DPS Legal Review

August 2017 Legal Services (404) 624-7423 Volume 16 No. 8

11TH Circuit Court of Appeals

VALIDITY OF ORDER REQUIRING MANUFACTURER TO UNLOCK SECURE DEVICE; SOCIAL MEDIA WARRANTS

FBI agents investigating an underage prostitution ring obtained sufficient evidence to arrest Dontavious Blake and Tara Jo Moore. Following their arrests, the agents executed a search warrant on Blake and Moore's home and seized an Apple iPad. Because of the device's security features, however, the agents were unable to access any data on the device. The FBI sought and received a special order ("the bypass order") from the U.S. District Court for the Southern District of Florida under a U.S. law known as the "All Writs Act." The bypass order required Apple "to assist the FBI in bypassing the iPad's passcode lock and other security measures. With Apple's help, the FBI was able to … unlock the device and download its data."

The FBI also executed several other search warrants against Blake and Moore. One such warrant "directed Microsoft… to turn over emails from two of Blake and Moore's email accounts... The Microsoft warrant did not seek all emails in those two email accounts; instead, it was limited to certain categories of emails in them that were linked to the sex trafficking charges against Blake and Moore. For example, the warrant required Microsoft to turn over all '[e]mails, correspondence, and contact information for Backpage.com' and all '[e]mails and correspondence from online adult services websites' that were contained within the two email accounts." The FBI also received two search warrants for information from a Facebook account known to be associated with Moore. The Facebook account was also "suggestive of criminal conduct: the publicly viewable version of the account listed Moore's occupation as 'Boss Lady' at 'Tricks R [U]s.'" The warrants required Facebook to turn over "virtually every type of data that could be located in a Facebook account," without any restrictions as to time or content.

Blake and Moore were later convicted of crimes related to underage prostitution and appealed their conviction to the Eleventh Circuit Court of Appeals. Among their arguments were claims that (1) the bypass order was unlawful under the All Writs Act; and (2) the warrants related to Blake and Moore's email accounts and Moore's Facebook account "were so broad that they violated the Fourth Amendment's particularity requirement."

The Eleventh Circuit first held that the bypass order requiring Apple to assist the FBI in accessing the found iPad was lawful. The Court explained that "five requirements… must be met before a court can compel under the All Writs Act the assistance of a third party in a criminal investigation: (1) the order must be necessary or appropriate to effectuate a previously issued order, (2) it must not be covered by another statute, (3) it must not be inconsistent with the intent of Congress, (4) the third party must not be too far removed from the underlying case, and (5) the burden imposed on the third party must not be unreasonable." **Here, the bypass order met all the requirements because (1) "there was no other way for the FBI to execute the district court's order to search the contents of the iPad;" (2) there is "no statute that expressly permits or prohibits it;" (3) no evidence existed showing the order was inconsistent with any intent of Congress; (4) Apple, which manufactured the device and maintained a connection with it through conveying messages to and from it and backing up its data, was not too far removed from the case; and (5) the burden on Apple was minimal because it only had to transfer the data of the iPad with a special device.**

The Court went on to discuss the Microsoft and Facebook warrants. Blake and Moore contended that

they did not meet the "particularity" requirement for search warrants under the Fourth Amendment, which requires that "those searches deemed necessary should be as limited as possible." The Court held that **the Microsoft warrant met this requirement because "[i]t limited the emails to be turned over to the government, ensuring that only those that had the potential to contain incriminating evidence would be disclosed."** The Court also held, however, that **the Facebook warrants unnecessarily required "disclosure to the government of virtually every kind of data that could be found in a social media account." The Court explained that the information sought should have been limited, for example, to "messages sent to or from persons suspected at that time of being prostitutes or customers." Furthermore, the request should only have included data "from the period of time during which Moore was suspected of taking part in the prostitution conspiracy."** Despite those flaws, however, the Court explained that the evidence obtained by the warrant should not be excluded, because "'evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant' should generally not be excluded." Here, the Court held it was objectively reasonable for the FBI agents to believe the warrant was valid, and therefore the evidence obtained from it was allowed. *U.S. v. Blake*, No. 15-13395, 2017 WL 3586887 (11th Cir., Aug. 21, 2017).

U.S. District Court – Northern District of Georgia

USE OF DEADLY FORCE – SUICIDAL SUBJECT

On March 31, 2014, Shirley Joyce Brown called 911 and reported that she was suicidal and wanted the 911 operator to "send someone out to help her die." Several Newton County Sheriff's Office deputies responded, including Deputies Gordon, Ramsey, and Shirley. Brown asked the 911 operator "to forget the request if the deputies were not going to kill her." All of Brown's statements were relayed to the deputies before their arrival. Deputies Gordon and Ramsey – who were in the same vehicle – arrived first and, as they approached a carport next to Brown's home, Brown, who was 74 years old and 145 pounds, came out of her house holding a rifle. The deputies backed down the driveway away from the home. At the same time, Deputy Shirley arrived. The deputies stopped their vehicles near each other "a safer distance" away from Brown. Deputies Gordon and Ramsey got out of their vehicle and went to the trunk, where Deputy Gordon retrieved a shotgun and Deputy Ramsey retrieved a patrol rifle. Deputy Shirley also retrieved a patrol rifle from his trunk, and all three deputies positioned themselves behind the cover of Deputy Gordon's vehicle. The Deputies were approximately 120 feet from Brown.

According to the complaint, Brown then "repeated her wish to die and appeared to be having difficulty handling her rifle." From their protected positions, Deputies Shirley and Ramsey then shot Brown, who was struck twice and killed.

Brown's husband filed suit on her behalf against Deputies Shirley and Ramsey, their department, and the sheriff, alleging, among other things, that Deputies Shirley and Ramsey used excessive force when they shot Brown. The deputies filed a motion for judgment on the pleadings, arguing that they were entitled to have the case against them dismissed even assuming all of the facts alleged by Brown's husband to be true.

The U.S. District Court for the Northern District of Georgia denied the deputies' claim. Brown's husband alleged in his complaint that the deputies did not attempt to use non-deadly force to subdue Brown, and did not provide any verbal warning. While the deputies disputed both facts, the court explained that in addressing a motion for judgment on the pleadings, the allegations of the complaint must be accepted as true and construed in the light most favorable to Brown. Viewing the facts in that manner, the Court found **"it is plausible that Officers Shirley and Ramsey lacked probable cause to believe Ms. Brown posed a serious threat of physical harm to the officers. It is also plausible that they failed to give Ms. Brown some warning about the possible use of deadly force, even though such a warning was feasible under the**

circumstances. These alleged facts, if developed through discovery, could support a finding that Officers Shirley and Ramsey used excessive force in violation of Ms. Brown's Fourth Amendment rights." *Brown v. Newton County Sheriff's Office*, No. 1:16-CV-1399, 2017 WL 3447898 (N.D. Ga., Aug. 7, 2017).

Georgia Court of Appeals

IMPLIED CONSENT NOTICE – FAILURE TO DESIGNATE TYPE OF CHEMICAL TEST

On the early morning of February 18, 2016, Kevin Jacobs was arrested for DUI per se, DUI less safe, improper parking, and an open container violation by a DeKalb County Police Department police officer. Immediately after being arrested, the officer read Jacobs the appropriate Georgia implied consent notice. The last sentence of that notice, as printed in O.C.G.A. § 40-5-67.1(b)(2), reads: "Will you submit to the state administered chemical tests of your (*designate which tests*) under the implied consent law?" As the Georgia Court of Appeals later explained, "'designate which tests' is in parenthesis and underlined, suggesting that the officer reading the implied consent statute should specifically designate which test is being requested, rather than actually saying "designate which test." In this case, however, the officer read to Jacobs, "[w]ill you submit to the State-administered chemical test of your designated – designate which one under the Implied Consent Law?" Thus, the officer testified that he allowed Jacobs the option of which test to take, and Jacobs agreed to a breath test. Jacobs took the test without incident.

Jacobs later moved to suppress the results of the breath test, arguing that his consent was not valid. The trial court agreed, finding that "the officer failed to designate the specific test for which he was requesting consent and that the way in which the officer read the implied-consent notice to Jacobs improperly asked him to choose one of the available chemical tests instead of asking him whether he would consent to a test in the first place." The trial court thus suppressed the results of Jacobs' breath test, and the prosecution appealed the ruling to the Georgia Court of Appeals.

The Court of Appeals reiterated the rule that when seeking to justify a search – such as a breath test – on the basis of consent, consent is valid where it is given "freely and voluntarily under the totality of the circumstances." The Court of Appeals held that **"considering the implied-consent notice as a whole and without isolating the final question, the notice as read to Jacobs made clear that he had the right to refuse testing."** In this case, "the officer read the implied-consent notice verbatim with no further comments, threats, or coercion; Jacobs appeared to understand and answer the officer's questions appropriately; there was no evidence that Jacobs's youth or lack of education impaired his ability to consent; and Jacobs was advised of the various consequences of his refusal to consent to any testing." Based upon those facts, **the Court found that the officer's request that Jacobs designate which test did *not* invalidate Jacobs' consent to the breath test.** As such, the trial court was reversed. *State v. Jacobs*, No. A17A1288, 2017 WL 3274980 (Ga. Ct. App., Aug. 2, 2017).

Enforcement Tips

DISTRACTED DRIVING RULES FOR AUTOMATED VEHICLE OPERATORS

An increasing number of vehicles driven in Georgia include full or partial automated driving features (such as Tesla's Autopilot). New Georgia laws related to the operation of "fully autonomous vehicles" came into effect on July 1, 2017, under SB 219. For a comprehensive review of the changes under SB 219, see the Department's 2017 Legislative Summary, which was distributed via e-mail on June 26, 2017.

Under SB 219, the term "operator" is defined to mean "any person who drives or is in actual physical control of a motor vehicle **or who causes a fully autonomous vehicle to move or travel with the automated driving system engaged"** (emphasis added). ***All*** persons who meet this definition, including those operating fully autonomous vehicles, are still

subject to Georgia's distracted driving statutes, O.C.G.A. §§ 40-6-241 (general distracted driving), 40-6-241.1 (wireless telecommunications device for drivers under 18), and 40-6-241.2 (wireless telecommunications device for driver 18 or older and commercial motor vehicle drivers).

Similarly, O.C.G.A. § 40-8-11(c) provides that "[u]nless otherwise provided in this Code section, fully autonomous vehicles, automated driving systems, and any commercial use or operation of fully autonomous vehicles shall be governed by this Code section, Code Sections 40-1-1 and 40-5-21, Chapter 6 of this title [also known as the Uniform Rules of the Road and including the distracted driving statutes], and [Chapter 8 relating to equipment and inspection of motor vehicles] notwithstanding any other provision of law to the contrary." As such, **operators for fully autonomous vehicles and vehicles with automated driving systems are still subject to Georgia's distracted driving statutes and the other provisions of the Uniform Rules of the Road and equipment requirements except where specifically exempted by law.**

REQUIRED LIGHTS/REFLECTORS ON BICYCLES

Pursuant to O.C.G.A. § 40-6-296(a), every bicycle **"when in use at nighttime" must be equipped with:**

- **A white light on the front visible from a distance of 300 feet; AND**
- **Either:**
  - **A red light on the back visible from a distance of 300 feet; OR**
  - **A red reflector on the rear that is approved by the Department of Public Safety.**

DPS Rule 570-10-.01 states that **a red reflector meets the requirements of O.C.G.A. § 40-6-296(a) if it complies with the requirements set forth in Section 1512.16 of Title 16 of the Code of Federal Regulations.** Under that regulation:

- The reflector or mount shall not contact the ground plane when the bicycle is resting on that plane in any orientation;
- The reflector shall be mounted such that it is to the rear of the seat mast with the top of the reflector at least 3 inches below the point on the seat surface that is intersected by the line of the seat post;
- The optical axis of the reflector shall be directed rearward within 5° of the horizontal-vertical alignment of the bicycle when the wheels are traveling in a straight line, as defined by federal regulations;
- The reflectors and/or mounts shall incorporate a distinct, preferred assembly method that shall insure that the reflector meets the federal reflector requirements when the reflector is attached to the bicycle;
- The reflector must satisfy a reflector mount and alignment test provided for in 16 C.F.R. § 1512.18(m);
- The reflector must satisfy a reflectance value test provided for in 16 C.F.R. § 1512.18(n).

Under O.C.G.A. § 40-6-296(a), any bicycle operated at nighttime must be equipped with either a red light or a red reflector meeting these requirements.

ALS REMINDERS

A 4th copy has been added to the new 1205 form. The extra copy of the 1205 form is to be provided to court personnel as needed.

The 1205 form must be personally served on the DUI defendant.

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

Send questions/comments to zhoward@gsp.net