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Enforcement Tip

FLASHING LIGHTS / SIRENS ON PRIVATE VEHICLES

Blue Lights: pursuant to O.C.G.A. § 40-8-90, it is "unlawful for any person, firm, or corporation to operate any motor vehicle equipped with or containing a device capable of producing any blue lights, whether flashing, blinking, revolving, or stationary, except:

(A) Motor vehicles owned or leased by any federal, state, or local law enforcement agency;

(B) Motor vehicles with a permit granted by a state agency to bear such lights;…"

(C) Certain rear lamps of antique, hobby, and special interest vehicles; and

(D) A personal vehicle owned by an elected sheriff that is properly marked in accordance with O.C.G.A. § 40-8-91 and used as a law enforcement vehicle.

O.C.G.A. § 40-8-92 further states that while officially marked law enforcement vehicles do not require a permit to use blue lights, all other vehicles require a permit from the Department of Public Safety designating them as an emergency vehicle authorized to utilize blue lights.

Red / Amber Lights: The Department of Public Safety also issues permits to vehicle owners/operators for the use of red or amber flashing or revolving lights. Pursuant to O.C.G.A. § 40-8-92(b), "[t]he Commissioner [of the Department of Public Safety] shall authorize the use of red or amber flashing or revolving lights only when the person or governmental agency shall demonstate to the commissioner a proven need for equipping a vehicle with emergency lights." The following classes of vehicles are exempt and do **not** require a permit for flashing or revolving red or amber lights:

(A) Fire department vehicles distinctly marked on each side (red lights); and

(B) Ambulances, as defined by O.C.G.A. § 31-11-2 (red lights)

Georgia Department of Transportation Rule 672-2-.06(1) specifically requires that pilot / escort vehicles for oversize loads must have a permit to operate flashing or revolving amber lights.

Green Lights: Pursuant to O.C.G.A. § 40-8-92(d), it is generally unlawful "for any person, firm, or corporation to operate any motor vehicle or to park any motor vehicle on public property with flashing or revolving green lights." Such lights can be used by a government entity, however, to designate the location of a command post at the site of an emergency.

Other Colors: Other colors of flashing or revolving lights are not specifically prohibited by Georgia law and do not specifically require a permit for operation. However, in accordance with O.C.G.A. § 40-6-395(c)(1), no vehicle can be equipped with *any* flashing or revolving light so as to make it resemble a motor vehicle or motorcycle belonging to any federal, state, or local law enforcement agency. Violations of this code section will likely depend upon how the vehicle is equipped and the conduct of the vehicle operator. **Note: flashing or revolving lights of any color may be utilized off the highway / on private property.**

Sirens: O.C.G.A. § 40-8-70(b) states that "[n]o vehicle shall be equipped with nor shall any person use upon a vehicle any siren, whistle, or bell except as otherwise permitted" for the purposes of horns, theft alarms, and for use by authorized emergency vehicles.

Parade Exception: O.C.G.A. § 40-6-7 authorizes the operation of motor vehicles in parades authorized by local authorities "although such motor vehicles… and their operators… do not meet the… requirements of law, especially with respect to flashing lights, sirens, and safety equipment." This exception applies while such vehicles are participating in the parade and returning to the marshaling area, but not when the vehicles are traveling to and from the parade site or otherwise not directly participating in the parade.

11TH CIRCUIT COURT OF APPEALS

EXCESSIVE FORCE: USE OF TASER ON UNRESPONSIVE SUBJECT

Ricky Hinkle was arrested in Alabama while visibly intoxicated and later transported to the Birmingham City Jail. Hinkle "suffered from alcoholism, heart disease, and depression" and, while in jail, "began suffering from alcohol-withdrawal symptoms and exhibiting delusional behavior." He was eventually transferred to a cell monitored by Deputies Habimana Dukuzumuremyi and Christopher Cotten.

"Shortly after Hinkle arrived… Dukuzumuremyi realized that he couldn't see him on the video monitor, so he called to him over the loudspeaker." Hinkle failed to respond and when Cotten went to investigate, he "found Hinkle in the corner of his cell, wearing only underpants and shoes." Hinkle stated that he "wanted to die." As a result, "Cotten decided to move Hinkle to a padded cell." Hinkle was initially cooperative as Cotten moved him but, after Cotten ordered Hinkle to remove his shoes, Hinkle "then ran down the hallway to the bathroom and grabbed a shower curtain. Cotten took the shower curtain away from Hinkle shortly before Dukuzumuremyi arrived on the scene."

"After the officers attempted three times to pull Hinkle into his new cell, Dukuzumuremyi fired his taser, hitting Hinkle on the left side of his chest just above his heart. As a result of that taser shock—which lasted 5 seconds—Hinkle fell to the floor on his right side and urinated on himself. Dukuzumuremyi then ordered Hinkle to roll over to be handcuffed, but Hinkle remained unresponsive. Eight seconds after the end of the first shock, and while Hinkle still lay motionless (and wet) on the ground, Dukuzumuremyi tased him again, this time on the front left side of his neck. Shortly after the second shock, Hinkle went into cardiac arrest. He was taken to the emergency room, where he was pronounced dead."

Hinkle's estate filed suit against Deputy Dukuzumuremyi and other parties, alleging in part that Deputy Dukuzumuremyi used excessive force. Deputy Dukuzumuremyi, in turn, moved to dismiss Hinkle's claim, arguing that he did not use excessive force and thus did not violate Hinkle's rights under the Constitution. He further argued that – even if he did – those rights were not clearly established and thus he was entitled to qualified immunity. The U.S. District Court for the Northern District of Alabama denied Deputy Dukuzumuremyi's motion, however, and found that Deputy Dukuzumuremyi's use of force could be seen as excessive and the lawsuit should be allowed to continue. Deputy Dukuzumuremyi then appealed this ruling to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit explained that **"because force in the pretrial detainee context may be defensive or preventative—but never punitive—the continuing use of force is impermissible when a detainee is complying, has been forced to comply, or is clearly unable to comply."** Here, the Court stated that it was undisputed "that the first shock was a permissible use of force given Hinkle's resistance and the officers' need to 'preserve internal order and discipline' and 'maintain institutional security.'" With respect to the second shock, the Court held that "[i]t seems to us totally unreasonable to expect that a man who is lying on the floor immobilized—and incontinent—following a taser shock should pep up, roll over, and submit to handcuffing within eight seconds." The Court further explained that the eight-second delay between the first and second taser shock further demonstrated the unreasonableness of the use of force: "in eight seconds, we believe, any reasonable officer would have concluded that a detainee who lay inert on the floor, having soiled himself, was no longer putting up a fight." Thus, **the Court concluded that it was**

"excessive to tase for a second time a man who, as a result of an initial shock, is lying motionless on the floor and has wet himself, and who presented only a minimal threat to begin with." The Court further held that this law was clearly established at the time the force was used. As such, the Court upheld the lower Court's conclusion that Dukuzumuremyi was not entitled to qualified immunity. *Piazza v. Jefferson County*, No, 18-10487, 2019 WL 2049785 (11th Cir., May 9, 2019).

SEARCH AND SEIZURE: WHEN IS PROPERTY ABANDONED?

In October of 2016, Homeland Security Investigation Special Agents were investigating James Robert Gregg in connection with his potential involvement in an internet based application used for sharing and viewing child pornography. During the course of the investigation, the agents had spoken to Gregg and his girlfriend, Allison Anderson, at her residence. Anderson later spoke with the agents and explained that Gregg had moved out of the residence "several weeks earlier, leaving behind many belongings, including" an old, broken cell phone, and a tablet. Anderson consented to the agents' search and seizure of the electronics. Gregg was later indicted for receiving and possessing child pornography based in part upon evidence found on the recovered cell phone. Anderson's attorney moved to suppress the cell phone evidence, arguing that the agents had violated Gregg's Fourth Amendment rights by searching it without a warrant and without his consent.

Anderson testified in the suppression hearing that "[w]hen they lived together, Mr. Gregg had never prohibited her from using his phone or said anything that made her believe she could not use it, although she never used the phone. When the phone broke, Mr. Gregg obtained a new one and placed the broken phone in his bedside drawer." Anderson later demanded Gregg move out and leave his key, at which point he "packed a small duffel bag of his belongings and left, taking his new cell phone but leaving the broken one in the bedside drawer." Anderson also testified that, after leaving, Gregg did not attempt to retrieve the items or ask her to return them. Although she asked him to retrieve the rest of his things, he did not do so until November, at which point she had already consented to the agents' search and seizure of the phone.

Based upon this evidence, the district court held that Gregg had abandoned the cell phone, and therefore did not have a reasonable expectation of privacy in its contents and could not challenge the search. Gregg was then convicted and appealed his conviction to the Eleventh Circuit, arguing in part that the cell phone evidence should have been excluded.

The Eleventh Circuit held that, although it was a close case, the district court's ruling was correct. The Court explained that **while "Gregg's devices were left in a known location and in the control of a person with whom he could readily communicate… Gregg did not take advantage of any opportunity to retrieve the devices, although it would have been relatively easy to do so." Moreover, the Court held, while Gregg and Anderson may have had an *initial* understanding that he had not fully abandoned the property, he took no steps for weeks to retrieve it, despite prompting from Anderson to do so. Under the circumstances, the Court held, "[e]ven if Mr. Gregg possessed an initial subjective belief that he had not abandoned his property, his subsequent actions were consistent with abandonment."** As such, he could not challenge the search and seizure and his conviction was proper. *United States v. Gregg*, No. 18-12295, 2019 WL 2061918 (11th Cir., May 9, 2019).

ALS REMINDER

All DPS members should now have a copy of the new lime green Georgia Implied Consent Notice printed by the Department of Driver Services this month. If you have not received the new card, please contact your supervisor.

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