DPS Legal Review

June 2017 Legal Services (404) 624-7423 Volume 16 No. 6

Georgia Supreme Court

MURDER CONVICTION OVERTURNED BY DEFICIENT SEARCH WARRANT

Avery Bryant was among a group of teens sitting near a public street when a stranger, Newton Gordon, approached in a vehicle asking for directions. Several of the people with Bryant testified that he unexpectedly walked up to the car and "just started shooting" Gordon. Gordon died at the scene and officers recovered .40 caliber shell casings and a .40 caliber bullet, but never located the murder weapon. After the shooting occurred, the teens split up and eventually one of them told his mother what happened. The mother sent her son to give a statement to detectives, and after further investigation, the officers sought a search warrant for Bryant's residence.

In the portion of the warrant affidavit requiring the detective seeking the warrant to list the items to be seized, the officers listed "a detailed description of Bryant's home and the vehicles on the property" rather than a description of the items the officers hoped to seize. Nonetheless, the detective seeking the warrant did provide testimony by cell phone video to the magistrate at the time the warrant affidavit was presented identifying what she expected to seize. The magistrate granted the warrant, but "[t]he warrant provided no other information to identify the particular items 'to be searched and seized' by law enforcement" and "[t]he search warrant did not incorporate the affidavit or the oral testimony by reference."

Using the warrant, officers searched Bryant's home and located an empty box of .40 caliber ammunition. Bryant was then arrested and charged with Gordon's murder. While a great deal of testimonial evidence implicated Bryant, the empty box of ammunition – which matched the caliber of the weapon used to kill Gordon – was the only physical evidence which connected Bryant to the crime. Moreover, Bryant's attorneys substantially challenged the credibility of the prosecution's witnesses. Nevertheless, a jury found Bryant guilty of malice murder and other charges. Bryant appealed his conviction, arguing in part that the box of ammunition should not have been admitted because it was based on a faulty warrant affidavit.

The Georgia Court of Appeals held that under the Fourth Amendment to the U.S. Constitution, a warrant must "particularly describe the place to be searched and the persons or things to be seized. A warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." **Because the warrant provided no information to identify the particular items to be searched and seized, it was unconstitutional. Moreover, the fact that the detective seeking the warrant may have described the items to be seized to the magistrate was irrelevant, because "the contents of the search warrant itself, not the contents of the supporting documents, are scrutinized under the Fourth Amendment's particularity requirement." Because the state relied heavily on the unconstitutionally seized evidence, Bryant's murder conviction was overturned.** *Bryant v. State*, No. S17A0388, 2017 WL 2332647 (Ga., May 30, 2017).

Georgia Court of Appeals

IMPLIED CONSENT REFUSAL: NO RIGHT TO INDEPENDENT TEST AFTER BLOOD TEST BASED UPON SEARCH WARRANT

On April 6, 2016, a Cherokee County Sheriff's Office deputy observed James Hynes weaving across the center lane of a road and pulled him over. After an investigation, the deputy arrested Hynes for driving

under the influence of alcohol. The deputy read Hynes the appropriate implied consent notice and asked Hynes to submit to a blood test. Hynes refused the state-administered test but "stated that he would 'do an independent test.'" The deputy then obtained a search warrant to do a blood test on Hynes, which he performed, but did not permit Hynes to obtain an independent test. The deputy testified that he refused to allow an independent test because Hynes "refused implied consent."

In the subsequent prosecution of Hynes for DUI, Hynes moved to suppress the results of the blood test from evidence because the deputy refused to accommodate his request for an independent test. The trial court denied Hynes' motion, stating that a "defendant's right to an independent test accrues only upon the defendant's consent to the State's test as requested after the reading of the implied consent card." Hynes appealed this ruling to the Georgia Court of Appeals, thus presenting that Court with this question for the first time: does a DUI suspect have the right to an independent chemical test when that suspect *refuses* a test under the implied consent law, but is *then* tested pursuant to a search warrant?

The Georgia Court of Appeals held that a DUI suspect has no such right, thus affirming the trial court. The Court explained that **a suspect's right to an independent test, as described in O.C.G.A. § 40-6-392(a)(3), is contingent upon the suspect's submission to a chemical test pursuant to *implied consent,* not upon the state's obtaining a chemical test by some other means, such as a warrant.** Thus, "if [Hynes] chose to submit to state-administered testing as provided by the implied consent notice, he would be entitled to take advantage of the incentive offered. He refused to submit to the required State-administered test and must, therefore, suffer the adverse consequences of that choice." The Court also noted that, by the terms of the implied consent statute, **a suspect is only entitled to an independent test when they first submit to a state chemical test "administered at the direction of a law enforcement officer." Because search warrants are issued at the command or direction of a judicial officer, and not at the direction of a law enforcement officer, they do not qualify as the type of test which entitle a DUI suspect to an independent test.** *Hynes v. State*, No. A17A0633, 2017 WL 2361134 (Ga. Ct. App., May 31, 2017).

CONSENT TO SEARCH RESIDENCE NOT VALID IF FROM KNOWN NON-RESIDENT

Officers in Dawson County received a complaint of drug activity at a residence. Two officers responded to the residence. The officers had independent knowledge that they were looking for a resident at the house in question, Audrey Holtzclaw. Upon arrival, the officers knocked on the front door and, though they could hear activity inside the house, initially no one came to the door. Eventually, "a man named Shannon emerged from a garage door where the officers met him." Shannon explained that he was there to visit Holtzclaw, but she was not present. He stated that "this is not my house. This is my cousin's house… I don't live here." Shannon explained that he did not have a key and that when he arrived the front door would not open, so he located another door that was open and entered the house to wait for Holtzclaw.

The officers asked if Shannon would allow them to walk through the house to see if anyone else was there and Shannon responded, "that's fine with me, but like I said, this is not my house." After entering the home, officers encountered another individual whom they arrested after a brief altercation. Officers also detected an odor of marijuana and a marijuana smoking device in a separate bedroom. After the initial sweep, officers attempted to contact Holtzclaw but were not successful. The officers contacted investigators, who arrived on the scene. Two officers then left to obtain a search warrant, but were called back when officers at the residence reported that Holtzclaw had returned.

When Holtzclaw arrived at her residence, "she observed that 'officers were coming in and out of the front door… They were already in there, and they had already taken [one person] to jail, and Shannon was not there. Police were in there and didn't have permission to be in my house. Nobody was there. Just the police officers with the front door wide open.'" Officers then asked Holtzclaw for consent to search her house. They

explained that "she would have an opportunity to explain the circumstances for anything they found and whether it was brought there by visitors. The officer also explained… that they had already found 'a marijuana pipe' in the house, and they were in the process of obtaining a search warrant." Holtzclaw initially declined consent to search, but upon further assurances from an officer that "he would allow Holtzclaw a chance to explain whatever they find," Holtzclaw relented and consented to a search.

During the search, officers found drugs and drug paraphernalia in her bedroom. Holtzclaw was charged with and prosecuted for several drug offenses. During her prosecution, Holtzclaw moved to suppress the evidence found in her home, arguing that "the police lacked the authority to enter it initially and that her subsequent consent was not voluntarily given." The trial court granted Holtzclaw's motion, stating that "Shannon did not have authority to allow police into Holtzclaw's home while she was not there and that her subsequent consent based in part on that initial entry was involuntary." The State appealed that ruling.

The Georgia Court of Appeals first explained that when an officer's authority to enter a residence is based upon consent to enter provided by a "third party" non-resident, "the State has the burden to prove not only that consent was voluntary but that the third party had authority over, and other sufficient relationship to, the premises sought to be inspected." In this case, the Court held that "police knew that Holtzclaw owned the home, and Shannon explained to them that 'this is not my house.' Shannon told the officers that he did not have a key, and he was waiting for the owner, who would be there soon." **Under these circumstances, "it was clear… that Shannon was merely a visitor to the home and had no actual or apparent authority over it." As such, police were not entitled to rely on his consent.**

The Court also held that police were not entitled to rely upon Holtzclaw's later consent to search, because it was not voluntary. The Court explained that "voluntariness is determined by the totality of the circumstances," and dependent upon a number of factors. In this case, Holtzclaw arrived to find police already in her home (based upon an illegal entry). While no overt threats were made, officers told her they already found a marijuana pipe and that they were going to find anything in the house anyways because they were obtaining a search warrant. They also prohibited her from entering the house until they were able to obtain a warrant and search it. **"These circumstances authorized the trial court to conclude that Holtzclaw believed she had very little choice in the matter, particularly because she witnessed police already in her house." As such, her consent was not voluntary and the evidence discovered during the search was required to be excluded.** *State v. Holtzclaw*, No. A17A0148, 2017 WL 2481531 (Ga. Ct. App., June 8, 2017).

U.S. Court of Appeals – Eleventh Circuit

USE OF DEADLY FORCE – POTENTIALLY ARMED BURGLARY SUSPECT

Houston County Deputy Sheriff Steven Glidden was in the process of serving civil papers when he overheard a radio broadcast of a residential burglary in progress. Deputy Glidden responded to assist. The dispatcher was not able to provide a description of the suspect but stated that the suspect may be armed with a .45 caliber handgun which was stolen during the burglary.

Deputy Glidden, searching for the suspect in a wooded area near the burglary site, encountered an individual wearing a large black jacket with a hood pulled over his head and both of his hands in his pockets. The individual was later identified as Robert Chambers. Deputy Glidden ordered Chambers twice to take his hands out of his pockets but Chambers did not, instead responding, "Why? What's going on?" Deputy Glidden did not answer, but ordered Chambers again to take his hands out of his pockets and to take the hood of his jacket off. Chambers complied with the later request by tilting his head back so that his hood fell off his head, but kept his hands in his pockets. Deputy Glidden testified that he "did not feel threatened by Chambers [at that point,] and did not draw his

weapon." Chambers walked closer to Deputy Glidden and Deputy Glidden asked Chambers where he lived. Glidden responded that his mother lived in a nearby subdivision.

As Chambers approached within six inches of Deputy Glidden, he "stepped to Glidden's right as if to walk by him." As he did so, Deputy Glidden remained still and watched the area behind Chambers to make sure no other persons were approaching. "Using his peripheral vision, Glidden saw Chambers start to pull his left hand from his jacket pocket and saw the butt of a pistol in Chambers' left hand." A struggle ensued during which Deputy Glidden testified that Chambers unsuccessfully attempted to gain control of Glidden's service weapon. Deputy Glidden was eventually able to deploy his taser to attempt to get Chambers under control, but the taser did not make good contact with Chambers.

Once the taser was deployed, it activated a camera which depicted Deputy Glidden repeatedly yelling at Chambers to get on the ground and tugging Chambers by the front of his shirt. Chambers got to his hands and knees and responded "I'm on the ground, sir!" No weapon can be seen in the video. The camera then began to shake and provided no additional useful video. Deputy Glidden stated that he approached Chambers and held on to his jacket, but Chambers "wriggled free of his jacket, pulled away… and fled towards the neighborhood where other deputies and residents were located." Glidden held onto Chambers jacket but did not feel the weight of the gun he had seen earlier in it. As such, he believed Chambers to still be armed. Deputy Glidden then, without giving a verbal warning, fired his service weapon once at Chambers as he ran, striking him in the back of the head and instantly killing him. Although Deputy Glidden admitted that "he did not see a gun in Chambers' possession at the time he shot him," he testified that "he believed Chambers was armed and presented an imminent threat to the residents and deputies in the neighborhood." In the subsequent investigation it was discovered that although Chambers was unarmed when he fled, the stolen .45 caliber handgun was lying on the ground near Chambers' jacket.

Chambers' estate filed suit against Deputy Glidden and his department in the U.S. District Court for the Middle District of Georgia alleging that the shooting constituted excessive use of force in violation of Chambers' constitutional rights. Deputy Glidden then filed for summary judgment, arguing that his use of deadly force was reasonable under the circumstances. The district court granted Deputy Glidden's motion, and Chambers' estate appealed to the Eleventh Circuit.

The Eleventh Circuit first observed that while there are several factors that impact whether the use of deadly force by an officer is objectively reasonable, "[t]he mere failure to give a warning… does not preclude summary judgment where the facts otherwise indicate that the officer's use of force was reasonable." In this case, the Court explained, **"[w]hen he made the decision to shoot, Deputy Glidden had probable cause to believe that Chambers was the burglar, that he was armed with a .45 caliber pistol, and that he posed a threat to officers and the public. Thus, Deputy Glidden had to make a 'split second judgment' in a situation that was rapidly unfolding. A reasonable officer in Deputy Glidden's position could have believed that deadly force was necessary to prevent the decedent's escape and avert a threat of harm to others. Deputy Glidden resorted to deadly force after his verbal commands and physical altercation did not subdue the decedent. Under the evidence in the record… we conclude that the district court properly determined that the use of deadly force did not violate Chambers' Fourth Amendment rights. Accordingly, we hold the district court properly granted qualified immunity to Deputy Glidden."** *Wells v. Talton*, No. 16-13401, 2017 WL 2334321 (11th Cir., May 30, 2017).

OBSTRUCTION – MOMENTARY FAILURE OF SUSPECT TO RESPOND TO COMMAND

On April 19, 2013, the DeKalb County Police Department was conducting a compliance raid on an adult entertainment club. Officer Jeffery Rutland was one of the officers involved in the raid. Joshua Schindler was a valet working outside the club at the time. As the officers arrived, Schindler was preparing to park a vehicle. Two officers began entering the front

of the club while Schindler proceeded behind them towards the valet stand. As Schindler continued walking, Officer Rutland, who was nearby, approached him, began yelling for him to "back down," and demanded to know what he was doing. Rutland believed that Schindler was attempting to interfere with the officers entering the club. Schindler stopped, turned towards Rutland, and told him that he was a valet and did not understand what was going on.

Officer Rutland then came extremely close to Schindler and again yelled for him to "back down." Schindler restated that he was a valet and asked Rutland why he was being so aggressive. Schindler testified that "he did not understand what Rutland meant by 'back down.'" However, he eventually took a step back "and put his hands out low and to his sides in a placating gesture." Approximately 12-13 seconds passed between when Officer Rutland approached Schindler and when Shindler took a step back. Officer Rutland and another officer then detained Schindler in zip ties behind his back for the remainder of the raid. He was eventually arrested for disorderly conduct.

The charge against Schindler was later dropped, and Schindler filed suit against Officer Rutland and DeKalb County alleging, among other things, that Officer Rutland lacked probable cause to arrest him. Officer Rutland moved for summary judgment, responding that he had at least arguable probable cause to justify Schindler's arrest on the basis of either disorderly conduct or obstruction of an officer under O.C.G.A. § 16-10-24(a). The district court denied Officer Rutland's motion for summary judgment, and Officer Rutland appealed to the Eleventh Circuit.

On appeal, Officer Rutland's attorneys did not challenge the district court's ruling that there was no probable cause to justify an arrest for disorderly conduct. **The Eleventh Circuit held that "even if the issue were properly before us, we agree with the district court that, under Schindler's version of events, arguable probable cause to arrest for disorderly conduct did not exist." The Court also held that "no reasonable officer could have believed that Schindler's conduct constituted obstruction under Georgia law." The Court explained that "Schindler's conduct amounted to no more than a 'mere failure to immediately respond' to a police officer's orders, which, without more, is insufficient to show obstruction under § 16-10-24(a)." As such, Officer Rutland had no probable cause to arrest Schindler, and was not entitled to summary judgment.** *WBY, Inc. v. DeKalb County*, No. 16-10490, 2017 WL 2609086 (11th Cir., June 16, 2017).

ENFORCEMENT TIP

The classes of offenses for which a driver may display their driver's license and be issued a uniform traffic citation in lieu of a custodial arrest are governed by O.C.G.A. § 17-6-11(a). Effective July 1, 2017, that code section is being modified by SB 176. Under the amended code section, a uniform traffic citation may be issued in lieu of a custodial arrest when a driver displays their license and is accused of a violation of:

- Title 40 (except charges involving a license suspension for a first offense, violations of O.C.G.A. § 40-5-54, or violations of Article 15 of Chapter 6 of Title 40 (serious traffic offenses));
- Vehicle and load width, height, and length offenses;
- Common carrier and motor contract carrier offenses;
- Hazardous material transportation offenses; or
- Offenses involving road taxes on motor carriers under Article 2 of Chapter 9 of Title 48.

ALS REMINDERS

The new law regarding the ALS process goes into effect on July 1, 2017 and it applies to DUI arrests made on or after that date. The new version of the DDS 1205 Form (Rev. 05/17) must be used beginning July 1, 2017. For more information regarding the new ALS process, see the e-mail and attached document sent to all DPS employees by Kelly Ward on June 26, 2017.

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