



DPS LEGAL REVIEW



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GEORGIA COURT OF APPEALS

DUI ARREST - PRE-ARREST STATEMENTS / ACTUAL CONSENT

In April of 2013, a police officer responded to a report of a vehicle striking an entrance gate at an apartment complex. The officer located the damaged gate and saw vehicle debris around it. While searching the complex's parking lot, he discovered an unoccupied vehicle with damage that appeared to match the debris.

As the officer began running the license plate, the defendant's girlfriend – who lived in the complex – arrived and asked the officer if the defendant was ok. She stated the defendant had called her and said he needed to go to the hospital. She also explained that she had seen him drinking earlier in the evening. She told the officer that the defendant was in her apartment and let the officer speak to him using her phone.

During their conversation, the defendant admitted to driving the truck. The officer asked the defendant to come outside to speak with him. The defendant was initially reluctant but relented when the officer "threatened to seek a warrant for his arrest." The defendant came outside and the officer detected an odor of an alcoholic beverage on his breath during their conversation. The defendant also admitted to consuming two drinks prior to driving to the apartment complex and drinking more after arriving. He stated the damage to the gate occurred when he was unable to get the entrance gate to open.

The officer eventually placed the defendant under arrest for DUI, read him the implied consent notice, and requested a blood test. The defendant verbally agreed. The officer did not inform the defendant of his *Miranda* rights during their encounter.

The defendant was eventually convicted, but appealed, arguing that (1) the statements he provided

after leaving the apartment were inadmissible because he was not properly advised of his *Miranda* rights; and (2) his consent to a blood test was not actual and voluntary as required by the Fourth Amendment.

The Georgia Court of Appeals rejected both arguments. With respect to the defendant's *Miranda* challenge, the court held that "[l]aw enforcement officers are required to give *Miranda* warnings prior to questioning only where the subject is in police custody, having either been formally arrested or restrained to an extent associated with such an arrest." In this case, no such custody existed, because **the defendant "voluntarily, albeit reluctantly, exited the apartment and walked down a set of stairs to speak with the officer. [He] was not handcuffed or otherwise restrained at that point.** Although there is no evidence that the officer explicitly told him he was not under arrest, the officer did not tell him that he was under arrest, either." The Court also found that **the officer's statement that he would seek a warrant if the defendant did not come out did not invalidate the consensual nature of the encounter.**

The Court also held that the defendant's consent to a blood test satisfied the Fourth Amendment as applied by *Williams v. State*. **The defendant gave an affirmative response to the implied consent request, and though he was injured, there was no indication his injury affected his ability to consent. Similarly, "there was no evidence that [the defendant] was so intoxicated that he was unable to respond appropriately to the officer's questions or appreciate the nature of their interaction."** Because he spoke clearly with the officer for several minutes prior to his arrest and showed understanding of the situation, his consent satisfied the requirement of *Williams*.

The Court also briefly addressed the U.S. Supreme Court's decision in *Birchfield v. North Dakota*, and stated that **"since Georgia's implied consent law does**

not impose criminal penalties” on drivers who refuse to submit to a chemical test, Georgia’s implied consent law is still approved of. *Jacobs v. State*, A16A1115, 2016 WL 5489013 (Ga. Ct. App. Sept. 29, 2016).

ARTICULABLE SUSPICION FOR TRAFFIC STOP BASED ON SUSPICIOUS BEHAVIOR

At 1:38 A.M. on March 23, 2014, a White County Sheriff’s Deputy witnessed a truck driven by Yolande Gaither turn from a highway into the side entrance of a closed business. The deputy followed as Gaither proceeded up a hill and passed a driveway which was located approximately 50 feet “before the top where the gate is that says the road is closed.” The deputy activated his patrol vehicle’s blue lights as soon as Gaither passed the driveway. Gaither then turned her truck around in front of the patrol car and began to go back towards the highway. As she passed the deputy’s patrol car, the deputy verbally instructed her to stop the car. Gaither continued “a few more feet” but then stopped her truck behind the patrol car. The deputy made contact with Gaither and, after observing an open container of alcohol in the car, eventually arrested Gaither for DUI.

Gaither moved to suppress all evidence obtained from the stop, arguing that the deputy lacked “a particularized... basis for suspecting that she was, or was about to be, engaged in criminal activity when he initiated the stop.” The deputy testified that he stopped the vehicle “solely because it was a suspicious vehicle.” He stated that he did not observe Gaither commit any traffic offenses before activating his blue lights and that there were no signs indicating that the road onto which [Gaither] had turned was closed to the public. The trial court nonetheless held that because of the late hour and Gaither’s presence at a closed site, “there was legitimate and articulable reasonable suspicion” for the stop.

Gaither appealed the trial court’s decision and the Court of Appeals overturned the trial court. The Court of Appeals explained that **(1) the deputy did not see Gaither commit a traffic violation; (2) “there was no evidence that he had received any report of criminal activity in the vicinity;” and (3) no indication existed**

that the road onto which Gaither turned was closed to the public. Under these circumstances, no articulable, reasonable suspicion existed to justify the deputy’s stop of Gaither. Moreover, the Court stated that even if reports of criminal activity in the area existed, they would provide “no more than an unparticularized suspicion or hunch, which is insufficient to justify an investigative stop” without more evidence that **Gaither may have been engaged in criminal activity.** *Gaither v. State*, A16A0788, 2016 WL 5799073 (Ga. Ct. App., Oct. 4, 2016)

U.S. COURT OF APPEALS - ELEVENTH CIRCUIT

EXCESSIVE USE OF FORCE: TASER

On March 17, 2012, a Florida sheriff’s deputy responded as a back-up officer to a beach in reference to an ongoing altercation between a state law enforcement officer and James Clifton Barnes. The state officer was attempting to arrest Barnes for an earlier incident, and Barnes had been resisting. Upon his arrival, the deputy “found Barnes bleeding from the face and observed [the state officer] striking Barnes multiple times. The two officers immobilized Barnes face down on the sand. Barnes had no weapon and was awkwardly handcuffed, which... had a greater than normal effect of further neutralizing Barnes.” The deputy then tased Barnes five times. Multiple witnesses stated that after the second tasing, Barnes was no longer resisting and was immobile, while others testified that Barnes was still resisting during subsequent tasings. After Barnes had become still and quiet, the officers and an off-duty fire lieutenant realized that he was no longer breathing and rendered aid to him. Barnes nevertheless died two days later.

Barnes’ estate sued the deputy alleging excessive use of force as a result of his use of a taser (the estate sued the other involved entities as well, all of whom settled out of court). The deputy moved for summary judgment, alleging he was entitled to qualified immunity, but the district court denied the motion and the deputy appealed. The United States Court of

Appeals for the Eleventh Circuit affirmed the lower court, stating that **“there is... unambiguous evidence that by the third tasing, Barnes was handcuffed, immobile and still, such that a reasonable officer... would conclude that Barnes did not present a risk of flight, or a threat of danger to the officers or to the public. Under these circumstances, further shocks were unnecessary and grossly disproportionate.”** The Court held that while some evidence existed that Barnes continued to resist throughout the tasing, that evidence should be resolved by a jury, and thus the deputy was not entitled to summary judgment. *Wate v. Kubler*, 15-15611, 2016 WL 5929633 (11th Cir., Oct. 12, 2016)

USE OF DEADLY FORCE TO PREVENT VEHICULAR ASSAULT

Adam Shaw, A Sarasota County, Florida Sheriff’s Deputy, witnessed Rodney Mitchell commit a traffic violation and pulled behind Mitchell’s jeep and attempted to pull it over. A very brief pursuit occurred before another deputy, Troy Sasse, joined the pursuit and Mitchell voluntarily pulled over. A passenger was in the jeep with Mitchell. Deputy Shaw pulled his patrol car in behind Mitchell’s jeep and approached the driver’s side from the rear, while Deputy Sasse parked his car in front of Mitchell’s and approached the front of Mitchell’s vehicle and positioned himself near the driver’s side tire. Mitchell had his foot on brake but the jeep was still in drive.

Shaw repeatedly gave instructions to Mitchell to put his hands on the steering wheel and Mitchell eventually complied. Shaw asked why Mitchell hadn’t immediately stopped and ordered Mitchell to produce his license, but Mitchell ignored him. Shaw ordered Mitchell to put his jeep in park but Mitchell ignored this command as well. During this time Mitchell refused to make eye contact with the deputies and was “looking around” in a manner that led Sasse to believe Mitchell may attempt to flee. Mitchell eventually shifted into park but left his hand on the gear shift.

Sasse, unable to see Mitchell’s hands at this point, stepped back, drew his firearm, and ordered Mitchell to show his hands. Mitchell then shifted the jeep back to drive, and Shaw ordered him to stop and reached across Mitchell toward the gear shift. Mitchell then hit the accelerator. Sasse, believing he was about to be struck

by the jeep, fired twice at the jeep and fell to the ground. Shaw saw Sasse “falling out of the way” and, thinking that the jeep may run over him, “drew his firearm and shot twice toward Mitchell,” striking him in the head and killing him. The vehicle crashed into a fixed object without striking either officer.

Mitchell’s estate and the passenger brought suit against the deputies alleging excessive use of force. The deputies moved for summary judgment, arguing that they were entitled to qualified immunity, and the U.S. District Court for the Middle District of Florida granted their motion and dismissed the case. Mitchell’s estate and the passenger appealed.

The United States Court of Appeals for the Eleventh Circuit held that **“[i]n the light of Mitchell’s evasive behavior and Sasse’s presence near the front of Mitchell’s jeep, both deputies reasonably feared that Mitchell’s use of the jeep created an imminent danger of serious injury to Sasse,”** and thus the deputies had not violated Mitchell’s Fourth Amendment rights by using excessive force. Though Mitchell argued that several witnesses “stated that the ‘gunshots preceded the sound of the engine accelerating,’” the Court was unpersuaded because **no witness could dispute that the jeep – at the absolute least – moved towards Deputy Sasse before the deputies used deadly force.** Under the circumstances, the Court stated that such a use of force was reasonable. *Clemons v. Knight*, 16-12239, 2016 WL 5929636 (11th Cir., Oct. 12, 2016).

ALS REMINDERS

If an ALS case is continued while you are in Court for the case, the Judge typically provides a new hearing date at that time. You may not receive a mailed continuance order from the Court if you were notified in Court of the new hearing date. You may check the OSAH website (www.osah.ga.gov) for upcoming court dates to see a list of cases that are scheduled.

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