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11th Circuit Court of Appeals

EXIGENT CIRCUMSTANCES REQUIRED FOR SEIZURE ON CURTILEGE OF HOME

On the night of October 24, 2015, a hunter in Pickens County, Georgia, called 911 to report that he had been threatened with bodily harm by a resident who claimed that the hunter was on his property. The hunter left the area and was not in any immediate danger. Several Pickens County Sheriff's Deputies responded to the call.

The deputies made their way to the property in question, which contained a cabin and a main house "enclosed in a fence with a closed gate that blocked the driveway." There, they spoke with Stan O'Kelley outside the gate, who "informed them that the 911 call was about his stepson Harley and that Harley was armed. The deputies sent Mr. O'Kelley to a neighbor's house." Shortly thereafter, Harley, "shirtless and armed with a pistol in a chest holster, approached the gate from the cabin with a flashlight talking loudly about trespassing." The deputies drew their guns and ordered Harley to put his hands up and his gun down. Harley stated that he had "already put the gun down" and asked the deputies why they were "trying to trespass," to which one deputy responded, "We're not trespassing; we're cops."

Over the course of approximately 30 minutes, the deputies continued in a verbal standoff with Harley. The deputies continue to order Harley to put his gun down while Harley, with his gun still in a chest holster and on his property, stated he "simply wanted the officers to keep trespassers away from his property. Harley was distressed and perceived the officers as threatening him. Several times, he told them to 'go ahead and shoot me.' The deputies repeatedly assured Harley they would not shoot him." At one point, Harley retreated to his cabin to get a drink of water. While he was away, two deputies – including Deputy Travis Curran, armed with less-than-lethal shotgun – "crossed the fence into the property and took cover in order to 'try to get a better position' for a shot on Harley."

Harley returned and the standoff continued with Harley's gun remaining in its holster. Eventually, Harley stated that he was tired and wanted to go to bed. One of the deputies, however, wanting to draw Harley closer to a spot where Deputy Curran could get a good shot, urged Harley to come closer to the fence to talk. Harley came closer to the fence and talked to the deputy for some time but refused to remove his gun from its holster and put it on the ground. Eventually, "Deputy Curran fired three beanbag rounds from his shotgun. At least one round struck Harley and knocked him down. Harley drew his pistol and returned fire. The other officers opened fire, killing Harley."

Harley's mother later filed suit against the responding law enforcement officers and sheriff's office on his behalf, alleging in part that the deputies' actions amounted to an unlawful seizure of Harley "within the curtilage of his home, in violation of the Fourth Amendment." The defendant officers moved to dismiss, arguing in part that the seizure of Harley was justified by probably cause and that a warrant was not necessary for the seizure because of exigent circumstances. The U.S. District Court for the Northern District of Georgia granted the defendants' motion to dismiss, and Harley appealed to the Eleventh Circuit.

The Court first explained that the protection afforded to homes under the Fourth Amendment "extends to 'the area immediately surrounding and associated with the home' – what courts refer to as the curtilage." Even when probable cause for a search exists, "searches and seizures within a home or its curtilage and without a warrant are presumptively

unreasonable." Such searches and seizures are constitutional only if justified by an exception to the warrant requirement, such as exigent circumstances.

In this case, the Court explained that Harley was seized within the curtilage of his home and that deputies entered the curtilage without a warrant. The Court held that this was an unlawful seizure because "[e]ven assuming probable cause to arrest existed, no exception to the warrant requirement applied on the facts alleged." The Court explained that **exigent circumstances did not exist because "no reasonable officer would believe that Harley's conduct presented in *imminent* risk of serious injury to the Deputies or others. By the time the officers arrived on the scene, the events that gave rise to the 911 call by the hunter were complete, the hunters were safely away from the property, and Harley was in his cabin. There had been no report of gunshots, only a verbal and conditional threat of bodily harm against a group of alleged trespassers who were no longer in the area."** Moreover, exigent circumstances were not created during the encounter. **"The mere presence of Harley's unconcealed gun did not give rise to exigent circumstances… and no facts alleged… suggest that the Deputies had reason to believe that Harley's possession of the gun was unreasonably dangerous or even unlawful." Harley's conduct, while distressed, was not violent or threatening, and he repeatedly informed the Deputies that he only wanted to go to sleep. Harley's failure to comply with the Deputy's commands to put the gun down also did not create an exigency, because the deputies had no legal authority to seize Harley under the circumstances.** As such, the Court concluded that the deputies' actions as alleged could amount to an unlawful seizure, and therefore their motion was denied. *O'Kelley v. Craig*, No. 18-14512, 2019 WL 3202928 (11th Cir. July 16, 2019).

SEARCH WARRANT – PARTICULARITY AND PROBABLE CAUSE REQUIREMENTS

Police officers in the Garden City, Georgia, area investigating a murder obtained probable cause to believe that the murder weapon, a – .22 caliber pistol – could be found at the residence of Pablo Rangel, located at 275 Milton Rahn Road in Rincon, Georgia. A second suspect, Refugio Ramirez, also lived in a trailer on this property and was known to possess a .22 caliber pistol. A detective applied for a received a warrant to search 275 Milton Rahn Road. The warrant stated that that the property was "owned by Pablo Rangel" and spanned 26.65 acres. It also stated that the property "has multiple dwellings that can not be accessed without driving on a private drive that dead ends on this land," and went on to describe each of the trailers and structures on the property by color and location.

Officers executed the search warrant and, in doing so, "searched several residences and vehicles on the property," including the residence of Hipolito Martinez-Martinez, which was one of the trailers described in the search warrant. At the time of the search, officers were unaware that, while Martinez's trailer was on the property described by the search warrant, the trailer had a separate address of 135 Milton Rahn Road, not 275 Milton Rahn Road. Inside that trailer officers found a 12-gague shotgun. Martinez was later indicted for being an illegal alien in possession of a firearm. Martinez moved to suppress the shotgun from evidence, arguing that "there was no probable cause to search his personal trailer" and that the warrant did not describe the premises to be searched with the degree of particularity required by the Fourth Amendment. Martinez's motion was denied by the U.S. District Court for the Southern District of Georgia and Martinez was later convicted, but he appealed his conviction to the Eleventh Circuit, arguing that his motion should have been granted.

The Eleventh Circuit first addressed Martinez's particularity argument, stating that "[t]he Fourth Amendment requires 'limiting the authorization to search to the specific areas and things for which there is probable cause to search.'" The Court held that **the warrant met this requirement because it "listed the dwellings on the Rangel property – including Martinez's – with clear physical descriptions that would enable the searchers 'with reasonable effort to ascertain and identify the place intended.'" The fact that the warrant did not reference the actual address of**

the Martinez dwelling did not invalidate this requirement because "the particularity standard 'does not necessitate technical perfection.'"

The Court further explained that the confusion as to the addresses was reasonable in this case and that, under the circumstances, officers had probable cause to search Martinez's residence despite the fact that Martinez was not the subject of the search. The Court explained that officers "reasonably believed that evidence of [the] murder could exist in any structure on the Rangel property." The search warrant affidavit demonstrated that "both Rangel and Ramirez were suspected in the murder, that both men lived on the Rangel property," and that Ramirez could be in possession of the murder weapon. Further, the detective that obtained the warrant did not know which structures on the property belonged to Rangel or Ramirez, but was warned by local law enforcement that "if he drove on to the property in a preliminary attempt to narrow the investigation, he would be seen, and evidence might be destroyed." **Given these facts, "there was a 'substantial basis' for the local magistrate to conclude that probable cause existed… that… evidence of a crime, such as the murder weapon, would be found somewhere on the entire Rangel property." As such, the search of Martinez's dwelling was justified and his motion to suppress was properly denied.** *U.S. v. Martinez-Martinez*, No. 18-12602, 2019 WL 2713287 (11th Cir. June 28, 2019)

FALSE ARREST – PROBABLE CAUSE FOR DISORDERLY CONDUCT CHARGE

On June 1, 2014, Atlanta Police Officer Stephenson Camille was on foot patrol in a public park. Caroline Croland was also present in the park with a volunteer group distributing food to the homeless. Croland was also a member of "Cop Watch of East Atlanta," a police accountability group that often filmed police officers in public. Officer Camille remained in the area where the volunteer group was operating for approximately an hour and a half, and, during that time, was filmed by several volunteers. At one point, a volunteer approached Officer Camille and "asked [him] to leave the park" because he was not wanted there. Officer Camille responded that he had a right to be in the park and refused to leave. The volunteer continued to make "mocking and insulting comments to Officer Camille and to ask [him] to leave the area," but Officer Camille generally ignored the comments, only responding to provide his name and badge number.

Officer Camille continued patrolling the area, conversing casually and laughing with others in the area. Eventually, he returned to the area where the volunteers were located. Croland remarked to another volunteer that she was angry that Officer Camille was present. The other volunteer encouraged Croland to start a chant to "fucking make [Officer Camille] understand that he's a piece of shit," but Croland responded, "No, nothing could make him understand that." Croland then said loudly, "[i]t's like we can't like… share a meal with people every Sunday without state harassment!" Officer Camille then turned and began to leave the area, at which point Croland began yelling with increasing volume, "Why?! Why?! WHY?! WHY?! WHY?! WHY?!" and finally demanded "ANSWER ME!!" As Croland yelled at Officer Camille, "one or two people looked up, but no volunteers or members of the public reacted visibly in any other way to Plaintiff's outburst. Nor did [Croland] appear to move physically toward Officer Camille."

Officer Camille, in response to Croland's yelling, "turned to face [Croland], walked slowly about 11 steps toward [Croland], and told [Croland] that she was under arrest for disorderly conduct in the park." Croland was subsequently charged for disorderly conduct under Atlanta City Code § 106-81(3), "which makes it unlawful to cause, provoke, or engage in a fight or riotous conduct."

Croland filed suit against Officer Camille in the U.S. District Court for the Northern District of Georgia "alleging that she was arrested without probable cause and in retaliation for her protected speech" in violation of her First and Fourth Amendment rights. Officer Camille filed for summary judgment, arguing that he had not violated Croland's rights and that, even if he had, those rights were not clearly established and therefore he was entitled to qualified immunity. The

district court denied Officer Camille's motion and she appealed the ruling to the Eleventh Circuit.

The Eleventh Circuit stated that "a constitutional arrest must be based on a reasonable belief that a crime has occurred rather than simply unwanted conduct." In this case, Atlanta's disorderly conduct statute made it unlawful, "for a person to 'act in a violent or tumultuous manner toward another whereby any person is placed in fear of the safety of such person's life, limb, or health;' or to 'cause, provoke, or engage in any fight, brawl, or riotous conduct so as to endanger the life, limb, health, or property of another.'" Croland's conduct, by comparison, "consisted of yelling at Officer Camille in front of a group of people. [Croland] made no physical gestures with her hands and took no steps toward Officer Camille, who was then about 11 steps away. Although a couple of other volunteers had objected verbally to Officer Camille's presence in the park, those volunteers had also made no physical threats or physically aggressive movements. The video also shows that the overall demeanor of the crowd was calm."

The Court held that **"an objective officer – under the circumstances – could not have believed reasonably that Plaintiff was engaged in (or about to engage in) conduct that" violated Atlanta's disorderly conduct statute, Georgia's disorderly conduct statute (O.C.G.A. § 16-11-39) or inciting to riot statute (O.C.G.A. § 16-11-31). The Court further held that "[a]t the time of Plaintiff's arrest in 2014, the law was clear that yelling about police harassment in front of a crowd – by itself – was not enough to give rise to probable or arguable probable cause to arrest."** As such, Officer Camille was not entitled to qualified immunity and her motion for summary judgment was properly denied. *Croland v. City of Atlanta*, No. 19-10312, 2019 WL 3244983 (July 19, 2019)

Georgia Court of Appeals

DUI ARREST – PROBABLE CAUSE / ADMINISTRATION OF HGN

At approximately 2:30 A.M. on November 25, 2017, a Georgia State Patrol Trooper observed a vehicle driving without its headlights on in downtown Macon. The trooper performed a traffic stop on the vehicle, which was driven by Antonio Culler. Culler immediately pulled his vehicle off the roadway and into a parking lot. Culler then "exited the vehicle and waited for the [trooper] to approach him." In the ensuing interaction, Culler was cooperative, communicated clearly, and was easy to understand. He "responded appropriately to all questions and directions and exhibited no problems with his balance." Moreover, the trooper later testified that "the traffic stop was based solely on the lack of headlights, and not on Culler's operation of the vehicle."

Nevertheless, the trooper observed that Culler's eyes appeared bloodshot and watery and that his speech was slurred. The trooper also detected a strong odor of an alcoholic beverage emanating from Culler's person. Culler admitted that "he had consumed 2 to 3 mixed drinks over the course of the evening, and that he had last consumed alcohol approximately 40 minutes earlier." Culler then agreed to perform standardized field sobriety tests. The trooper later testified that Culler exhibited six out of six clues of impairment on the HGN test, one clue on the walk-and-turn test, and zero clues on the one-leg stand test. The trooper then performed a portable breath test on Culler, which tested positive for the presence of alcohol. The trooper then placed Culler under arrest for DUI less safe.

During his subsequent prosecution, Culler moved to suppress the evidence against him, arguing to the court that the trooper did not have probable cause to place him under arrest for DUI less safe. The trial court granted Culler's motion, finding that while "the evidence provided the [trooper] with a reasonable basis for believing the Culler was operating the care after having consumed alcohol," it did not demonstrate that

the trooper had probable cause to believe that Culler was *impaired*. Specifically, the trial court "declined to give any weight to Culler's failure to turn on his headlights, noting that the video showed that the streets were well lit, such that the absence of headlights would not have been readily apparent to a driver. Additionally, the court rejected Burns's testimony that Culler was slurring his speech, explaining that the video showed… that Culler 'spoke very clearly,' 'asked appropriate questions to clarify' the officer's directions to him, and 'provided prompt, clear responses when questioned.' The trial court further found that Culler exhibited no [other] outward signs of being an impaired driver." Finally, the trial court also rejected the results of the HGN test, observing that the video demonstrated that the trooper performed the "lack of smooth pursuit" phase of the test more quickly than the scientifically accepted pace of "two seconds in and two seconds out." As such, "the court concluded that the only credible evidence that Culler was impaired were the presence of alcohol and Culler's one positive clue on the walk-and-turn test." In light of the evidence that Culler was *not* impaired, the trial court found that this did not support a reasonable probability that Culler was driving while impaired. The prosecution appealed this ruling to the Georgia Court of Appeals.

The Court of Appeals found that the trial court improperly excluded the results of the HGN test for two reasons. First, there was not sufficient testimony at trial regarding the proper administration of the HGN test and what the effect of failing to comply with the required timing of the "lack of smooth pursuit" phase would cause. Without such testimony, the court could not discern whether the trooper failed to comply with the scientific guidelines or, if he did, whether his deviation would cause a "false positive" result. Second, the trial court did not state and the record did not reveal whether a failure to properly administer the "lack of smooth pursuit" phase of the test would invalidate the remaining phases or observation of clues of impairment during those phases. As such, the prosecution validly argued that four of the six clues observed by the trooper may have still been valid even if the clues observed on the "lack of smooth pursuit" phase could not be considered. As such, The Court of Appeals ordered the case be remanded to the trial court to make a ruling on these issues.

However, the Court of Appeals held that ***if*** the trial court were to determine that the HGN test was improperly administered and could not be considered in a probable cause assessment, then it's ruling that the trooper "lacked probable cause to arrest Culler for DUI less safe" was valid and should be upheld. Specifically, the Court of Appeals explained that the trial court "properly considered the totality of the circumstances in assessing probable cause" and that its conclusion that probable cause did not exist would only need to be revisited if it determined that some portion of the HGN test was sufficiently reliable to be included in evidence. As such, the Court remanded the case to the trial court for further proceedings. *State v. Culler*, No. A19A0244, 2019 WL 2619271 (Ga. Ct. App. June 25, 2019)

ALS REMINDER

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