



DPS Legal Review

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REASONABLE SUSPICION FOR DETAINMENT AND REASONABLE LENGTH OF DETENTION

A little before 2:00 a.m., an officer was patrolling a neighborhood in response to a call from dispatch about a vehicle burglary. The officer saw a car parked in the driveway of a mobile home with the car's front driver's side door open. The officer did not see anyone near the car and thought that the car might have been burglarized. The officer approached the car and saw the defendant slumped in the driver's seat with his head hanging forward. The officer thought that the defendant was a potential suspect as he appeared to match the description of one of the vehicle burglars. The officer could not tell if the defendant was sleeping, pretending to be asleep, or unconscious. After observing a handgun on the passenger seat the officer retreated and called for backup.

When backup arrived, the officers approached the car. The defendant sat up and looked at the first officer. The officer told him not to reach for the handgun, ordered him to get out of the car, handcuffed him, and then moved him to the rear of the car. The detention took place at 1:59 a.m. One of the officers checked the defendant's identification card and ran a routine criminal history check. The check was completed at 2:13 a.m. showing that the defendant had twelve prior felony convictions.

The defendant was arrested for being a felon in possession of a firearm. The officer picked up the firearm and a pill bottle rolled out from underneath it. The pill bottle appeared to contain crack cocaine. The officers searched the entire vehicle and found more crack cocaine as well as cocaine residue and marijuana.

The defendant moved to suppress the drugs, firearm, and ammunition. The district court denied the motion. The defendant appealed contending that he was unlawfully detained and was detained for an unreasonable amount of time.

HOLDING: The Court held that the defendant was not unlawfully detained nor was he detained for an unreasonable amount of time. Law enforcement officers can detain a suspect "for a brief investigatory...stop where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity, and (2) the stop was reasonably related in scope to the circumstances which justified the interference in the

first place." To make this determination, the Court must look at the totality of the circumstances in deciding whether reasonable suspicion exists for an investigatory stop, asking whether the officers have "a particularized and objective basis for suspecting the particular person stopped of criminal activity."

The Court determined that the officer had a "particularized and objective basis" for detaining the defendant. Here, the officer saw an unattended car parked in a driveway around 2:00 a.m. with its door open in a neighborhood adjacent to one where a vehicle burglary had been reported so the officer had reasonable suspicion to approach the car to investigate the situation. The state of Florida prohibits open carry of a firearm so when the officer observed the firearm in plain sight next to the defendant he had reasonable grounds to believe the defendant was violating the state's firearms laws.

The defendant also argued that he was detained for an unlawful amount of time while the officers ran the criminal history check. The Court held that detaining the defendant for 14 minutes while waiting for the results of the check as part of the original investigatory stop was not unreasonable. United States v. Presley, 2016 WL 946565 (11th Cir.).

VOLUNTARY CONSENT TO BREATH TEST DESPITE INTOXICATION

An officer was dispatched to a 911 call in reference to a hit & run/striking fixed object. Upon reaching the location the officer was unable to locate the driver and the vehicle. An unknown person told the officer that a vehicle that appeared to be involved in an accident was at a nearby auto parts store with the driver trying to change the tire and that "he's pretty drunk." The officer did not hear the person's comment about the driver's possible intoxication. The officer found the defendant outside of his vehicle in the auto parts store parking lot. The vehicle was parked, doors open, and it appeared that the defendant was attempting to change a tire. The officer engaged the defendant in conversation and he admitted that he was in an accident and did leave the scene. The defendant handed the officer his driver's license. The officer told the defendant that she needed his insurance information to write a report. The defendant replied that his insurance has just changed. The defendant made attempts to get the insurance information which included looking in the vehicle and making phone calls.

Four minutes after arriving at the defendant's location, the officer called in the defendant's driver's license and tag information into dispatch. Two minutes later, a second officer arrived on scene. The first officer told the second officer that she did not smell anything and that she intended to give the defendant a ticket for leaving the scene. Two minutes later she received the information from dispatch that both the driver's license and tag were valid. Almost four minutes later, the defendant still had not been able to locate his insurance information and walked freely around his vehicle, got into and out of his vehicle, and walked into and out of the auto parts store. The second officer began to suspect that the defendant might be impaired due to the defendant's inability to successfully find out his insurance information or even operate his cellphone properly. He asked the first officer about doing an alcosensor test. The first officer responded that she did not smell anything. The defendant denied consuming alcohol and continued in his attempts to get his insurance information.

Seven minutes later after the officers' conversation, the second officer told the first officer that another officer was going to bring an alcosensor. The defendant still had not been able to locate his insurance information and the first officer attempted to get the information for him. Seven minutes later, another officer arrived with an alcosensor. The first officer was assisted by another officer in operating the alcosensor and the defendant voluntarily blew into it. It registered positive for alcohol at approximately twice the legal limit. The officers did not conduct any field sobriety evaluations. For ten minutes, the officers talked to the defendant and talked to each other. Four minutes later, the two officers waited for the first officer to come to the conclusion to arrest the defendant for DUI. During the interaction, the defendant swayed and was unsteady on his feet.

The first officer told the defendant that he was under arrest. Approximately 42 minutes elapsed from the time the first officer arrived on scene. Two minutes later, the officer secured the defendant in her patrol car and read implied consent correctly. The defendant agreed to take the state's test.

The defendant filed a motion to suppress the results of the breath test. The trial court granted the motion concluding that "the [d]efendant's apparent voluntary intoxication left him without the ability to voluntarily consent to a search of his breath with the use of a machine, despite the lack of threats, benefits or promises from any of the three officers present on the scene." The State appealed.

HOLDING: The Court held that the defendant voluntarily consented to the breath test and reversed the trial court's granting the defendant's motion to suppress the evidence.

Georgia courts have adopted a "totality of the circumstances test" in determining whether an accused voluntarily gave consent to search. In

determining whether a defendant has knowingly and voluntarily waived his right to be silent under the Fifth Amendment, the Court has held that "the mere fact that a defendant was intoxicated at the time of the statement does not necessarily render it inadmissible. If the evidence is sufficient to establish that the defendant's statement was the product of rational intellect and free will, it may be admitted even if the defendant was intoxicated when he made the statement."

The Court reviewed the video of the officers' interaction with the defendant and decided that although the defendant was under the influence of alcohol, the defendant "...was capable of understanding what was said to him, able to freely and voluntarily consent, and actually did so." The Court based its decision on the facts that the defendant's responses to the first officer and other officers were appropriate and timely; he admitted that he ran off of the road due to bad tires; he continually attempted to search for his insurance information after being requested to do so by the first officer; he followed the directions to blow into the alcosensor without difficulty; he answered appropriately when asked if a weapon was in his vehicle; he understood when he was informed that the weapon would be placed in evidence for safekeeping; and he responded appropriately and timely when asked if he would submit to a state-administered test. State v. Depol, 2016 WL 964389 (Ga.App.).

ALS REMINDERS

📍 When testifying at an ALS Hearing, remember to read the implied consent notice at the hearing. You should also provide testimony related to how you determined the age appropriate implied consent notice to read to the DUI defendant.

On Intoxilyzer 9000 cases, always bring a copy of your permit to operate the Intoxilyzer 9000 along with the original test results to the ALS Hearing. Both the permit and the original test results must be provided to the court at the hearing.

Best Wishes, Christina Calloway!

Christina Calloway is leaving DPS to work for the U.S. Patent and Trademark Office. We thank Christina for her service and wish her all the best!

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