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GEORGIA COURT OF APPEALS

EXISTENCE OF REASONABLE SUSPICION TO SUPPORT INVESTIGATIVE DETENTION

On the night of March 19, 2016, a Floyd County police officer was dispatched to respond to a report that someone was attempting to break into vehicles. The officer passed a man in the area, later identified as Preston Dougherty, walking down the side of a busy road. Given the report of attempted car break-ins, the officer decided to speak with Dougherty. He turned his vehicle around and activated his blue lights because of the traffic conditions. Dougherty continued walking as the officer approached. After catching up to Dougherty, the officer asked, "Howdy, hey how are you doing sir?" "The officer stated that "Dougherty acted 'completely weird' and 'was not making sense' when the officer... tried to speak with him, causing the officer to be concerned for his own and Dougherty's safety while standing on the road."

The officer spoke briefly with Dougherty then asked Dougherty "to take his hands out of his pockets and then to come over in front of his patrol car away from traffic." Dougherty removed his hands from his pockets but kept patting his pockets down and trying to put his hands back in them. Dougherty would also respond "okay" to "the officer's requests for him to move out of the lane of traffic and come stand in front of the patrol car," but would then start moving away from the officer and down the road.

Dougherty continued to be minimally responsive and evasive, and eventually the officer received consent to search Dougherty's pockets. During the search, the officer felt a needle, at which point Dougherty "took one of his hands off of the police car and swung it in the air while saying 'I'm

sorry.'" The officer attempted at that point to place Dougherty under arrest, but Dougherty continued to struggle. A second officer arrived and the pair were able to control Dougherty.

Dougherty was convicted during a bench trial of two counts of misdemeanor obstruction. The court found that while the officer's encounter with Dougherty was initially a first-tier consensual encounter with a citizen, "the officer escalated the encounter to second-tier investigatory detention 'very fast.'" Nevertheless, the Court found that the officer had reasonable suspicion that Dougherty was "at least ... a pedestrian under the influence of something" in violation of O.C.G.A. § 40-6-95, and thus his initial detention was proper. Dougherty appealed his conviction and argued that (1) the encounter was a second tier investigatory detention at the outset once the officer activated his blue lights and; (2) regardless of when the detention began, the officer lacked reasonable suspicion for such a stop.

The Georgia Court of Appeals rejected both arguments. **The Court first explained that "there was evidence of a short gap in time between when the officer initially observed and interacted with Dougherty and when the officer escalated the encounter to a second-tier investigatory detention."** Specifically, dash camera audio revealed that the officer spoke briefly with Dougherty before having him remove his hands from his pockets. Moreover, **the Court explained that where, as here, the officer testified that he activated his patrol car's blue lights because of the traffic in the area, the trial court was entitled to hold that the activation of those lights did not, by itself, cause the encounter to become an investigatory stop.**

Finally, the Court held that the officer did possess sufficient reasonable suspicion to support an investigatory detention. The Court explained that based on the testimony and footage, **"there was evidence from which the trial court could find that the**

officer, upon first interacting with Dougherty, developed reasonable suspicion to believe that Dougherty was a pedestrian under the influence and to quickly escalate the encounter to a second-tier detention on that basis.” The Court found it irrelevant that the officer did not testify that he suspected that Dougherty was a pedestrian under the influence, because **“an officer’s subjective motivation is irrelevant’ in determining whether reasonable suspicion exists.”** *Dougherty v. State*, A17A0461, 2017 WL 1166964 (Ga. Ct. App., Mar. 29, 2017).

U.S. COURT OF APPEALS - ELEVENTH CIRCUIT

EXCESSIVE USE OF FORCE DURING ARREST OF NON-VIOLENT SUSPECT

On the evening of February 16, 2009, Deputy Nick DeGiovanni of the Broward County (Florida) Sheriff’s Office was patrolling an area which had recently experienced burglaries. DeGiovanni observed a vehicle and two occupants in the parking lot of a mixed-use complex made up of businesses and residences. Although the vehicle was not parked in a spot reserved for retail parking, DeGiovanni parked behind the vehicle and approached the occupants to investigate. The occupant in the driver’s seat, Paul Stephens, was “sitting on the metal frame of the driver’s doorway, with both feet out of the vehicle and on the ground,” while the passenger, Stephens’ cousin Roan Greenwood, was in the passenger’s seat. The two were inspecting the car in preparation for selling it to Greenwood’s girlfriend, Claudia White, who lived in the complex. At the time DeGiovanni arrived, the ignition and engine were off.

As DeGiovanni approached, he asked Stephens, “What are you two doing over here?” Stephens responded that he and Greenwood were chatting. DeGiovanni responded, “You two are not supposed to be over here,” to which Stephens responded that “they were invited guests of... White,” who lived at the complex. Greenwood confirmed this, and to prove this point, used a key given to him by White to unlock a door

on the first-floor of the complex which gave him access to White’s apartment.

After Stephens and Greenwood returned to the vehicle they were inspecting, DeGiovanni asked Stephens for ID. Stephens stood and provided a Florida ID card. Stephens’ phone then rang and he attempted to answer it using a Bluetooth earpiece, but “DeGiovanni unexpectedly slapped the Bluetooth from Stephens ear and stated: ‘Who told you to answer the phone?’” Stephens then requested a supervisor, to which DeGiovanni responded, “Shut your damn mouth,” and “using his full body weight, slugged Stephens hard in his chest, slamming him into the driver’s seat.” Stephens stood back up and asked “Why are you doing this?” DeGiovanni struck Stephens again, knocking him back into the seat, and Stephens again stood up and said “[White’s] kids are upstairs looking at you. What kind of example are you setting for the kids.” DeGiovanni then stepped on Stephens’ foot, grabbed him by the neck, and slammed him backwards into the car-door frame, causing him to hit his head and neck. DeGiovanni then forcefully grabbed Stephens hand and twisted it, then tightly handcuffed him. Stephens began to lose feeling in his hands and asked DeGiovanni to loosen the handcuffs. DeGiovanni responded, “It’s punishment. You people come here and think you can do as you please.” DeGiovanni did not loosen the handcuffs for almost three hours. As a result of the incident, Stephens suffered serious injuries including a cervical sprain with multilevel-disc herniations, a rotator-cuff tear, and a wrist sprain.

Stephens was charged with resisting an officer without violence and driving without a license. The first charge was later dismissed, but Stephens later pled nolo contendere to the second. Stephens filed suit against DeGiovanni, alleging that DeGiovanni did not have probable cause to arrest him and that DeGiovanni had used excessive force. The U.S. District Court for the Southern District of Florida, however, granted summary judgment to DeGiovanni, stating that Stephens’ plea of nolo contendere invalidated any false arrest claim he may have, and that DeGiovanni’s use of force was lawful. Stephens appealed.

With respect to the false arrest claim, the U.S. Court of Appeals for the Eleventh Circuit held that, under Florida law, Stephens' nolo contendere plea constituted a conviction for his arrest and **"a... conviction... is [generally] a sufficient legal determination of the existence of probable cause."** Thus, probable cause for Stephens' arrest existed as a matter of law because of his plea. Nevertheless, the Court explained that **had Stephens not been convicted, its analysis would have been different: "the facts known by... DeGiovanni during his encounter with Stephens and Greenwood... should have confirmed their explanation of being on the premises... as invitees... This apparent and verified explanation should have dispelled... DeGiovanni's stated reason for his investigatory stop."**

With respect to Stephens' claim of excessive force, the Court overturned the trial court and denied DeGiovanni summary judgment. The Court recounted that while an officer is always entitled to use a certain "de minimus" amount of force in affecting an arrest, beyond that level, "the amount of force used by an officer in seizing and arresting a suspect 'must be reasonably proportionate to the need for that force.'" Here, the Court held, **"the amount of force used by... DeGiovanni in arresting Stephens, which caused his severe and permanent injuries... forecloses any de minimis argument."** Rather, the Court explained, **"No reasonable police officer could believe that' the force... DeGiovanni exerted on compliant, non-resisting Stephens, evidenced by his severe, permanent injuries, 'was permissible given these straightforward circumstances.'" *Stephens v. DeGiovanni*, 15-10206, 2017 WL 1174381 (11th Cir., Mar. 30, 2017).**

DUTY TO INTERVENE WHEN WITNESSING EXCESSIVE USE OF FORCE

Lauren Militello was in the custody of the Broward County Sheriff's Office for a probation violation. On May 25, 2012, Militello was transported by Deputy Rufino Morel from a courtroom back to the jail. Upon arriving at the sally port, "Militello sat down due to pain in her legs." Two other deputies, Deputy Delia Daly-England and Deputy Danny Polk, were on scene

to assist. Deputy Daly-England, in the presence of the other deputies, ordered Militello to stand up, and Militello asked her for help. Deputy Daly-England then used an expletive and again ordered Militello to stand. The other two deputies then lifted Militello to a standing position, and Deputy Daly-England said to Militello, "I will do more than help you get up." Deputy Daly-England and other deputies led Militello to the booking area, leaving Deputies Morel and Polk behind.

Militello alleged that after Deputies Morel and Polk had lost visual contact with her, Deputy Daly-England "pushed her to the ground and dragged her into a search room... [and] punched her three times in the face." Militello filed suit against several deputies, and alleged excessive use of force against Deputy Daly-England and "failure to intervene" against Deputies Morel and Polk. Deputies Morel and Polk moved for summary judgment, arguing that they had not violated Militello's rights and that they were entitled to summary judgment. The U.S. District Court for the Southern District of Georgia denied their motion, finding that "if Deputy Daly-England made the statement to Militello that 'I will do more than help you get up,' that statement would be 'sufficient to establish that Deputies Polk and Morel had reason to expect that excessive force would be used against Plaintiff'" and thus that they could be liable to Militello for failing to intervene. Deputies Polk and Morel then appealed.

The U.S. Court of Appeals for the Eleventh Circuit reversed the district court. The Court explained that **"an officer can be held liable... for failing to intervene when a fellow officer uses excessive force if he or she 'is present at the scene' and 'fails to take reasonable steps to protect the victim.'" The Court cautioned, however, that "[t]his liability... only arises when the officer is in a position to intervene and fails to do so."**

The Court held that "Daly-England's statement to Militello was not a direct threat of force. **Reasonable officers would not necessarily have thought that Daly-England was going to assault Militello based solely on the words of her statement."** Moreover, **Deputies Morel and Polk were neither physically present nor did they observe Daly-England's alleged use of excessive force. Thus, the Court held that "nothing in our prior**

precedent put Morel and Polk on notice that... they were required to take any particular action that they failed to take after hearing Daly-England's statement."

As such, they were entitled to qualified immunity. *Militello v. Broward Sheriff's Office*, 16-10548, 2017 WL 1244835 (11th Cir., Apr. 5, 2017).

U.S. DISTRICT COURT - SOUTHERN DISTRICT OF GEORGIA

USE OF DEADLY FORCE UPON NON-COMPLIANT BURGLARY SUBJECT

Officer Bobby Waiters of the Savannah-Chatham Metropolitan Police Department was patrolling an area near a nightclub in the early morning hours of April 10, 2013. Officers in the area – including Waiters – heard several gunshots and began canvassing for the source. Waiters was then flagged down by a woman – Victoria Dennison – outside of her home. Dennison stated that two people had broken into her back yard. Waiters reported that he was on the scene of a possible ongoing burglary and requested additional units.

The persons in Dennison's backyard, however, were not burglars, but rather were taking refuge from the earlier gunfire. Nonetheless, at least one was also armed with a handgun. As Officer Waiters, standing in the front yard of the residence, approached the fence to the backyard, the group ran the other direction and scaled the fence on the opposite side of the backyard. As Officer Waiters radioed this information in, one of the suspects, later identified as Timothy Williams, came back over the fence into the backyard and started running towards Waiters. Officer Waiters gave commands to Williams to stop and identified himself as a police officer, but Williams continued towards him. Williams scaled the fence to enter the front yard, where Officer Waiters was standing. Dennison's mother was outside on the front porch with Waiters as Williams approached. It was dark and difficult to see, and Waiters was not making use of his flashlight at the time. "When [Williams] failed to comply with [Officer Waiters'] requests, [Waiters] fired three shots in [Williams'] direction wounding him in his abdomen."

Williams was then taken into custody and it was discovered that he did not have a weapon. He was charged with criminal trespass and loitering and prowling, but the charged were dismissed. He later sued Waiters in the U.S. District Court for the Southern District of Georgia for excessive use of force as a result of the shooting. Waiters moved for summary judgment, arguing that his use of deadly force was objectively reasonable under the circumstances and thus he was entitled to qualified immunity.

The District Court first explained that "officers may use deadly force when an officer... 'has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" The Court held that, under these circumstances, "**[t]his split-second decision [Waiters] made regarding the applicable force to be used during a potential burglary, after shots had been fired, and when an unidentified individual was approaching the officer and a bystander [despite Waiters identifying himself as a police officer and ordering the individual to stop] was objectively reasonable. This analysis does not change simply because after the shooting, the evidence indicated that [Williams] was not armed [and] was not charged with burglary.**" Because Waiters' use of force was objectively reasonable, he was granted summary judgment with respect to Williams' claim. *Williams v. Waiters*, 4:15-CV-118, 2017 WL 1170875 (S.D. Ga., Mar. 28, 2017).

ALS REMINDERS

ALS Continuance Requests:

1. ALS continuance requests must be in writing. The Court does not accept ALS continuance requests in the body of an email. The document may be emailed to the court as an email attachment.
2. The Court does not accept ALS continuance requests by telephone.

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