



DPS LEGAL REVIEW

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11TH CIRCUIT COURT OF APPEALS

TERRY STOP / PAT-DOWN: AMMUNITION

NOTE: ordinarily, a three-judge “panel” decides cases at the Eleventh Circuit. A party who disagrees with a panel ruling can request that all twelve judges of the Eleventh Circuit re-hear the case in what is referred to as an “en banc rehearing.” A request for an en banc hearing is only granted if a majority (at least seven) of the court’s judges agree that either “en banc consideration is necessary to secure or maintain uniformity of the court’s decisions” or “the proceeding involves a question of exceptional importance.” This case is an en banc decision of the Eleventh Circuit and is included because it overrules the panel decision, which was included in the March 2018 Legal Review.

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 held that the officers, responding to a burglary call at 4:00 A.M. in a high crime area, had a reasonable expectation that Johnson may be a threat to their safety given his similarity to the suspect's description. As such, a pat down was 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, 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.

Following this ruling, the prosecution moved for en banc reconsideration from the Eleventh Circuit and their request was granted. The Court agreed to reconsider only the second question; that is, whether an officer is entitled to reach into a pocket and seize ammunition when the officer immediately detects the presence of ammunition during a Terry frisk. The Court held that while “[a]mmunition is not a gun... it is an integral part of what makes a gun lethal.” As such, under these circumstances – in which it was unknown if a handgun or any other suspects were nearby – it was reasonable for the officer to remove the ammunition. **The en banc Court overruled the panel decision and held that “during a Terry frisk, an officer may remove ammunition from a suspect when the removal is reasonably related to the protection of the officers and others nearby.”** Notably, the Court did **not** state that ammunition may always be seized during a Terry frisk; rather, the seizure must be justified by the circumstances of the case. *U.S. v. Johnson*, No. 16-15690, 2019 WL 1615283 (11th Cir. Apr. 16, 2019) (en banc).

EXIGENT CIRCUMSTANCES FOR SEARCH – CRAWLSPACE OF HOME

A team of law enforcement officers in Alabama sought to arrest Willie Lee Cooks at his home in connection with an existing arrest warrant for assault. After surveilling the house for some time, the officers attempted to make contact with a resident who had been seen coming and going from the home. That resident, however, ignored officers, ran into the home, and locked the door. Though the officers were not able to immediately gain entry to the home, they were able to communicate with people inside to determine that Cooks was present, had barricaded himself in the residence with several other people, and was armed, thereby creating a hostage situation. One of the occupants also stated that Cooks was “doing something in a hole in the floor.” Officers could also hear what sounded like a power drill being operated in the residence.

After a four hour standoff, officers deployed tear gas and were eventually able to force entry into the home, make contact with the residents they had communicated with, and take Cooks into custody. One resident stated “that Cooks had put multiple guns in a hole in the floor.” Officers then “performed an initial 30-second [protective] sweep, followed by a three- to five-minute secondary sweep. In the process, they found a four-by-four-foot hole covered by plywood that... had been ‘hastily’ ‘nailed down with screws.’” An officer used a crowbar to remove the plywood and discovered it led to a crawlspace. An officer entered the crawlspace and, “[a]s he put his hand down to brace himself, he felt a plastic tarp move and, under it, saw the butt of a gun in plain view.” He observed additional firearms in the crawlspace while shining his flashlight in the area. The officers later obtained a search warrant for the home and eventually “seized nine pistols and 22 long guns from the crawlspace.”

Cooks was charged with being in unlawful possession of a firearm in connection with the weapons found in the crawlspace. During his prosecution, he moved to suppress the guns that were discovered, arguing that the weapons were found and seized during an unlawful warrantless search. Cooks contended that

even if the officers could lawfully” conduct a protective sweep of the home without a warrant, “pulling up floor boards and crawling under the house was overbroad for a protective sweep.” The prosecution countered that “the search was justified under the exigent-circumstances doctrine because the officers” had a need to check the home – including the crawlspace – for other individuals who may have been either affected by the tear gas or injured by Cooks. The district court agreed that although the search of the crawlspace was not justified by the protective-sweep doctrine, it was justified by the exigent-circumstances doctrine, and thus denied Cooks motion to exclude evidence. Cooks was subsequently convicted and appealed the ruling to the Eleventh Circuit.

The Eleventh Circuit upheld the district court’s ruling, and explained that the search of the crawlspace was justified even without a warrant by the “‘emergency-aid’ aspect of the exigent-circumstances doctrine.” The court explained that it is “clear that the hostage situation at Cooks’s residence—which is how the police perceived the situation—created an exigency of the sort that would justify a warrantless search.” Moreover, the Court concluded that it was reasonable under the circumstances for the officers to believe the crawlspace could have contained someone who was in danger. The Court found that certain evidence both supported and contradicted this conclusion. However, the Court concluded, “[i]n assessing the reasonableness of officers’ actions, we cannot indulge ‘the 20/20 vision of hindsight,’ but instead must adopt the ‘perspective of a reasonable officer on the scene’—which, here, entailed an armed standoff with a gang-member fugitive that had evolved into a hostage situation.” Indeed, the officers had no knowledge of whether anyone else was actually in the home and what Cooks was doing while drilling during the standoff. Under the circumstances, the Court held that the warrantless search of the crawlspace to check for possible victims was not a constitutional violation, and thus upheld the district court. *U.S. v. Cooks*, No 18-10080, 2019 WL 1462062 (11th Cir. Apr. 3, 2019)

PROBABLE CAUSE FOR OBSTRUCTION CHARGE DURING ARREST OF RELATIVE

On November 23, 2016, a Georgia State Patrol Trooper responded to a single vehicle accident in which a vehicle driven by Jessica Gaha left the road and struck a tree in the yard of a private residence. Gaha called a friend, who arrived on scene first, followed by a local deputy, then the trooper. The subsequent interactions were recorded on the trooper’s in-car video system. The trooper began investigating the accident by obtaining Gaha’s license, examining her vehicle, and speaking with her. The trooper discovered during the investigation that Gaha’s license was suspended. The trooper informed Gaha of this fact and explained that he would have to place her under arrest. The trooper delayed applying handcuffs to Gaha and allowed her to interact with her friend, who was standing close by. During this time, Gaha’s friend called Gaha’s mother, Kiersten Quick, who arrived shortly thereafter and parked in a nearby parking lot. Gaha shouted to her mother that she was going to jail and asked her mother to come get her from jail. Meanwhile, Gaha’s friend asked the trooper if she could retrieve Gaha’s purse from her vehicle and the trooper allowed her to do so.

Quick then “advanced toward [the trooper] as he handcuffed Gaha and said, ‘Are you f**king kidding me?’ Gaha exclaimed, ‘Mom stop it!’ Oswaldo Lopez, Quick’s fiancé, joined Quick as she demanded that [the trooper] explain ‘what crime’ had occurred. [The trooper] ordered the couple to ‘go over there and stand.’” Quick then turned away from the trooper and began approaching Gaha’s vehicle while still talking. Lopez did not move, and the trooper again ordered him to go back to Quick’s vehicle. He also ordered Quick to return to her own vehicle “or you will go to jail for obstruction.” Meanwhile, “Gaha yelled, ‘Mom stop it!’ and then pleaded, ‘My keys are in my car, Mom can you come get me from jail?’ and ‘Can you take care of my car please?’”

After securing Gaha in his patrol car, the trooper observed Quick opening the front passenger side door of Gaha’s vehicle and peering inside. He walked quickly to the vehicle and stated “well, ma’am, I’m going to tell you one more time to go right back over there or you

are going to jail." Quick did not comply and the trooper continued to order her to step away from Gaha's vehicle. As she continued to fail to comply, the trooper "warned Quick that she was 'obstructing,' and she responded, 'I'm not obstructing anything,' and waved her hand at [the trooper]." Quick continued arguing and eventually "raised her hand a second time," at which point the trooper grabbed Quick's arm, and took her to the ground. Lopez began to move to intervene but the trooper and deputy on scene repeatedly warned Lopez that he would go to jail as well if he interfered. After some additional struggling, the trooper was able to place handcuffs on Quick and take her into custody.

Quick subsequently sued the trooper and other parties alleging a claim for false arrest "and that the arrest was retaliatory in violation of her rights under the First, Fourth, and Fourteenth Amendments." The trooper moved for summary judgment, arguing that he possessed at least arguable probable cause to arrest Quick and her claim could not succeed. The U.S. District Court for the Northern District of Georgia granted the trooper's motion for summary judgment, stating that "arguable probable cause barred Quick's claim of a false arrest" and that because probable cause for the arrest existed, no claim for a retaliatory arrest could prevail either. Quick then appealed this ruling to the Eleventh Circuit.

Quick argued to the Eleventh Circuit "that she stood 'idly by,' acted 'materially similar to other persons in the area,' and complied with [the trooper's] 'volley of directives in an imminently reasonable fashion.'" The Court held, however, that "'the videotape tells quite a different story.' Quick disobeyed at least seven orders from [the trooper] to return to her vehicle and defied him by meddling with Gaha's vehicle. Quick was aggressive, interrupted [the trooper] as he handcuffed Gaha and hampered [the trooper's] efforts to prepare the vehicle for towing and to restore the normal flow of traffic on the road." Others on the scene were "respectful, cooperative, and deferential, which provides a plausible explanation for why" the trooper allowed them more freedom to interact with Gaha and her vehicle than Quick.

The Court explained that **the trooper's order for Quick to leave the area of Gaha's vehicle was lawful because the trooper was authorized to "create a reasonable scene perimeter and to exclude Quick from a reasonable physical zone of an arrest within which there was a risk of physical contact between' himself and Gaha."** Quick's knowing and willful refusal to follow these commands "obstructed or hindered [the trooper's] abilities to conclude his investigation, to prepare Gaha's vehicle for towing, and to restore the normal flow of traffic." As such, the trooper had at least arguable probable cause to arrest Quick for obstruction, and he was entitled to summary judgment with respect to Quick's false arrest claim. *Quick v. Geddie*, No. 18-13807, 2019 WL 1567763 (11th Cir. Apr. 11, 2019).

ALS REMINDER

Documents for an ALS Hearing:

1. 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.
2. On Intoxilyzer 9000 cases, a copy of your permit to operate the Intoxilyzer 9000 and the original test results are required for the ALS Hearing. The permit must be the one that was in effect at the time of the Intoxilyzer test. The copy of your permit and the original test results must be provided to the Court at the ALS Hearing.
3. On roadblock cases, take a certified copy of the roadblock supervisor approval form, the final report form, and the DPS Policy on roadblocks with you to the ALS Hearing and provide the documents to the Court. The certification sticker on the forms must be the original sticker and not a copy of the sticker.
4. On blood test cases, a copy of the GBI crime lab results must be provided to the Court at the 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

Send questions/comments to zhoward@gsp.net