



DPS LEGAL REVIEW



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GEORGIA COURT OF APPEALS

IMPLIED CONSENT - AMBIGUOUS REQUEST FOR ADDITIONAL BLOOD TEST CONSTRUED IN SUSPECT'S FAVOR

A DeKalb County police officer stopped a vehicle for traveling at 79 miles-per-hour in a 55 mile-per-hour zone. The officer detected an odor of an alcoholic beverage while speaking with the driver and the driver admitted he had consumed "a couple of beers." The driver consented to performing field sobriety tests and demonstrated multiple signs of impairment, and consented to a portable breath test, which tested positive.

The driver was arrested for DUI and the officer read him the appropriate implied consent notice, asking if the driver would submit to a state-administered breath test. A conversation ensued in which the driver seemed confused, and the officer began to re-read the notice. During the second reading the driver interrupted and verbally consented to the breath test. The driver then asked the officer "[y]ou said after a period of time I get to submit to another chemical blood test or something like that?" and the officer responded that "[a]fter first submitting to the required state test, you are entitled to an additional independent test." More conversation about the independent test ensued in which the driver asked how much such a test would cost and the officer responded that he did not know. The driver then asked if he would lose his license if he failed the test and the officer responded that he could not answer that question. The driver then agreed to the state-administered chemical test again.

While being transported, the driver asked the officer, "[w]here I gotta do my blood test at?" and the officer responded that it would be conducted at the

jail. The driver subsequently took the state-administered breath test which showed a BAC of 0.096. He did not make any further statements about an independent test.

During his prosecution, the driver filed a motion to suppress the results of the state-administered breath test, arguing that he requested but was not given an independent test. The trial court denied the motion and the driver appealed. The Georgia Court of Appeals considered the standard applicable to requests for independent tests under the implied consent law: "**an accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test.**"

The Court found that the driver's statement "where I gotta do my blood test at?" could have multiple meanings, but because the driver "expressed some interest in an independent test," one possible meaning was a desire for an independent test, especially given that the State decided to administer a breath test and the driver had inquired about an independent *blood* test. **Context is critical in determining whether a statement or question is a request for an independent test:** even though the officer in this case did not interpret the driver's statements as a request for an independent test, the Court held that "**[t]he fact that [the driver's] ambiguous statements reasonably could support two different interpretations... requires us to resolve the ambiguity in his favor, because his statements 'reasonably could' be construed as a request for an independent test.**" The Court held that the results of the state-administered test should not have been admitted. *Wright v. State*, No. A16A0240, 2016 WL 3922161 (Ga. Ct. App. July 15, 2016).

MIRANDA WAIVER AND VOLUNTARINESS OF STATEMENTS

Christian Morales was arrested by police officers for rape and kidnapping. Following his arrest, detectives interviewed Morales regarding the crime. “Two unarmed detectives were present at an interview with Morales, who was not restrained. One of the detectives, who spoke Spanish, read a Miranda warning printed in Spanish to Morales and obtained Morales’s initials and signature on that warning. The detective then interviewed Morales in Spanish.” During a 52 minute interview, Morales at first stated only that his co-perpetrators said they “were going to rape” the victim, but eventually he admitted that he had raped her. During the interview, the detective encouraged Morales to tell the judge “sincerely” that he had “made a mistake” and to write the words “Forgive me for everything” on his recorded statement.

Morales later moved to have his statement excluded on the grounds that it was not voluntarily given, but his motion was denied. He was convicted of rape and appealed, arguing that the trial court should have suppressed his statement because “(a) his Miranda rights were not waived knowingly and intelligently, and (b) his statement to police was not freely and voluntarily given.”

With respect to Morales’ Miranda rights, the Court of Appeals cited the rule that “[W]hether a defendant lacks the capacity to understand and waive such rights due to a mental deficiency or illiteracy is a question of fact for the trial court to determine.” In this case, the record demonstrated that at the time of his interview, (1) Morales was 18 years old; (2) he had been in the U.S. for four months; (3) he had finished sixth grade in Guatemala; (4) the copy of the Miranda warnings that Morales initialed and signed was in Spanish and was read to Morales in Spanish, and; (5) “the transcript of the interview shows that when Morales responded to questions as to whether he understood his Miranda rights, he responded, ‘Hmm’ and nodded his head, at which point the detective told him that he was required to respond affirmatively by saying, ‘Yes,’ which Morales did.” Based on these facts, the Court of Appeals held that Morales “understood his Miranda rights and knowingly and voluntarily, without coercion, waived those rights.” Thus, the Court turned to the question of whether his confession was voluntary.

The Court cited O.C.G.A. § 24-8-824 for the proposition that “[t]o make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.” The Court stated that while “[g]enerally, the ‘hope of benefit’ to which the statute refers has been construed as a hope of lighter punishment, ... **neither a police officer’s nor a family member’s exhortation that a defendant tell the truth or ask for forgiveness constitutes an impermissible hope of benefit.**” The Court reasoned that, in this case, **the detective’s “statements that Morales should ‘tell the judge’ ‘sincerely’ that Morales had ‘made a mistake’ and write the words ‘forgive me for everything’ on his recorded statement were mere exhortations that Morales should tell the truth,” and, “since no ‘hope of benefit’ springs from such an admonishment, [the] trial court did not err when it concluded that Morales’s confession was voluntary.** *Morales v. State*, No. A15A2386. 2016 WL 3563730 (Ga. Ct. App. June 29, 2016).

DRUG ARREST - CONSTRUCTIVE POSSESSION BY FLEEING SUSPECT

A counter-narcotics team executing a search warrant on a residence suspected of being a drug manufacturing location arrested Andre William Johnson after he and several other individuals attempted to flee from the residence. A bag of crack cocaine was found within reach of Johnson’s arm at the location where he was arrested behind the residence. Police discovered cocaine powder being actively cooked in the residence, as well as packaged cocaine, cooking and packaging materials, and other drug-related paraphernalia.

Following his arrest, Johnson was Mirandized and waived his rights. Johnson gave the police a different home address but “admitted that he had been staying at the [searched] house... and had some belongings in the front room.” Johnson was convicted of trafficking in cocaine and possession of drug-related objects, but appealed his conviction, arguing that the State failed to show that he had actual or constructive possession of any of the cocaine found at the scene.

The Court of Appeals explained that while constructive possession requires “some connection between the defendant and the contraband other than mere spatial proximity,” evidence showing that the defendant “owned or controlled premises where contraband was found” creates a rebuttable presumption that the defendant “constructively possessed” the contraband. Here, the Court held that **the State met this presumption despite the fact that Johnson had a different home address because “he also told police that he had been staying at the [searched] house... and the evidence showed that he was keeping some of his belongings in the front bedroom.”** Thus, the State presented sufficient evidence for the jury to find that Johnson resided in the house where the cocaine was found to establish constructive possession of the cocaine. Moreover, **“while this presumption may be rebutted by showing that others had access to the premises, the equal access doctrine applies to rebut the presumption of possession only where the sole evidence of possession of contraband found on the premises is the defendant’s ownership or possession of the premises.”** In this case, the evidence showed not only possession of the premises, but also that Johnson (1) was present while cocaine was actively being cooked, (2) fled the scene with several other people, “some of whom were throwing cocaine in the air during their escape,” (3) was apprehended in the back yard within arm’s reach of cocaine, and (4) made an inculpatory statement to officers [that he had belongings in the house.]” **Given those facts, “the evidence was sufficient to establish that Johnson had constructive possession of the large quantity of cocaine found in the house.”** *Johnson v. State*, No. A16A1224, 2016 WL 4205327 (Ga. Ct. App. Aug. 9, 2016)

***U.S. DISTRICT COURT -
SOUTHERN DISTRICT OF GEORGIA***

**TRAFFIC STOP – JUSTIFICATION FOR
STOP AND USE OF FORCE**

A City of Waycross police officer passed a vehicle driven by Montre Merritt on the night of January 17,

2014. The officer believed Merritt’s vehicle was “travelling far to the right side of the road, creating a potential hazard and indicating possible impairment.” The officer turned to follow Merritt to confirm the lane violation. Merritt turned at an intersection before the officer could do so, but while Merritt was turning the officer observed that he appeared to be “leaning in forward in such a way that he did not appear to be wearing a seatbelt.” The officer also observed that one of Merritt’s brake lights did not appear to be working. While the officer was still catching up to Merritt’s vehicle, Merritt turned left at another intersection where his house stood on the corner, and in an effort to maneuver his vehicle to back into his driveway, entered the oncoming lane of traffic.

The officer, after catching up to Merritt, approached his vehicle and turned on his blue lights. Merritt “stopped his vehicle in the middle of the street and, preparing to back in to his parking spot, put the vehicle in reverse... and turned the steering wheel sharply to the left and then to the right.” The officer pulled his police car within “three to five steps” of Merritt’s car and exited his own vehicle, thinking that Merritt may attempt to flee on foot. Merritt then saw the patrol car’s blue lights, and put his vehicle in park. Due to a slight incline in the road, though, the vehicle rolled backwards before stopping. The officer saw the vehicle moving backwards towards him and called for backup. Due to Merritt’s unusual maneuvering, the officer “was uncertain... “whether [Merritt] was trying to turn around or... angle the car in such a way that he could shoot at [the officer] out of the window.” The officer also knew that the surrounding neighborhood had a history of drug activity.

Based on these facts, the officer drew his service weapon and pointed it towards Merritt. The officer shouted at Merritt to get out of his car and to lie on the ground, and Merritt promptly complied. The officer handcuffed Merritt and helped him to his feet. Merritt explained to the officer that he lived at a residence on the corner, and the officer confirmed Merritt’s address on his driver’s license and unhandcuffed him. After it was determined that Merritt’s brake lights were all

functional, he was cited for a seatbelt violation and released.

Merritt sued the officer and the city in the U.S. District Court for the Southern District of Georgia alleging, among other things, that the traffic stop was unconstitutional and that the officer used excessive force during the stop. The officer moved for summary judgment, arguing that he was entitled to judgment as a matter of law based upon the facts as alleged.

The Court found that, with respect to the traffic stop itself, the officer had probable cause to believe that Merritt had committed a seatbelt violation and a lane violation by entering the oncoming lane in order to back into his driveway. “Because [the officer] had probable cause to believe that [Merritt] had violated state traffic laws... [the officer’s] decision to initiate a traffic stop in that moment was justified under the circumstances.”

The Court also found that once initiated, the traffic stop did not at any point become an unreasonable seizure. In making this determination, courts consider four factors: “(1) the law enforcement purposes served by the detention; (2) the diligence with which the police pursue the investigation; (3) the scope and intrusiveness of the detention; and (4) the duration of the detention.” Here, the Court quickly found that factors (1), (2), and (4) all demonstrated that the stop was constitutional. The Court analyzed the third factor in greater detail, and ultimately found that **“Although [the officer] used rather intrusive measures to carry out the objectives of the stop—including drawing his weapon, ordering [Merritt] out of the vehicle, and making him lie on the ground to be handcuffed... the prevailing case law makes clear that those measures did not automatically transform the traffic stop into an arrest. Moreover, the evidence demonstrates that this level of restraint was necessary to ensure [the officer’s] safety, in light of the following circumstances: (1) [Merritt] was driving in an area known for drugs and other criminal activity; (2) the encounter occurred around midnight; (3) [the officer] saw Plaintiff make an unusual maneuver by turning his vehicle into the oncoming lane of traffic and stopping with his vehicle straddling both lanes; (4) [the officer] saw [Merritt’s] vehicle roll backward toward his police car; and (5) [the**

officer] was alone.” Thus, the Court found that all of the relevant factors weighed “heavily in favor of finding that the scope of Plaintiff’s detention was reasonably related to the purposes of the traffic stop” and was constitutionally permissible.

Based upon many of the same circumstances, the Court also found that the officer’s limited use of force was justifiable. The Court stated that **“In this tense moment, a police officer in [this] position could have reasonably concluded that [Merritt] was positioning to shoot at him out of the driver’s side window, and would not have needed to wait and see whether [Merritt] was, in fact, going to do so... Rather, a reasonable officer under these circumstances would have been justified in taking reasonable action to protect his own safety, including drawing his weapon, ordering [Merritt] to get out of the vehicle and onto the ground, and handcuffing him... That [the officer] was mistaken in his assessment of the actual threat posed by Plaintiff does not change this result, as the reasonableness of his belief at that time is the touchstone of this analysis.”**

Merritt v. Gay, No. CV514-083, 2016 WL 4223687 (S.D. Ga. Aug. 9, 2016)

ALS REMINDERS

If an additional witness is needed for an ALS Hearing, the witness must be subpoenaed. If you need assistance in subpoenaing an additional witness, contact Dee.

If your case involves a roadblock, please remember to bring a **certified** copy of the roadblock supervisor approval form and the final report form with you to the ALS Hearing. The certification sticker on the forms must be the **original** sticker and not a copy of the sticker.

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