



DPS LEGAL REVIEW

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LEGISLATION

2019 S.B. 25 – REVISIONS TO O.C.G.A. § 40-6-163 (PASSING SCHOOL BUS)

On February 15, 2019, Governor Kemp signed Senate Bill 25, which became effective immediately upon his signature. The primary effect of S.B. 25 is to reverse changes that were made to O.C.G.A. § 40-6-163(b) under 2018 House Bill 978 affecting the duty of drivers meeting or overtaking a school bus.

Under the new language of O.C.G.A. § 40-6-163(b), a driver traveling on a highway in a direction opposite to a stopped school bus with its visual stop signals activated must stop before reaching the school bus unless the driver is “upon a highway with separate roadways that are separated by a grass median, unpaved area, or physical barrier.” Drivers are also not required to stop “upon a controlled access highway when the school bus is stopped in a loading zone which is a part of or adjacent to such highway and where pedestrians are not permitted to cross the roadway,” but this provision is unchanged from prior law.

Under the revised code section, a driver traveling on the same highway as a school bus must stop when the bus is stopped with its stop signals activated even when traveling the opposite direction on a highway with a center turn lane. **A driver traveling in the opposite direction as the school bus is exempt from the requirement to stop only when: (1) the school bus is on a separate roadway, meaning that there is some area between the roadways that is not improved, designed, or ordinarily used for vehicular travel; AND (2) the roadways are separated by a “grass median, unpaved area, or physical barrier.” If the roadways are separated in any other way, the driver approaching the school bus is still required to stop.** The only other situation in which a driver is not required to stop when approaching

a stopped school bus with its stop signals activated is when the school bus is stopped in a loading zone that is a part of or adjacent to the highways and where pedestrians are not permitted to cross the roadway.

11TH CIRCUIT COURT OF APPEALS

USE OF FORCE ON NONCOMPLIANT SUSPECT – CLOSED FIST STRIKES

On August 3, 2014, Douglasville Police Officer Patrick Clements pulled over a vehicle driven by Herman Baker after observing the vehicle being driven with equipment violations. Officer Clements and Baker “walked to the back of [the] car so [Baker] could see the broken tag light.” While at the rear of the car, Officer Clements performed a consensual pat down of Baker and found no weapons or contraband. During this time, Officer Joseph Dwyer arrived on scene.

Officer Clements then asked consent to search Baker’s vehicle. Baker “provided no verbal response and, instead, started to walk away.” Officer Clements ordered Baker to sit on the bumper of his patrol car, which Baker did. Officer Clements again asked consent to search Baker’s car, and Baker again did not provide a verbal response. “Seconds later, [Baker] started to run away. Officer Clements grabbed [Baker’s] shirt and brought [Baker] to the ground.” The two struggled as both officers ordered Baker “to get on the ground and to give Officer Clements his hands.” During the struggle, Officer Dwyer also tased Baker.

The officers were eventually able to pin Baker to the ground and handcuff his left hand, but his right hand remained free. The officers continued to order Baker to give them his right hand, but he did not. “At that point, [the] Officers delivered a series of closed-fist strikes to [Baker’s] right side. Officer Clements ultimately succeeded in handcuffing [Baker’s] right hand about

GEORGIA SUPREME COURT

ADMISSIBILITY OF IMPLIED CONSENT REFUSAL IN DUI PROSECUTION

In August of 2015, a police officer arrested Andrea Elliott following a traffic stop and DUI investigation. The officer read Elliott the appropriate implied consent notice in accordance with O.C.G.A. § 40-5-67.1, requesting that she consent to a state administered breath test. Elliott refused consent. During her prosecution, Elliott moved to suppress her refusal from being introduced into evidence, arguing that “the introduction of that evidence at trial would violate her right against compelled self-incrimination under the Georgia Constitution and Georgia Code.” The trial court denied Elliott’s motion, and Elliott appealed the matter to the Georgia Supreme Court.

The Georgia Supreme Court held that, as explained in *Olevik v. State*, 302 Ga. 228 (2017), “the Georgia Constitution’s right against compelled self-incrimination prevents the State from forcing someone to submit to a chemical **breath test**” (emphasis added). In Elliott’s case, **the Supreme Court held that the Georgia Constitution prohibits “admission of evidence that a suspect refused to consent to a breath test” during that suspect’s prosecution. The Court further held that “OCGA §§ 40-5-67.1(b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant’s refusal to submit to a breath test to be admitted into evidence at a criminal trial.**” The Court’s holding did not address the administration of blood or urine tests. *Elliott v. State*, No. S18A1204, 2019 WL 654178 (Ga. Feb. 18, 2019).

GEORGIA COURT OF APPEALS

REASONABLE ARTICULABLE SUSPICION TO JUSTIFY PAT DOWN SEARCH

On the night of February 2, 2016, an Atlanta Police Officer on routine patrol drove past a vehicle in a gas station parking lot and observed that it was occupied by a driver and a passenger. The passenger, later identified as Nicholas Robusto, was not wearing his

40 seconds after handcuffing [Baker’s] left hand.” The officers did not use any further force. Baker was eventually charged with marijuana possession, two counts of obstruction, and equipment violations.

Baker was convicted but later filed suit against the officers claiming, among other things, that the force officers used during his arrest was excessive under the Fourth Amendment. The officers moved for summary judgment, arguing that the force used was reasonable and that they were entitled to qualified immunity. The district court granted the officers’ motion for summary judgment, and Baker appealed the ruling.

On appeal, Baker specifically alleged that the officers’ “use of fist strikes while [he] was face-down on the ground” was unconstitutionally excessive. The court explained that “[a]n officer’s use of force is unconstitutionally excessive only if the force used was ‘objectively unreasonable in light of the facts and circumstances confronting’ the officer... ‘In determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate.’” Here, the Court held that “[w]hen [the officers] employed the fist strikes, [Baker] had just attempted to evade arrest by flight and had refused multiple orders to get on the ground, to stop resisting, and to give his hands to the officers. An objective officer could also have believed reasonably that [Baker] – who had only a single hand in handcuffs – presented an immediate threat to [the officers’] safety when the fist strikes were used. Not only had [Baker] offered continuous physical resistance to [the officers’] efforts to restrain him, but we have said that an arrestee with only one hand handcuffed may pose a danger to officers because ‘without both hands shackled, the single handcuff could be used as a weapon.’” **The Court thus held that the officers’ “split-second decision to employ force to gain control of the situation and to avoid the risk of serious injury” was reasonable and not excessive under the circumstances.** *Baker v. Clements*, No. 18-12724, 2019 WL 418602 (11th Cir. Feb. 4, 2019).

seat belt. The vehicle accelerated out of the parking lot and onto a four-lane road. "The officer followed and, given that the passenger was not wearing his seat belt," initiated a traffic stop. The driver pulled the vehicle into an adjacent shopping center parking lot and stopped.

The officer approached the vehicle and "asked both occupants for identification." The driver produced his license and Robusto stated that he was not carrying identification but nevertheless provided his name and date of birth. During his interaction, the officer "noticed a small spoon with white residue on it in the vehicle's center console, which the driver attempted to conceal... as well as a newly opened box of Q-tip cotton swabs, both of which led the officer to suspect that the vehicle's occupants were engaging in illegal intravenous drug use."

The officer then ordered the driver to exit the vehicle and asked if the vehicle contained any illegal drugs. "[T]he driver denied being in possession of any drugs, but claimed that Robusto did, in fact, have drugs on his person." The officer next ordered Robusto out of the vehicle and, once Robusto was out, "asked him if he was in possession of any illegal drugs." Robusto stated that he was not, but the officer nevertheless "initiated a pat-down search, which he characterized as being performed for safety purposes and as standard operating procedure for the APD. During this pat-down search, the officer felt what he believed to be syringes in the pockets of Robusto's pants. At this point, the officer shined his flashlight into Robusto's pockets and confirmed that he was in possession of two loaded syringes, which the officer then seized." The officer then arrested Robusto and subsequently discovered a small bag of heroin hidden in Robusto's shoe. Robusto was subsequently charged with possession of heroin and failure to wear a seat belt.

During his prosecution, Robusto moved to suppress the evidence seized as a result of the traffic stop and pat-down search. The trial court agreed with Robusto that "the arresting officer's pat-down search was not supported by a reasonable belief that Robusto was armed or dangerous, and thus" held that the search was unlawful and granted Robusto's motion. The state then appealed this ruling to the Georgia Court of Appeals.

The Georgia Court of Appeals held first that the initial stop of the vehicle was justified based upon the officer's observation that Robusto was not wearing his seat belt once the vehicle left the gas station parking lot. The court further held that the officer was entitled to conduct "a reasonable inquiry and investigation" into Robusto to insure his safety and that of others during the stop.

The Court explained, however, that **the right to conduct an inquiry and investigation does not automatically give the officer the right to conduct a pat-down search. Rather, the officer "must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."** In this, case, the officer may have had reasonable articulable suspicion that Robusto was in possession of illegal drugs, but he was unable to articulate any facts that made a pat-down search necessary to protect himself from attack. Rather, the officer testified that "such pat-downs were standard operating procedure... and that he performs pat-downs on everyone he suspects of using intravenous drugs." Because the officer did not have "a reasonable, articulable, particularized basis for believing Robusto was armed or dangerous," he did not have a lawful basis to perform the search. *State v. Robusto*, No. A18A1802, 2019 WL 512798 (Ga. Ct. App. Feb. 11, 2019).

ALS REMINDER

If you do not receive an ALS Hearing notice and your case is dismissed, a Motion to Vacate Default Order can be filed requesting that the case be reset for an ALS Hearing. The motion must be filed within ten days of the Court's Final Decision/Order of Dismissal. Contact Dee if you need a motion filed.

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