DPS Legal Review

August 2019 | Volume 18 No. 8

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

11th Circuit Court of Appeals

ARREST – PROBABLE CAUSE BASED UPON CONFLICTING ACCOUNTS OF INCIDENT

Palm Beach County Deputies were called to respond to the home of Lori Huebner in reference to a dispute that Huebner was having with her sister, Kathleen Dobin. Dobin reported that, during the course of her argument with Huebner, Huebner had pulled her hair and punched her in the face while Dobin was in her car. Dobin also alleged that Huebner's husband threw rocks at her car. A deputy inspected Dobin and her car but found no evidence of injuries to Dobin or damage to her car.

The deputy then went to Huebner and placed her under arrest. Huebner protested "that she was the one who had called 911, that she had 'a cut on her arm where Dobin scratched her,' and that" her two daughters were witnesses to the incident. The deputy "declined to speak with Huebner's 'witnesses'" and, "instead… handcuffed her and 'tried to pull her rings off her finger.'"

Huebner alleged that the handcuffs were too tight and that the deputy's efforts to pull her rings off were painful. Huebner was transported to a police sub-station where the deputy completed initial paperwork. Because the sub-station did not have a holding area, the deputy left Huebner in the car handcuffed behind her back for one and a half to two hours. Although the deputy explained how to sit in the patrol car to minimize the discomfort of being handcuffed, Huebner stated that this position was also painful.

Huebner later filed suit against the deputy in federal court, alleging that he violated her rights under the Fourth Amendment by arresting her without probable cause and that the force used in handcuffing her was excessive. The deputy moved for summary judgment, arguing that, even assuming all of Huebner's allegations were true, he had not violated her rights. The district court granted the deputy's motion, and Huebner appealed the ruling to the Eleventh Circuit.

The Eleventh Circuit first considered whether the deputy had sufficient probable cause to arrest Huebner. Under Florida law, a battery occurs when "a person… [a]ctually and intentionally touches or strikes another person against the will of the other; or… [i]ntentionally causes bodily harm to another person." Like the offense of simple battery in Georgia, battery in Florida can occur with minimal contact and does *not* require physical injury. The Eleventh Circuit held that the Deputy had sufficient probable cause to arrest Huebner based upon "Dobin's 911 call identifying Huebner as her assailant" and "Dobin's sworn statement, in which she alleged that Huebner had 'pulled her hair' and 'punched her in the face.'" **Moreover, the court held, neither the lack of physical evidence nor the deputy's failure to investigate further established that he lacked probable cause. The Court explained that physical evidence of an injury was not a required element of battery under Florida law. With respect to the deputy's investigation, the Court held that no further investigation was required once the existence of probable cause was established.**

Finally, the Eleventh Circuit considered whether the deputy's use of force in executing the arrest was excessive. The Court held that **the deputy "employed a common handcuffing technique, and he attempted (to no avail) to tell Huebner how to get more comfortable in the patrol car. The force that [the deputy] used in arresting Huebner was not constitutionally excessive."** *Huebner v. Bradshaw*, No. 18-12093, 2019 WL 3948983 (11th Cir. Aug. 22, 2019).

USE OF DEADLY FORCE AUTHORIZED DUE TO POSSIBLE PRESENCE OF WEAPON

On February 11, 2015, law enforcement officers in Tallapoosa County, Alabama, responded to a call from Benny Welch, who reported that his uncle Fletcher Ray Stewart, "was wandering on the road 'raising all kind of Cain, and he's got a pistol in his pocket.'" Tallapoosa County Sheriff's Deputy Bryan Edwards was the first to respond, followed by Dadeville Police Officers Rico Hardnett and Christopher Fenn. Deputy Edwards "had prior experiencing dealing with Stewart and had "been able to diffuse any problem by merely talking to Stewart, or by giving him snacks or small change." Edwards, also knew, however, that Stewart had previously used or threatened violence against "others, including police officers, with weapons such as a taser, bicycle chain, and large rock… Edwards also knew that Stewart had at various prior times been in possession of a knife and brass knuckles."

As Deputy Edwards approached Stewart, Stewart ran from the road into the woods. "Edwards chased Stewart and commanded him to stop, which eventually he did. At that point, the other two officers had arrived at the scene with their guns drawn. Edwards shouted commands to Stewart, alternating between ordering him to keep his hands up and asking him where he had placed the gun. Instead of following either of Edwards's commands, Stewart moved his hands toward his back waistband, and Edwards opened fire. Two rounds struck Stewart, killing him." Nearly simultaneously, Stewart drew a pistol-shaped object that was later determined to be a BB gun that resembled a real pistol. Although Edwards was equipped with a body-worn camera that captures the incident, the court was unable to tell from the footage whether Stewart was shot before or after Stewart appeared to draw a weapon.

Stewart's estate filed suit against Edwards and the other responding officers, alleging that the shooting constituted excessive use of force in violation of Stewart's Fourth Amendment rights. Deputy Edwards filed for summary judgment, arguing that he did not violate Stewart's constitutional rights and that he was entitled to qualified immunity. The district court granted his motion and Stewart's estate appealed to the Eleventh Circuit.

The Court first explained that, in assessing a motion for summary judgment, the Court was required to assume that the facts alleged by Stewart's estate were all true. Thus, in this case, the Court was required to assume that Stewart had *not* drawn a weapon at the time he was shot, but rather had only put his hands towards his rear waistband. Nevertheless, the Court explained "that Edwards knew Stewart to be mentally unbalanced, was reported to be armed, and was behaving in an erratic and potentially dangerous manner. The record also clearly demonstrates that upon seeing Edwards, Stewart fled. When Stewart stopped running, Edwards did not see a gun. Thus, Edwards reasonably could have concluded that the gun was concealed on Stewart's person." When Deputy Edwards ordered Stewart to show his hands and turn around, Stewart disobeyed. When Deputy "Edwards asked Stewart where the pistol was, Stewart did not respond; instead, Stewart reached his right hand behind his back into his waistband." Stewart was then ordered – at gunpoint – to show his hands, but instead "kept his right hand behind his back and refused to show his hands." The Court held that "**[o]n this record, where Edwards had significant personal knowledge of Stewart's history with violence, as well as of his mental unpredictability, we agree with the district court's finding that at this point, whether Edwards saw the gun or not, he had probable cause to believe that Stewart posed a danger to himself and to the officers on the scene." As such, "[h]e was not required to wait any longer before using deadly force," and his use of deadly force was constitutional under the Fourth Amendment.** *Davis v. Edwards,* No. 18-11695, 2019 WL 3814435 (11th Cir. Aug. 14, 2019).

Georgia Court of Appeals

TRAFFIC STOP – WHEN PROLONGED STOP MAY BE JUSTIFIED

On May 26, 2015, an agent with an Atlanta-area drug task force was performing surveillance in a Home

Depot parking lot in which he had reason to believe methamphetamine transactions were taking place. The agent observed two individuals he suspected of being involved in these transactions meet outside their vehicles. One of the individuals, Randall Hall, gave the other a yellow bag, and received in return a "bulky, white plastic bag," which he placed in his truck before departing.

The agent, believing a drug transaction had taken place, followed Hall's vehicle to a Chick-fil-A. Hall's vehicle entered the drive-thru lane, and the agent then noticed two Georgia State Patrol vehicles in the parking lot. The agent entered the Chick-fil-A, located the Troopers, identified himself, and "explained to the troopers his belief that a driver currently waiting in the drive-thru was in possession of a significant amount of narcotics." The agent identified Hall's vehicle and asked the troopers if they could follow and perform a traffic stop on the vehicle, and the troopers agreed.

The troopers were able to follow Hall's vehicle out of the parking lot and performed a traffic stop after observing Hall fail to maintain his lane and change lanes without signaling. One of the troopers then had a short conversation with Hall, during which he seemed nervous and repeatedly reached into his pockets. "[T]he trooper asked Hall if he could pat him down for weapons. Hall consented, resulting in the trooper discovering that he was carrying over $1,000." The trooper also asked Hall for consent to search his vehicle, but Hall refused.

The trooper then returned to his vehicle to perform a records and warrant check, and requested a K-9 officer to the scene. The trooper then discovered that he could not establish via GCIC whether the vehicle was properly insured, and thus asked Hall to retrieve "paper copies of his vehicle's registration and insurance." As Hall did so, the trooper followed him and noticed the odor of burnt marijuana emanating from the vehicle. The trooper then returned to his vehicle to begin entering the information from the documents. At this time, approximately 15 minutes after the traffic stop began, a K-9 officer and his dog arrived. The dog performed an open-air sniff of the vehicle, during which the dog alerted to the presence of narcotics. Based upon this evidence, the trooper searched Hall's vehicle and discovered "a large white plastic bag" containing methamphetamine, as well as a small amount of marijuana.

Hall was charged with trafficking in methamphetamine and misdemeanor possession of marijuana. During the course of his prosecution, Hall argued that the evidence discovered in his vehicle should be excluded because "the state trooper unlawfully prolonged the stop to allow for the arrival of the K-9 officer and his dog." The trial court rejected this argument and Hall was convicted, but he appealed his conviction to the Georgia Court of Appeals, arguing that the trial court was incorrect.

The Court of Appeals explained that it was undisputed that the initial traffic stop was valid and based upon reasonable suspicion, in general "an officer 'cannot continue to detain an individual without reasonable articulable suspicion'" after the officer has accomplished "the tasks related to the investigation of the traffic violation and processing of the citation." Here, however, the Court explained that "the trooper had reasonable, articulable suspicion that Hall was involved in criminal activity—even independent of the observed traffic offenses—upon initiating the traffic stop." Specifically, the trooper was told by another law enforcement officer – the drug task force agent – that Hall had recently engaged in an illegal drug transaction. **The "collective knowledge" provided by the task force agent justified the prolonging of the stop to await a K-9 officer. Moreover, the Court explained that the trooper's detecting the odor of marijuana while conducting aspects of the stop related to the traffic infraction provided further reasonable articulable suspicion to justify the delay.** As such, the trial court's ruling was proper and upheld. *Hall v. State*, No. A19A1444, 2019 WL 3980525 (Ga. Ct. App. Aug. 23, 2019).

DUI ARREST – *MIRANDA* WARNING NOT REQUIRED FOR BREATH ALCOHOL TEST

In March of 2014, a concerned citizen contacted 911 regarding an erratic driver. A police officer eventually located the erratic driver, later identified as

Sheikh Abusai Fofanah, and performed a traffic stop. During the subsequent investigation, the officer obtained probable cause to place the driver under arrest for DUI. The officer then read Fofanah the appropriate implied consent notice and requested that Fofanah submit to a state-administered chemical breath test. Fofanah agreed and the subsequent test revealed a BAC of 0.216 grams.

Fofanah was subsequently charged with DUI per se and DUI less safe. During his prosecution, he moved to suppress the results of the breath test, arguing in part that "he did not validly consent to the breath test because the officers failed to give him a *Miranda* warning." The trial court denied Fofanah's motion to suppress and he was then convicted. Fofanah then appealed his conviction, arguing in part that the trial court erred in deciding a *Miranda* warning was not required prior to his consent to the breath test.

The Georgia Court of Appeals first explained that, under the Fifth Amendment to the U.S. Constitution, "'[a] defendant's verbal consent to take a breath test and the results obtained from such a test… do not implicate the right against self-incrimination under the Fifth Amendment…' Accordingly, because 'a defendant's Fifth Amendment right against self-incrimination is not implicated by a State-administered breath test,' '**the absence of *Miranda* warnings does not require suppression of Fofanah's consent to the breath test under federal law.**" The Court further explained that "our [Georgia] Supreme Court recently held that, based on the history and context of Georgia constitutional provisions, **neither Georgia law nor the Georgia Constitution requires that a suspect in custody receive a *Miranda* warning before being asked if he or she will submit to a breath test**… **Thus, the officers were not required to give Fofanah a Miranda warning before asking him if he would submit to the breath test, and the trial court did not err in that regard."** *Fofanah v. State*, No. A19A0787, 2019 WL 3820274 (Ga. Ct. App. Aug. 15, 2019).

ALS REMINDER

A written continuance motion must be filed it you are unavailable for an ALS Hearing. The ALS Court does not accept continuance requests by telephone or in the body of an e-mail. The continuance request must be in writing and emailed to the Court as an e-mail attachment or faxed to the Court.

Published with the approval of
Colonel Mark W. McDonough.

Legal Services
Joan Crumpler, Director
Zack Howard, Deputy Director
Dee Brophy, ALS Attorney

Send questions/comments to zhoward@gsp.net