DPS Legal Review

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Georgia Supreme Court

WEAPONS IN SCHOOL SAFETY ZONES

GeorgiaCarry.org ("GCO") filed a lawsuit against Georgia's Code Revision Commission ("CRC") and several other state government actors seeking an order compelling the CRC to "amend the text of O.C.G.A. § 16-11-127.1 and a judgment declaring that it is not a crime for a person with a weapons carry license to carry a firearm within a school safety zone." GCO's lawsuit was based upon a conflict between two bills which passed during the 2013-2014 session of the Georgia General Assembly. The first bill, HB 826, was signed into law on April 22, 2014, and "amended O.C.G.A. § 16-11-127.1 to permit a person licensed to carry a firearm [in Georgia] to do so within a school safety zone." The second bill, HB 60, was signed into law on April 23, 2014, and – as part of a comprehensive weapons carry and licensing reform – "expressly prohibited the carrying of a weapon [including a firearm] within a school safety zone" except in limited circumstances, including for weapons carry license holders who are engaged in picking up or carrying a student to or from a school safety zone.

The CRC, which is the state entity responsible for enacting Georgia's passed legislative bills into law, resolved the conflict between the two bills by relying upon the statutory mandate that "the later legislative enactment controls in the event two legislative enactments conflict and cannot be given simultaneous effect." Thus, the CRC gave effect to HB 60, making it generally illegal to carry a weapon in a school safety zone, with limited exceptions. GCO subsequently filed suit, seeking that the CRC replace the language of the statute to be compatible with HB 826. The trial court dismissed GCO's case, stating that GCO was not entitled to the requested relief, and GCO appealed to the Georgia Supreme Court.

The Georgia Supreme Court upheld the trial court's decision, finding that "the two statutes cannot stand together," and therefore the later enacted bill controls. As such, **the code section properly prohibits persons from carrying weapons – including firearms – into school safety zones unless they fall into an exception, such as weapons carry license-holders picking up or dropping off students.** *GeorgiaCarry.org v. Code Revision Commission*, S16A1045, 2016 WL 6407253 (Ga., Oct. 31, 2016).

Georgia Court of Appeals

DUI ARREST – VOLUNTARY CONSENT TO STATE BLOOD TEST

A Savannah-Chatham Metropolitan Police Department officer responded to a report of a traffic accident between 2:00 A.M. and 3:00 A.M. on March 14, 2015. Upon arrival, the officer located defendant Henry Clay in a vehicle which had t-boned a stalled vehicle in an intersection. EMS was called for Clay, who complained of shoulder pain. While awaiting EMS, the officer noticed a strong smell of an alcoholic beverage coming from Clay, that he was slurring his words, and that his eyes were glassy. Clay admitted that he had been drinking but gave inconsistent answers as to how much and when. Clay was also unsteady on his feet. Clay consented to field sobriety testing, but the officer only performed horizontal gaze nystagmus because of poor road and weather conditions. Clay demonstrated 6/6 clues of impairment on HGN. He consented to a portable breath test, tested positive, and was arrested.

Clay was then immediately read the appropriate implied consent warning and asked if he would consent to a test of his blood. Clay responded, "so you're going to draw my blood, all right, I'll submit." EMS personnel on the scene drew Clay's blood, first asking if Clay consented, and he stated he did. He also signed an

electronic consent form provided by EMS. Clay was charged with DUI per se and DUI less safe.

Clay later moved to suppress the results of the state-administered blood test, arguing that he merely acquiesced to the officer's authority to demand a blood test, rather than providing voluntary consent as required by *Williams v. State*. At the motion hearing, the officer testified that "throughout the encounter with Clay, she spoke in a calm tone of voice and was not threatening or violent" and that "[s]he did not observe anything that led her to believe that Clay was unable to make a decision on his own." Despite that, the trial court held that because "a suspect [in Clay's position] could feel concerned about refusing because of the possibility of losing a limited [driving] permit, among other reasons," such consent may not be fully voluntary and therefore may not satisfy *Williams*. Here, the trial court reasoned that because "there was no apparent additional conversation or interaction with regard to the test to indicate that actual consent was sought or given," Clay's implied consent did *not* satisfy *Williams*. The State appealed the trial court's ruling.

The Georgia Court of Appeals reversed the trial court, holding that the trial court erred in granting the motion to suppress. The Court of Appeals took issue with the trial court's reasoning that "a suspect could feel concerned about refusing [the test] because of the possibility of losing a limited permit." The Court explained that **"[a]lthough it is appropriate for the trial court to consider 'whether a reasonable person would feel free to decline the officers' request,' nothing in our jurisprudence allows the trial court to speculate about how a hypothetical (and possibly unreasonable) suspect might feel under the circumstances."** Moreover, the Court explained that **the mere reading of the appropriate implied consent statute is not unlawfully coercive because it merely informs the suspect of the sanctions the state may impose for a refusal.** Finally, the Court rejected the notion that the state was required to provide any evidence of "additional conversation or interaction with regard to the test to indicate that actual consent was sought or given." The Court explained that **while, under *Williams,* an affirmative response to the implied consent notice does not always demonstrate actual, voluntary consent, there is similarly "no per se rule that the State must *always* show more than consent under the implied consent statute"** (emphasis added). Thus, in this case, "where there is no evidence that Clay's consent was anything but free and voluntary, the trial court erred in granting the motion to suppress." *State v. Clay*, A16A1233, 2016 WL 6747949 (Ga. Ct. App., Nov. 15, 2016).

DUI ARREST – VOLUNTARY CONSENT TO STATE BREATH TEST

A Gwinnett County Police Officer travelling on I-85 at approximately 2:00 A.M. on December 28, 2014, encountered a vehicle stopped in a middle lane and impeding traffic. He activated his blue lights and approached the driver, Alfrea Young, who was on her cell phone. Young rolled down her window and the officer immediately smelled the odor of an alcoholic beverage. Young was visibly upset and stated that she had hydroplaned and pulled off the road because she did not feel safe driving. The officer instructed Young to pull onto the left shoulder, which she did, and a DUI task force officer then arrived on the scene.

The task force officer observed that Young's eyes were bloodshot and watery, her speech was slow, and he detected an odor of alcohol emanating from her vehicle and breath. Young admitted to drinking "one or two beers… way earlier in the day." Young agreed to submit to field sobriety evaluations and the task force officer observed that she was slow and unsteady while exiting her vehicle. Because of their location on the interstate and the poor weather and visibility, the task force officer only performed the horizontal gaze nystagmus test, which he performed with Young seated unrestrained in his patrol car. Young demonstrated 6/6 clues of impairment on the HGN test. She agreed to a portable breath test, which tested positive for alcohol. The task force officer then placed Young under arrest for DUI.

The officer handcuffed and searched Young, placed her in his patrol car, and read her the appropriate implied consent notice. At the conclusion, he asked Young if she would submit to the State-administered

breath test, and Young immediately replied, "yes," without hesitation. The officer was "very respectful" during his interaction with Young.

Young was transported to a police precinct for the breath test, during which she "'did not appear reluctant,' was 'comprehensive [sic],' seemed intelligent, listened to… instructions, and did not refuse to take the test. [The officer] '[did not] have any sort of concerns that [Young] was so impaired that she couldn't consciously make a decision.'" The breath tests revealed BACs of 0.160 and 0.151. Young filed a motion to exclude the results, arguing that she did not voluntarily consent to testing, and the trial court granted the motion. The trial court based its decision on the facts that (1) Young was not informed that the breath test was not mandatory; (2) the language of the implied consent notice implies that the test *is* mandatory; and (3) Young was not advised of her Miranda rights. The State appealed that ruling.

The Court of Appeals overturned the trial court and ruled that Young's consent was voluntary. The Court of Appeals explained **that an officer's reading of the implied consent notice does not create unlawful coercion, because it merely informs the arrestee of the permissible range of sanctions that the [S]tate may ultimately be authorized to impose."** The Court also held that **"[t]he Supreme Court of the United States and other courts have rejected invitations to create a duty to inform suspects of their constitutional right against unreasonable searches and seizures, and we will not depart from their well-worn path." Given that officers did not use fear, intimidation, threat of physical punishment, or lengthy detention to obtain consent, and rather "conducted themselves calmly" and that neither Young's intoxication nor any other factor invalidated the voluntariness of her consent, the results of the state test should have been allowed.** *State v. Young*, A16A1435, 2016 WL 6518741 (Ga. Ct. App., Nov. 2, 2016).

DUI CONVICTION UPHELD DESPITE NON-*WILLIAMS* COMPLIANT BLOOD TEST

After being pulled over by a Georgia State Patrol trooper, Gheorghe Stoica was arrested and later convicted for DUI less safe, DUI per se, and failure to maintain lane. During the trial, the jurors were presented with "testimony about Stoica's erratic, dangerous, and concerning driving, the odor of alcohol emanating from his person, his slurred speech and bloodshot eyes, his unsteadiness, his inability to comply with the field sobriety tests, his admission to drinking, the open container of a liquid that smelled like alcohol in his car, and his positive alcosensor result. The jury also viewed the dash-cam video of the trooper's interaction with Stoica." The jury was also presented with the results of the state-administer blood test which Stoica took after providing implied consent. Stoica moved for a new trial, arguing that under *Williams v. State*, the results of the state-administered blood test should not have been admitted because his extreme intoxication and a language barrier invalidated his affirmative response to the implied consent notice.

The trial court granted a new trial to Stoica on *only* the DUI per se charge, but not the DUI less safe or failure to maintain lane charges, and Stoica appealed. The Georgia Court of Appeals, however, upheld the trial court's ruling, explaining that **"the evidence that Stoica was a less-safe driver was overwhelming, even in the absence of his blood tests results," and thus his conviction for DUI less safe should stand. Similarly, because "Stoica's failure to maintain lane conviction was based on the trooper's observation [that Stoica failed to maintain his lane] rather than on the admission of the BAC evidence or any other evidence related to the DUI charges," his conviction on that count should be upheld regardless of whether the results of the state-administered blood test were actually admissible.** *Stoica v. State*, A16A1147, 2016 WL 6788063 (Ga. Ct. App., Nov. 16, 2016).

U.S. Court of Appeals – Eleventh Circuit

TRAFFIC STOP – USE OF DEADLY FORCE

On May 14, 2010, East Dublin police officer Jeffrey Deal, while sitting in his patrol car, witnessed Melvin Williams fail to stop at a stop sign while driving. Officer

Deal had prior dealings with Williams and knew he had a criminal record involving violent offenses. He had also been told of a previous incident in which Williams had made threats against another officer and had allegedly stated that the next time he was pulled over by or encountered the other officer "it would be the last time." Officer Deal also recalled being told that Williams was being investigated for trafficking stolen TVs and guns.

After witnessing Williams run the stop sign, Officer Deal made eye contact with Williams, who then made what Officer Deal perceived to be maneuvers to evade him. He eventually caught up with Williams as he was pulling into a residential driveway, and activated his blue lights as he turned in behind Williams' car. Williams immediately removed his seatbelt and moved around inside the car, then jumped out "as if to flee." Officer Deal quickly exited his car, ran towards Williams' car, and loudly stated "[g]et in the car. Don't get out of the car on a traffic stop." Williams, however, continued towards Officer Deal, who pushed him back into the car.

The two then engaged in a vigorous fight. "During this fight, Mr. Williams hit Officer Deal in the head several times with a closed fist and Officer Deal responded with some knee strikes. Officer Deal tried to get out his pepper spray but was preoccupied blocking Mr. Williams." Williams twice stated "what is wrong with you?" during the fight. Williams also grabbed Officer Deal's firearm holster and made several violent jerking motions, causing the holster to unsnap despite Officer Deal's retention efforts. As the two continued to struggle, Williams punched Officer Deal on the back of his head or neck, after which Officer Deal was able to separate from Williams, draw his weapon, and point it at Williams. Williams then advanced towards Officer Deal while raising his hands. From a distance of six feet, Officer Deal fired one shot, which struck and killed Williams.

Williams' estate filed suit against Officer Deal, arguing, among other things, that (1) Officer Deal's initial push of Williams into the car was unreasonable and escalated the situation, thereby causing Williams' death, and (2) that Officer Deal's use of deadly force was excessive under the Fourth Amendment. Officer Deal moved for summary judgment, arguing that the facts, even when viewed as favorably as possible to Williams, entitled him to qualified immunity. The U.S. District Court for the Southern District of Georgia disagreed, and held that a jury would need to decide whether Officer Deal's use of force was justified. Officer Deal appealed this ruling.

The U.S. Court of Appeals for the Eleventh Circuit reversed the district court and granted summary judgment to Officer Deal. **The Court first held that Officer Deal's initial push of Williams back into the care was justified under the circumstances and based upon the knowledge Officer Deal possessed of Williams' history. The Court held that the level of force used was only that *de minimus* amount which is authorized during *all* arrests, and that "action that *complies* with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction."**

The Eleventh Circuit also held that the shooting of Williams was justified. The Court explained that **Officer Deal was not required to give a verbal warning before using deadly force where, as here, such a warning was not feasible and may have cost the officer his life.** Moreover, the court stated that **"Officer Deal drawing and aiming his gun plainly served as a nonverbal warning against approaching the officer; a warning that Mr. Williams disregarded."** The Court also held that the fact that Williams was unarmed did not change the fact that the use of deadly force was justified, where, as here, Williams had been involved in a violent fight with Officer Deal, had landed multiple punches, and had attempted to gain possession of Officer Deal's firearm. **Under the circumstances, the court held, a reasonable officer would perceive a substantial risk of serious injury or death. The court concluded that "a police officer needn't risk his life on the chance that the advancing suspect has or will suddenly develop peaceful intentions."** *Williams v. Deal*, 14-14183, 2016 WL 6247614 (11th Cir., Oct. 26, 2016).

ENCOUNTER WITH STRANDED MOTORIST AS TIER 1 CONSENSUAL ENCOUNTER

Julio Aponte was arrested for possession of heroin with intent to distribute after an Alabama State Trooper initially stopped to assist his apparently stranded vehicle on the shoulder of I-10 with its flashers on. Upon pulling up, the trooper spoke with a passenger, who explained that the vehicle had a flat tire and was on the phone with AAA. While speaking to the passenger, the trooper noticed that Aponte's hands were trembling. The trooper asked for and received Aponte and his passengers' IDs, and asked Aponte "in an everyday, conversational tone if he would mind having a seat in the patrol car." Aponte agreed and sat in the front-passenger seat of the patrol car, which remained unlocked at all times.

The trooper began running criminal history checks on the occupants of the vehicle, and while in the process discussed Aponte's travel plans with him. Aponte described travel plans that did not make sense and seemed suspicious, and continued to exhibit extreme nervousness, to the point that he had to leave the patrol car to vomit at one point. The trooper then requested backup, which arrived shortly. The trooper then received the results of the criminal history check, which showed nothing for Aponte but trafficking heroin charges on two of his passengers.

The trooper then asked for and received consent to search Aponte's vehicle from Aponte and the vehicle's passengers. Prior to asking for consent, the trooper had returned Aponte's ID to him. The search of the vehicle led to the discovery of a gray substance in plastic bags, which Aponte admitted was heroin, leading to his arrest.

Aponte moved to suppress the discovered heroin, arguing that his encounter with the trooper transformed from a consensual encounter into an investigatory detention for which "reasonable suspicion was required but lacking." The U.S. District Court for the Southern District of Alabama denied the motion and Aponte appealed after he was convicted. The U.S. Court of Appeals for the Eleventh Circuit upheld the district court's finding that **no reasonable suspicion was required to continue the encounter because it was voluntary in nature and "a reasonable person would have felt free to terminate the encounter with Trooper Christen." The court explained that (1) only one trooper was present for most of the encounter; (2) the trooper "did not display a weapon or touch Aponte;" (3) the trooper "used a [conversational], non-threatening tone of voice when conversing with Aponte;" (4) "Aponte's path was never blocked or impeded;" (5) "Aponte, 'whatever his education, intelligence and first language, readily understood Christen';" and (6) "the length of the encounter and [the trooper's] questioning were both short."** Finally, the Court found that **"the fact that [the trooper] retained Aponte's driver's license was not dispositive of whether Aponte was seized… because the SUV was immobile and Aponte could not have driven away [regardless]."** *United States v. Aponte*, 14-15208, 2016 WL 6246828 (11th Cir., Oct. 26, 2016).

ALS REMINDERS

When a 1205 form has been issued to a driver arrested for DUI, please send the original 1205 form to the Department of Driver Services within ten days of the arrest.

Once the Administrative License Suspension has taken effect, the suspension cannot be withdrawn by the arresting officer unless the 1205 form was issued in error. All negotiations for withdrawal of the ALS for a DUI guilty plea must take place prior to the administrative suspension taking effect. See Department of Driver Services Rules and Regulations 375-3-3-.04(6)(b)(2).

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