



# DPS LEGAL REVIEW

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

### ARREST FOR VIOLATION OF ANTI-MASK STATUTE DURING PROTEST

On November 26, 2014, Austin Gates participated in a march and protest in downtown Atlanta. During the march, Gates was given a stylized “Guy Fawkes” mask popular amongst protestors. He and many others wore the mask during the protest. Gates stated “that he wore the mask both to ‘express himself...’ and to maintain his anonymity during the protest,” and that “he never intended to threaten or intimidate anyone by wearing the mask.”

Eventually, Atlanta Police Department officers ordered the protestors to remove their masks. APD Officer Whitmire repeatedly issued such orders over a loudspeaker. Several, including Gates, did not comply, and Officer Whitmire eventually ordered other officers to arrest anyone who was wearing a mask. Several officers then entered the crowd and one officer detained and arrested Gates for violation of Georgia’s anti-mask statute, O.C.G.A. § 16-11-38.

Gates later sued the officers involved in his arrest in the U.S. District Court for the Northern District of Georgia, alleging that he was arrested without probable cause in violation of his Fourth Amendment rights and that his arrest also violated his First Amendment rights. The officers moved for summary judgment, alleging that they were entitled to qualified immunity, but the district court denied their motion, and the officers appealed to the Eleventh Circuit.

The Eleventh Circuit explained that qualified immunity protects officers from suit unless they violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” In this case, Gates alleged his rights were violated because he was arrested (1) without probable cause; and (2) while engaging in a protest.

Georgia’s anti-mask statute states that – with some exceptions (such as for traditional holidays and persons

wearing masks for work or sport) – it is a misdemeanor for any person to “wear a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer” upon “any public way or public property.” In addition, the Georgia Supreme Court has held that “a person can be convicted of violating” the statute “only if the State also proves that (1) the mask is worn with the intent to conceal the identity of the wearer and (2) the wearer of the mask ‘knows or reasonably should know that his conduct provokes a reasonable apprehension of intimidation, threats, or violence.’” Gates primarily argued that there was no evidence that his conduct met this last requirement, and thus there was no probable cause to arrest him. He also alleged that his wearing the mask was protected by the First Amendment.

The Eleventh Circuit rejected both arguments. The Court held that **officers are not required to prove “every element of a crime” in order to obtain probable cause to support an arrest. In this case, proof of Gates’ subjective intent or knowledge was not required.** Moreover, the Court held, Gates persisted in wearing the mask after being ordered to remove it by the police. The Court held that “[a] reasonable officer could infer that [Gates] intended to intimidate based on such conduct, or, at the least, infer that [Gates] could reasonably foresee that his behavior would be viewed as intimidating.” **As such, Gates’ arrest was properly supported by probable cause.** With respect to Gates’ first amendment claim, the Court held that, under existing case law, **“the existence of probable cause... defeats a First Amendment claim.”** Because the officers properly arrested Gates, they were entitled to qualified immunity with respect to his Constitutional claims. *Gates v. Khokhar*, No. 16-15118, 2018 WL 1277395 (11th Cir., Mar. 13, 2018).

## USE OF DEADLY FORCE UPON KNOWN VIOLENT SUSPECT WITH HATCHET

On a December afternoon in 2013, Selma, Alabama, police received a disturbance call about “a 74-year-old mentally ill man” who had attempted to enter a restaurant but was turned away by the manager. Dispatch provided a description of the man, later identified as Ananias Shaw, “and informed [officers] that Shaw had been at the restaurant the Sunday before ‘armed with a knife.’” Officer Ronald Jones was the first on scene and spotted Shaw in an abandoned laundromat. He was quickly joined by Officers Daniel Boone and Desmond Williams. The subsequent events were partially captured on Officer Williams’ body camera.

Officer Boone – who was familiar with Shaw – went inside the laundromat to talk with Shaw and attempt to coax him out. Officer Williams approached the building and Officer Jones, who also knew Shaw, “warned Williams that Shaw would ‘fight you in a minute.’” Inside the building, Shaw refused to leave and instead picked up a hatchet. Officer Boone drew his service weapon and “started backing out of the building” while Shaw followed him. Once Shaw was outside, Officer Williams also drew his service weapon and Officer Jones drew his baton. Shaw began walking away from the officers in the direction of residences while the officers repeatedly commanded Shaw to “drop the axe.” Eventually, Shaw turned and began slowly moving towards Officer Williams as Officer Williams continued to command him to drop the axe. “As he approached, Shaw shouted for Williams to ‘Shoot it! Shoot it!’ As he did so, Shaw’s right arm and the hatchet were outside the frame of the video. By the time he was less than five feet away from Williams, Shaw, while holding the hatchet, yelled ‘Shoot it!’ one more time. Williams immediately fired a single shot at Shaw’s chest, and Shaw fell. The video shows that when the shot was fired Shaw was close to Williams and moving closer.” Shaw died at the scene.

Shaw’s estate later filed suit against Officer Williams alleging excessive use of force. Officer Williams moved for summary judgment, alleging that even if the facts were viewed in the light most favorable

to Shaw, his use of force was justified under the circumstances. He also argued that he was entitled to qualified immunity because no clearly-established law put him on notice that his conduct violated Shaw’s constitutional rights. The district court granted Williams’ motion, and Shaw appealed.

On appeal, Shaw’s estate argued that “summary judgment should not have been granted because there is a genuine issue of material fact about whether Shaw had raised the hatchet in his hand when Williams shot him.” The estate contended that (1) because the facts on summary judgment must be viewed in the light most favorable to Shaw, it must be assumed that he had not raised the hatchet, and (2) no officer reasonably could have believed that Shaw posed an immediate threat to Williams or others under those circumstances. The Court of Appeals agreed with the first premise: under these circumstances, it was required to assume that Shaw did not raise the hatchet. The Court disagreed, however, with the second premise, and stated that, in this case, “Shaw was mentally ill and dangerous” and “Williams had been warned moments before that Shaw ‘would fight [him] in a minute.’” Shaw had been reported only days prior for threatening customers at the same location with a knife. On this occasion, Shaw “was an armed and noncompliant suspect who had ignored more than two dozen orders to drop the hatchet. At the time he was shot, Shaw was advancing on Williams with hatchet in hand. He was close to him—within a few feet—and was getting closer still, yelling at Williams to ‘Shoot it!’ Shaw could have raised the hatchet in another second or two and struck Williams with it. Whether the hatchet was at Shaw’s side, behind his back, or above his head doesn’t change that fact. **Given those circumstances, a reasonable officer could have believed that Shaw posed a threat of serious physical injury or death at that moment.**” **The Court thus held that “[a] reasonable officer could have... concluded, as Williams apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense.”** *Shaw v. City of Selma*, No. 17-11694, 884 F.3d 1093 (11th Cir., Mar. 7, 2018).

## TERRY STOP / PAT-DOWN: AMMUNITION

Shortly after 4:00 A.M. on June 14, 2015, the Opa-Locka, Florida, Police Department “received a 911 call about a potential burglary in progress at a multifamily duplex.” The duplex in question contained four units and was located in a high-crime area. The caller stated “that a ‘person was trying to get through the window of a neighbor’s house’ and described the person as a black male wearing a white shirt.” Officer Dwight Williams and Corporal B.A. Colebrooke responded to the scene within five minutes. The officers observed a black male wearing a white shirt, later identified as Paul Johnson, coming down an unlit alleyway from the back side of the complex. The officers did not see any other people in the area.

The officers “drew their weapons, pointed them at Mr. Johnson, and ordered him to come to the front of the building with his hands up. Mr. Johnson complied, and Officer Williams handcuffed him and ordered him to get down on the ground.” During the encounter, a third officer arrived. “[B]ecause of ‘the nature of the call, the area of the call, and the lighting conditions,’” Officer Williams detained Johnson “and conducted a pat down ‘for officer safety.’” During the pat down, Officer Williams felt “a nylon piece of material; and then, underneath it, a round, hard-like, oval-shaped object,” which Officer Williams immediately believed to be ammunition. “Officer Williams reached into Mr. Johnson’s front right pocket and removed a black nylon pistol holster and one round of .380 caliber ammunition.”

Because of the discovered ammunition and holster, officers searched the area for a matching handgun or other evidence. Eventually, officers found a pair of pistols near where they had originally seen Johnson. After being Mirandized and waiving his rights, Johnson admitted to being in possession of the weapons. He was later charged with being a felon in possession of a firearm and ammunition.

During his criminal prosecution, Johnson moved to suppress “all physical evidence and statements” resulting from the pat down, subsequent search, and questioning. Johnson alleged that the officers did not have justification to search or seize the items found

during the pat down, and that all subsequent evidence must therefore be excluded as well. The district court denied Johnson’s motion, finding that the officers had sufficient justification to perform a Terry stop and pat down of Johnson. Furthermore, “Officer Williams’ decision to search the interior of Mr. Johnson’s pocket and remove the ammunition and holster was a permissible continuation of the initial frisk.” Johnson later appealed these rulings, arguing in part that (1) there was not a sufficient basis to justify the Terry pat down; and (2) even if there was, the officer’s reaching into his pocket to search upon immediately recognizing ammunition was an unjustified extension of the Terry pat down.

With respect to the first question, The Eleventh Circuit explained that “[o]nce an officer has stopped an individual, he may conduct a pat down or frisk for weapons if he reasonably believes that his safety, or the safety of others, is threatened.” Here, the officers were responding to a burglary call at 4:00 A.M. in a high-crime area, Johnson matched the suspect’s description, and officers had not yet secured the scene and were not sure if other suspects were present. The Court held that, **under these circumstances, no “more concrete threatening conduct was required for the officers to reasonably believe that their safety was threatened and a pat down justified.”**

However, the Court went on to hold that, **under Terry, “[t]he pat down and feeling of an object in a pocket is limited... to determining if the object is a weapon.” If weapons or immediately apparent contraband are identified during a pat down, they can be seized.** In this case, there was no question that the ammunition by itself was neither a weapon nor immediately apparent contraband. As such, the Court held, **“the presence of a single round of ammunition—without facts supporting the presence, or reasonable expectation of the presence, of a firearm—was insufficient to justify the seizure of the bullet and the holster from Mr. Johnson’s pocket.”** The Court thus held that the evidence seized from Johnson should be suppressed, and that his sentence should be vacated. *U.S. v. Johnson*, No. 16-15690, 2018 WL 1415709 (11th Cir., Mar. 22, 2018).

## PROBABLE CAUSE – REQUIREMENT TO CONDUCT ADEQUATE INVESTIGATION

On December 10, 2014, a Rockdale County, Georgia, deputy arrested Robert Abercrombie for assault. The deputy was responding to a 911 call by a customer at an AAMCO co-owned by Abercrombie alleging that Abercrombie “had thrown a document at her and struck her” while the two were arguing. The charge against Abercrombie was later dismissed, and he filed suit against the deputy alleging that the deputy violated his constitutional rights by arresting him without probable cause. The Deputy moved for summary judgment alleging that the arrest was supported by probable cause and that, even if it was not, he was protected by qualified immunity because he had not violated any of Abercrombie’s clearly-established constitutional rights. In reviewing the deputy’s motion, the district court was required to view the facts in the light most favorable to Abercrombie, which showed the following:

According to Abercrombie, the deputy responded to a 911 call from the alleged victim, who was a customer at the AAMCO. Upon arrival, the deputy spoke with Abercrombie and her fiancé, who stated that Abercrombie had assaulted her. The deputy then almost immediately handcuffed and arrested Abercrombie, without asking him any questions or obtaining any information about the situation from him. Abercrombie also alleged that there were at least three other witnesses with whom the deputy did not speak and that the deputy told several of them to “shut up or they’d be arrested.” Abercrombie also stated that the deputy failed to view the AAMCO’s surveillance footage despite the fact that “he passed a sign on the door that clearly stated, ‘VIDEO SURVEILLANCE IN PROGRESS 24/7.’”

The district court granted the deputy summary judgment, finding that he had “at least arguable probable cause” to support the arrest. The Court also held that the deputy’s “investigation was not constitutionally deficient because he interviewed the victim and a witness.” Abercrombie appealed this ruling to the Eleventh Circuit.

The Eleventh Circuit explained first that officers are generally protected from federal civil rights suits based upon a theory of false arrest so long as they have at least “arguable probable cause” at the time of arrest, which “exists where reasonable officers in the same circumstances and possessing the same knowledge as the defendant [officer] could have believed that probable cause existed to arrest.” **In this case, the Court held that, it would not have been “unreasonable for an officer to conclude that Abercrombie may have committed simple assault” based upon the evidence obtained by the deputy.**

However, because probable cause requires a “totality of the circumstances” analysis, the Court has previously held that “**police officers objectively ‘should not be permitted to turn a blind eye to exculpatory information that is available to them.’” Similarly, their actions should not be solely supported by “selected facts they chose to focus upon.”** In short, “**an officer may not ‘conduct an investigation in a biased fashion or elect not to obtain easily discoverable facts.’”** Here, the Court found that the deputy failed to interview three readily-available witnesses about the encounter, and that no exigency prevented him from being able to interview those witnesses. Indeed, several witnesses reported that the deputy told them to “shut up” or they would be arrested, thus dissuading them from presenting evidence or testimony. The Court further found that even the testimony of the alleged victim’s fiancé did not fully match the victim’s story, and thus “did not obviate the need ‘to investigate both sides of the story.’” Based upon this investigative failure, **the Court held that arguable probable cause did not exist as a matter of law, and thus the deputy was not entitled to summary judgment.** *Abercrombie v. Beam*, No. 17-13930, 2018 WL 1341535 (11<sup>th</sup> Cir., Mar. 15, 2018).

## GEORGIA COURT OF APPEALS TRAFFIC STOP – FAILURE TO MAINTAIN LANE; INVENTORY SEARCH

On March 9, 2009, a City of Griffin police officer performed a traffic stop on a vehicle after witnessing a vehicle driven by Kelly Stroud make “a wide right turn

onto 14<sup>th</sup> Street, heading northbound' and crossing into 'the southbound lane of 14<sup>th</sup> Street.'" The officer subsequently discovered that Stroud had a suspended driver's license, and arrested him. After Stroud was arrested and secured in the officer's patrol car, the officer searched Stroud's vehicle and found drug paraphernalia and an off-white substance which was tested and determined to be cocaine.

Stroud was charged for failure to maintain lane, driving with a suspended license, and possession of cocaine. During his prosecution, he moved to suppress the items seized from his car, arguing that the search of his vehicle was not justified. At the hearing on Stroud's motion, the "officer testified that the search of Stroud's vehicle was not performed incident to his arrest, but instead was performed because police had to impound the car. The officer... explained that an impound was necessary because Stroud, the car's sole occupant, lacked a valid license and therefore could not drive the car. The officer, however, provided no explanation for why the car had to be removed from the scene immediately—i.e., there was no evidence that the car was illegally or dangerously parked or that it was a hazard to traffic." The officer also did not speak with Stroud to determine if someone else could drive the car away, but testified that a second officer was present and "might have had that discussion with Stroud." The trial court denied Stroud's motion to suppress ruling that "because Stroud's car was being impounded, an inventory search of the vehicle was legally required." Stroud was later convicted and appealed, arguing that (1) there was not sufficient evidence to sustain his conviction for failing to maintain lane and (2) that his motion to suppress should have been granted.

With respect to the first question, the Court of Appeals explained that, to convict a defendant of violating Georgia's failure to maintain lane statute (O.C.G.A. § 40-6-48), **"the State must prove that the road on which the defendant was driving at the time of the alleged violation was, in fact, 'divided into two or more clearly marked lanes for traffic.'" In this case, while the officer testified that Stroud crossed into a southbound lane while travelling northbound, the state introduced no evidence to show that the lanes in**

**question were clearly marked. As such, the Court held that Stroud's conviction for failure to maintain lane should be overturned.**

With respect to the search of Stroud's car, the prosecution admitted that the search was not incident to arrest, but rather was an inventory search prior to impound. **"Impoundment of a vehicle is valid only if there is some necessity for the police to take charge of the property,' and police 'may not use an impoundment or inventory as a medium to search for contraband.'" Such necessity may exist, for instance, when the vehicle is an out-of-state-rental, when the car cannot be safely or legally driven, or where the car is illegally or dangerously parked. Here, however, the trial court had not ruled on whether it was "reasonably necessary" to impound the vehicle, and there was no evidence that impoundment was in fact reasonably necessary. As such, the search could not be justified on that ground.** The Court of Appeals thus remanded the case to allow the trial court to further develop the record and determine whether the search was justified. *Stroud v. State*, No. A17A1679, 2018 WL 1100352 (Ga. Ct. App., Mar. 1, 2018).

### ALS REMINDERS

Take the implied consent card to the ALS Hearing that was read to the DUI defendant. When testifying at the hearing, provide testimony regarding how you determined the age appropriate implied consent notice to read to the DUI defendant and read the implied consent notice into the record.

On Intoxilyzer 9000 cases, always take a copy of your permit to operate the Intoxilyzer 9000 along with the original test results to the ALS Hearing. The permit must be the one that was in effect at the time of the Intoxilyzer test. The permit and the original 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