DPS Legal Review

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Georgia Court of Appeals

DUI ARREST – CONSENT TO BLOOD TEST HELD NOT VOLUNTARY

On the afternoon of May 13, 2015, a police officer responding to a call of a vehicle stopped in an intersection encountered Colleen Brogan. EMS personnel had already arrived and had found Brogan asleep behind the wheel of her vehicle with the car still in gear. The officer roused and woke Brogan and noticed her face appeared lethargic and "droopy" and that her speech was slow and slurred. Brogan stepped out of the car at the officer's request, but was so unsteady that the officer felt she could not safely perform field sobriety tests. Throughout the encounter, Brogan appeared "confused and lacking control over her physical movements, and she [gave] tentative and sometimes nonresponsive or incomprehensible answers to the officer's questions."

The officer did not smell any alcoholic beverage on Brogan or in her car, and told Brogan "that he did not suspect she was impaired by alcohol." The officer asked Brogan if she was on any drugs, and Brogan responded that she had taken allergy medication. Brogan stated that she wanted to go home and the officer responded that she could not drive herself home. Brogan then turned away from the officer and – believing that she was going back to her car – the officer handcuffed Brogan and placed her in his patrol car. He did not tell Brogan that she was under arrest or explain her detention, but read her the Georgia implied consent notice and asked Brogan if she consented to a state blood test. "The officer testified that Brogan bobbed her head, but he conceded that he 'really c[ould]n't speak to how she articulated yes.'" The encounter was recorded on the officer's dashboard camera, but no answer to the officer's implied consent request could be heard on the videorecording.

The officer took Brogan to a hospital, where her blood was drawn without incident. The blood test revealed a very high level of alcohol in Brogan's blood. At her trial for DUI, Brogan moved to exclude the results of the blood test, arguing that the state failed to show that her consent to the blood test was voluntary under *Williams v. State* and subsequent cases. The trial court granted Brogan's motion, and the state appealed.

The Georgia Court of Appeals upheld the trial court's ruling and ruled that Brogan's consent was not voluntary under *Williams*. The court explained that "[t]he evidence in this case… showed that Brogan was extremely intoxicated and confused during her encounter with the officer" and that the interaction between the officer and Brogan was ambiguous. "The officer did not tell Brogan she was under arrest; instead, he told her that he did not think she was under the influence of alcohol and he expressed concern about her medical condition and her need for medical attention." **The Court held that "[w]hile Brogan's knowledge of her right to refuse consent to a search," was not an essential condition of effective consent under *Williams*, "it nevertheless was a factor that the trial court could take into account… and these circumstances could be construed to cast doubt on that knowledge."** *State v. Brogan*, A16A2152, 2017 WL 639757 (Ga. Ct. App., Feb. 15, 2017).

TRAFFIC STOP - LACK OF REASONABLE ARTICULABLE SUSPICION

An officer observing traffic at a four-way stop ran the license plate number of a vehicle travelling through the intersection. Based upon the information returned, the officer discovered that the registered owner of the vehicle did not have a driver's license. While the registration information showed the registered owner of the vehicle to be a female, the officer did not check the gender of the person actually driving. The officer testified that although there was a light at the four-way

stop, she could not see the gender of the driver because the stop occurred at night. Nevertheless, the officer performed a traffic stop on the vehicle based upon the unlicensed status of the registered owner.

The driver of the vehicle, Geraldo Martinez-Arvealo, a male, was not the registered owner but also did not have a driver's license. He was charged with driving without a license, but later filed a motion to suppress, arguing that the officer had no reasonable articulable suspicion to stop him. The trial court granted his motion, and the state appealed.

The Georgia Court of Appeals upheld the trial court's decision "that **the officer lacked a reasonable articulable suspicion for making the stop because she completely failed to note the unlicensed owner's name and gender as listed in the license plate search report, and she made no attempt to observe the driver's gender prior to the stop, even though, as the court specifically noted in its order, there was a light at the intersection.**" *State v. Martinez-Arvealo*, A16A1813, 2017 WL 660592 (Ga. Ct. App., Feb. 17, 2017).

U.S. Court of Appeals – Eleventh Circuit

TRAFFIC STOP – VEHICLE SEARCH NOT INVALIDATED BY LENGTH OF STOP

An Alabama law enforcement officer performed a traffic stop on a vehicle occupied by Antonio Castro and Oswaldo Vargas for following too closely and failing to maintain lane. The vehicle's driver, Castro, admitted to the officer that he did not have a driver's license, and the officer asked Castro to come back to his patrol car. There the officer asked Castro where he was going, and Castro first said Alabama, but then Georgia, and finally specified Atlanta. Shortly thereafter, the officer told Castro he was issuing him a warning for following too closely.

The officer continued asking Castro routine questions to fill out a written warning. The officer then approached Vargas to ask if he had a license and could drive the vehicle. Vargas did not. The officer continued to try to work with both Castro and Vargas to get the vehicle moved by a licensed driver, for instance by asking if either knew someone who could drive the vehicle for them, but to no avail. Approximately fifteen minutes after telling Castro he was issuing him a warning, the officer asked for and received Castro's permission to search the vehicle. During the search, the officer found cocaine and methamphetamine hidden in the vehicle.

Vargas was charged with drug offenses as a result of the stop but moved to suppress the drugs found during the vehicle search. He argued that the officer "had violated the Fourth Amendment by continuing the stop after he informed Castro that he was issuing him a warning." The district court denied Vargas's motion, and he later appealed to the Eleventh Circuit.

The Eleventh Circuit Court of Appeals upheld the district court's decision. The Court explained that, while, as a general rule, "a traffic stop 'exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures," officers are entitled to make "ordinary inquiries incident to the traffic stop" during the course of the stop. "Those inquiries 'involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.'… Because they 'serve the same objective as enforcement of the traffic code'—namely, 'ensuring that vehicles on the road are operated safely and responsibly'—those inquiries do not unconstitutionally extend the traffic stop."

In this case, the Court held, the officer's actions during the traffic stop "were taken in the lawful discharge of his duties, which included enforcement of the law requiring that any person driving a vehicle be licensed to do so… **It was after [the officer] discovered that neither man had a driver's license, and while the continued detention was still lawful, that [the officer] asked Castro for permission to search the vehicle… What prolonged the stop was not Minor's desire to search the vehicle but the fact that both occupants of it could not lawfully drive it away."** *U.S. v. Vargas*, 16-14714, 2017 WL 632127 (11th Cir., Feb. 16, 2017).

USE OF FLASHBANG WITHOUT VISUAL INSPECTION HELD UNCONSTITUTIONAL

On July 19, 2010, a special agent with the Narcotics Unit of Clayton County, Georgia, applied for and obtained a search warrant for the apartment of Jason Ward based upon Ward's suspected possession of marijuana. Ward was known to carry a handgun and the warrant contained a no-knock provision.

The operational plan for the execution of the search warrant called for two flashbangs to be set off as diversionary devices: one inside the front door, and one outside the apartment near the bedroom wall. All of the officers, however, were vested with the authority to deploy other flashbangs if needed. Because flashbangs are capable of causing serious bodily injury, the officers were instructed to "visually inspect an area first before deploying a flashbang."

During the warrant execution, three flashbangs were deployed. Two were deployed in accordance with the operational plan, while a third was deployed by a team member stationed outside a bedroom window. Ward was asleep with his girlfriend, Treneshia Dukes, in his bedroom at the time. Dukes alleged the flashbang was deployed through the bedroom window (which was broken by another team member) and landed on top of her. The officer who threw the device did not visually inspect the room prior to throwing the flashbang into it. The flashbang caused severe burns on Dukes' body which required her to be hospitalized for three days. Ward was successfully arrested during the raid.

Dukes filed suit against the officer who threw the third flashbang, his supervisor, his department, and others in U.S. District Court for the Northern District of Georgia, alleging, among other things, that the deployment of the flashbang constituted excessive use of force in violation of her Fourth Amendment rights. The officer and his supervisor moved for summary judgment on the basis that both were entitled to qualified immunity and were not subject to suit because the officer had not violated any of Dukes' clearly-established constitutional rights. The district court granted the motion, and Dukes appealed.

The Eleventh Circuit upheld the district court's ruling and explained that **although the use of the flashbang did constitute an excessive use of force under the Fourth Amendment, because that violation was not clearly established at the time of the incident, the officer was entitled to qualified immunity because "though badly mistaken, [he] could have reasonably believed, based on the facts known to the officers on the morning of the search, that throwing a flashbang into Ward's bedroom was not excessive force."** The Court established that **where, as here, (1) the officer threw a flashbang he knew was capable of generating heat in excess of 2,000 degrees Celsius "into a dark room in which the occupants were asleep"; (2) the officer failed to inspect the room for bystanders or other hazards; (3) other distractionary devices were called for in the operational plan and successfully used; and (4) the suspected crime involved was possession and sale of marijuana, the risks generally posed by potential drug dealers and specifically by Ward's potential possession of a handgun did not justify the risk of injury posed by the use of the flashbang without a visual inspection.** *Dukes v. Deaton*, 15-14373, 2017 WL 370854 (11th Cir., Jan. 26, 2017).

ALS REMINDERS

If you have an ALS Hearing scheduled and you will unavailable for the ALS Hearing, a written motion for continuance must be filed as soon as possible with the OSAH Judge but no less than approximately seven to ten days prior to the scheduled ALS Hearing. A continuance form is located on the MyDPS website in the ALS Form folder under DPS Forms. The Court does not accept ALS continuance requests by telephone. If you have questions regarding filling out the continuance form, please contact Dee.

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