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U.S. Supreme Court

PROBABLE CAUSE – TRESPASS ARREST OF HOUSE PARTY GUESTS

At approximately 1:00 A.M. on March 16, 2008, District of Columbia Metropolitan Police responded to call from a resident about "loud music and illegal activities" in a home that the complainant stated had been vacant for several months. Officers heard loud music upon arriving at the subject home. Neighbors in the area confirmed that the property should be vacant.

The responding officers knocked on the door and "saw a man look out the window and then run upstairs." Eventually a partygoer opened the door and the officers went inside. The officers immediately observed that the house "was in disarray" as a result of the party but did not appear to be lived in. The officers smelled marijuana, saw beer bottles and cups of liquor on the floor, and otherwise found the house to be extremely messy. Although the power and water were working, there were minimal signs of habitation including only metal chairs, toiletries, and blinds. The officers found "a makeshift strip club" in the living room, and many of the partygoers scattered when the officers entered. Upstairs the officers found additional debauchery, including a bedroom with a bare mattress on the floor, a naked woman, and several men.

A total of 21 people were found in the house. The officers interviewed all of them, but could not get a consistent story on who owned or lived in the home or why the partygoers were there. Two of the women working the party claimed that a woman they identified only as "Peaches" was renting the home and had invited them, but was not present. Eventually, the officers were able to get one of the women to call Peaches and speak with her.

Although Peaches first claimed that she was indeed renting the house and gave the partygoers permission to be there, she eventually admitted that she did not have permission to use the house. The officers were then able to make contact with the home's owner, who stated that he had been trying to negotiate a lease with Peaches but they had not reached an agreement yet and neither she nor any of the partygoers had permission to be there. The officers then arrested all of the partygoers for unlawful entry. That charge was later changed to disorderly conduct, and eventually all of the charges were dropped.

Sixteen of the twenty-one partygoers later sued the District of Columbia and five of the arresting officers for false arrest and negligent supervision, arguing that officers lacked probable cause to arrest them. Both the partygoers and the officers moved for summary judgment. The District Court ruled that the partygoers were entitled to summary judgment because the officers lacked probable cause and could not benefit from qualified immunity because they violated clearly established constitutional rights of the partygoers. On appeal, the D.C. Circuit Court of Appeals affirmed. Both courts noted that "under District case law, 'probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner.'" In this case, however, "[t]he officers were told that Peaches had invited the partygoers to the house… and nothing the officers learned in their investigation suggested the partygoers 'knew or should have known that they were entering against the owner's will.'" The courts further explained that the officers were not entitled to qualified immunity because they needed 'some evidence' that the partygoers 'knew or should have known they were entering against the will of the lawful owner.'" However, the officers had no evidence contradicting the partygoers' explanations

that they were invited by Peaches, who they believed in good faith lived there. Following this ruling, the officers appealed to the Supreme Court, which granted the appeal.

The Supreme Court reversed the lower courts and ruled that the officers did not violate any constitutional rights of the partygoers because they in fact had probable cause for the arrests and that in any event the officers were also entitled to qualified immunity. The Court explained that while there was no dispute that the owner did not consent to the partygoers' presence, "the partygoers contend that the officers lacked probable cause… because the officers had no reason to believe that they 'knew or should have known' their 'entry was unwanted…' We disagree. **Considering the totality of the circumstances," including the conduct of the partygoers and their evasiveness, the condition of the home, the various explanations they gave, and Peaches' lying and evasive behavior, "the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party."** The Court explained that, rather than considering each fact in isolation, the lower courts "should have asked whether a reasonable officer could conclude – considering all of the surrounding circumstances, including the plausibility of the explanation itself – that there was a 'substantial chance of criminal activity.'" Because, in this case, there was, the officers had probable cause for the arrests. *District of Columbia v. Wesby*, No. 15-1485, 2018 WL 491521, (U.S., Jan. 22, 2018).

11TH CIRCUIT COURT OF APPEALS

USE OF STRAIGHT ARM BAR TAKEDOWN DURING ARREST

On October 13, 2012, DeeAnn Horn attended a Luke Bryan concert with her ex-husband and 12 and 18-year-old daughters in Macon, Georgia. Horn and her family tailgated for approximately five hours beforehand, during which time Horn claimed to have had two beers. After entering the concert, Horn and her family went as close to the stage as they could get. Sometime thereafter, Horn engaged in a verbal altercation with a group of three young women who tried to push past Horn's family to get closer to the stage. The exchange between the women lasted one or two minutes and involved the use of profanity while several young children were present. Eventually, a City of Macon police officer who was working at the event forcibly escorted Horn from the concert. Horn was belligerent and uncooperative and continued using profanity in the presence of children while being escorted out.

At the concert entrance, the officer escorting Horn was forced to attend to another rowdy concert-goer, and had Officer William Barron, who was stationed near the entrance, watch Horn while he did so. While doing so, two of the women with whom Horn originally had a confrontation "approached Officer Barron and told him they had been assaulted." One of the women had visible injuries including a bloody nose and contusions around her eye, and both identified Horn as the assailant. Horn –standing several feet from Officer Barron – became agitated and started shouting profanities at Officer Barron while walking towards him.

"Officer Barron decided to arrest Horn for disorderly conduct and, thus, approached her and took hold of her left arm." He did not announce to Horn that she was under arrest or that he was going to handcuff her. As Officer Barron attempted to secure her, Horn "pulled her arm away from him." In response, Officer Barron took Horn to the ground using a straight arm bar takedown technique. After some further struggle with Horn's ex-husband, Officer Barron was eventually able to handcuff Horn, who had suffered a broken humerus (upper arm) as a result of the takedown. Horn was eventually charged with two counts of disorderly conduct.

Horn later sued Officer Barron and other defendants in the U.S. District Court for the Middle District of Georgia. She claimed, among other things, that Officer Barron used excessive force during the course of her arrest. Officer Barron moved for summary judgment with respect to that claim, arguing

that – even assuming all the facts alleged by Horn to be true – the force he used was reasonable under the circumstances. The District Court rejected Officer Barron's motion, reasoning that there were "genuine issues of material fact" that would need to be resolved by a jury in order to determine whether the force used by Officer Barron was reasonable. Officer Barron then appealed to the Eleventh Circuit Court of Appeals.

The Court of Appeals reversed the District Court and granted summary judgment to Officer Barron. The Court first explained that a certain "*de minimis*" level of force is *always* expected and lawful when affecting an arrest, and that such a use of force "without more, will not support an excessive force claim" or "defeat an officer's qualified immunity." The Court went on to explain that **"Even assuming that Horn was totally compliant with Officer Barron, he was allowed to use some force in effecting her arrest. And, even if the force applied by Officer Barron in effecting Horn's arrest—a soft hands, straight arm bar takedown technique, by which he gained control of her by taking hold of her left arm, putting his right arm over her left arm, and using gravity and his own weight to bring her to the ground—was unnecessary, it was not unlawful."** Because Officer Barron was entitled to qualified immunity, his use of force would only be unlawful if he violated the *clearly established* constitutional rights of Horn. In other words, a case or legal principle must exist which put Officer Barron on notice that his conduct was unlawful. However, no cases exist that hold that the force used by Officer Barron on an unrestrained suspect who pulls away from an officer is unlawful. Rather, **"[t]he force used here by Officer Barron was no more severe than the force that we have described as de minimis and lawful in other materially similar cases."** As such, Officer Barron was entitled to summary judgment. *Horn v. Barron*, No. 16-16166, 2018 WL 286108 (11th Cir., Jan. 4, 2018).

Georgia Court of Appeals

DUI ARREST: ADMISSIBILITY OF PBT REFUSAL / CHEMICAL BREATH TEST

A Forsyth County Sheriff's Office deputy performed a traffic stop on a vehicle driven by Alison MacMaster after witnessing her repeatedly fail to maintain her lane. During the ensuing stop, deputies noticed the strong odor of an alcoholic beverage emanating from MacMaster, bloodshot, watery eyes, a flushed face, and thick speech. MacMaster also admitted she had been drinking. MacMaster agreed to perform standardized field sobriety tests and the administering deputy detected 6 out of 6 clues on HGN, 6 out of 8 clues on walk-and-turn, and 3 out of 4 clues on one-leg stand. The administering deputy "asked MacMaster if she would take a preliminary breath test on his handheld Alco-Sensor device," ("PBT") but MacMaster refused, stating that she was uncomfortable with the test.

The administering deputy then arrested MacMaster for DUI, read her the appropriate implied consent notice, "and asked whether she would agree to a State-administered test of her breath. When MacMaster asked if she had a choice, the second deputy explained that it was her choice to say yes or no. MacMaster then agreed to take the test." MacMaster was transported to the detention center for testing and processing and did not change her mind regarding the test during the trip. At the detention center, MacMaster asked the Intoxilyzer operator "if she should take the breath test on the machine, and the administrator explained to her that she did not have to take it and that it was voluntary. MacMaster then submitted to a breath test on the Intoxilyzer, which returned blood-alcohol concentration readings of 0.166 and 0.159."

MacMaster was charged with DUI per se and DUI less safe, and during her prosecution, moved to exclude (1) her statements refusing to take the PBT; (2) her statements consenting to the chemical breath test; and (3) the results of the chemical breath test on numerous constitutional grounds. The trial court rejected all of MacMaster's motions and allowed all of the evidence.

MacMaster appealed four aspects of the court's ruling to the Georgia Court of Appeals. Each of those grounds is addressed below in turn.

1. **Exclusion of chemical breath test results under the Fourth Amendment**

MacMaster first argued that the results of her chemical breath test should be excluded because they were not a reasonable search under the Fourth Amendment. The State, in response, argued that she freely and voluntarily consented to the breath test, and thus the test was admissible under the consent exception to the Fourth Amendment. **The Court of Appeals reviewed the record and dashboard camera recording from the incident and concluded that the trial court properly concluded that, under the totality of the circumstances, MacMaster freely and voluntarily consented to the test.** She gave an affirmative response when asked to consent, never changed her mind, was not so impaired that she could not consent, and showed no other signs that demonstrated her consent was questionable. Moreover, the deputy did not use fear, intimidation, threat of physical punishment, or lengthy detention to obtain her consent. As such, the results were properly admitted under the Fourth Amendment.

2. **Exclusion of statements consenting to chemical breath test and results under right against self-incrimination under US and Georgia Constitutions**

MacMaster next argued that, under her right against self-incrimination under both the U.S. and Georgia Constitution, her statements consenting to a chemical breath test, and the results of the test itself should be excluded. With respect to the U.S. Constitution, the Court of Appeals explained that only "evidence of a testimonial or communicative nature" can be excluded under the right against self-incrimination. "To be testimonial, an accused's communication must itself, explicitly or implicitly, relate to factual assertion or disclose information." The Court explained that neither **MacMaster's verbal consent to take the breath test nor the results of the test itself could be considered testimonial or communicative, and thus they were not protected under the U.S. Constitution's right against self-incrimination.**

By contrast, the Georgia Constitution *does* protect against compelled breath tests, as explained in the recent Georgia Supreme Court case *Olevik v. State*. However, "the right against self-incrimination under [the Georgia Constitution] is not violated where the defendant voluntarily consents to the breath test rather than being compelled." **Because the Court analyzed MacMaster's consent under the Fourth Amendment and determined that it was free and voluntary, the Court also concluded that MacMaster's consent to the test and the results from the test were not made inadmissible by MacMaster's right against self-incrimination under the Georgia Constitution.**

3. **Exclusion of statements consenting to chemical breath test due to failure to read *Miranda* rights**

MacMaster's third argument was that her statements consenting to take a chemical test should be excluded because they were made *after* she was in custody but *before* she was read her Miranda rights. The Court explained that – **under the U.S. Constitution – this challenge was based upon MacMaster's Fifth Amendment right against self-incrimination, which the Court already ruled did not apply to her statements consenting to a breath test.** As such, the failure to read *Miranda* did not make her statements inadmissible under the U.S. Constitution.

Furthermore, While the Georgia Constitution's right against self-incrimination *did* apply to such statements, as explained in *Olevik, Olevik* does not explicitly require the reading of *Miranda* prior to asking a suspect's consent for a breath test. **Because no prior Court of Appeals case required the reading of *Miranda* (and because MacMaster's attorney failed to present an argument that the reading of *Miranda* should be required under current law), the Court held that MacMaster's statements consenting to the test were admissible under the Georgia Constitution.**

4. **Exclusion of statements refusing to take PBT under Fourth Amendment**

Finally, MacMaster argued that the PBT which deputies asked her to take is a Fourth Amendment search which she had the right to refuse and that, in

general, a refusal to consent to a search cannot be held against a suspect in court. The Court of Appeals agreed that "the administration of a breath test is a search under the Fourth Amendment," and that "an individual should be able to invoke his Fourth Amendment rights without having his refusal used against him at trial." However, the Court explained, a breath test of a DUI suspect is a much different kind of search than the search of a suspect's car or other property, and a refusal for such a search is similarly much different. The Court further stated that "the case law interpreting implied consent laws demonstrates that the judiciary overwhelmingly sanctions the use of… evidentiary consequences against DUI suspects who refuse to comply" and that the refusal to take a state-administered chemical test under the implied consent law is admissible at trial. **The Court concluded that they discerned "no reason why the same rule in favor of admission should not apply in the context of a defendant's refusal to take [a PBT], which we have previously held is admissible as circumstantial evidence tending to show that the defendant was impaired."**

Thus, the Court upheld all of the trial court's rulings and held that MacMaster's statements refusing to take the PBT, statements consenting to the chemical breath test, and the results of the chemical breath test were all admissible at trial. *MacMaster v. State*, No. A17A2083, 2018 WL 345036 (Ga. Ct. App., Jan. 10, 2018).

QUESTIONING AND BLOOD TEST OF MEDICATED/HOSPITALIZED DUI SUSPECT

On the night of May 24, 2014, a Georgia State Patrol Trooper encountered a traffic accident involving a pickup truck and a second vehicle while on the way to work. The trooper radioed in a report of the accident and requested additional assistance. The trooper approached the pickup truck and found the driver, later identified as Robert Diaz, moaning and unable to get out. Eventually emergency personnel were able to extract him and place him on a stretcher. The trooper spoke briefly with Diaz, who "appeared to understand the officer's questions and was able to tell the officer his address and where he had been coming from at the time of the collision." The trooper noted that Diaz had thick speech which was slow and slurred.

While at the scene, the trooper learned that the driver of the other vehicle died from his injuries. He also spoke with a witness who stated Diaz was "all over the road" before wandering into the other driver's lane and striking it head-on. Finally, the trooper discovered that shortly before the collision, a nearby resident had called 911 to report that a driver in a vehicle similar to Diaz's had "driven through the caller's yard, run over a mailbox, and appeared to be impaired."

The trooper then went to the hospital where Diaz had been transported to conduct further investigation. Diaz had received a CT scan and medications for pain and nausea by the time the trooper arrived. A nurse was present while the trooper spoke to Diaz. The trooper reintroduced himself and stated he was there to investigate the accident. Diaz asked what happened to the other driver and the trooper explained that he had died, causing Diaz to tear up. Diaz then admitted "that he had self-administered methadone earlier in the day and that there was possibly some other 'stuff' in his system." The trooper did not ask any follow up questions in response to Diaz's statement, but read the appropriate implied consent notice. Diaz's nurse was still in the room at this time. Diaz consented to a blood test and the trooper also had him sign an official voluntary consent form authorizing the blood test. Diaz "was alert and appeared to understand what was being said," and "did not say anything or display any conduct that indicated that he was unable to consent" or that his consent was not free and voluntary.

The nurse drew blood from Diaz without incident, and a blood test later revealed the presence of methadone and benzodiazepines in Diaz's system. A state toxicologist later testified that the drugs in Diaz's system could have caused impairment while driving. Diaz was charged, tried, and convicted for homicide by vehicle in the first degree, DUI less safe (drugs), and failure to maintain lane. Diaz appealed his convictions, arguing on several grounds that various pieces of evidence against him should have been excluded from the trial. The trial court denied Diaz's motion and Diaz appealed to the Georgia Court of Appeals.

Diaz first argued that the results of his blood test and his statements regarding self-administering methadone and there being "other stuff" in his system should not have been admitted because (1) "the State failed to prove that [the trooper] read him the implied consent notice because the officer did not record in his police report that he had given the notice;" and that (2) regardless, Diaz did not knowingly and voluntarily consent to that test. **The Court rejected the first part of Diaz's argument because the trooper testified that "it was his standard practice" to read the implied consent notice to DUI suspects prior to obtaining a blood sample and that he specifically remembered doing so in this case because of the "magnitude" of the case and the location of the crash site, which was on his way to work. Furthermore, the nurse who obtained the blood sample testified that she was in the room when the trooper read the implied consent notice and remembered him doing so.**

The Court also held that Diaz's consent was free and voluntary. **Based on the trooper's observations of Diaz, he did not appear to be unable to give free and voluntary consent. Hospital records also showed he was oriented and obeyed commands during the time period in question. Moreover, the nurse who drew Diaz's blood testified that the medications he was given should either have worn off or otherwise not affected his ability to consent.**

Diaz also argued that the results of his blood test and his self-incriminating statements about the drugs he had taken should not be admissible because he was not read a *Miranda* warning. The Court rejected this argument, stating that **Diaz was not under arrest or otherwise in police custody at the time of the blood test or when his statements were made, and thus *Miranda* did not apply. Further, the Court held that "there is no duty for an officer to inform a suspect of his or her constitutional right against unreasonable searches before obtaining a blood sample." Finally, the Court explained that Diaz's self-incriminating statements were spontaneous and thus not subject to *Miranda*.**

Diaz further contended that the results of his blood test were not admissible because the trooper had no authority to ask for the blood test under O.C.G.A. § 40-5-55(a). Under that code section, an ensuing blood test is considered warranted and constitutional if the suspect was involved in an accident resulting in serious injuries or fatalities *and* the investigating officer has probable cause to believe that the suspect was under the influence of alcohol or drugs. Diaz, in this case, argued that the trooper did not have probable cause as required by this code section. The Court, however, rejected this argument, explaining that **the trooper had been a law enforcement officer for about fifteen years, including four on a DUI task force, had been involved in over 400 traffic stops based on suspicion of impaired driving, and had investigated numerous vehicular homicide cases. Given the facts of this case and the trooper's observations of Diaz, there was sufficient probable cause to support the blood test. Moreover, the Court held that probable cause was likely not even necessary given that Diaz gave written consent to the blood test.** Because the Court rejected this and all of Diaz's other evidentiary challenges, it upheld his convictions. *Diaz v. State*, No. A17A1821, 2018 WL 507088 (Ga. Ct. App., Jan. 23, 2018).

ALS REMINDERS

If you are unavailable for an ALS Hearing, a written continuance motion must be filed with the OSAH Judge. The Court does not accept continuance requests by telephone or in the body of an email. The continuance motion must be filed as soon as possible with the Court but no less than approximately seven to ten days prior to the scheduled hearing. A continuance form is located on the MyDPS website in the ALS Form folder under DPS Forms. If you have questions regarding filling out the continuance form or need assistance with filing the motion, please contact Dee.

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