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11TH CIRCUIT COURT OF APPEALS

USE OF DEADLY FORCE – REASONABLE BELIEF OF THREAT POSED BY SUSPECT

On May 12, 2013, Deputy Sheriff Michael Garner of the Richmond County Sheriff's Office was speaking to an apartment complex resident "when he heard a loud disturbance coming from behind a nearby building." Deputy Garner drove around to the location of the disturbance, where he exited his car and discovered a number of bystanders at a cookout yelling. Several people stated that one of the cookout attendees, Roderick Haynes, had a gun. Haynes, who was still on site, "ran to and entered another car, and Deputy Garner yelled and motioned for Haynes to stop, which he did not." Haynes then accelerated toward Deputy Garner, coming within a few feet of him before passing him.

Deputy Garner then returned to his vehicle to pursue Haynes. Haynes eventually abandoned his car and continued fleeing on foot. While the parties disputed the exact sequence of events, Haynes eventually collided with Deputy Garner's patrol car in a parking lot, allegedly while Deputy Garner was "traveling at a speed in excess of 60 miles per hour." Haynes was then arrested and faced several charges, including aggravated assault and fleeing and attempting to elude. However, no firearm was recovered from the vehicle or elsewhere. Haynes suffered injuries including "a concussion, laceration of his lip, and abrasion of the upper arm." The medical report documenting Haynes' injuries stated "that Haynes was hit by a vehicle traveling at approximately 20 miles per hour."

Haynes filed suit against Deputy Garner in the U.S. District Court for the Southern District of Georgia, alleging that Deputy Garner used excessive force in

striking him with his vehicle. Deputy Garner moved for summary judgment, arguing that even if the facts alleged by Haynes were true, Haynes' constitutional rights had not been violated. The district court granted summary judgment to Deputy Garner, and Haynes appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit first explained that Deputy Garner would be entitled to qualified immunity – and therefore summary judgment – if either (1) he did not actually violate Haynes' constitutional rights; or (2) he violated a constitutional right of Haynes that was not clearly established at the time. Haynes argued that Deputy Garner violated his Fourth Amendment rights and "that *Tennessee v. Garner*... provide[d] clearly established law here because he was unarmed and did not pose a threat of serious harm."

The Court rejected Haynes' argument that Deputy Garner's use of force was excessive as established by *Tennessee v. Garner*. Even assuming that Deputy Garner intentionally struck Haynes while travelling 60 miles per hour, the Court explained that *Tennessee v. Garner* authorized the use of deadly force "if the officer had 'probably cause to believe that the escaping suspect posed a threat of serious physical harm.'" In this case, **"although Haynes was unarmed... [i]t would not have been clear to a reasonable officer in Deputy Garner's position that Haynes was unarmed and nondangerous."** Indeed, Deputy Garner (1) had heard an altercation at Haynes' location; (2) had been told by multiple people on the scene that Haynes had a gun; and (3) had ordered Haynes to stop to no avail. Furthermore, Haynes accelerated towards Deputy Garner in a vehicle and nearly struck him in an effort to escape. **Under the specific circumstances, therefore, a reasonable officer could have concluded "that Haynes was armed and posed a threat of immediate harm," thereby justifying Deputy Garner's use of his patrol car to strike and subdue Haynes.** *Haynes v. Richmond*

TERRY FRISK – REASONABLE BELIEF SUSPECT IS ARMED / SCOPE OF SEARCH

Federal agents investigating an illegal firearms trafficking ring obtained probable cause to arrest Genaro Mejia for his involvement in the operation. The agents also had evidence linking another person, Sergio Zambrano, to Mejia and the illegal activity. On March 24, 2016, the agents surveilled Mejia's residence with the intention of arresting him. Agents on site were made aware that Zambrano was an associate of Mejia and shown a picture of both, but they did not expect Zambrano to be at Mejia's residence.

At approximately 7:00 A.M., Zambrano left Mejia's house and began walking towards Mejia's vehicle. The surveilling agent, Edwin Lopez, "mistook Zambrano for Mejia and gave the other agents the signal that Mejia was present. Lopez then approached Zambrano, ordered him to stop, and called Mejia's name." Agent Lopez, still believing Zambrano to be Mejia, "detained Zambrano and patted him down... for officer-safety reasons, since Mejia was a known gun trafficker. While patting Zambrano down, Lopez felt 'bulky items' in his pockets," which he believed could have been a weapon. Based on this belief, Agent Lopez reached into Zambrano's pockets and retrieved the items he felt, which he discovered were four cell phones, a wallet, and keys.

Zambrano eventually explained to Agent Lopez that he was not Mejia. Sometime thereafter, another agent received consent from Zambrano to search through the items discovered during the pat-down. During the search of Zambrano's wallet, the agents found evidence which led them to a storage unit that contained additional evidence of gun trafficking and that led to Zambrano's arrest.

During his prosecution, Zambrano argued that the evidence found following his pat-down and the removal of his wallet and cell phones from his pocket should be excluded because the search violated his Fourth Amendment rights. Zambrano argued that the initial Terry pat-down was unconstitutional because the

agents lacked a reasonable belief that he was armed and presently dangerous. Furthermore, Zambrano argued that even if the pat-down was legal, Agent Lopez's subsequent search and seizure of items in his pockets was an unconstitutional expansion of the Terry frisk. The district court denied Mejia's arguments and he later appealed the ruling to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit explained that a pat-down or Terry frisk is constitutional only when an officer can "point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Furthermore, "the search must be reasonably limited in scope to protecting the officer by 'disarming a potentially dangerous man.'" In this case, **agents had probable cause to arrest Mejia, and "had a good-faith belief that Zambrano was Mejia under the circumstances." As such, they were justified in initially detaining Zambrano. Furthermore, Mejia was suspected of trafficking in high-powered rifles and "arms traffickers are considered to be potentially dangerous." Therefore, the Court held that the initial pat-down of Zambrano was justified.**

Finally, the Court explained that "an officer is entitled to ensure his safety by searching a person's pocket after an initial pat-down supplies reason to believe that [a concealed item] might be a weapon." Here, Agent Lopez felt bulky items he believed may have been a weapon. "Lopez explained in his testimony, 'we get all sorts of bulletins with what weapons may be. You have cell phones that are guns. You have knives that are credit cards, sir.'" And in this case, he was dealing with an arms trafficker and felt hard, bulky items in his pocket. **Under the circumstances, that the items were in fact cell phones does not negate the reasonableness of his belief that they could have been weapons." Because Agent Lopez reasonably believed that the items he felt may be weapons, his search of Zambrano's pockets and removal of those items was constitutional.** *United States v. Zambrano*, No. 17-12377, 2018 WL 4896756 (11th Cir. Oct. 9, 2018).

GEORGIA COURT OF APPEALS

IMPLIED CONSENT – CURRENT STATUS OF LAW RELATED TO “VOLUNTARINESS”

On October 25, 2015, a law enforcement officer conducted a traffic stop on a vehicle driven by Terry Holland. After a DUI investigation, the officer placed Holland under arrest for DUI less safe. The officer then read Holland the appropriate implied consent notice. Holland then “asked the officer about the breath testing,” and the officer accidentally responded, “if you are above 0.08, then you’re not DUI.” Holland then consented to a breath test, which later measured his BAC at 0.12.

During Holland’s prosecution for DUI, Holland’s attorney moved to suppress the results of the breath test, arguing in part that “his consent was not freely and voluntarily given because the... officer’s explanation was factually and legally inaccurate.” The trial court denied Holland’s motion, finding that under the U.S. Supreme Court’s decision in *Birchfield v. North Dakota*, a breath test following a DUI arrest was justified under the Fourth Amendment as a search incident to arrest. As such, any challenge to the voluntariness of consent was irrelevant. In other words, since the “search incident to arrest” doctrine provided justification for the search under the Fourth Amendment, the officer need not rely upon “consent” under the Fourth Amendment and need not be concerned with the voluntariness of consent.

After the trial court made this ruling, however, the Georgia Supreme Court issued its decision in *Olevik v. State*. In that case, the Georgia Supreme Court held that under the Georgia Constitution, **“a suspect is protected from compelled acts of self-incrimination, which includes protection against being compelled to submit to a breath test given after receiving the implied consent warning, and accordingly has a right to refuse such testing under the Georgia Constitution.”** The Court went on to hold that while a suspect can consent to perform a self-incriminating act, the Court must determine whether such consent is *voluntary*, using essentially the same analysis it would have used to

determine the voluntariness of consent under the Fourth Amendment. Factors in such analysis include “the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.”

In this case in particular, the voluntariness of Holland’s consent was questionable because of the officer’s accidental misleading statement about the consequences of the breath test. **Because the trial court relied upon *Birchfield* and did not conduct a satisfactory analysis of whether Holland’s consent was a voluntary self-incriminating act under the Georgia Constitution, the court remanded the case back to the trial court for further analysis.** *Holland v. State*, No. A18A1317, 2018 WL 4940514 (Ga. Ct. App. Oct. 12, 2018).

U.S. DISTRICT COURT – NORTHERN DISTRICT OF GEORGIA

WARRANTLESS ENTRY ONTO PRIVATE PROPERTY – EXIGENT CIRCUMSTANCES

On October 24, 2015, Pickens County Sheriff’s Deputies were dispatched to the home of John Harley Turner in response to a complaint by several hunters that a person on that property had accused them of trespassing and threatened them with bodily harm. The hunters were able to leave the area and call 911 before the incident escalated. The responding deputies arrived at the property and spoke with Stan O’Kelley, Turner’s step-father. “Mr. O’Kelley informed the deputies that Turner had threatened the hunters and that Turner was currently armed.” Turner then “approached the deputies, armed with a pistol in a chest holster... The deputies ordered Turner to put down his gun,” but Turner refused, instead asking why the deputies were trespassing. The deputies responded “that they were ‘cops.’”

As the situation continued to unfold, several more deputies and Georgia State Patrol Troopers arrived. Turner eventually “un-holstered his pistol and was carrying it above his head” while the deputies continued to ask Turner to put the gun down. At one point, Turner’s mother, Janet O’Kelley, arrived on the scene and “told the deputies ‘that Turner would defend himself if the deputies opened fire.’” The encounter continued for over a half hour, during which Turner put his pistol back in its holster but refused commands to put it down. He “did not verbally threaten or point his gun toward the deputies,” but appeared distressed and “challenged the deputies to ‘go ahead and shoot him.’”

Eventually, the deputies attempted to subdue Turner with non-lethal beanbag rounds from a shotgun when Turner approached an unarmed deputy who was negotiating with him. Turner fell but then drew and fired his pistol, after which the deputies shot and killed Turner. Turner’s mother later sued the deputies on behalf of Turner, alleging among other things that the deputies violated Turner’s Fourth Amendment rights because they entered Turner’s home and seized him (through use of force) without probable cause and without a valid exception to the warrant requirement. The deputies, in response moved to dismiss the complaint.

The U.S. District Court for the Northern District of Georgia held that the deputies had probable cause to seize Turner based upon Georgia’s terroristic threat statute, O.C.G.A. § 16-11-37, which “in relevant part, makes it a crime to threaten to ‘commit any crime of violence.’” **The 911 caller in this case “specifically referenced a potential threat of bodily harm,” which provided probable cause for violation of that statute. Furthermore, the deputies “had arguable probable cause to seize Turner based on his failure to cooperate and the attenuating circumstances.”** Specifically, Turner was armed and distressed throughout the deputies’ encounter, and Turner’s mother stated he would defend himself. Finally, deputies used non-lethal force to subdue him when he approached an unarmed deputy while still armed, and only used lethal force once Turner had himself done so. Under the

circumstances, the court found the Deputy’s seizure by use of deadly force was reasonable.

The Court also found – for many of the same reasons – that the deputies’ entry onto Turner’s residence was supported by exigent circumstances and thus did not require a warrant. Turner argued that exigent circumstances could not exist because “the individual who made the call [about Turner’s threat] was already safe.” The Court rejected that argument, however, stating that **“exigent circumstances existed because it was reasonable for Defendants to believe that an armed suspect was inside the subject premises who posed a potential threat to those in the surrounding area or the officers.”** As such, the deputies’ actions were supported by both probable cause and the exigent circumstances exception to the warrant requirement, and did not constitute a violation of Turner’s constitutional rights. *O’Kelley v. Craig*, No. 2:17-CV-215, 2018 WL 4636638 (N.D. Ga. Sept. 27, 2018).

ALS REMINDER

On Intoxilyzer 9000 cases, the original test results, and not a copy, must be provided to the Court at the ALS Hearing.

The ALS Court does not accept continuance requests by telephone or in the body of an email. The continuance request must be in writing and emailed to the Court as an email attachment.

The 1205 form must be personally served on the DUI defendant.

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