DPS Legal Review

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Georgia Court of Appeals

NON-STANDARD ADMINISTRATION OF HGN TEST HELD ADMISSIBLE

A Brookhaven police officer observed a vehicle stopped in the middle of a roadway at night with brake lights on but no headlights and, upon investigating, found James Roy Walsh asleep in the driver's seat with the car in gear and his foot on the brake. The officer – suspecting the driver may be under the influence of alcohol – asked and the driver agreed to submit to standardized field sobriety tests including HGN.

The officer medically cleared Walsh to perform HGN. Walsh was wearing eyeglasses at the time and the officer did not ask him to remove them prior to administering the test. Following the tests, and based in part on Walsh's performance on the HGN test, Walsh was arrested for DUI less safe. At trial, Walsh moved to exclude the results of the HGN test from evidence, arguing that the officer's failure to ask Walsh to remove his glasses during the test rendered the results inadmissible. The officer testified that "although it would have been better practice for him to ask Walsh to take off his glasses, the glasses would have no effect on his interpretation of the test." Nevertheless, the trial court excluded the test results from evidence, finding that the officer had not administered the test properly. The State then appealed the trial court's ruling.

The Georgia Court of Appeals overturned the ruling, stating that "**[a]bsent a fundamental error, such as one affecting the subject's qualification for the HGN test, evidence of the possibility of error goes only to the weight of the test results, not to their admissibility.**" The Court held that no evidence was presented that would demonstrate that the officer's failure to remove Walsh's glasses caused a fundamental error in the test, and thus the results of the test should have been allowed in evidence. *State v. Walsh*, A16A1618, 2016 WL 7365806 (Ga. Ct. App., Dec. 19, 2016).

DUI ARREST – VOLUNTARINESS OF CONSENT TO STATE BLOOD TEST

At approximately 2:50 A.M. on May 25, 2014, a Georgia State Patrol corporal stopped a vehicle driven by Christopher Kettle and occupied by Kettle's wife at a roadblock. Upon asking for Kettle's driver's license, the corporal noted an odor of marijuana coming from the vehicle. Kettle admitted to smoking marijuana earlier in the day. The corporal asked Kettle to exit the vehicle and perform standardized field sobriety tests, and Kettle agreed. The corporal observed that Kettle had bloodshot eyes, dilated pupils, and was unable to maintain his balance. Based on his observations, the corporal placed Kettle under arrest for DUI less safe (drugs) and immediately read him the appropriate implied consent notice, designating a blood test. Kettle stated that he would consent to a blood test. At no point did the corporal threaten Kettle or raise his voice, and Kettle never changed his mind about submitting.

Kettle stated that, after being asked about a blood test by the corporal, he asked "whether his wife would be able to leave." The corporal asked Kettle "whether she had been 'drinking or doing anything,'" and when Kettle confirmed that she had not, the corporal spoke with Kettle's wife and then told Kettle that she would be free to leave. At trial, Kettle moved to suppress the results of his state-administered blood test, arguing that his consent to the test was not free and voluntary under *Williams v. State* because he only agreed to the test so that the corporal would allow his wife to leave. The trial court rejected Kettle's argument and Kettle appealed.

The Georgia Court of Appeals held that **there was "no evidence that the corporal used fear, intimidation, threats or lengthy detention to obtain the consent."** Rather, the entire encounter was civilized, and Kettle did not argue that his age, level of education, or

intelligence prevented him providing voluntary consent. The Court of Appeals also rejected Kettle's argument that his consent was only provided as a condition to allow his wife to leave. Rather, the Court held that the evidence demonstrated that "**the corporal's willingness to let Kettle's wife leave was based on the corporal's conclusion that she was not impaired and not as an inducement for Kettle to submit to the blood test.**" As such, the State met its burden of demonstrating that Kettle's consent was voluntary. *Kettle v. State*, A16A1338, 2016 WL 6820779 (Ga. Ct. App., Nov. 18, 2016).

U.S. Court of Appeals – Eleventh Circuit

USE OF DEADLY FORCE AGAINST ADVANCING SUSPECT

On the night of August 18, 2013, Polk County police officers, including Officer Benjamin Logan, responded to a 911 call from the wife of Robert Hart. Officers had responded to Hart's residence several times in the past for domestic violence, including an instance in which Officer Logan had responded and arrested Hart for allegedly choking his wife and putting her in a headlock. On this occasion, Hart had gotten into an argument with his wife and attempted to shoot himself in the head with a handgun. Hart's wife grabbed his arm immediately before the shooting so that the bullet only grazed his scalp, pried the gun out of his hands, grabbed a phone, and left the residence while calling 911. Hart's wife reported these events to the dispatcher while Hart followed her outside attempting to retrieve the gun. Eventually Hart gave up and returned to the front porch, yelling at his wife to "shoot him again."

Officer Logan and other officers then arrived. The responding officers were aware that Hart was "mentally unstable and violent, with a history of refusing to cooperate with police officers." Upon the officers' arrival, Hart's wife gave Officer Logan the handgun he had used to shoot himself, and he secured the weapon in his vehicle. Although it is undisputed that Officer Logan asked if Hart had any additional weapons, the parties disputed how Hart's wife responded: Officer Logan stated that Hart's wife was not sure if he had any other weapons, whereas Hart's wife claimed she stated he had no other weapons.

Officer Logan held his service weapon at low-ready while another officer approached Hart on the front porch and asked him to sit down. Hart refused and shouted "Shoot me in the head again! Shoot me in the f***ing head!" Officer Logan testified that Hart then moved to attack his wife, at which point the officer approaching Hart grabbed Hart's shirt. Hart ducked out of his shirt, breaking free, and spun towards Officer Logan.

Hart approached Officer Logan repeatedly shouting "Give me that f***ing gun!" As Hart approached, Officer Logan backed up and "commanded Mr. Hart to stop and show his hands." Hart refused and continued to shout "Give me that f***ing gun!" Officer Logan stated that once Hart was five to eight feet away, Hart "began moving his hand down toward his waist as though he were moving toward his pocket." Fearing that Hart was reaching for a weapon, and that Hart was close enough to try to take his own weapon, Officer Logan fired two shots, which struck and killed Hart. Hart's wife disputed Officer Logan's account, stating that he was actually twenty-five feet away from Officer Logan when he was shot, and that Hart never reached towards his pocket.

Hart's wife sued Officer Logan in the U.S. District Court for the Northern District of Georgia alleging, among other things, that Officer Logan used excessive force by shooting Hart. Officer Hart moved for summary judgment, alleging that his use of force was justified and he was entitled to qualified immunity even assuming all the facts alleged by Hart's wife to be true. The district court denied the motion, stating that a genuine dispute existed as to whether the shooting was justified, and that a jury would need to decide the case. Officer Logan appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit reversed the district court, finding that Officer Logan's use of deadly force in this case was protected by qualified immunity. The Court

stated that Officer Logan "faced a tense and rapidly-escalating situation at the time of the shooting, with… Hart standing and then advancing towards [him], all the while ignoring… repeated commands to stop and show his hands." The Court also held that Officer Logan's fear that Hart was trying to arm himself either by taking his service weapon or retrieving his own gun were not unreasonable given Hart's repeated demands to "give him the f***ing gun" and his approach towards Officer Logan. **Where, as here, Officer Logan (1) had a reasonable fear that Hart was attempting to arm himself; (2) Hart had already behaved dangerously and erratically by trying to shoot himself; and (3) Officer Logan "knew from his previous experience… that… Hart had a history of violent disputes with" his wife, Officer Logan had a reasonable belief that Hart was erratic, unpredictable, and posed a great danger to others. As such, Plaintiff could not demonstrate –as she would be required to do to overcome Officer Logan's assertion of qualified immunity – that he had fair notice that the use of deadly force would be unconstitutional under the circumstances.** *Hart v. Logan*, 16-10556, 2016 WL 6871448 (11th Cir., Nov. 22, 2016).

WARRANTLESS ENTRY INTO HOME JUSTIFIED BY EXIGENT CIRCUMSTANCES

In June of 2011, members of the Orange County, Sheriff's Office in Florida obtained felony arrest warrants for a suspect who had, in the process of robbing a retail store, pointed a gun at an employee, struck her, bound her, and locked her in a bathroom. Using the suspect's cell phone signal, investigating deputies tracked his location to a street where a surveilling deputy spotted the suspect near a multi-family residence. The suspect – who the deputy reported was using binoculars – also saw the deputy. The deputy radioed this information in and another deputy drove an unmarked vehicle to the residence, where he reported that he had also seen the suspect and that the suspect had looked in his direction before rushing into one of the residences.

A team of deputies then forcibly entered several of the units in the building looking for the suspect, including one unit occupied by Adria Hill. The deputies had no warrant and broke down Hill's locked door during their search, but did not locate the suspect. Hill denied that the suspect had ever been in her unit and filed suit in federal court against the deputies, alleging her civil rights were violated by the deputies' warrantless entry. The trial court, however, granted summary judgment to the deputies, and Hill appealed.

The U.S. Court of Appeals for the Eleventh Circuit upheld the district court's ruling, holding that the deputies' warrantless entry into Hill's home was justified by the existence of exigent circumstances. The suspect in question was wanted for multiple violent felonies and the deputies had "good reason" to believe that he was inside Hill's home. Specifically, **the deputies had tracked the suspect's phone to the street in question, then, while conducting surveillance, two different deputies stated that they had spotted the suspect in the vicinity of the residence and that he had rushed into it. It was reasonable under the circumstances to believe that the suspect was still armed and dangerous and that "any delay… could allow [the suspect] to escape or cause harm to others." Thus, warrantless entry was justified by the exigent circumstances exception.** *Hill v. Orange County Sheriff*, 16-11462, 2016 WL 7335575 (11th Cir., Dec. 19, 2016).

ALS REMINDERS

When serving a DUI defendant with a 1205 form, please remember that the form must be personally served on the defendant. The defendant must be served with the 1205 form that is designated as "Driver's Copy" and the Department of Driver Services must be provided with the page designated as "Department of Driver Services Copy." When serving a computer generated 1205 form, remember to provide the defendant with the instruction page containing the hearing procedures to ensure the defendant has the information regarding the appeal process.

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Colonel Mark W. McDonough.

Legal Services
Melissa Rodgers, Director
Joan Crumpler, Deputy Director
Dee Brophy, ALS Attorney
Zack Howard, Legal Services Officer