



# DPS LEGAL REVIEW



March 2017

Legal Services (404) 624-7423

Volume 16 No. 3

## *GEORGIA COURT OF APPEALS*

### **HABITUAL VIOLATORS – NOTICE REQUIRED BEFORE CHARGING**

On February 24, 2014, Courtney Clinton was pulled over in Richmond County for a suspected window tint violation. Clinton stipulated at trial that, at the time of this pullover, he had previously been arrested for DUI on February 18, 2011; March 8, 2012; and September 15, 2012. He also admitted that on September 17, 2012, he had pled guilty to all three DUI charges and “signed [an official notice] advising him that his license was being revoked or suspended ‘upon conviction for’ offenses including DUI and driving with a suspended license.” This notice, however, did **not** indicate “that Clinton’s license was being suspended because he was a habitual violator.”

Clinton was charged with habitual impaired driving under O.C.G.A. § 40-5-58(c)(2) as a result of the stop. At trial, he argued that “he was not guilty of the habitual impaired driving charge because he had not received notice of his status as a habitual violator.” The Court nevertheless found Clinton guilty of habitual impaired driving, and Clinton appealed the conviction.

The Georgia Court of Appeals reversed the trial court and reversed the conviction. The Court explained that there is an important difference “between license revocation, which occurs ‘by operation of law,’ and notice of a person’s status as a ‘habitual violator,’ which notification enables the State to prosecute that person when later found to be driving a vehicle in Georgia.” The Court concluded that **“when a driver qualifies as a ‘habitual violator’ under OCGA § 40-5-58 (a), the State must show that it provided notice to the driver of his status as such before it can obtain a conviction for either... driving while a habitual violator or... ‘habitual impaired driving.’”** *Clinton v. State*, A16A1606, 2017 WL 950229 (Ga. Ct. App., Mar. 9, 2017).

### **FALSE IMPRISONMENT – OFFICIAL IMMUNITY FOR ARRESTING OFFICER**

On January 20, 2013 Atlanta Police Officer Nicholas Mercado arrested Bobby Swoope for ticket scalping at the Georgia Dome. The parties strongly disputed the facts which led to Swoope’s arrest. Mercado stated that he and a female officer working undercover saw another individual, Gerald Jones, selling tickets, and began speaking with him to gain evidence for an arrest. Swoope interjected and offered to sell the couple tickets. After negotiating with Swoope and Jones, the officers signaled a takedown team who arrested both.

Swoope, however, claimed that he was outside the stadium when a couple (the undercover officers) approached him seeking tickets. Swoope stated he told them he only had one, and intended to use it himself, and the couple began to talk to Jones instead. He stated he was then suddenly arrested without warning. Swoope admitted that he “jokingly” told the couple, “if I was selling tickets, [you] would have to make me an offer.”

The charge against Swoope was later dismissed, and Swoope filed suit against Mercado and others alleging that his arrest constituted false imprisonment. The case was eventually heard before a jury, who found in Swoope’s favor and awarded him \$19,240. Mercado moved for a judgment from the Court setting aside the verdict, alleging that he was entitled to official immunity under Georgia law and that, under that doctrine, he could not be held liable to Swoope because he had not acted with “actual malice,” or an actual intent to unjustifiably harm Swoope. The trial court denied this motion, holding that “‘there may be slight evidence’ of malice,” and Mercado appealed the ruling.

The Georgia Court of Appeals reviewed the doctrine of official immunity, which states that **under Georgia law, public employees are immune from suit in their individual capacity when they take discretionary actions within the scope of their official functions**

**unless acting with actual malice or actual intent to injure the aggrieved party.** The Court explained that a public officer's "'subjective feeling or mental state is irrelevant unless it prompts him... to intend to do a legally unjustifiable action'... 'All that is required for a lawful warrantless arrest is probable cause. To determine whether probable cause existed, we look at the facts within the officer's knowledge at the moment of arrest.'" **Even if a suspect did not actually commit the crime for which they were arrested, "the legitimacy of the officer's actions would not be negated if at the moment of arrest he reasonably believed the plaintiff had committed the crime."**

Here, the Court found that even construing the evidence in Swoope's favor, "Swoope admitted that he was standing near Jones, who he does not dispute was scalping tickets, and that Swoope told Mercado to 'make him an offer' for the ticket, albeit allegedly as a joke. **Under these circumstances, Mercado's belief that Swoope was selling his ticket... was reasonable, and the arrest was therefore legally justifiable.**" The Court held that no evidence was presented which would "authorize a finding of actual malice sufficient to pierce the shield of official immunity," and reversed the trial court. *Mercado v. Swoope*, A16A1572, 2017 WL 951667 (Ga. Ct. App., Mar. 10, 2017).

## ***U.S. DISTRICT COURT - MIDDLE DISTRICT OF GEORGIA***

### **PROBABLE CAUSE FOR ARREST- TRESPASSING AND STALKING**

During the early morning hours of July 7, 2013, Mark Casteel discovered a private investigator – Noel Wilson – filming him and a friend without their knowledge while the two were in Casteel's backyard, which was not visible from the street. Wilson had entered a neighbor's property in order to conduct the filming. Casteel called the police and an investigation ensued. Crisp County Sheriff's Investigator Karla Stowe discovered that Wilson had "terrified" Casteel and affected his ability to sleep and that Wilson had followed Casteel in the past. Stowe sought and obtained warrants against Wilson for criminal trespass and stalking, and Wilson turned himself in. The warrants, however, were later dismissed, and Wilson

filed a lawsuit against Stowe alleging that he was arrested without probable cause in violation of the Fourth Amendment. Stowe moved for summary judgment, alleging that probable cause did exist for the arrest, or that if it did not, she was entitled to qualified immunity because she did not violate any of Wilson's clearly established rights.

Wilson argued that no probable cause existed for his criminal trespass arrest because Stowe made an error in the warrant affidavit: while Stowe stated in the affidavit that Wilson committed criminal trespass by entering onto property without an authorized representative's permission, she *intended* to refer to a different section of the criminal trespass statute which prohibits entering onto private property "for an unlawful purpose" (in this case, filming others in a private place without consent). The District Court, however, held that "**[w]hen a warrant contains a discrepancy, but the officer seeking the warrant knew the correct information when the warrant was sought, the officer does not lose the defense of qualified immunity," and that, here, "regardless of the discrepancy in the warrant, a reasonable officer with Stowe's knowledge would not have questioned whether there was probable cause to arrest Plaintiff."**

Wilson also alleged that Stowe lacked probable cause to obtain a stalking warrant because she "did not have evidence that he intended to intimidate or harass [Casteel or his friend]" as required by Georgia's stalking statute. The Court however, explained that "in this case, Stowe had evidence of a pattern of behavior directed at [the surveillance subjects] that was causing them fear. **Stowe was not required to have specific evidence of Plaintiff's intent to harass and intimidate before swearing out a warrant for his arrest. The undisputed facts as known to Stowe at the time of issuance constituted 'arguable probable cause' and a 'reasonable officer would have sought [an] arrest ... warrant[ ]' for stalking.**" As such, the District Court dismissed Wilson's claims against Stowe. *Wilson v. Stowe*, 1:15-CV-109, 2017 WL 969971 (M.D. Ga., Mar. 13, 2017).

***U.S. DISTRICT COURT -  
NORTHERN DISTRICT OF GEORGIA***

**WARRANTLESS ENTRY INTO HOME;  
USE OF DEADLY FORCE**

On September 6, 2013, Officer Charles Thompson of the Whitesburg Police Department received a BOLO for a missing child, Jesse Brown. Jesse was last seen with his father, Michael Brown, who did not have custody of Jesse. Officer Thompson responded to an address suspected to be Brown's residence, where he found Brown's vehicle and Jesse inside of it. Officer Thompson called for Brown, who came out and spoke with Thompson and allowed Jesse to be secured in Brown's patrol car. Thompson was then informed by radio that a detective was in the process of swearing out warrants for Brown. Thompson told Brown they needed to discuss his possible warrants, but Brown "turned and began walking or running back to the house." Thompson followed and entered the house, but Brown darted into a bedroom and shut the door behind him.

Thompson ordered Brown to come out, and Brown responded by cursing at Thompson that he was not coming out. As Thompson tried to force entry, Brown held the door shut with his body. Thompson's efforts eventually caused a shotgun Brown had against the bedroom wall to fall and discharge in the opposite direction of the door and Thompson. Thompson, hearing the shot and believing that Brown was firing at him, drew his service weapon and fired through the door, striking Brown in the legs, injuring him.

Brown filed suit against Thompson and others, alleging among other things that Thompson violated his Fourth Amendment rights by (1) entering his home without a warrant; and (2) using excessive force. Thompson moved for summary judgment, alleging that he had not violated Brown's rights and that, even if so, he was entitled to qualified immunity because those rights were not clearly established.

The U.S. District Court for the Northern District of Georgia granted Thompson's motion. With respect to the warrantless entry of Brown's home, the Court held that **exigent circumstances justified the entry because Thompson was in hot pursuit of Brown, whom Thompson had probable cause to arrest.** Brown argued

that the "hot pursuit" exception should not apply to persons suspected only of misdemeanors. The Court held that **"even if Thompson possessed probable cause to believe that Brown had committed only a misdemeanor," no relevant case law prohibited hot pursuit of a suspect believed to have committed only a misdemeanor. Therefore, no clearly established right was violated, and Thompson was entitled to qualified immunity from any such claim.**

With respect to the claim that Thompson used excessive force, the Court stated "[t]hese undisputed facts reflect precisely the type of 'split-second judgments' made under 'tense' and 'uncertain' circumstances" that Courts are uninclined to second-guess. **The Court explained that "there is no way Thompson could have known that the gun accidentally discharged. Thompson, who was alone inside the house with Brown, responded by fighting what he perceived to be fire with fire, and in so doing, he struck Brown in the legs." As such, his use of force was justified and did not violate Brown's constitutional rights.** *Brown v. Thompson*, 3:15-CV-158, 2017 WL 1053876 (N.D. Ga., Mar. 20, 2017).

**ALS REMINDERS**

**Withdrawing an ALS:** See Department of Driver Services Rules and Regulations 375-3-3-.04(6)(b)(2).

1. 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.
2. If a person does not timely request an ALS Hearing within ten business days of the arrest and the driver's license is suspended, the arresting officer cannot submit a letter to DDS to withdraw the suspension.
3. If an ALS hearing is requested, the arresting officer cannot withdraw the ALS once a decision has been issued by the Administrative Judge suspending the driver's license.
4. Please contact Dee if you have any questions regarding withdrawing an ALS case.

Published with the approval of  
Colonel Mark W. McDonough.

**LEGAL SERVICES**

Melissa Rodgers, Director  
Joan Crumpler, Deputy Director  
Dee Brophy, ALS Attorney  
Zack Howard, Legal Services Officer