



DPS LEGAL REVIEW



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GEORGIA COURT OF APPEALS

DUI ARREST - IMPEDING TRAFFIC / IMPLIED CONSENT FOR NON-RESIDENT

A Doraville police officer on patrol at 2:48 A.M. observed a truck driven by Saevon Smith slow down and then stop for no apparent reason in front of another vehicle at an intersection while a green light was displayed. The other vehicle negotiated traffic to move into another lane around Smith, while Smith's vehicle remained stationary. The officer pulled his car behind Smith's, activated his blue lights, and approached the vehicle. Smith appeared to be falling asleep with his foot on the brake and his vehicle in drive. The officer opened the vehicle door and detected a strong odor of an alcoholic beverage. Smith was also drowsy, slow to respond to the officer's questions, had red and watery eyes, and had sluggish movements. After additional investigation and performing standardized field sobriety tests and a portable breath test, Smith was placed under arrest. At the time of his arrest, Smith possessed a South Carolina driver's license. Following his arrest, Smith agreed to submit to an Intoxilyzer breath test, "but only after he was advised by the arresting officer that, if he refused the test, 'they will turn around and suspend your license for a year.'" Smith's Intoxilyzer breath test returned blood alcohol readings of .145 and .142, and he was later convicted of one count of impeding the flow of traffic and two counts of DUI (one less safe and one *per se*).

Smith appealed his convictions on numerous grounds including that (1) his conviction for impeding the flow of traffic should be overturned because "other lanes of traffic remained open, allowing traffic to flow around him;" and (2) his DUI convictions should be overturned because the Court erroneously allowed the results of his breath test to be admitted into evidence

despite the fact that his implied consent to the test was invalid because "the officer provided him with misleading information concerning the consequences of his refusal to submit to the test."

With respect to the first argument, the Georgia Court of Appeals held that "**[a]lthough traffic was not stopped completely by Smith's conduct... Smith interfered with other drivers' ability to proceed normally and safely through a busy intersection, thereby impeding the normal and reasonable movement of traffic.**" Thus, the evidence was sufficient to support Smith's conviction on that charge. However, the Court agreed that the arresting officer provided misleading information to Smith in attempting to obtain his implied consent and that the Intoxilyzer results should not have been admitted into evidence. Specifically, the Court held that "**the officer's statement was substantially misleading because the Georgia Department of Driver Services has no authority to suspend or revoke the driver's license of a non-resident motorist**" and that "**[b]ecause this misleading information may have affected Smith's decision to consent to the Intoxilyzer test, the court's decision to admit the test results in evidence was error.**" Because Smith was convicted of DUI *per se* and DUI less safe – the later of which did *not* require Intoxilyzer results for conviction – the Court ordered Smith be resentenced. *Smith v. State*, No. A16A0746, 2016 WL 4939448 (Ga. Ct. App., Sept. 16, 2016).

U.S. COURT OF APPEALS - ELEVENTH CIRCUIT

CIVIL RIGHTS: EXIGENT CIRCUMSTANCES / USE OF FORCE

In 2010, DeKalb County police officers responded to the home of Dirk Smith in response to a call from a

babysitter who was at the residence. Mr. Smith had been on vacation with his wife, but got in an argument with her and decided to come home early. Mr. Smith forgot his keys upon leaving. Mr. and Mrs. Smith agreed that Mr. Smith should seek counseling before he came home, and Mrs. Smith called the babysitter and told him not to let Mr. Smith into the house. Mr. Smith nonetheless returned to the residence, where the babysitter refused to let him in. In response, Mr. Smith went to the back of the house and attempted to break through a glass door, prompting the babysitter to exit through the front door, leaving two children inside the house. Mr. Smith eventually used a rock to break the glass door and entered the home. During this time, the babysitter called the police on Mrs. Smith's instructions.

The babysitter told the dispatcher "(1) that Mr. Smith broke into the house; (2) that Mr. Smith was not supposed to be in the house; (3) that the children were still inside; and (4) that the children were alone in the house when Mr. Smith started trying to break in." Upon officers arriving, Mrs. Smith also told them over the phone that Mr. Smith was "stressed out and needed somebody to talk to." Responding officers went to the broken glass door and entered the home without a warrant and with their weapons drawn, announcing themselves.

They eventually encountered Mr. Smith at the top of a stairwell, holding a kitchen knife down beside his body. Officers instructed Smith to drop the knife and he refused for approximately 2-3 minutes, instead walking up and down a portion of the stairs. One officer then fired his taser at Smith, who screamed, fell, and then ran into the bathroom. One of Smith's children witnessed this, and there was conflicting evidence as to whether Smith took the knife with him into the bathroom.

Smith barricaded himself in the bathroom and officers were able to remove the children from the home. After unsuccessful attempts to get Smith to come out of the bathroom voluntarily, officers broke the door down and tased Smith again, but it failed to incapacitate him. Finally, Smith left the bathroom, and the responding officers testified that he charged out

with the kitchen knife raised and slashing. Two officers shot and killed Smith. Smith's family sued the responding officers and department, alleging among other things that the officers violated Smith's constitutional rights by (1) making a warrantless entry into the home; (2) using excessive force by tasing Smith; and (3) using excessive force by shooting Smith. The officers moved for summary judgment and the U.S. District Court for the Northern District of Georgia granted their motion with respect to the illegal entry and taser claims, but denied it with respect to the use of deadly force claim.

On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's decision. With respect to the illegal entry claim, the Court held that "**the officers were authorized to enter the Smith home without a warrant under the exigent circumstances exception. In light of the specific circumstances confronting the officers, it was reasonable to believe that an emergency situation existed.**" With respect to the use of a taser, the Court held that both uses were reasonable because, in both instances, "**a reasonable officer on the scene could have believed that Mr. Smith posed a danger to himself or others and was actively resisting arrest**" based upon his behavior and failure to obey commands. The Court was unable to grant summary judgment to the officers with respect to their deadly use of force because a material issue of fact existed as to whether Smith was armed at the time. **Because the parties presented conflicting evidence as to whether Smith was armed at the time he was shot, which only a jury is entitled to resolve, the Court denied the officers' motion for summary judgment with respect to the shooting claim.** *Smith v. LePage*, No. 15-11632, 2016 WL 4473223 (11th Cir., Aug. 25, 2016).

CIVIL RIGHTS - EXIGENT CIRCUMSTANCES / HOT PURSUIT

A Hernando County, Florida sheriff's deputy responded to a complaint that a resident heard "explosions" coming from their neighbor's house. The deputy spoke with the complainant, who stated she heard "multiple loud explosions" coming from her neighbors' home. She also stated that her husband and

Michael Bratt, one of the neighbors in that home, had a verbal argument earlier.

The deputy went to Bratt's residence, knocked on the door, and heard Bratt ask, "who is there?" in response. The deputy identified himself and Bratt opened the door about a foot, turned on the lights in the home, and asked, "What's the problem?" The deputy identified himself again and Bratt opened the door slightly further. Bratt's wife, Marjorie Youmans, then came to the door. Bratt and Youmans started yelling at the deputy to "get off their property." Youmans began to move towards the deputy as she shouted. The parties disputed the subsequent events. Bratt claimed that he then put his arm across Youmans' chest to prevent her from approaching the deputy. The deputy, by comparison, stated that he saw Bratt "forcefully grab and shove" Youmans twice.

The deputy then began pushing on the door to enter and Bratt attempted to shut the door. The deputy deployed his taser through the partially open door on Bratt's leg, then entered the residence. A struggle ensued, and the deputy was eventually able to handcuff and arrest Bratt. Bratt was charged but later acquitted.

Bratt filed suit, claiming, among other things, that the deputy entered his residence unconstitutionally. After the deputy moved for summary judgment, the U.S. District Court for the Middle District of Florida held that – assuming the Plaintiff's version of the facts to be true (as courts are required to do at the summary judgment stage) – the deputy had entered the home illegally. The deputy appealed that ruling.

The Eleventh Circuit Court of Appeals held that, regardless of whether the deputy had probable cause, the entry was illegal and could not be justified under either the "exigent circumstances" or "hot pursuit" doctrine. The Court stated that "**application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned,**" and that in this case, no exigent circumstances existed because "**under the facts viewed in the light most favorable to Plaintiffs... [n]o reasonable officer would believe that Bratt's conduct presented an imminent risk of serious injury**" to the deputy or to Youmans. The Court also held that the "hot pursuit" doctrine did not apply

because **in order for the hot pursuit exception to apply, "the arrest must have been 'set in motion in a public place,'" and "'some sort of chase' must have occurred... which involves the 'immediate or continuous pursuit of the suspect from the scene of a crime.'" Here, the Court held that no "immediate or continuous pursuit of Bratt 'from the scene of the crime' happened.**" Thus, the Court held that the deputy was not entitled to summary judgment, and a jury would have to consider the parties' differing accounts of the events. *Bratt v. Genovese*, No. 15-15659, 2016 WL 4575564 (11th Cir., Sept. 2, 2016).

ENFORCEMENT TIP: REGISTRATION & LICENSING OF SIDE-BY-SIDE UTVs

Side-by-side UTVs (e.g. Polaris Ranger, Kawasaki Mule, Intimidator 4x4) are considered motor vehicles and thus operators must have a license when driving them on public roads. O.C.G.A. § 40-5-20. Per Georgia Department of Revenue policy, however, they are not required to be registered unless the vehicle is "intended for use predominantly on public roads." O.C.G.A. § 40-7-3. **Exceptions:** operators of vehicles (including UTVs) used exclusively for agricultural purposes do not need a license or registration, even if on a public roadway, if the proper emblem is attached and their use is not otherwise restricted by ordinance. O.C.G.A. § 40-6-305. Law enforcement UTVs are required to be registered and operators licensed. O.C.G.A. § 40-8-91.1.

ALS REMINDERS

On Intoxilyzer 9000 cases, the **ORIGINAL** test results must be presented to the Court at the ALS Hearing along with a copy of your permit to operate the Intoxilyzer 9000. The test results cannot be a copy but must be an **ORIGINAL** printed at the time the test was administered.

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