



# DPS LEGAL REVIEW



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## *GEORGIA COURT OF APPEALS*

### **IMPLIED CONSENT - DRUG IMPAIRMENT**

On January 19, 2014, Christopher Osterloh was traveling on Georgia 400 when another vehicle struck his and he skidded off the road and into the tree line. Osterloh lost consciousness and awoke on the side of the road with his head hanging out of the passenger side window of his vehicle. Paramedics, firefighters, and Forsyth County deputies responded. A deputy made contact with Osterloh, who was initially cooperative and reported that he had a metal rod in his leg, had hit his head during the accident, and was not on any medication. He walked with a significant limp and stated he had injured his leg.

Eventually, "the deputy asked Osterloh to stand in a particular spot, and Osterloh suddenly started screaming and ran toward the road, seemingly attempting to flag down a passing vehicle." Osterloh continued to act erratically and was uncooperative, until he was eventually pinned to the ground by four deputies and handcuffed. Osterloh then began speaking gibberish for several minutes while the deputies unsuccessfully asked him to calm down.

Osterloh eventually stopped yelling and was rolled onto his side by deputies. First responders determined that Osterloh was breathing normally but had dilated pupils. "The deputy then placed Osterloh under arrest and read Georgia's implied-consent notice for drivers over the age of 21. Osterloh interrupted the deputy and said, 'I ain't going to trial f\*\*\*ing dumb ass. What you read that for?' The deputy then asked if Osterloh would submit to a State-administered blood test, and Osterloh replied, 'yeah.'" While being read the implied consent notice, Osterloh was held to the ground by one and sometimes two deputies, and was heaving and vomiting while on the ground. After the notice was

read, Osterloh remained pinned to the ground for about fifteen minutes, occasionally shouting in gibberish, until an ambulance arrived to transport him.

Osterloh did not state at any point that he did not wish to take the blood test, but at the hospital, he "was combative and had to be immobilized, including during the blood draw." Osterloh spent three days in ICU and had to be placed in a medially induced coma. He suffered from a head injury, vomited blood, had blood in his urine, and suffered respiratory failure. Osterloh was charged with several traffic offenses, including DUI per se and DUI less safe based upon consumption of methamphetamines. Osterloh moved to suppress the results of his blood test, arguing that he had not voluntarily consented to the state test. The trial court granted Osterloh's motion, stating that he was "clearly injured" and "incapable of making any kind of rational decision." The prosecutors appealed the ruling to the Georgia Court of Appeals.

The Court of Appeals reiterated the rule from *Williams* that "the State must show that a suspect 'gave *actual consent* to the procuring and testing of his blood, which would require the determination of the voluntariness of the consent under the totality of the circumstances.'" In this case, the Court held that while "the evidence is clear that Osterloh responded affirmatively to the deputy's request following the implied-consent warning... **the uncontradicted evidence also shows that Osterloh had been in an accident, in which he sustained injuries, including a head injury so serious that he had to be placed into a medially induced coma and spend three days in the [ICU.]**" The Court also explained that while Osterloh appeared to comprehend and respond to the deputy's questions at the beginning of their encounter, "**he is largely incoherent after he attempts to enter the roadway and is forced to the ground.**" Finally, the Court held that **nothing prevented the deputies in this**

**case from obtaining a warrant to perform a blood draw on Osterloh.** As such, the Court held that the trial court's ruling that Osterloh did not voluntarily consent to the blood draw was supported by the evidence. *State v. Osterloh*, A17A1199, 2017 WL 3811136 (Ga. Ct. App., Aug. 30, 2017).

### **WARRANTLESS ENTRY INTO HOME NOT JUSTIFIED**

On the night of April 23, 2015, Richard Hall, the maintenance man of a Cobb County apartment complex, called 911 to report a suspicious white vehicle backed into a parking spot. Hall suspected drug activity because there was heavy foot traffic between the vehicle and one of the apartment buildings and because he observed a lot of people leaning inside the vehicle. However, he did not smell any illegal substances and did not observe any hand-to-hand transactions. Two Cobb County Police Department officers responded. On their way to the apartment complex, the officers ran the tag of the white vehicle and discovered it had been reported stolen. The officers met with Hall, who "described the man who had been inside the vehicle as a white male wearing jeans, no shirt, and with tattoos."

Hall stated he believed the male had entered a particular building of the complex and the officers began knocking on doors in that building. They made contact with a resident who stated "he had seen a tattooed white male wearing jeans and without shoes" earlier who he believed lived in one of the downstairs apartments. The officers eventually reached a door which was opened by Patrick Heitkamp. When Heitkamp opened the door, two white males standing behind him ran further into the apartment. One of these men, later identified as Christopher Barfield, was a white male with visible tattoos on the back of his arms and was wearing jeans. However, Barfield also wore a black tank top. After opening the door, Heitkamp also "turned and walked away from the door, though not at a fast pace."

The officers testified that they believed Barfield was their suspect "since he ran to another part of the apartment as soon as he saw the officers and because he matched the description given by Hall and the other

resident. They also believed that probable cause to arrest Barfield existed for theft of the vehicle. The officers further thought that "Barfield posed a threat when he retreated into a room... where the officers could no longer see him." Based on these beliefs, the officers entered the apartment to pursue Barfield.

After entering the apartment, the officers saw methamphetamine in plain sight. The officers obtained a search warrant, found additional contraband, and arrested Heitkamp for related charges. Heitkamp moved to suppress the contraband found, arguing that "officers lacked probable cause, exigent circumstances or any other legal justification for entering the apartment." The trial court denied Heitkamp's motion, and he appealed to the Georgia Court of Appeals.

The Court of Appeals explained that "a private home is 'an unquestionable zone of privacy under the Fourth Amendment'.... Therefore, the state bore the burden of establishing that the officers had *both* probable cause and exigent circumstances to justify their intrusion into the apartment." **In this case, the Court found that the officers' entry into the home was unjustified because they lacked probable cause to arrest Barfield. The Court explained that the only evidence they had that Barfield had committed any crime was information supplied by Hall, and they had no information demonstrating that Hall's statements were reliable. Moreover, "even if Hall were determined to be a reliable source, he provided the officers only with a 'vague description' of the man he saw inside the vehicle. A description that could describe any number of occupants of that apartment complex—a tattooed, white male wearing jeans." Based on that evidence, the Court held, "the police officers did not have probable cause to conclude that Barfield was the occupant of the stolen car or had committed any other crime before they entered the apartment and saw the contraband," and thus their entry into the apartment was unconstitutional.** The Court stated that "further observation and corroboration," such as a specific identification from Hall that Barfield was the man he had seen in the stolen car, may have led to a different conclusion. *Heitkamp v. State*, A17A0816, 2017 WL 3761862 (Ga. Ct. App., Aug. 31, 2017)

## *11<sup>TH</sup> CIRCUIT COURT OF APPEALS*

### **SEARCH OF RESIDENTIAL OUTBUILDING JUSTIFIED BY ARREST WARRANT**

FBI agents conducting an investigation into a large scale drug operation obtained arrest warrants against Anthony DeJuan Williams for multiple drug-related offenses. Agents surveilled Williams at a property which public records showed to be his residence and determined that the property consisted of a main residence and “an outbuilding approximately twenty feet away in the backyard.” The outbuilding had a front and back door, several windows, and a garage door, giving it the appearance of “a mother-in-law suite or guest house.” Agents were also able to hear what sounded like a metal drug compressor used to repress and repackage cocaine with a diluting agent, but could not tell if the activity was occurring in the main residence or the outbuilding.

On the date the arrest warrant was executed, agents performed a drive-by of the property and saw Williams’s car and two other vehicles parked at the residence, leading them to believe that multiple people were present. Because they were unsure if Williams lived in the main residence or the outbuilding, the agents decided to make simultaneous entries of both buildings. The agents were divided into two teams and, after knocking and announcing their presence at the main residence, breached that door and, immediately afterwards, breached the outbuilding. Agents in the outbuilding discovered “a white powdery residue and some razor blades on a table and a drug press.” Williams was arrested in the main residence. Based on the plain view evidence discovered, agents obtained a search warrant and discovered additional evidence.

Williams later moved to suppress all the evidence discovered at the residence, arguing that the officers lacked any justification to search the outbuilding. The U.S. District Court for the Northern District of Alabama denied Williams’s motion, and, after being convicted, Williams appealed that ruling to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit upheld the trial court’s ruling, explaining that “**the search of the adjacent outbuilding was reasonable**” both as (1) an entry pursuant to the arrest warrant; and independently as (2) a valid protective sweep. With respect to the entry pursuant to the warrant, the Court explained that “[t]o enter a residence to execute an arrest warrant, a law enforcement officer must have a reasonable belief: (1) ‘that the location to be searched is the suspect’s dwelling,’ and (2) ‘that the suspect is within the residence at the time of entry.’” In this case, **public records showed the property to be Williams’s residence, both the main property and outbuilding appeared to be living spaces, and Williams was frequently on the property. Moreover, the warrant was executed while Williams’s car was on the property and in the early morning when Williams was likely to be home. As such, the search of the outbuilding was justified by the arrest warrant.**

The Court also held that the agents were justified in searching the outbuilding as part of a protective sweep supported by “reasonable suspicion that dangerous individuals were present in the outbuilding.” The Court found that, here, “[t]he layout of the property, the close proximity of the outbuilding to the main residence, the noise indicating drug distribution activities might be occurring on the property, and the fact that three cars were parked in the driveway all suggested that there may be more people present on the premises, besides defendant Williams, who could pose a threat to the arresting agents’ safety.” Under either the warrant or protective sweep theory, the search of the outbuilding was justified. *U.S. v. Williams*, No. 16-16444, 2017 WL 4160846 (11th Cir., Sept. 20, 2017).

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

### **NEGATIVE DRUG FIELD TEST NOT FATAL TO EXISTENCE OF PROBABLE CAUSE**

On July 4, 2014, members of a Bulloch County crime suppression team including Bulloch County

Sheriff's Department Investigator Benjamin Lienhard "met with an informant who stated that he could have Arizona Zeb Connell deliver heroin to the officers in a sting operation." The officers arranged a controlled buy in which Lienhard would pose as the buyer. The informant contacted Connell and told him what kind of vehicle Lienhard would be in. Connell eventually agreed to meet the same day at a convenience store.

Lienhard arrived at the agreed-upon location and parked. Connell later arrived driving a vehicle owned by Addison Reddick, who was in the passenger seat, and parked "a couple of spaces down from" Lienhard. Connell exited the vehicle and was identified by other officers, who confronted him when he went into the store. Reddick remained in the vehicle and Lienhard approached her, identified himself, explained why he was there, and "asked basic questions." Reddick identified herself and Lienhard recognized her name and that she had previously been convicted of possession of cocaine.

Reddick later testified that Lienhard then told her she was "going to jail for being part of a drug sale" and she stated that she "did not know anything about drug activity." She was nevertheless detained, and a police canine made a positive alert on the vehicle for the presence of drugs. The vehicle was searched and Lienhard discovered "pieces of a white, rock-like substance on the floorboard where [Reddick] had been seated" which looked to Lienhard like crack cocaine. Lienhard then performed a chemical field test on the substance. Reddick claimed that the field test did *not* return a positive result indicating the presence of cocaine, but Lienhard later testified that the test was positive. In any event, Lienhard disposed of the field test. Reddick was arrested for drug possession.

Reddick later sued Lienhard for false arrest in the U.S. District Court for the Southern District of Georgia, alleging her arrest violated the Fourth Amendment because Lienhard lacked probable cause. Lienhard moved for summary judgment on Reddick's claim, stating that even assuming the facts she alleged were true, he was entitled to qualified immunity and, in any event, he had probable cause to arrest her.

The U.S. District Court granted Lienhard's motion for summary judgment. The Court explained that, under the circumstances, "the use of a field test is within the officer's discretion," and, "[m]ore importantly, the decision of whether to arrest is not solely based on a field test." Thus, the Court explained, "**even if the field test proved negative, a reasonable officer could still arrest a suspect if he has probable cause to do so in the absence of a field test.**" In this case, the Court explained, "**even assuming that [Lienhard's] field test yielded a negative result for cocaine, a reasonable officer in his position at the time of arrest still could have believed that [Reddick] possessed cocaine based upon her presence at a drug transaction, her prior history with cocaine, the canine alert, and the presence of what appeared to be crack cocaine on the floorboard. Thus, [Lienhard] had arguable probable cause for the arrest, and the arrest did not violate the Fourth Amendment.**" *Reddick v. Lienhard*, No. 6:16-CV-51, 2017 WL 2789280 (S.D. Ga., June 27, 2017).

### ALS REMINDERS

Issue a **1205 S** form instead of a **1205** form if a **blood** test is administered to a DUI driver pursuant to implied consent. The **1205 S** form is filled out and submitted to the Department of Driver Services once the blood test results have been received from the GBI crime lab and the results are per se alcohol. The DDS notifies the DUI driver that a 1205 S form has been submitted by the arresting officer. If the blood test was administered pursuant to voluntary consent and the implied consent notice was **not** read, then a 1205 S form would not be filled out and the ALS process would not apply.

When testifying at an ALS Hearing on a case in which a blood test was administered, a copy of the GBI crime lab blood test results must be provided to the court at the hearing.

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**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](mailto:zhoward@gsp.net)