



DPS LEGAL REVIEW



December 2017

Legal Services (404) 624-7423

Volume 16 No. 12

GEORGIA COURT OF APPEALS

LIABILITY FOR HIGH SPEED PURSUIT BASED UPON MINOR TRAFFIC OFFENSE

On the morning of February 6, 2013, a Lamar County Sheriff's Department deputy witnessed a vehicle on I-75 straddling two lanes of the interstate. The deputy entered traffic and attempted to perform a traffic stop on the vehicle, but the driver accelerated away. The deputy decided to initiate a pursuit, notified the dispatcher of the pursuit, and asked the dispatcher to notify the Monroe County Sheriff's Department as the vehicle was close to and travelling towards the Monroe County line. The deputy also read the dispatcher the vehicle's license plate and "learned that it was a rental car that had not been reported missing or stolen." At the time the pursuit was initiated, "the weather was clear and dry and there was moderate traffic on the interstate." The fleeing driver quickly became very aggressive, reaching speeds of up to 125 mph. Both the fleeing vehicle and the deputy were weaving in and out of traffic as other vehicles attempted to move out of the way.

Eventually, three deputies from Monroe County joined the chase as it continued into that county. "The police dispatcher advised the Monroe deputies and their supervisors who were listening over the radio that the pursuit was for the driver's failure to stop for a 'routine traffic stop' and indicated that there were no 'warrants... or anything like that' for the driver." The fleeing driver continued driving in an aggressive and erratic manner onto I-475, which one deputy noted on the radio "gets real congested." While on I-475, the pursuing Lamar County deputy – who had allowed Monroe County to take the lead – struck a median and blew a tire, forcing him to discontinue. Only Monroe County deputies remained in pursuit.

The fleeing driver exited onto Highway 247 and continued his aggressive and erratic driving through four-way intersections and congested traffic. Monroe County deputies slowed but continued to pursue the vehicle. Eventually, approximately 20 miles from the point at which the Lamar County deputy was forced out of the pursuit, "the fleeing driver drove at a high rate of speed through a red light at an intersection near [a mall] and collided" with another vehicle, causing the occupants to sustain serious injuries. The fleeing driver was found to have a small bag of marijuana in his car and was driving on a suspended license.

The occupants of the struck vehicle later sued the Lamar and Monroe County sheriffs, alleging that their departments were liable for the injuries they sustained because the pursuit was initiated and continued in reckless disregard for the safety of the public. The Lamar County sheriff moved for summary judgment, alleging that he could not be sued as a result of the incident because his department enjoyed sovereign immunity and that while sovereign immunity is usually waived for instances which arise from the use of a government-owned motor vehicle, no such vehicle was "in use" at the time of the injuries because Lamar County was no longer involved in the pursuit. The Monroe County sheriff also moved for summary judgment, arguing that – while he could not claim sovereign immunity – he was nevertheless entitled to summary judgment because the plaintiffs "failed to present any evidence that the Monroe deputies acted with reckless disregard for proper law enforcement procedures." The trial court granted both sheriffs summary judgment based upon their arguments, and the plaintiffs appealed.

The Georgia Court of Appeals upheld the grant of summary judgment to the Lamar County sheriff. The Court explained that, **while it is true that a sheriff does not have sovereign immunity "for a loss arising out of**

**EXECUTION OF ARREST WARRANT:
ENTRY INTO HOME; USE OF FORCE;
PROTECTIVE SWEEP; BODILY PRIVACY**

the negligent use of a covered motor vehicle,” the term “use” in this context refers to “motor vehicles that were actively in use when the injury arose.” Thus, in this case, “because the Lamar County patrol car undisputedly was disabled and unable to participate in the pursuit when the collision occurred, the plaintiffs’ injuries did not arise out of the ‘use’ of the patrol car,” and thus the Lamar County sheriff was entitled to sovereign immunity.

However, the Court reversed the finding of summary judgment for the Monroe County sheriff. There was no question that the Monroe County patrol cars were “in use” at the time of the collision, and thus that agency was not entitled to sovereign immunity. Where no sovereign immunity exists, the injured parties must prove “that the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer’s decision to initiate or continue the pursuit” in order to recover from the pursuing agency.

In this case, the Court found that **a jury could conclude that the Monroe County deputies acted with reckless disregard for pursuit procedures in continuing the chase. Specifically: (1) the deputies were aware the pursuit was for a minor traffic violation and did not involve any known warrants; (2) the driver was driving in an extremely aggressive and erratic manner through increasingly congested traffic; (3) the deputies were aware of Monroe County policies that required them to “weigh the gravity of the suspect’s offense and hazard to the public;” and (4) the deputies knew the vehicle had been identified by license plate as belonging to a rental agency, which would have provided “a potential means for later tracking down the fleeing driver.”** Because a jury weighing these facts could conclude the deputies acted with reckless disregard for proper law enforcement procedures by continuing the pursuit, the sheriff was not entitled to summary judgment. *Wingler v. White*, No. A17A1549, 2017 WL 6046718 (Ga. Ct. App., (Dec. 7, 2017).

On February 7, 2011, Gwinnett County Sheriff’s Office Deputies Casal and Pardinias arrived at a residence shortly after 11:00 P.M. to serve a felony motor vehicle theft arrest warrant issued in November of 2010 for Wesley Brand. Although the warrant listed Wesley’s address as “unknown,” Deputy Casal “investigated and found an address for Wesley on a... jail booking sheet dated about three weeks before the warrant issued for him.” The warrant also “described Wesley as a 27-year-old white male,” but - unbeknownst to the deputies - Wesley had begun to identify as a woman and was actually 17 years old and mixed race.

Upon arrival at the residence, Deputy Pardinias went around to the back of the house while Deputy Casal approached the front. Deputy Casal asked the dispatcher to run the license plate of a car parked in the driveway and discovered it was registered to a Theotis Brand. Deputy Casal then walked to the front porch and encountered a woman, later identified as Jayne Velazco and a relative of the Brands. Deputy Casal asked Velazco if Wesley Brand was there and she “responded that she ‘would get his mother and father.’” Velazco went inside and returned with Wesley’s parents. Mr. Brand carried a 7-month-old infant and Mrs. Brand was pregnant.

Deputy Casal informed Mrs. Brand “he had a warrant for Wesley Brand, a 27-year-old white male. Mrs. Brand, confused because the description provided did not match Wesley, asked Deputy Casal “if he wanted ‘Wesley Brand’ or ‘a 27-year-old white male.’” Deputy Casal responded that he wanted “Wesley Brand, a 27-year-old white male,” then asked if Wesley was home. Mrs. Brand said she did not know, but called for Wesley. Wesley - who had been in the basement - then came up and stepped onto the front porch where the group was standing. Deputy Casal became

confused at this point Because Wesley was dressed and appeared as a female.

Deputy Casal then told Mrs. Brand that he needed to come into the house, but Mrs. Brand refused, stating “he couldn’t come in because he didn’t have a search warrant and because Wesley was already outside waiting for Deputy Casal to arrest him.” As the two continued to argue over whether Deputy Casal had the authority to enter the residence, Wesley stepped back inside. Deputy Casal eventually grabbed Mrs. Brand by the shirt in an attempt to pull her out of the doorway. Mrs. Brand “resisted and held on to the doorway,” causing her front of her shirt to rip, exposing her breast. While this encounter was occurring, Deputy Pardinias had moved to the front of the residence after unsuccessfully attempting to contact Deputy Casal via radio. At some point prior to moving to the front of the residence, Deputy Pardinias also radioed that she saw a man near the rear of the house.

Deputy Pardinias entered the foyer where the entire group, including Deputy Casal, had moved. Deputy Pardinias explained they had an arrest warrant and confirmed Wesley’s identity as the subject of the warrant. “Mrs. Brand was by now ‘extremely upset, agitated,’ and again told the officers to ‘get out of my house.’” Mrs. Brand then asked Velazco for a phone so that she could call 911, and Velazco handed her a phone. “Deputy Pardinias ordered Mrs. Brand to ‘drop the phone,’ but she did not,” instead announcing she was dialing 911. In response, Deputy Pardinias tased her without warning, causing her to fall to the floor. Deputy Pardinias ordered Mrs. Brand to lie flat on her stomach and began “punching her back.” Mrs. Brand stated she couldn’t lie flat because she was pregnant and kept one of her legs “elbowed out” to protect her stomach. Deputy Pardinias kicked Mrs. Brand’s leg several times to get her fully prone.

Soon afterwards, several additional officers arrived. Deputy Casal, as the primary officer, directed the others to perform a security sweep of other areas of the house. Mr. Brand later stated that several officers went through “pretty much everything” in the house, even “going through drawers.” Deputy Casal, however, only performed a security sweep of areas adjacent to the

foyer. Meanwhile, Deputy Pardinias removed the taser probes from Mrs. Brand, but did not take any steps to rearrange her clothing or cover her exposed breast. The deputies reportedly refused Mrs. Brand’s request to cover her for over an hour while she was in the residence and after being taken to the jail for booking, even refusing to allow her husband to cover her with his own shirt. Mrs. Brand was later charged with obstruction and third degree cruelty to children but was acquitted by a jury.

The Brands later filed a lawsuit against Deputies Casal and Pardinias alleging the following constitutional violations: (1) the deputies illegally entered the Brands’ home without sufficient justification; (2) Deputy Pardinias’s use of force upon Mrs. Brand was excessive; (3) Deputy Casal unconstitutionally ordered an excessively intrusive search of the home that went beyond a protective sweep; and (4) the deputies violated Mrs. Brand’s right to bodily privacy by refusing to allow her to cover her breast. The U.S. District Court for the Northern District of Georgia denied summary judgment to the deputies with respect to all of the above claims, and the deputies appealed to the Eleventh Circuit. Each of the four allegations is discussed in turn below.

1. Unlawful Entry Into Home

The Eleventh Circuit explained that “[e]ven with no search warrant, an arrest warrant authorizes an officer to enter a person’s home when” the so-called *Payton* requirements are met: the officer has a reasonable belief that (1) the location to be searched is the suspect’s dwelling and (2) the suspect is within the residence at the time of entry. With respect to the first requirement, the Eleventh Circuit held that “Deputy Casal had a reasonable belief that Wesley Brand lived” at the residence. The address in question was listed as Wesley’s residence on a booking sheet four months prior to the warrant execution. Moreover, the car parked in the driveway was registered to a person with the same last name as Wesley, and “[w]hen Deputy Casal asked Ms. Velazco if Wesley was there, she said she would get his mother and father.” The Court explained that a reasonable officer could believe that Wesley lived there with his parents and “Ms. Velazco

thought the officer should speak with Wesley's parents first."

With respect to the second requirement, the Court held that it was reasonable for the deputies to assume that Wesley would be at his residence after 11:00 P.M. on a cold February night, especially in the absence of any information about Wesley's schedule that would rebut that presumption. As such, **the Court held that "Deputy Casal's entry based on the arrest warrant was permitted under *Payton*" and "did not violate the Fourth Amendment."** Thus, the Eleventh Circuit overturned the district court with respect to this claim.

2. Excessive Use of Force

The Eleventh Circuit analyzed the Brands' claim that Deputy Pardinias used excessive force on Mrs. Brand under the "objective reasonableness" standard of *Graham v. Connor*. Under *Graham*, several factors affect whether the force used in a situation was constitutional, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight." **The Court held that all of the *Graham* factors tended to show that the force used by Deputy Pardinias was excessive.** First, Mrs. Brand was not suspected of any crime when the deputy deployed her taser because (1) she was not the subject of the arrest warrant; and (2) at the time she deployed her taser, Deputy Pardinias had not seen and did not know about the altercation between Mrs. Brand and Deputy Casal. Second, there was no indication that Mrs. Brand posed an immediate threat to the safety of the officers or others. While she may have been upset and agitated, she was not doing anything sufficiently threatening to justify the use of a taser with no warning. Third, "Mrs. Brand was neither actively resisting arrest nor attempting to escape when Deputy Pardinias tased her."

The Court also held that Deputy Pardinias was not entitled to qualified immunity with respect to Mrs. Brand's excessive use of force claim. Such immunity protects officers from suit when they violate the constitutional rights of a person but those rights have not been clearly established by law. In this case,

however, **the Eleventh Circuit held that prior case law clearly established that the use of a taser against a suspect who is not violent or aggressive and not resisting arrest constitutes excessive force.** As such, the Court overturned the district court and denied summary judgment to Deputy Pardinias with respect to the Brands' excessive use of force claim.

3. Overly Intrusive Protective Sweep

The Brands also claimed that the protective sweep of their home during the arrests ordered by Deputy Casal was unconstitutional. A protective sweep is constitutional during the execution of a valid arrest if the "officer possessed a reasonable belief based on specific and articulable facts... that the area swept harbored an individual posing a danger to officers or others." Here, the Eleventh Circuit held that several facts justified the protective sweep, including (1) "Ms. Velzco's presence at the Brands' home;" (2) "radio reports from Deputy Pardinias identifying a man near the rear of the house;" (3) the fact that Deputy Pardinias and Mrs. Brand had just had a violent encounter; and (4) "[t]he split-level layout of the home," which "prevented Deputy Casal from being able to see all the adjacent spaces where another person might be hiding." Thus, **the Court held that the protective sweep was justified.**

Nevertheless, the Court also explained that a protective sweep "may extend only to a cursory inspection of those spaces where a person may be found." While there was no question that Deputy Casal did not personally search any area beyond this allowable scope, the Brands alleged that other officers exceeded this authority by searching everything in the home, including drawers. The Court held that while "searching through drawers plainly goes beyond what is allowed for a protective sweep," **Deputy Casal could only be held liable for that violation if he either "directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so."** Here, the Court found that **"the record does not show that Deputy Casal directed (or even knew of) the actions taken by the other officers in carrying out the sweep."** Thus, the Court upheld the district court ruling and explained that

Deputy Casal cannot “be liable for the claim that the protective sweep exceeded its proper scope.”

4. Violation of Bodily Privacy

Finally, the Eleventh Circuit addressed Mrs. Brand’s claim that the deputies violated her right to bodily privacy by refusing to allow her to cover her exposed breast for an extended period of time. The Court referred to a 2007 U.S. Supreme Court case, *Los Angeles County v. Rettele*, which established that **“police officers violate the Fourth Amendment when they force an arrestee to expose herself ‘longer than necessary to protect their safety’ or effectuate some other legitimate purpose.”** The Court held that in this case, **“[t]he defendants have pointed to no explanation about why they couldn’t give Mrs. Brand a new shirt, or let Mr. Brand or Ms. Velazco get her one as they asked to be allowed to do. Unlike *Rettele*, [which involved] involuntary nudity [which] was constitutional because it was brief and lasted no longer than necessary to protect the officers’ safety, Mrs. Brand’s involuntary exposure continued for longer than necessary, with no good law enforcement purpose.”** The Court also held that the deputies were not entitled to qualified immunity with respect to this claim, because Mrs. Brand’s right to bodily privacy was clearly established at the time of the violation. As such, the Eleventh Circuit upheld the district court’s denial of summary judgment to the deputies with respect to this claim. *Brand v. Casal*, No. 16-10256, 2017 WL 6461965 (11th Cir., Dec. 19, 2017).

PROBABLE CAUSE FOR VEHICLE SEARCH— INFORMATION FROM OTHER AGENCIES

DEA Agents began investigating Cleola Sullivan after Jarrick Williams, an individual arrested on suspicion of distributing cocaine, identified Sullivan as his primary supplier. “Williams told agents... he had known [Sullivan] for more than a year” and that “she transported cocaine by hiding it under her car’s bumper.” Williams agreed to conduct controlled communications with Sullivan and, through a series of phone calls and texts, was eventually able to get Sullivan to agree to deliver him five ounces of cocaine in Tallahassee.

DEA Agent Matthew Vickers then obtained a search warrant to track Sullivan’s phone using GPS. “When the GPS indicated Sullivan was travelling south toward Tallahassee... Vickers arranged for agents to physically surveil her.” During the course of their surveillance, the agents observed Sullivan drive to a Walmart, park next to and enter the passenger side of another vehicle, remain for a few minutes, and return to her vehicle. “Although the agents were unable to see what happened inside, they testified they believed a bag had been exchanged.”

Sullivan then drove to Atlanta and went to a bank, where an agent followed her on foot. While inside, she “received a call from Williams, to which she responded, ‘You know I’m coming, that’s why I called you.’... She then withdrew \$1,500, exited the bank, and briefly sat in the passenger side of a car that was waiting outside. Later that evening, Sullivan visited an industrial park, where agents were unable to continue following her.”

The following morning, Sullivan began travelling on I-75 south. The surveilling agents expected Sullivan was travelling to Tallahassee to deliver the cocaine and thus anticipated she would merge onto I-10, but instead she travelled south on I-75 past I-10, causing the agents to lose physical surveillance. In response, Agent Vickers contacted Sgt. Michael Rowlands of the Alachua County Sheriff’s Department and arranged for Alachua County deputies to “orchestrate ‘a traffic stop on Ms. Sullivan with independently-obtained probable cause.’”

Sgt. Rowlands recruited Alachua County Deputies Rodriguez and Abbot to conduct the traffic stop. Deputies Rodriguez and Abbot positioned their vehicle along I-75 and eventually encountered Sullivan’s vehicle. The deputies performed a traffic stop on Sullivan’s vehicle after witnessing her following another vehicle too closely. During the course of the stop, Deputy Rodriguez asked Sullivan if he could search the vehicle, and Sullivan consented. Sgt. Rowlands, who was by then on site and in touch with Agent Vickers, searched underneath the vehicle for contraband but did not discover any. Deputy Rodriguez then gave Sullivan a written traffic warning, but after Sullivan signed the warning, deputies continued

searching her vehicle. Eventually, a canine handler circled the vehicle with a drug detection dog, which alerted to the front bumper. Due to inclement weather, the vehicle was then moved to the sheriff's office, where it was placed upon an elevated lift. A sock was then discovered under the rear bumper, "which contained one half of a kilogram of cocaine." Sullivan was then arrested and "made inculpatory statements regarding her involvement in cocaine distribution."

Sullivan was charged with several federal controlled substance violations in the U.S. District Court for the Northern District of Florida. "Prior to trial, Sullivan moved to suppress the cocaine found in her vehicle and her subsequent inculpatory statements," arguing among other things that her consent to search the vehicle did not extend to the dog sniff and that the officers "unreasonably prolonged the stop to conduct the dog sniff." The district court denied Sullivan's motion, finding that although Sullivan's consent to search her vehicle "expired upon the conclusion of the traffic stop and thus could not justify the search conducted after the traffic warning had been issued... the officers' search of Sullivan's vehicle was lawful because [law enforcement's] collective knowledge... 'established probable cause to believe Sullivan would be transporting drugs on that day.'" Sullivan was later convicted and appealed her conviction to the Eleventh Circuit, arguing that her motion to suppress should have been granted.

The Eleventh Circuit Court of Appeals upheld the ruling of the trial court. The Court explained that **while Sullivan's consent to search the vehicle did in fact expire when the traffic stop concluded (i.e. when she received a warning for the violation), the search could nevertheless be justified based upon the automobile exception to the warrant requirement if "(1) the vehicle is readily mobile (i.e., operational) and (2) agents have probable cause to believe the vehicle contains contraband or evidence of a crime."** In this case, there was no question that the first element was met because the vehicle was indisputably operational. With respect to probable cause, the Court explained that **the information obtained from Williams, who had recently been found with cocaine, identified Sullivan as his**

primary supplier, and described how she hid cocaine under her car's bumper, coupled with the communication between the two "arranging for the sale and delivery of the cocaine," could lead "a reasonable officer with the information that was available to [Agent] Vickers [to] believe that there were drugs in that car." Moreover, the Court explained that **"[a]lthough this information came from various officers... because [Agent] Vickers was in touch with the officers on the road, his knowledge could also be considered" as a basis for probable cause within the collective knowledge of law enforcement.** As such, the search of Sullivan's vehicle was properly supported by probable cause and the automobile exception to the warrant requirement and her motion to suppress was properly denied. *U.S. v. Sullivan*, No. 16-17636, 2017 WL 6003332 (11th Cir., Dec. 5, 2017).

ALS REMINDERS

When a driver is arrested for DUI, always take the driver's license (residents and nonresidents). Issue a temporary driving permit to a DUI driver with a valid license. If the driver has a valid driver's license and a 1205 form is issued, sign the 45 day temporary driving permit at the bottom of the 1205 form. If the driver has a valid driver's license and a 1205 form is not issued, attach a 180 day temporary driving permit sticker to the defendant's DUI citation. (See O.C.G.A. § 40-5-67). Only one type of temporary driving permit (45 day or 180 day) is to be issued to the driver.

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