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11th Circuit Court of Appeals

TERRY STOP – REASONABLE ARTICULABLE SUSPICION

In March of 2017, a security guard at a Marietta apartment complex "saw a group of young men walk toward a wooded area behind some of the apartment buildings" just after 6:30 P.M. Shortly thereafter, the security guard heard gunshots coming from the same area. He approached the woods but could not see anyone. The security guard then called 911 to report the gunshots.

At approximately 6:45 P.M., a police dispatcher advised Marietta police officer John Bisker to respond to reported gunshots at the apartment complex. The dispatcher did not describe any suspects. Bisker was familiar with the apartment complex as a high-crime area. He arrived five to seven minutes after speaking with the dispatcher. Bisker spoke with the security guard, who showed Bisker where he had heard the shots, then Bisker began to search the area. After driving around for a few minutes without seeing any additional signs of criminal activity, Bisker saw an individual later identified as Patrick Heard. Heard was walking a small dog "'near the front of' an apartment building" close to where the gunshots were heard. By this point between 15 and 29 minutes had passed since the gunshots were heard.

Officer Bisker approached Heard on foot and asked whether he had heard gunshots. Heard stated he had and that the gunshots had come from the woods behind him. Bisker asked Heard for identification and Heard provided it; Heard's ID did not have an address in the apartment complex. Bisker asked Heard where he lived and Heard responded that "his mother lived there and pointed to the apartment building closest to where he was standing with his small dog." Bisker asked Heard for his mother's apartment number, but Heard did not provide it. Bisker explained, however, that he was outside to walk his dog. "Bisker observed that Heard was swaying slightly. Based on his swaying and 'overall demeanor,' Bisker thought 'possibly Heard wasn't supposed to be there.'"

A second Marietta police officer, Daniel Dilworth, then arrived and approached Bisker and Heard. Dilworth observed an unoccupied vehicle 15 to 20 feet away with a smashed window and a stick holding the trunk open, but decided to address it after speaking with Heard. As he approached, he noted the conversation between Bisker and Heard was amicable. "Soon after Dilworth's arrival, Bisker asked Heard for permission to search him because he wanted to make sure Heard was not carrying a weapon. Heard responded that 'he had not done anything wrong.'" Dilworth observed that Heard became somewhat more animated and did not want to answer any more questions. Bisker and Dilworth then began to issue commands to Heard to either keep his hands by his side or raise his hands so he could be patted down. Heard repeated that he had done nothing wrong. Eventually, Dilworth performed a search of Heard's person and found a handgun. The officers later determined that Heard was a convicted felon and arrested him for being a felon in possession of a firearm.

During his subsequent prosecution, Heard moved to suppress the gun on the grounds that the officers lacked justification to perform a *Terry* stop and search him. The U.S. District Court for the Northern District of Georgia denied the motion to suppress, reasoning that the officers had reasonable, articulable suspicion to stop and search Heard. Heard then appealed.

On appeal, the Eleventh Circuit first explained that up to the point at which "Dilworth began giving Heard orders" to keep his hands at his said or raise them, the interaction between Bisker and Heard was consensual. Thus, no justification was needed to justify the initial

interaction. With respect to the subsequent interaction, however, "no reasonable person would have felt free to refuse once Dilworth began giving Heard orders," and thus the interaction became a *Terry* stop. The Court reviewed that "Officers may conduct a brief investigatory stop, a so-called Terry stop, 'where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity, and (2) the stop 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" Further, the Court stated that "[u]nless, at the time of the stop, the officers could point to 'specific articulable facts that reasonably warrant suspicion,' the stop cannot be justified."

In this case, the Court overruled the district court and held that the evidence should be excluded because the *Terry* stop was not justified. The Court explained as follows: **"Factors like known criminal activity in an area; time of day; proximity, both temporal and geographic, to reported suspicious activity; unusual nervousness; and refusal to cooperate can certainly contribute to reasonable suspicion. Here, though, the district court failed to consider factors that objectively cut against suspicion of criminal activity; namely, that Heard was walking his small dog in a grassy area in front of an apartment building inside a gated complex and, when approached by a uniformed police officer, remained calm, provided identification, and willingly answered questions about the gunshots, his residence, and his reason for being there. These facts—which objectively indicated that Heard was uninvolved in the reported gunshots—considered alongside the other relevant facts, preclude a finding of reasonable suspicion in this case. Thus, the stop was unlawful at its inception."** *United States v. Heard*, No. 17-12397, 2018 WL 823895 (11th Cir., Feb, 12, 2018).

Georgia Court of Appeals

DUI ARREST: ADMISSIBILITY OF CHEMICAL BREATH TEST REFUSAL

After being called by a driver who noticed a vehicle stuck in a ditch, a sheriff's deputy made contact with the driver of the stuck vehicle, Anthony Cherry. During the course of his interaction with Cherry, the deputy obtained sufficient probable cause to arrest Cherry for DUI. After placing Cherry under arrest, the deputy read Cherry the appropriate implied consent notice and Cherry agreed to a chemical breath test. "After being taken to the jail, however, Cherry began expressing reservations about taking the test." Cherry requested the deputy re-read the implied consent notice, and the deputy complied. Cherry then refused to submit to the test.

Cherry was prosecuted for DUI (alcohol) and convicted. At his trial, prosecutors introduced his refusal to submit to a chemical breath test as evidence of his guilt. Cherry appealed his guilty verdict and argued on appeal that – notwithstanding the fact that he was properly read an implied consent notice and advised of his right to refuse the test and the consequences of doing do – the chemical breath test was an unreasonable search and seizure under the Fourth Amendment and the Georgia Constitution. Thus, Cherry argued, his refusal to take the test could not be used against him because he was merely exercising his constitutional right to refuse an unreasonable search and such a refusal cannot be used as evidence of guilt.

The Court of Appeals refused Cherry's argument and upheld his conviction. Referencing the Georgia Supreme Court's recent decision in *Olevik v. State*, the Court held that "**As the Supreme Court of Georgia recently explained… the Fourth Amendment permits a warrantless breath test as a search incident to a DUI arrest…Because a warrantless breath test is permitted as a search incident to a valid DUI arrest, securing a breath test after arrest pursuant to our Implied Consent law does not violate the Fourth Amendment." As such, Cherry's refusal to submit the test was admissible against him.** Cherry also attempted to rely upon *Olevik* to argue that his refusal constituted an exercise of his constitutional right against self-incrimination under the Georgia Constitution, but the Court did not address this argument because it was not made in a timely manner. *Cherry v. State*, No. A17A2085, 2018 WL 991676 (Ga. Ct. App., Feb. 21, 2018).

TRAFFIC STOP – USE OF PRIVATE DRIVEWAY TO AVOID TRAFFIC SIGNAL

An officer with the Clayton County Police Department was stopped behind a vehicle driven by Alfred Harris while that vehicle was stopped in traffic behind a red light. Harris had his right turn signal engaged and, after waiting for several minutes, "turned right into an adjacent gas station, drove through the gas station parking lot, and exited on the other side of the gas station to avoid the traffic light." The officer conducted a traffic stop on Harris, later testifying that he believed that by driving through the gas station to go around or "disengage" the traffic light, Harris had violated O.C.G.A. § 40-6-20. The officer stated that he had stopped other drivers in the past for the same behavior, and that he had been trained that the conduct was illegal. Following a DUI investigation after the traffic stop, Harris was arrested for DUI (alcohol) and also charged with violating O.C.G.A. § 40-6-20. Harris was convicted and appealed his conviction, arguing that the traffic stop was unjustified because his conduct was legal.

O.C.G.A. § 40-6-20(a) states that "[t]he driver of any vehicle shall obey the instructions of an official traffic-control device applicable thereto… unless otherwise directed by a police officer." The trial court "found that no violation of OCGA § 40-6-20 had occurred," but "the traffic stop was legal because the officer's mistake of law was 'reasonable but honest'" based upon his training and his prior history of stopping drivers for similar conduct. Harris appealed, arguing that "the officer's incorrect understanding of the law did not give rise to the reasonable articulable suspicion required for a traffic stop."

The Court of Appeals first reiterated that "[f]or a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity." The Court also restated its holding from *Abercombie v. State* that "when an officer's honest belief that a traffic violation has actually occurred proves to be incorrect, the officer's mistaken-but-honest belief may nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for the stop." In this case, however, the Court held that it was entirely unambiguous that Harris did *not* violate the statue, and therefore the officer's belief that a law had been broken was not reasonable. The Court explained that "it is clear, based on the plain language of OCGA § 40-6-20 (a) and (e), that Harris did not violate the statute because he did not 'disregard' or 'disobey' the traffic light's instruction to stop at the intersection. Rather, as the officer described it, he "disengaged" from the light, which is not prohibited. **"'[T]here is but one reasonable interpretation of the statute in this case.' The officer's understanding that 'disengaging' the traffic light is a violation of OCGA § 40-6-20 is not supported by the plain language of the statute, and nothing in the plain language of the statute indicates that Harris committed a violation by 'running' the light, when he took a detour around the intersection This is not a case where the law in question is 'genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work.'" Therefore, the Court held that "the officer's mistake of law… was not objectively reasonable and there was no reasonable articulable suspicion to support the traffic stop."** *Harris v. State*, No. A17A1785, 2018 WL 847632 (Ga. Ct. App., Feb. 14, 2018).

TRAFFIC STOP – EVIDENCE OF AUTOMOBILE INSURANCE

On the night of November 4, 2016, an Atlanta Police Department officer on patrol ran the license plate of a vehicle being driven by Brent Lewis through GCIC and discovered that the vehicle was listed as not having the required insurance. The officer confirmed this result through a second database (the Atlanta Criminal Information Center), which also showed that the vehicle did not have insurance. The officer then performed a traffic stop on the vehicle based upon the apparent lack of insurance.

The officer approached Lewis and explained that he had stopped the vehicle for not having insurance. "Lewis responded that he had insurance" and handed the officer paperwork purporting to demonstrate the existence of valid insurance. The officer testified that

the paperwork "appeared to be a warning from an insurance company stating that the vehicle was uninsured." Lewis stated "that he showed the officer an e-mail and an insurance company app on his cell phone demonstrating that he had insurance, but the officer told him he could not accept that information." The officer later testified that he "was not sure if Lewis showed him an app on his phone because Lewis was very nervous and 'was trying to do a bunch of things at the same time.'" Eventually, the officer issued Lewis a citation for driving without insurance and performed an inventory search of the vehicle prior to impounding it. The officer found additional contraband during that search for which Lewis was charged.

During Lewis's prosecution, he moved to suppress all evidence found in his vehicle, arguing that the officer lacked probable cause to issue him a citation for driving without insurance and thus did not have the authority to impound or perform an inventory search of his vehicle. "At the motion hearing, Lewis presented a copy of his insurance card, his policy declaration page, and a printout of his premium payment history, which showed that the car was insured as of October 28, 2016, and at the time of the traffic stop approximately one week later, on November 4." Lewis also showed the judge "a screenshot of his insurance card from his phone, which he said he showed the officer that night." Based on that evidence, the trial court granted Lewis's motion to suppress, finding that "because the officer had proof of valid vehicle insurance at the outset of the traffic stop and he had no other articulable reason for the stop, Lewis was entitled to suppression of the evidence seized." The prosecution appealed the ruling.

The Court of Appeals first held that the initial traffic stop was valid because the officer was entitled to rely upon the database results indicating that Lewis's car did not have insurance, which provided reasonable, articulable suspicion "that Lewis was committing the crime of driving without insurance." However, the issuance of a traffic citation requires "probable cause to believe that an offense has been committed." In this case, the evidence presented to the trial court revealed that Lewis "showed the officer his insurance app, which demonstrated Lewis had obtained insurance for the car seven days before the stop… The officer did not dispute Lewis' testimony; rather, he simply did not remember seeing the app. Moreover, the officer conceded that in his experience sometimes cars with insurance showed up as having no insurance in the police databases." **The Court thus concluded that "even though the officer had reasonable articulable suspicion to initiate the traffic stop, once Lewis provided proof of insurance in a manner acceptable under OCGA § 40-6-10, the officer did not have probable cause to arrest Lewis or issue him a citation. Without probable cause to issue the citation, the officer had no basis for impounding Lewis's vehicle. Accordingly, the trial court properly granted the motion to suppress."** *State v. Lewis*, No. A17A1692, 2018 WL 990069 (Ga. Ct. App., Feb. 21, 2018).

ALS REMINDERS

If you do not receive an ALS Hearing notice and your case is dismissed, a motion can be filed requesting that the case be reset for a hearing. If an ALS case is continued while you are in Court, a new hearing date is typically provided at that time and a new hearing notice is not mailed to you. The OSAH website (www.osah.ga.gov) has a calendar of upcoming court dates and cases that are scheduled for an ALS Hearing.

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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