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11th Circuit Court of Appeals

TRAFFIC STOP – CONSENSUAL SEARCH OR UNLAWFUL EXTENSION OF STOP?

During the early morning hours of September 16, 2016, Anniston, Alabama police officer Josh Powers performed a traffic stop on a vehicle driven by Cantrell Burwell after witnessing Burwell fail to maintain his lane. Officer Powers approached the vehicle, also occupied by Kelly Boucher. The officer explained the reason for the stop and requested Burwell's driver's license, which he provided. Officer Powers engaged in friendly conversation with the vehicle occupants, who stated they had been on a fishing trip at a friend's pond in LaGrange, Georgia.

Officer Powers then returned to his vehicle and checked for outstanding warrants for both occupants but found none. He discovered, however, that Burwell had prior drug convictions, and called for another officer, who arrived shortly thereafter. Officer Powers explained Burwell's prior convictions and stated that Burwell seemed very nervous. He also stated that he found Burwell's fishing story suspicious and stated that he was going to "get [Burwell] out and explain to him I'm going to write him a warning and try to sweet talk my way in," meaning that he would attempt to convince Burwell to consent to a search of the vehicle.

Officer Powers then returned to the vehicle and, after telling Burwell he was going to give him a warning for failing to maintain lane, asked him to step out of the car to explain. Burwell complied and, after further interaction and conversation, Officer Powers completed the warning and returned Burwell's license to him with a copy of the warning. Burwell then began to return to his vehicle, but then "Powers said, 'hey before you go, you care if I ask you a few more questions?" Burwell said that he did not and Officer Powers went on to explain that his supervisor had been "on us pretty bad about being productive" and that part of the officers' job was to check for drugs, weapons, and other contraband. Officer Powers asked if Burwell had anything like that in the vehicle and Burwell responded, "no sir, you can check." Officer Powers then asked, "[y]ou don't care if I search it real quick?" and Burwell gave consent. Officer Powers then performed a search of the vehicle and discovered under the hood a handgun and approximately 55 grams of methamphetamine. Burwell admitted that the guns and drugs belonged to him and he was charged in accordance.

During his prosecution, "Burwell moved to suppress the evidence against him on the ground that… the traffic stop was completed before Powers asked about contraband and requested consent to search his vehicle" and therefore "Powers was not justified in detaining him to ask to search his car." The U.S. District Court for the Northern District of Alabama granted Burwell's motion, finding that the traffic stop ended prior to Officer Powers requesting to search the vehicle and that Powers' consent was not voluntary and therefore not valid. The Court reasoned that "Powers used a friendly tone and joked with Burwell to exert a subtle form of pressure – the pressure of a debt that Powers created by letting Burwell off with a warning instead of a citation, which made Burwell feel compelled to oblige the officer's requests." Because of these tactics and "because Officer Powers did not tell Mr. Burwell that the traffic stop was over or that he was free to leave without consenting to the search," the Court concluded Burwell's consent was not voluntary. Therefore, the trial court suppressed the evidence uncovered during the search. The prosecution then appealed this ruling to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit reversed the district court's ruling. The Court first explained that **Officer Powers was not *required* to tell Burwell that he was free to leave before asking consent to search the vehicle.** In this case, "Powers's question itself—'hey before you go, you care if I ask you a few more questions?'—indicated to Burwell that the traffic stop was over and staying to answer additional questions was optional. Moreover, at that time, Burwell was not impeded, touched, or threatened by Powers, their interactions appeared to be fully cooperative, Powers's gun remained holstered, and Powers used the same friendly tone that he had used during the entire traffic stop." **Because Burwell agreed to answer additional questions, and a reasonable person would have felt free to leave, the encounter was voluntary in nature.** Moreover, the Court held that Burwell's consent to search was voluntary and not coerced. **The Court explained that "[t]here is nothing inherently coercive" about an officer's use of a warning in lieu of a citation or their engaging "with drivers in a friendly tone to de-escalate the situation." Here, "the encounter was 'polite and cooperative,' and Powers 'used no signs of force, physical coercion, or threats…' Nothing in the video and audio record shows that Powers lied, deceived, or tricked Burwell." As such, under the totality of the circumstances, his consent was voluntary and the evidence discovered during the search should not have been suppressed.** *United States v. Burwell*, No, 18-13039, (11th Cir. Feb. 27, 2019).

USE OF FORCE – EXCESSIVELY TIGHT HANDCUFFING

On July 7, 2015, Miami police officer Jay Grossman stopped a vehicle being driven by Ruben Sebastian for speeding and a suspected window tint violation. Officer Grossman asked Sebastian for consent to search the vehicle, but Sebastian refused. Officer Grossman subsequently requested that another officer respond, and Lieutenant Javier Ortiz arrived. Lt. Ortiz also sought consent to search the vehicle, but Sebastian again refused. In response, Sebastian alleged that Lt. Ortiz "'became enraged,' opened the car door, and removed Sebastian from the vehicle." Sebastian stated he was then handcuffed by either Lt. Ortiz or a third responding officer "in a manner purposely intended to cause pain and injury, cutting off the circulation in his hands, and cutting into the skin on his wrists." Sebastian stated he complained about the handcuffs, and an officer "responded that 'he knew of a way to make them tighter.'"

Lt. Ortiz eventually directed a fourth officer, Officer Daniel Crocker, to "place Sebastian in his vehicle for transportation to the police station." One of the officers then replaced the metal handcuffs on Sebastian with plastic "flex-cuffs," but again intentionally tightened "the cuffs in a manner purposely and wantonly intended to cause pain and further injury." The officers then placed Sebastian in Officer Crocker's vehicle, allegedly "in a position and manner that increased the pain caused by the over tightened flex-cuffs." As he sat in the vehicle, he began to lose feeling in his hands. Eventually, Sebastian "was transported to a police station where he was detained for more than five hours, still handcuffed behind his back." As a result, Sebastian "suffered nerve damage and the permanent loss of sensation in his hands and wrists."

Although Sebastian was initially charged with obstruction in connection with the incident, that charge was later dropped. Sebastian subsequently sued the responding officers for, among other things, excessive use of force. The defendant officers moved for summary judgment, arguing that – even assuming Sebastian's allegations to be true – they had not violated Sebastian's constitutional rights. The officers further argued that they were entitled to qualified immunity because Sebastian's rights in these circumstances were not clearly established. The U.S. District Court for the Southern District of Florida denied the officers' motion, and the officers then appealed the ruling to the Eleventh Circuit.

The Eleventh Circuit upheld the trial court's ruling, explaining that Sebastian's allegations, if true, would support a claim for excessive use of force. **The court explained that Sebastian was suspected of committing only a speeding offense and that "there is not the slightest indication in this record that Sebastian posed**

a threat to officer safety or to anyone else, or was a flight risk at any time during the interaction." The Court rejected the argument "that handcuffing alone can never constitute excessive force, regardless of the need for the use of force under the circumstances or the extent of the injuries inflicted." Rather, the court held that "[i]f an officer, for instance, needlessly handcuffed an injured driver who crashed his vehicle while speeding and seriously aggravated the injuries caused by the accident, the fact that the officer harmed the driver by 'merely' applying handcuffs would not necessarily bar an excessive force claim." The court further held that **the officers were not entitled to summary judgment because, under the specific facts of this case as alleged by Sebastian, no officer could have believed that the gratuitous and excessively tight handcuffing – even after a different set of handcuffs were applied – was constitutional given Sebastian's compliance and lack of threat.** As such, the Court held that the officers were not entitled to summary judgment. *Sebastian v. Ortiz*, No. 17-14751, 2019 WL 1187012 (11th Cir. March 14, 2019).

Georgia Court of Appeals

CONSENT TO SEARCH HOME – DETAINED CO-OCCUPANT'S RIGHT TO REFUSE

After receiving a tip from a citizen about a social media post by Dustin Lee, Chief Jason McCoy applied for and obtained an arrest warrant for Lee for the crime of terroristic threats. Chief McCoy then traveled to Lee's home with several other law enforcement officers to execute the warrant. "Upon their arrival at the residence, Lee and his co-occupant, Vanessa Richardson, stepped out onto the porch. Lee was immediately arrested without incident… and placed in a patrol car." Officers then asked Richardson whether there were any guns in the home, and Richardson stated "that there was a .22 rifle inside." She then gave the officers permission to enter the home while she retrieved the rifle. "Once inside the home, Chief McCoy saw a rifle in plain view" in the living room. "Richardson confirmed that it was the rifle she described and handed it over to law enforcement to be collected as evidence." Officers did not seek Lee's permission to enter the home or seize the rifle, though he remained on site detained in a patrol car.

Lee was subsequently prosecuted for possession of a firearm by a convicted felon. During his prosecution, he moved to suppress the rifle from evidence, arguing in part that the search of his residence was invalid because officers did not possess a search warrant and did not have *his* consent to enter the home. The trial court granted Lee's motion to suppress, and prosecutors appealed the ruling to the Georgia Court of Appeals.

The Georgia Court of Appeals explained that, under a prior case (*Preston v. State*), **law enforcement officers that arrive at a residence to perform a search may rely on a non-present occupant's prior consent to perform the search. However, if a co-occupant is present when the officers arrive to perform the search, officers must inform the co-occupant that they are performing that search based upon consent so that the co-occupant has an opportunity to object. Further, officers cannot simply remove a co-occupant from the premises to prevent them from being able to object to a search. The court found that the facts in this case were different, however, because "in this case, law enforcement did not arrive at Lee's residence to execute a search based upon a non-present co-occupant's consent." Rather, the officers went to the residence specifically to arrest Lee on a separate charge. "Although Lee was in police custody near the residence when officers asked his co-occupant for permission to enter the residence, nothing in the record suggests that law enforcement placed Lee in a patrol car prior to entry in order to avoid a possible objection from Lee."** Because officers did not remove Lee from the scene to avoid his objection and because they were otherwise entitled to rely upon the consent to search from Richardson, the search was valid and Lee's motion to suppress should have been denied. *State v. Lee*, No. A18A1869, 2019 WL 1054270 (Ga. Ct. App. March 6, 2019).

B.O.L.O. FROM OFF-DUTY OFFICER JUSTIFIES TRAFFIC STOP

During the early morning hours of March 18, 2017, "an off-duty police officer reported a possible drunk driver, and a deputy with the Paulding County Sheriff's Department was dispatched to the area where the driver was last seen. Dispatch instructed the deputy to be on the look out ('BOLO') for a white male and white female in a white SUV with a particular license plate number." Shortly thereafter, the deputy encountered a vehicle that matched the description provided and began following it. The vehicle in question was driven by Christopher Perry. "The deputy did not immediately pull Perry over in response to the BOLO because he believed that he did not yet have justification to effectuate a traffic stop." Instead, the deputy performed a traffic stop after witnessing Perry "weaving over the roadway." The deputy's pursuit of and encounter with Perry was recorded on the deputy's dash cam.

As a result of the traffic stop and ensuing investigation, Perry was charged with DUI, failure to maintain lane, and an open container violation. During his prosecution, Perry's attorney argued that the stop was invalid because Perry "did not fail to maintain his lane, and thus the deputy did not have reasonable articulable suspicion for the stop." The trial court reviewed the dash cam footage and agreed that "Perry operated his vehicle smoothly," and thus found that the deputy lacked reasonable, articulable suspicion for the stop. The prosecution appealed this ruling to the Georgia Court of Appeals.

The Georgia Court of Appeals explained that "[p]articularized alerts issued by police officers for specifically described vehicles possibly involved in criminal activity have long served as a legitimate basis for investigatory stops. **A dispatcher's report of a suspected intoxicated driver, containing details about the driver, the driver's vehicle, the driver's behavior, and the location where the behavior occurred, has been held to provide articulable suspicion authorizing a responding officer to detain the driver, even if the source of the report is a citizen or unidentified informant."** The Court held that in this case, "the deputy was aware of a BOLO based upon a report of an off-duty police officer that the driver of Perry's vehicle, identified by license plate number, may be intoxicated." The Court explained that **this BOLO provided reasonable articulable suspicion to stop Perry, even if the deputy did not observe Perry fail to maintain his lane, and even if the deputy did not believe the BOLO independently justified the traffic stop.** As such, the court reversed the trial court's ruling. *State v. Perry*, A18A2110, 2019 WL 1146659 (Ga. Ct. App. March 13, 2019).

TPO / CIVIL PROTECTION ORDER CANNOT SERVE AS SEARCH WARRANT

On May 31, 2013, an individual identified in court documents as "A.S." filed a verified petition for a temporary protective order ("TPO") against Steve Burgess, with whom A.S. had a long-term relationship and was a co-parent. A.S. subsequently testified at an *ex parte* hearing about abuse and threats that she had suffered from Burgess, and a superior court judge granted her petition for a TPO. Among other provisions, the order granting the TPO directed that A.S. be allowed to "go into [her and Burgess's residence] and take personal property she listed on her petition on a date determined by the sheriff." The order also required that "Pickens Co. Sheriff remove all firearms and explosives from the resid. and secure the same."

After receiving the TPO, A.S. was interviewed by a GBI agent about Burgess's suspected involvement in homicides and methamphetamine sales. A.S. provided information relating to those crimes and stated that she believed methamphetamine could be found at their residence. She also offered keys to the residence, gave consent to search the residence, and stated where explosives and firearms could be located therein.

On June 3, 2013, the agent and several Pickens County Sheriff's Office deputies went to the residence to serve the TPO on Burgess. "The agent and other officers served the order on Burgess that morning, and the agent testified that Burgess waited outside the residence in the driveway and in and around a patrol car while the officers searched; the agent did not recall that

Burgess was in handcuffs at any point. Explosives were found in the bathroom closet, where A.S. described them as being stored. Agents testified that they believed the TPO gave them authority to enter the property and seize the items without a separate warrant."

During this search, agents simultaneously searched the grounds and an "outbuilding/garage about 25 feet from the back porch," in which they discovered additional evidence. Sometime thereafter, Burgess was read and waived his *Miranda* rights and signed a "Waiver of Constitutional Rights to a Search Warrant" form, after which additional evidence was found and he made incriminating statements.

During his prosecution, Burgess moved to suppress all evidence found and statements made as a result of the initial search, arguing that "the search was not performed with a warrant, probable cause, or valid consent, among other things." The trial court held that "although officers lacked a warrant, the TPO served as a 'valid order' giving officers authority to enter Burgess's home and seize explosives and firearms." However, the court suppressed evidence that was recovered from the search of the outbuilding, finding that the order only authorized a search for *weapons,* and only to the extent that they were in the main home. The parties then each appealed different parts of this ruling to the Georgia Court of Appeals.

The Court of Appeals held that **no** search of the property could be justified solely by the TPO. The Court explained that "**the procedure to obtain a TPO does not contain all the safeguards codified in this State's warrant statute (specifically, application by a law enforcement officer), and we decline to hold that, under these circumstances, issuance of the TPO under this statutory scheme met the 'warrant and probable cause standard' of the Fourth Amendment and OCGA § 17-5-20, obviating the need for officers to first obtain a warrant to enter Burgess's property." Because the TPO did not satisfy the warrant requirement of the Fourth Amendment and state law and because no other exigency justified the search, the search was not constitutional or valid under state law.**

Furthermore, the Court held that neither A.S.'s off-site consent to search after her TPO hearing or Burgess's on-site consent justified the search. With respect to A.S., the Court held that her consent was not valid because Burgess, a co-occupant, was not given the opportunity to object to the search on site. With respect to Burgess, the Court held that his consent was not free and voluntary because it was secured only after evidence was unlawfully uncovered during the initial search. As such, law enforcement was not entitled to rely upon consent to justify the search in the absence of a proper search warrant. *State v. Burgess*, No. A18A1495, A18A1496, 2019 WL 1198613 (Ga. Ct. App. March 14, 2019).

ALS REMINDER

If you are unavailable for an ALS Hearing, a written continuance motion must be filed with the OSAH Judge as soon as possible but no less than approximately seven to ten days prior to the scheduled hearing. The Court does not accept continuance requests by telephone or in the body of an email. 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 a continuance motion, please contact Dee.

Published with the approval of
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