DPS Legal Review

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Georgia Court of Appeals

DUI BREATH TEST DID NOT VIOLATE RIGHT AGAINST SELF-INCRIMINATION

On the night of September 15, 2016, a Cobb County police officer responded to a multi-vehicle accident and encountered one of the drivers, Susan Council. After speaking with Council and other first responders on the scene who believed Council may be intoxicated, the officer called for a DUI task force officer. The DUI officer arrived and conducted a DUI investigation during which Council was generally cooperative and there was no animosity.

Following the investigation, Council was placed under arrest for DUI. The officer began reading the appropriate implied consent notice, but Council "interrupted and requested to stand on the other side of her vehicle, away from traffic." Council was moved as requested and the officer re-read the notice. Council then asked the officer if "Georgia's laws had changed," and the officer read the implied consent notice again. Council consented to a breath test and the officer transported her to a Cobb County police station.

On the way to the precinct, Council's phone rang and she asked to answer it. The officer apologized and refused, but "offered to send another officer to check on [Council's] 14-year-old daughter, who was home alone." He also told Council that, although it was against policy, he would allow Council to call her boyfriend at the precinct to make sure her daughter was checked on. The officer then administered the breath test and booked Council without incident.

During the prosecution of her DUI charges, Council moved to exclude the results of her breath tests, arguing that – under the Georgia Supreme Court's recent decision in *Olevik v. State*, the breath tests violated her right under the Georgia Constitution against self-incriminatory acts. The trial court granted Council's motion, holding that Council "was compelled to perform the breath test… to produce evidence against herself in violation of her Georgia Constitutional right against self-incrimination." The prosecution appealed this ruling.

The Georgia Court of Appeals reversed the trial court, holding that the breath test did not violate Council's rights under the Georgia Constitution. The Court explained that the Georgia Supreme Court in *Olevik* "reaffirmed that **the right against self-incrimination is not violated where an accused voluntarily consents to the act. Rather, the Court uses the same "totality of the circumstances" test used to evaluate consent under the Fourth Amendment to the U.S. Constitution to determine whether consent is valid for the purposes of the Georgia Constitution's right against self-incrimination.**

Here, the Court explained, the officer patiently and calmly answered Council's questions during their encounter and Council appeared to understand and respond to questions. The officer "did not make any promises in exchange for [Council's] agreement to submit to a breath test. And, although the… officer did not allow [Council] to make any phone calls until they were finished with the breath tests, there is no evidence that [Council] was forced to take the breath tests against her will in order to make the phone calls." As such, **Council's consent was valid under the totality of the circumstances, and her right against self-incrimination under the Georgia Constitution was not violated**. *State v. Council*, No. A17A1218, 2017 WL 4875582 (Ga. Ct. App., Oct. 30, 2017).

FLIGHT FROM POLICE NOT SUFFICIENT PROBABLE CAUSE TO JUSTIFY ARREST

On April 27, 2016, Clayton County police officer Jalany Rogers "was on a routine foot patrol in an

area… known for a high rate of crime and drug use." While patrolling a hotel property, "Rogers and his partner climbed an outdoor stairway and rounded a corner, where they saw a group of five men standing in the breezeway." Officer Rogers made eye contact with one of the men, Willie Johnson III, "who then looked away and pulled up his pants." This motion indicated to Officer Rogers that Johnson was about to run, thus Rogers yelled to Johnson, "Don't do it." Officer Rogers believed this communicated to Johnson that he was not free to leave. Johnson nevertheless fled on foot. "Rogers then pursued Johnson while ordering him to stop, which Johnson" did not do. After a prolonged foot chase, Officer Rogers was able to apprehend Johnson. Johnson was placed under arrest for obstruction and, while being searched, marijuana was found in his pants pocket.

During his subsequent prosecution, Johnson moved to suppress the marijuana from evidence, arguing that it was only discovered because he was arrested without probable cause. The trial court denied the motion, relying on a previous U.S. Supreme Court decision, *Illinois v*. Wardlow, to find that "Johnson's presence in a 'high crime/high drug activity area with four other males,' together with his 'unprovoked' flight from a 'first-tier encounter' with officers provided police with a reasonable suspicion of criminal activity and therefore allowed them to conduct a brief investigatory detention of Johnson." The trial court held that Johnson's continued flight after he was ordered to stop thus provided probable cause for his arrest. Johnson was later convicted and appealed, arguing that the marijuana should have been suppressed.

The Georgia Court of Appeals reversed the trial court and ruled that Officer Rogers did not have probable cause to arrest Johnson and thus the search which resulted in the discovery of marijuana was illegal. The Court explained that "[u]nlike the police in *Wardlow*, the officers in this case did not use Johnson's flight to support a second-tier investigatory detention. 'Instead, they executed a full-blown arrest for obstruction based solely on Johnson's flight' from what the trial court found was an 'initial … first-tier encounter' with police… Our law is clear, however, 'that **a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter… and [e]ven running from police during a first-tier encounter is wholly permissible.'" Thus, "because Johnson had the right to leave the first-tier encounter, his exercise of that right, even if accomplished by running, cannot constitute obstruction.**" *Johnson v. State*, No. A17A0733, 2017 WL 4784609 (Ga. Ct. App., Oct. 24, 2017).

11TH CIRCUIT COURT OF APPEALS

LIABILITY FOR DUI ARREST ARGUABLY MADE WITHOUT PROBABLE CAUSE

On the early morning of March 16, 2014, Seminole County (Florida) Deputy Sara MacArthur observed a driver, Seana Barnett, "come to a complete stop at a green light before continuing through the intersection." Deputy MacArthur followed and observed the vehicle for several blocks then initiated a traffic stop. "Barnett admitted to drinking one glass of wine at dinner approximately nine hours earlier." Deputy MacArthur requested the vehicle's registration and proof of insurance but neither Barnett nor her intoxicated passenger – the vehicle owner – could access the locked glovebox to retrieve those items. Barnett did, however, provide her driver's license.

Deputy MacArthur stated that "Barnett's eyes appeared bloodshot and glassy, although she did not smell or observe any alcohol or drugs in the car. Barnett spoke lucidly and cooperated fully throughout the stop." Deputy MacArthur had Barnett perform several field sobriety tests, including walk-and-turn and vertical gaze nystagmus. During the walk-and-turn test, Barnett stated that her "performance may be affected by injuries… including muscle tears in her leg, which required weekly physical therapy. [Deputy] MacArthur did not take Barnett's physical injuries into consideration or alter the field sobriety tests." While Deputy MacArthur stated she observed several indicators of impairment during the tests, "[t]he parties dispute[d] how well Barnett performed on the field sobriety tests… [and] whether MacArthur

explained, administered, and interpreted the results of the field sobriety tests properly." Deputy MacArthur arrested Barnett for DUI and transported her to a police station for a breathalyzer test.

Barnett completed two breathalyzer tests, both of which returned a negative result for blood alcohol (0.000). After receiving the negative results, Deputy MacArthur ordered a DUI technician "to get a urine analysis to test for drugs and issued Barnett a traffic citation for driving under the influence. [Deputy] MacArthur admitted that she had no evidence to suspect Barnett was under the influence of drugs at the time of the arrest." Barnett consented to the urinalysis and was processed as an inmate. Urinalysis later confirmed that no drugs were present in Barnett's system, and the charges against her were dismissed.

Barnett filed suit against Deputy MacArthur and her employer, alleging among other things false arrest and unlawful detention against Deputy MacArthur. Deputy MacArthur moved for summary judgment, arguing that even assuming the facts alleged by Barnett were true, she had not violated Barnett's Constitutional rights and was entitled to qualified immunity. The U.S. District Court for the Middle District of Florida denied summary judgment on these claims, and Deputy MacArthur appealed to the Eleventh Circuit.

The Eleventh Circuit upheld the district court's ruling with respect to both the false arrest and unlawful detention claim. With respect to the false arrest claim, the Court explained that Deputy MacArthur would only be entitled to summary judgment if, after resolving all factual disputes in favor of Barnett, Deputy MacArthur either had probable cause to arrest Barnett, or a reasonable officer *could have believed* that probable cause existed. The Court concluded, however, that **"When we couple [the]… disputed facts, which we must view in the light most favorable to Barnett, with the undisputed evidence—that MacArthur did not smell or observe any alcohol during the encounter; perceived no indication that Barnett was under the influence of drugs; and admitted that Barnett communicated lucidly and cooperated fully—we do not believe a reasonable officer could have found probable cause to arrest Barnett."** As such a jury could potentially find Deputy MacArthur liable for false arrest, and she was not entitled to summary judgment on that claim.

The Court also found that, under the same standard, a jury could conclude that Deputy MacArthur was liable for unconstitutionally prolonging Barnett's detention after her arrest. Specifically, the Court took issue with Deputy MacArthur's detaining Barnett on the suspicion of driving under the influence of drugs after her breathalyzer tests returned negative for alcohol, because Deputy MacArthur – by her own admission – had no evidence that Barnett was driving under the influence of any other controlled substance. The Court explained that **"Putting aside MacArthur's personal admission, the objective facts of Barnett's detention upon receipt of the breathalyzer results are these: (1) Barnett was not under the influence of alcohol; (2) there was no evidence to detain her for driving under the influence of any other controlled substance. Under these circumstances, no reasonable officer could have found that there was probable cause to continue to detain Barnett."** As such, Barnett was not entitled to summary judgment on that claim. *Barnett v. MacArthur*, No. 16-17179, 2017 WL 4876289 (11th Cir., Oct. 30, 2017).

USE OF DEADLY FORCE – REASONABLE BELIEF IN THREAT OF SERIOUS HARM

Officers assigned to the Haralson-Paulding Drug Task Force obtained a search warrant for the home of Brenda Van Cleve and Daniel Hammett based upon evidence that Van Cleve was selling meth-amphetamines in the home. Officers executed the search warrant on the afternoon of October 17, 2012. The task force had no intelligence as to whether there were weapons in the home. The officers executing the warrant all "wore police gear or uniforms easily identifying them as law enforcement."

The officers approached the home, stacked up on a side door and "began knocking and announcing 'Sheriff's Office, search warrant' in a loud but non-yelling voice." There was no response from the house and the lead officer, Deputy Joey Horsley, tried the doorknob and found that the door was unlocked.

Deputy Horsley opened the door and called out "'Sheriff's Office" again but still received no response. The officers then entered with their firearms drawn and in the low-ready position. The house was very dark because the windows were entirely covered and most of the interior lights were off. As the officers cleared the residence they continued to call out "Sheriff's office, search warrant," but still received no response.

Deputy Horsley entered the living room followed by two other officers, Whitner and Rutherford, and looked towards a hallway leading to the home's bedrooms and a bathroom. Deputy Horsley saw a shadow emerge from the hallway and again announced that he was from the Paulding County Sheriff's Office. A large man, later identified as Hammett, came into the hallway and turned towards Deputy Horsley. Hammett "stopped for a second and Horsley saw that his hands were tucked into his waistband area. Horsley then saw him move something from his left hand to his right hand in a manner that concealed what he had." Deputy Horsley used his weapon-mounted light to illuminate Hammett's waistband and shouted "Sheriff's Office, let me see your hands." Hammett, without responding, moved suddenly toward Deputy Horsley and against a wall adjacent to him in an apparent attempt to get around him. Deputy Horsley began to move towards Hammett to subdue him and "Hammett quickly moved his right hand toward the left side of Horley's head. As he did so, Horlsey caught a brief glimpse of a shiny black object in Hammett's hands." Deputy Horsley, believing he was being ambushed, raised his firearm and shot once towards and struck Hammett while lurching backward to avoid Hammett's attack.

Officer Whitener saw Hammett approach Deputy Horsley and "reach up with his hands towards Horsley's face in an aggressive manner. She then heard a gunshot and saw Horsley lurch backward and begin to fall. Whitener immediately fired [at and struck] Hammett, who she feared was attempting to harm Horsley and had possibly shot him." A third officer fired another shot which did not strike Hammett. Hammett was killed as a result of the shooting. Due to clutter in the house at the location where Hammett was killed, it was never conclusively determined what was in his hands at the time he approached Deputy Horsley. No firearm was recovered from the area, but a can of pepper spray was near Hammett's body.

Van Cleve filed suit against the involved officers in the U.S. District Court for the Northern District of Georgia as the administrator of Hammett's estate, alleging among her claims that the officers' use of deadly force was excessive and violated Hammett's Fourth Amendment rights. The district court, however, determined that the officers' actions "were objectively reasonable in light of the circumstances and therefore granted qualified immunity." Hammett appealed.

The Eleventh Circuit Court of Appeals upheld the trial court's ruling. The Court explained that **"In the darkness, given the… circumstances, the officers had probable cause to believe [Hammett carried a] weapon and… intended to use it… It was not unreasonable of them to believe Hammett posed a threat of serious physical harm and to respond accordingly… We are 'loath to second-guess decisions made by police officers in the field,'… and we will not do so here.**" As such, the Court upheld the officers' summary judgment. *Hammett v. Paulding County*, No. 16-15764, 2017 WL 5505114 (11th Cir., Nov. 17, 2017).

ALS REMINDERS

On DUI cases in which a blood test was requested, a 1205 S form must be filled out once the test results are received from the GBI crime lab if the test results are per se alcohol. Send the original 1205 S to the Department of Driver Services and DDS will notify the DUI driver regarding the license suspension form.

When a 1205 Form is issued to a DUI driver, the original 1205 Form is to be submitted to the Department of Driver Services **within ten days** after the date of the DUI arrest. Please submit the original 1205 Form to DDS as quickly as possible after the arrest but no later than ten davs after the arrest.

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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