DPS Legal Review

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Georgia Supreme Court

DUI ARREST – ADMISSIBILITY OF BREATH TEST AS SELF-INCRIMINATORY ACT

Frederick Olevik was arrested for DUI and other traffic charges. Olevik was read the appropriate implied consent notice by his arresting officer and consented to a chemical breath test. The test showed a BAC of 0.113. At trial, Olevik's attorneys argued that the results of the breath test should not be admissible. They contended that the test was obtained in violation of Paragraph XVI of the Constitution of the State of Georgia. That paragraph is similar to the U.S. Constitution's Fifth Amendment and provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating."

Georgia courts have long held that – unlike the federal Fifth Amendment – this provision not only prohibits the government from forcing people to testify against themselves, but also that it prohibits the government from forcing people to commit any *acts* that could self-incriminate them. Olevik argued that the act of blowing into the intoxilyzer so that a chemical test could be done constituted a self-incriminatory act prohibited by the Georgia Constitution. The trial court rejected Olevik's argument, and Olevik appealed the ruling to the Georgia Supreme Court.

In the most widely publicized part of the decision, the Georgia Supreme Court held that **blowing into a machine for the purposes of a chemical breath test constitutes an act under Paragraph XVI and that a suspect cannot be forced by the government to perform that act and possibly self-incriminate him or herself.** This overruled a long line of cases which held that blowing into such a machine was not considered to be an "act" subject to this protection. However, the Court also held that **a suspect can waive his right against self-incrimination by consent, in much the same way that he can consent to waive his Fourth Amendment rights.**

In both instances, the Court explained, whether the suspect consented to testing is dependent upon the totality of the circumstances. The Court stated that "[t]rial courts already use the [totality] test to determine the voluntariness of a defendant's consent to chemical testing as an exception to the warrant requirement under the Fourth Amendment." Some of the factors to be considered include the suspect's age, education, intelligence, the length and circumstances of his detention, and the nature of his interactions with officers. No single factor is controlling.

Olevik went on to argue that no consent to testing could be valid when the suspect is read the Georgia implied consent notice because that notice is coercive by its very nature. The Court rejected that argument, stating that **"the notice, standing alone, is not per se coercive." Unless other evidence exists that a suspect was coerced into providing consent, the results of a chemical breath test should be admitted based upon a suspect's affirmative response to implied consent.** In this case, Olevik presented no other evidence that his consent to the breath test was coerced, and thus the trial court properly rejected Olevik's attempt to suppress the results. *Olevik v. State*, S17A0738, 2017 WL 4582402 (Ga., Oct. 16, 2017).

DUI ARREST - ALLOWABLE TESTIMONY REGARDING RESULTS OF HGN TEST

Defendant Mellecia Spencer was stopped by a law enforcement officer due to a nonworking headlight. The officer conducted a DUI investigation which included administering the Horizontal Gaze Nystagmus test (HGN). Spencer exhibited four out of six clues on the HGN test and was arrested for DUI. At trial, the officer testified that he administered the HGN test and that "[b]ased on my training and my

experience, four out of six clues generally indicates a blood alcohol level equal to or greater than a .08." The defense objected to the testimony and the trial court overruled the objection and allowed the testimony. Spencer was convicted of DUI less safe, but appealed, contending the trial court erred by allowing the officer's testimony correlating the results of HGN to a particular BAC range.

The Court of Appeals affirmed the conviction. The Court held that while under prior precedent, the officer would not be allowed to testify that a certain number of clues exhibited on the HGN test correlated to an *exact* BAC level, the officer in this case did not provide an exact BAC level but merely stated that four out of six clues generally *exceeds* the .08 impairing level. Spencer appealed this ruling to the Georgia Supreme Court, which agreed to hear the case and consider whether the Court of Appeals' holding was in error.

The Georgia Supreme Court held that the officer's testimony that four out of six clues on HGN generally indicates a BAC level equal to or greater than .08 was admitted without a sufficient foundation having been laid under *Harper v. State*. Under *Harper*, before admitting evidence of a scientific principle or technique, the Court must be satisfied that "the procedure or technique in question has reached a scientific stage of verifiable certainty." This standard may be established by presenting evidence such as expert testimony, exhibits, treatises, or rationale of cases from other jurisdictions.

The Court explained that **"[i]t is generally accepted that the HGN test 'has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol.'" However, there is not similarly sufficient evidence demonstrating that the HGN test has been established to show a specific number or a numeric range of BAC.** The Court reviewed relevant prior cases and held that no precedent established that such testimony should be allowed without additional evidence establishing the reliability of HGN as a tool for measuring an exact level or range of BAC. In this case, no scientific or medical testimony was presented, and although the officer stated that "several studies" supported the correlation between the clues and BAC, the studies were not identified or admitted into evidence. Therefore, the evidence was insufficient to establish the scientific validity of the correlation between the number of clues on HGN and a numeric BAC. **Thus while the officer could testify that a certain result on the HGN test was indicative of impairment, it was improper for him to testify that the test demonstrated an exact BAC or a certain range of BAC without expert testimony establishing the scientific validity of that assertion.** As such, the Court held the evidence was admitted improperly, and reversed the DUI conviction and sentence. *Spencer v. State*, S16G1751, 2017 WL 4341409 (Ga, Oct. 2, 2017)

11TH CIRCUIT COURT OF APPEALS

TEMPORARY DETENTION OF ARMED PERSONS FOR SAFETY REASONS

Deputies with the Rockdale County Sheriff's Office responded to a call from Venus Jones, who reported "that her neighbors had threated her family and brandished a gun." While Jones was on the phone with 911, the operator heard a gunshot. "The dispatcher told officers that there were 'shots fired' in the proximity of Jones's residence," but did not state that Jones had reported the incident. Deputy Angela Morrison arrived at the Jones residence first and encountered Jones's fifteen-year-old daughter, Briana, on the front porch. "Morrison asked Briana about the gunshots, and Briana gestured for the officer to talk to her neighbors." Deputy Morrison then spoke with the neighbors, who stated that "Jones had threatened them, had 'pulled a gun on them,' and had four guns in her house."

Two other deputies then went to Jones's house, drew their service weapons, and "ordered the occupants to exit the house with their hands in the air. Five persons walked out, including Briana, Jones, Jones's fourteen-year-old son, Derrion Pyror, and Jones's youngest child, Omaree Jones, who was eight or nine years old." The deputies commanded all the

residents to lie on the ground, "but Jones refused to comply until the officers averted their guns from Omaree." The officers handcuffed Jones, Briana, and Derrion and helped them get to their feet as a supervisor arrived. Omaree was not handcuffed, and reentered the home. The supervisor, having monitored the situation by radio, instructed his deputies to remove the Joneses' handcuffs. Jones, Briana, and Derrion were in handcuffs for no more than seven minutes.

Jones sued the responding deputies in the U.S. District Court for the Northern District of Georgia, alleging false arrest and excessive use of force among other claims. Jones admitted that the deputies' use of force was limited to that required to handcuff them and pick them up. The deputies moved for summary judgment, arguing that they acted reasonably under the circumstances and that they were entitled to qualified immunity. The district court granted the deputies' motion, stating that "the officers acted reasonably by detaining Jones and her two children briefly at gunpoint in their front yard to ensure they did not pose a danger to the officers as they investigated the origin of the gunfire." The Jones' appealed this ruling to the Eleventh Circuit.

The Eleventh Circuit upheld the district court ruling. With respect to the false arrest claim, the Court explained that **"[o]fficers do not offend the Fourth Amendment by detaining a person briefly as part of an investigation 'if they have a reasonable articulable suspicion based on objective facts that the person has engaged in criminal activity.'"** In this case, the officers had received information both from their dispatcher and a neighbor that Jones' may have voiced threats while wielding a gun and that several firearms were present in the home. As such, **it was reasonable for the officers to order Jones, Briana, and Derrion to exit their home and handcuff them to verify or dispel their suspicions of criminal conduct.**

With respect to the officers' use of force, the Court held that **"Officers are permitted to draw weapons 'when approaching and holding individuals for an investigatory stop… when reasonably necessary for protecting an officer or maintaining order.'" In this case, "[t]he officers reasonably feared for their safety based on their proximity to a house they suspected might contain several firearms and the potential for the situation to escalate in the light of Jones's [initial] refusal to cooperate."** As such, the Court upheld the grant of summary judgment to the responding deputies. *Jones v. Walsh*, No. 17-11318, 2017 WL 4329716 (11th Cir., Sept. 29, 2017).

TEMPORARY DETENTION AND SEIZURE OF WEAPONS FOR OFFICER SAFETY

Jackson County, Florida, Deputies Smith and Finch responded to a 911 call from a rural resident, Dennis Laramore. Laramore stated that he heard gunshots on neighboring property owned by Brenda Hamilton and that a dog may have been shot. Upon arrival at the property, the deputies encountered James Hamilton (Brenda Hamilton's father) and another neighbor standing near a vehicle. The deputies ordered both men to place their hands in the air and asked what they were doing and whether either man had a gun. Initially, both men put their hands up and the neighbor replied that he did have a gun. James Hamilton then began lowering his hands and a deputy ordered him again to raise his hands. Hamilton shouted at the deputies that "he owned this land" and that the deputies were trespassing. Hamilton began advancing towards the deputies while they retreated behind one of the patrol cars. The deputies continued to order Hamilton to stop and put his hands up. Hamilton continued arguing with the deputies and approaching them, until he got behind the patrol car with the deputies. Deputy Smith then handcuffed him. "Deputy Smith then retrieved the neighbor's loaded firearm from his waistband and a loaded revolver from the seat of the vehicle against which the men had been leaning."

At this point, Brenda Hamilton arrived at the property in her vehicle. She exited her vehicle "holding a bottle of Bud Light in her left hand and a [handgun] in her right hand. She walked quickly toward the deputies and her father asking what the deputies were doing to him." Deputy Smith drew his firearm and ordered Ms. Hamilton to drop the gun, warning that he would shoot her if she did not. Eventually, Ms. Hamilton stopped and, after Deputy Smith shouted

additional commands, dropped her gun. Deputy Smith then "slung Mr. Hamilton into the hood of the car and moved to subdue Ms. Hamilton." Ms. Hamilton dropped to the ground and "Deputy Smith stuck his knee in Ms. Hamilton's back, handcuffed her, 'snatched her up and shoved her in a patrol car. Deputy Finch retrieved Ms. Hamilton's weapon and secured it in his vehicle."

Shortly thereafter, the original caller, Dennis Laramore, arrived in his vehicle and began walking toward the patrol cars. Sergeant Bruce Ward had arrived on the scene to assist and ordered Laramore to "stop right there." Laramore stopped and, after exchanging some words, Sergeant Ward asked if Laramore had any firearms in his truck. Laramore stated that "he had two, but told Ward not to touch them unless he had a search warrant." Deputy Smith retrieved and secured one rifle but did not see or secure a pistol Laramore had in the vehicle. Sergeant Ward advised Laramore he was going to handcuff him, and Laramore responded, "[y]ou do it, make your arrest, because your ass is mine then." Laramore was then handcuffed and secured in a patrol car.

The deputies eventually determined there was no evidence that any dogs had been shot or that anyone had been trespassing on the Hamilton's property. All of the parties were released without being charged but the deputies – suspecting that Ms. Hamilton and Laramore had been drinking – retained their guns and stored them in evidence temporarily. Ms. Hamilton and Laramore retrieved the weapons the next day.

The Hamiltons later filed a lawsuit alleging excessive use of force, and Laramore sued alleging an unconstitutional search and seizure. Deputy Smith and the sheriff moved for summary judgment and the U.S. District Court for the Northern District of Florida granted their motion. The Hamiltons and Laramore appealed that ruling.

With respect to the Hamilton's claim that Deputy Smith used excessive force, the Eleventh Circuit held that the district court properly granted summary judgment. The district court held that "[t]he officers responded to a report of shots fired. Before they could sort out the situation, they were met with armed individuals, including two who resisted the officers' lawful commands. The two were verbally belligerent. One carried a handgun and refused, at least for a time, to put it down. The officers detained the individuals who resisted their lawful commands, using force of a kind that ordinarily attends an arrest." Under the circumstances, the Eleventh Circuit explained that **"It was not unconstitutional for Deputy Smith to shove Mr. Hamilton aside so he could deal with Ms. Hamilton, who was refusing to drop her gun while approaching an officer. It was also not unconstitutional for Deputy Smith to take control of Ms. Hamilton, who had shown a willingness to hold onto her gun when told to drop it. The force used on the Hamiltons was reasonable under the circumstances."**

Similarly, the Court held that Laramore's claim for unlawful search and seizure should be dismissed. As the district court explained, "the officers were dealing with armed and unruly individuals following a report of shots fired. It was dark; individuals continued to arrive; the officers were outnumbered and could not know if more individuals would be arriving; the situation was in flux. The officers understandably wished to control the guns at the scene." The Eleventh Circuit held that **under these facts, Deputy Smith "could reasonably believe it necessary to enter the truck and seize any guns to protect the [deputies] and the public." As such, the seizure was constitutional and the defendants' motion was properly granted.** *Hamilton v. Roberts*, No. 17-10521, 2017 WL 4534766 (11th Cir., Oct. 11, 2017).

ALS REMINDERS

When a 1205 form has been issued to a driver arrested for DUI, send the original 1205 form to the Department of Driver Services within ten days of the arrest.

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