledge that the suspect was actually in physical control of a moving vehicle while under the influence of alcohol [or drugs] to a degree which renders him incapable of driving safely. In this case, the defendant appeared to have caused the accident, he told the trooper he was taking medication that made him sleepy, the trooper observed that the defendant's eyes were bloodshot and watery and his speech was slurred, and the horizontal gaze nystagmus test indicated that the defendant was impaired.

The defendant also objected to the admissibility of the blood test results contending that the State failed to establish the chain of custody of the evidence. "Where the State seeks to introduce evidence of fungible nature, it must show a chain of custody adequate to preserve the identity of the evidence. The burden is on the State to show with reasonable certainty that the evidence is the same as that seized and that there has been no tampering or substitution. The State need not negate every possibility of tampering, and need only establish reasonable assurance of the identity of the evidence." Evidence was presented that the trooper provided the blood test kit to the hospital lab technician, witnessed her draw the defendant's blood, that she placed the specimen in the kit, sealed it, and returned the kit to the trooper. The trooper took the kit to his post, placed it in a box in the secretary's office, and the UPS picked up the kit to deliver it to the GBI crime lab. The lab technician testified that the blood test was requested by the trooper of a man by the defendant's name, that she performed the test, put the defendant's name on the collection tubes, and sealed the kit. The crime lab employee testified that the kit was received, the sealed tubes were intact, that photographs were made of the tubes, and that the blood was tested. The Court concluded that the chain of custody evidence was sufficient to establish with reasonable certainty that the blood test results belonged to the defendant. Holland v. State, 2014 WL 4695986 (Ga.App.).

INQUIRING MINDS

QUERY: Are law enforcement officers allowed to carry firearms on **private property** while off duty?

ANSWER: Under the new Georgia Carry Law, a **private property** owner may choose to ban weapons and long guns from his property by notifying the visitor that he does not want weapons or long guns on his property and then seeking to lawfully exclude or eject a visitor who does not comply. *However*, pursuant to O.C.G.A. § 16-11-130, current and retired peace officers of this State who remain certified are exempt from such a ban and ***may*** carry his or her firearm on the private property owner's property.

ALS REMINDERS

- When a driver is arrested for DUI, please remember to take the driver's license. The driver's license of Georgia residents and nonresidents shall be taken per O.C.G.A. § 40-5-67.

QUOTABLE WISDOM WORKS

"Our greatest weakness lies in giving up. The most certain way to succeed is always to try just one more time."

~ Thomas A Edison

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