DPS Legal Review

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Georgia Court of Appeals

USE OF EMERGENCY CALL FROM LOCKED PHONE TO DISCOVER OWNER'S IDENTITY

A suspect who fled a cab without paying left his phone in the backseat of the cab in question. Investigating officers discovered the phone but were unable to access its contents because it required a passcode. One officer, however, used the "emergency call" feature of the phone to call 911 and obtain the phone number, owner's name, and date of birth from the 911 dispatcher. The owner was later located and charged with theft of services. He moved to suppress the evidence obtained as a result of the emergency call, arguing that the call constituted an illegal search of his phone. The trial court agreed and suppressed the evidence obtained as a result of this call. The prosecution then appealed this ruling.

The Georgia Court of Appeals reversed the trial court's ruling. The Court explained that, although the Fourth Amendment prohibits "unreasonable searches and seizures," a "search" does not actually occur under the Fourth Amendment "unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable." In this case, the Court held that Georgia law clearly established that no legitimate expectation of privacy exists with respect to a person's identifying information, such as that obtained by the officers here. Moreover, the Court held that "[t]he fact that it was a law enforcement officer, rather than [the phone's owner], who placed a call from the phone does not change our conclusion that the information obtained was not subject to Fourth Amendment protection." **Because the officer was in lawful possession of the phone and because the officer did not attempt to access any information on the phone – an action which *would* have been considered a search and likely required a warrant – but instead simply *used* the phone in a manner which caused identifying information to be transmitted to a 911 dispatcher, the officer's actions did not constitute a search and were lawful.** *State v. Hill*, No. A16A0501, 2016 WL 3751806 (Ga. Ct. App. July 13, 2016)

DUI ARREST – NO ACTUAL CONSENT BY UNCONSCIOUS DRIVER

Following a single vehicle accident, investigating officers discovered Elmer Bailey seriously injured and trapped in the overturned vehicle and also found a box containing drugs next to the vehicle. Bailey was transported to the hospital, where a state trooper arrived and found Bailey unconscious. The trooper ordered hospital staff to obtain samples of Bailey's blood and urine for drug and alcohol testing. Based on those tests and the accident itself, Bailey was charged with DUI per se, DUI less safe (combined influence), and failure to maintain lane. Bailey moved to suppress the results of the blood and urine tests, arguing that the trooper did not comply with the implied consent statute and that, because he was unconscious at the time of testing, he was unable to give *actual* consent as required by *Williams v. State*. The Court denied his motion to suppress and Bailey was eventually convicted. Bailey appealed the trial court's decision to include the results of the blood and urine tests and his convictions.

The Georgia Court of Appeals held that the trooper complied with Georgia's implied consent law because, under O.C.G.A. § 40-5-55, Bailey was involved in a traffic accident involving a serious injury, and therefore his unconsciousness could not have the effect of withdrawing his implied consent**. The Court also held, however, that "Bailey's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was**

unconscious." The Court referenced the recent U.S. Supreme Court decision *Birchfield v. North Dakota,* in which the U.S. Supreme Court held that officers seeking blood tests for DUI arrests should either obtain a warrant or articulate the existence of an exception to the warrant requirement, such as exigent circumstances, and explained that **because, in this case, "the State failed to demonstrate that exigent circumstances justified the warrantless search, the trial court erred in admitting into evidence the results of Bailey's blood and urine tests."** *Bailey v. State*, No. A16A0200, 2016 WL 3751822 (Ga. Ct. App. July 13, 2016)

DUI ARREST –CONSENT TO BLOOD TEST NOT FREELY AND VOLUNTARILY GIVEN

In March of 2015, the Georgia Supreme Court ruled in *Williams v. State*, 296 Ga. 817, that compliance with Georgia's statutory implied consent law does not equate to a demonstration of voluntary consent to a state-administered blood test as required by the Fourth Amendment. Thus, prosecutors who wish to admit such tests must show that suspects voluntarily consented to such tests in accordance with the Fourth Amendment in order for such evidence to be admitted. Because the trial court in *Williams* had not done that analysis, the Georgia Supreme Court remanded the case to the trial court so that it could make that determination. Upon remand, the trial court held an evidentiary hearing to determine whether the State could meet that burden. The hearing showed as follows:

Williams was pulled over and arrested for DUI by a Gwinnett County police officer following a citizen complaint of an erratic driver and the officer witnessing Williams fail to maintain his lane. During the course of the traffic stop, Williams had trouble balancing and following the officer's instructions during standardized field sobriety tests. The officer testified that Williams seemed unsteady on his feet, confused, and had slow, thick, slurred speech. Nonetheless, Williams was read the appropriate implied consent warning following his arrest and the officer testified that he appeared to understand it and provided his consent. The officer took Williams to a hospital – during which time Williams continued to be unsteady on his feet – where medical staff obtained a blood and urine sample from Williams.

Given these facts, the trial court considered the legal principle that "[m]ere acquiescence to the authority asserted by a police officer cannot substitute for free consent" and concluded that while "[t]he state was able to show that Williams acquiesced to the officer's request that he submit to the state administered blood and urine tests." It was "unable to show actual consent," and thus ruled that the results of both the blood and urine tests would be inadmissible at trial. The trial court explained that **Williams' confusion during field sobriety tests "brought Williams's mental capacity into question and showed that Williams appeared 'highly intoxicated,'" such that he could not have actually consented to blood or urine testing.**

The State appealed this ruling to the Georgia Court of Appeals, arguing that "the trial court erred in failing to consider all the factors [such as (1) prolonged questioning, (2) the use of physical punishment, (3) the accused's age, level of education, intelligence, length of detention, and advisement of constitutional rights, (4) and the psychological impact of these factors on the accused] pertinent to the totality of the circumstances." The State also argued that "the trial court erred in giving too much weight to Williams's intoxicated state." The Court of Appeals, however, rejected both arguments, holding in turn that **(1) the trial court is not required to expressly address all of the factors relevant to the question of actual consent, particularly where the State did not carry its burden of proof with respect to those factors; and (2) that "a defendant's level of intoxication may be an appropriate factor for consideration among the totality of the circumstances in determining the voluntariness of consent."** The Court of Appeals found that the evidence supported the trial court's conclusions, and thus upheld that court's decision. *State v. Williams*, No. A16A0509, 2016 WL 3653584 (Ga. Ct. App. July 7, 2016).

DUI ARREST- CONSENT TO BREATH TEST NOT FREELY AND VOLUNTARILY GIVEN

A Gwinnett County police officer responded to an early-morning vehicle accident and encountered the defendant driver, Jae Sun Jung, leaning against his vehicle. The officer approached Jung and noted a strong odor of an alcoholic beverage and that Jung's eyes were bloodshot and watery. Jung's speech was slurred and mumbled, and "he had trouble walking or even standing on his own without support." Jung also admitted to drinking, and though he agreed to participate in field sobriety evaluations, "the officer had to assist him in walking to a nearby driveway because he was stumbling and staggering." The field sobriety evaluations led the officer to believe that Jung was impaired. Jung agreed to a portable breath test, which tested positive for the presence of alcohol. Following these tests, the officer placed Jung under arrest for DUI. Upon being read the appropriate implied consent notice, Jung responded "yes" when asked if he would consent to a state-administered breath test. "The officer later testified that he read the notice in a 'steady and monotone' voice. He further testified that Jung appeared to understand all of his questions and never indicated that he did not understand or that he needed an interpreter. He denied ever yelling at, using force against, or making promises or threats to Jung. In a supplemental police report, the officer indicated that Jung appeared 'confused' and failed to follow instructions on the HGN and one leg stand tests."

Another officer administered Jung's breath test at the police station. "That officer testified that Jung appeared to understand the instructions, did not ask any questions about the test, and never stated that he wished to refuse the test. He also denied ever raising his voice or using force against Jung." Jung later moved to suppress the results of the state-administered breath test, "arguing that he did not voluntarily consent to the test." The trial court noted "that the responding officer believed Jung appeared to understand him, that the responding officer did not raise his voice or use any weapons or other force, and that he read the statutory implied consent warnings to Jung." Nonetheless, the trial court granted Jung's motion. **The trial court explained that the State merely showed "submission or acquiescence" – and actual voluntary consent – to the officer's request that Jung submit to a breath test because "Jung was 'confused when he was stopped as well as during the walk and turn field sobriety evaluation and was unable to follow instructions,'" and thus "lacked the capacity to consent based upon his confusion and high level of intoxication."**

The State appealed the trial court's ruling, arguing that the court gave "too much weight to Jung's level of intoxication." The Court of Appeals, however, relying upon its own and the Georgia Supreme Court's recent precedent, rejected this argument, again holding that **"a defendant's level of intoxication may be an appropriate factor in determining the voluntariness of consent under the totality of the circumstances."** The Court of Appeals affirmed the trial court's ruling based upon this precedent. *State v. Jung*, No. A16A0527, 2016 WL 3658701 (Ga. Ct. App. July 7, 2016).

DUI ARREST – ACCEPTABLE IMPLIED CONSENT DELAY / CONSENT TO BLOOD TEST FREELY AND VOLUNTARILY GIVEN

A DUI specialist officer responded to an accident scene to investigate a driver whom another officer suspected of driving while impaired. The DUI officer made several observations which led him to believe the driver was under the influence of alcohol, and the driver admitted to having one beer. Based upon these observations, the officer asked the driver if she would consent to taking field sobriety tests, but she declined. The officer then instructed the driver to put her hands behind her back because she was under arrest for DUI. The officer attempted to handcuff the driver but she began passively resisting before exclaiming that she would take the field sobriety tests. The officer then released her and, because he had already told her she was under arrest, read her Miranda rights to her. The officer asked if she understood her rights and the driver responded, "Yep." The officer then asked if, having those rights in mind, she wanted to take the field sobriety tests, and she responded "Yeah." The officer then administered the field sobriety tests, all of which demonstrated multiple signs of impairment.

The officer then took out a portable breath test and explained to the driver that it would determine

whether or not alcohol was present on her breath. The driver asked whether she could decline that test, and when the officer told her it was voluntary, she declined it. The officer again told her that she was under arrest for DUI and asked her to place her hands behind her back. The driver refused and instead struggled with the officer for several seconds while exclaiming that she would take the portable breath test. The officer responded that they were "beyond that." As the struggle continued, another officer assisting with the arrest forced the driver's arm behind her back and pushed her forward onto the hood of a patrol car in order to gain control over her and handcuff her.

After being placed in handcuffs, helped upright, and led to the passenger compartment of a patrol car, the driver was read the appropriate implied consent notice. When asked if she would consent to a state-administered blood test, she at first paused before being prompted by the officer again and responding "yeah" and confirming her response upon a second prompting by the officer. The driver was then taken to a hospital where she signed a consent form and her blood was drawn. She later filed a motion to suppress the results of this test on the grounds that (1) her implied consent notice was not timely read; and (2) the State could not prove the actual voluntariness of her consent under *Williams*.

The trial court granted the motion to suppress, reasoning that the facts did not support a finding of actual voluntariness because (1) "The Defendant stated that she would submit… only after she was … pushed upon the hood of a patrol car, forcibly placed in handcuffs, and read the Implied Consent advisement;" and (2) it was not logical to believe that the driver would refuse a relatively non-invasive portable breath test but actually consent to a more invasive blood test. The State appealed this ruling.

The Georgia Court of Appeals overturned the trial court's ruling with respect to the actual voluntariness of the driver's consent to the state-administered blood test. The Court of Appeals first noted that "the trial court did not conclude that [the driver] was too intoxicated to consent," a ground upon which actual voluntariness has successfully been challenged in other cases. Moreover, the Court did not credit the trial court's reasoning that any use of force prior to reading the implied consent warning was significant to the voluntariness of the consent in this case. **The Court held that the driver's consent was provided "after she was assisted from the hood of the car, after she asked [the arresting officer] to retrieve her shoes, which he agreed to do, and after he asked her in a calm and polite voice to 'have a seat' in the patrol car." Before reading the implied consent notice, the arresting officer informed the driver "that there would be a question at the end, he asked whether her answer was yes or no after he read the notice, he confirmed again that her answer was indeed yes after she had already answered in the affirmative once, and the evidence included the hospital's consent form that gave her the option of refusing consent." Based upon the totality of the circumstances, the Court found that the driver had freely and voluntarily consented.**

Finally, the Court found that the driver was timely provided with the implied consent notice, despite the delay between her arrest and the reading of the notice. **The Court concluded that "[t]he 20–minute delay resulted from the exigencies of police work based upon the defendant changing her mind about performing field sobriety tests and the officer complying with her request to check her to see if she was safe to drive," and was thus permissible under the circumstances.** *State v. Domenge-Delhoyo*, No. A16A0362, 2016 WL 3878141 (Ga. Ct. App. July 15, 2016).

11th Circuit Court of Appeals

USE OF DEADLY FORCE/FIREARM TO STOP SUSPECT INVOLVED IN POLICE CHASE

A Dothan, Alabama police officer on patrol witnessed a vehicle which he believed to be driven by an individual with an active domestic violence arrest warrant. The officer attempted to stop the vehicle for further investigation but the driver, Christopher Thomas, accelerated away in an attempt to flee. Officers pursued Thomas. During the course of the pursuit, Thomas made wide, reckless turns on residential streets, ignored stop signs and traffic signals, and almost caused a wreck before entering into a mall parking lot. In the parking lot, Thomas was erratic and caused several pedestrians to fear for their

lives. Eventually, in an attempt to escape officers who had closed in on him, Thomas backed into a parked vehicle, causing extensive damage to it. Seconds after this collision, an officer approached Thomas's vehicle on foot and with his gun drawn, believing the chase to be over. The officer – who was positioned on the driver's side of the vehicle – shouted for Thomas to exit his car. Thomas's vehicle remained stationary, but he did not turn off the engine or raise his hands. Within seconds, the officer fired at Thomas from the vehicle's driver's side door, striking him five times and killing him. The vehicle then accelerated forward and crashed.

Thomas's estate filed suit against the officer and City of Dothan alleging, among other things, that the officer's use of deadly force was unreasonable and violated Thomas's Fourth Amendment Rights pursuant to 42 U.S.C. § 1983. The officer moved for summary judgment, arguing that he was entitled to qualified immunity because he had not violated Thomas's clearly established constitutional rights. The district court ruled in favor of the officer and Thomas's estate appealed.

The Eleventh Circuit first reiterated that use of force decisions must be evaluated from the perspective of a reasonable officer on the scene, and "in light of the facts and circumstances confronting them" and that "[a]n officer may use deadly force without violating the constitution when a car that is being used as a deadly weapon threatens his life or the life of another or presents a risk of serious bodily injury." Thomas argued that because the officer believed that the chase was over in the seconds before he fired, his use of force was unreasonable. The Court rejected this argument, however, and stated that "**The Plaintiff's focus on the few seconds before [the officer] opened fire ignores the critical events leading up to that moment**: Thomas's failure to pull over, the high-speed chase through residential streets, Thomas's narrow avoidance of a collision, Thomas's failure to stop in the parking lot next to a busy street, and Thomas's continued erratic driving in that parking lot that caused bystanders and officers to fear for their own safety and for the safety of others, including children, all evidencing Thomas's repeated unwillingness to surrender despite the danger he posed to the public." The Court also found it relevant that Thomas failed to turn off his engine or otherwise surrender after crashing his vehicle and being ordered to do so. "**Under the circumstances," the Court ruled, "it was objectively reasonable to believe that the chase was not over even after Thomas rammed into the parked car. Indeed, it had previously appeared that the chase was over when the police boxed in the Explorer, but Thomas proved that assumption wrong. Because it was objectively reasonable for a police officer to believe that Thomas continued to pose a dangerous threat to the public even after he crashed into the parked car, deadly force was warranted.**" *Thomas v. Moody*, No.115-13732, 2016 WL 3454152(11th Cir. June 24, 2016).

ALS REMINDERS

If you have an ALS Hearing scheduled and you will be in training, on vacation, or otherwise 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. The form for a continuance motion is located on the MyDPS website in the ALS Form folder under DPS Forms. Fill out the continuance form and send it to the Administrative Judge and the Petitioner's Attorney. If the Petitioner is not represented by an attorney, mail a copy of the continuance form to the Petitioner. The Court does not accept continuance requests by telephone or in the body of an email. The continuance motion can be emailed to the Court as an email attachment. If you have questions regarding filling out the continuance form, please contact Dee.

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