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11th Circuit Court of Appeals

ARREST INSIDE HOME – WARRANT REQUIRED

Santa Rosa, Florida, County Sheriff's Deputies were dispatched to respond to a call from a woman, Sherri Rolinger, who reported that her estranged husband, Kenneth Bailey, had been harassing her at their marital home. Bailey had left the home and Rolinger left shortly afterwards, taking the couple's two-year-old son to her mother's home, where she placed the call to 911. One of the responding deputies, Deputy Andrew Magdalany went to Rolinger's location to discuss the matter with her, while another, Deputy Shawn Swindell, went to Bailey's parents' home, where Bailey was staying. While en route, Deputy Swindell called Magdalany, who explained "that in the three months since Bailey's separation from his wife, he had visited the marital residence repeatedly, moved items around in the house, and installed cameras without his wife's knowledge. Magdalany also explained that Rolinger was 'fearful' and believed that her husband had 'snapped.'" Magdalany stated, however, "that he had not determined that Bailey had committed any crime."

After obtaining this information, Deputy Swindell approached Bailey's parents' home and knocked on the door. Eventually, Bailey, his brother, and his mother all stepped out onto the porch of the home. Deputy Swindell asked Bailey to speak privately with him at his patrol car, but Bailey refused. He asked Bailey's brother and mother to step back inside, but they also refused. After some brief conversation and after Deputy Swindell unsuccessfully repeated these demands, "Bailey then announced that he was heading inside and turned back into the house." Deputy Swindell, in response, "charged after him and 'tackled him into the living room,' simultaneously declaring, 'I am going to tase you.'" He then placed Bailey under arrest. At the time that Deputy Swindell made contact with Bailey, Bailey was across the threshold of the home and entirely inside of it. Deputy Swindell had neither an arrest warrant or a search warrant at the time of this incident.

Bailey later filed suit against Deputy Swindell alleging that he was falsely arrested. Bailey argued that Deputy Swindell violated his Fourth Amendment rights both because he was arrested without probable cause and because he was arrested in his home without a warrant. The U.S. District Court for the Northern District of Florida rejected both arguments and held that Deputy Swindell was entitled to summary judgment. Bailey appealed this decision to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit explained that regardless of whether Deputy Swindell had probable cause for the arrest, he was not entitled to summary judgment because, assuming the facts were true as alleged, a warrant was required to effectuate the arrest in this case. The Court explained that "while police don't need a warrant to make an arrest in a public place, the Fourth Amendment 'prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to' arrest him" absent any sort of exigent circumstances. The court went on to explain that **"[u]nless a warrant is obtained or an exigency exists, 'any physical invasion of the structure of the home, by even a fraction of an inch, is too much.'"**

Finally, the Court dismissed the argument that exigent circumstances such as hot pursuit were present in this case. While the Court has allowed a warrantless arrest to *conclude* in a home when an arrest *began* in a public place and the suspect ran into the home, that circumstance was not applicable here. **"Swindell gave no indication that he intended to arrest Bailey before**

he threatened to tase him and simultaneously tackled him from behind. Taken in the light most favorable to Bailey, the facts demonstrate that the threat and tackle occurred only *after* Bailey had retreated entirely into the house, so 'hot pursuit' provides no justification for the warrantless entry here." Based upon these conclusions, the Eleventh Circuit reversed the district court's ruling that Deputy Swindell was entitled to summary judgment. *Bailey v. Swindell*, No. 18-13572, 2019 WL 5204617 (11th Cir., Oct. 16, 2019)

REASONABLE ARTICULABLE SUSPICION – TERRY PAT-DOWN FOR WEAPONS

Santa Rosa County, Florida, Deputy Sheriff Chad Floyd was on duty in a patrol vehicle when he observed a pickup truck fail to stop at two different stop signs. Deputy Floyd initiated a traffic stop and the vehicle pulled over. Deputy Floyd approached the truck and observed a driver, Antonio Davis, and a passenger, Michael Bishop. Earlier in the day, Floyd had arrested a woman for possession of heroin and drug paraphernalia who "told Floyd that 'she was headed to Michael Bishop's house.'" Deputy Floyd also knew Davis to be a narcotics violator. Based upon these facts, Deputy Floyd requested a K-9 unit respond to the scene.

Shortly thereafter, a K-9 handler, Deputy Danny Miller, and another Deputy, Richard Dunsford, arrived to assist. Deputy Dunsford – a former corrections officer – recognized both Davis and Bishop as former inmates. Deputy Dunsford asked Davis to exit the truck and Davis complied. Dunsford then began to perform a pat-down search of Davis, at which point Bishop stated that Dunsford had "no right to stop us" or "to ask us to get out of the vehicle." Deputy Dunsford observed "that Bishop was agitated, 'fidgeting around,' 'moving around in the seat,' and 'very defensive.' Dunsford then asked Bishop to exit the truck, and Bishop adamantly refused," stating again that the Deputies did not have the right to force him to exit the vehicle. "Based on Bishop's general behavior and reluctance to exit the truck, Dunsford became concerned that Bishop 'might be hiding a firearm or a weapon or something on his person.' After multiple requests to exit the truck, Bishop complied."

Deputy Dunsford then "performed a pat-down search of Bishop's outer clothing." During the course of this pat-down, Deputy Dunsford discovered a magazine and a matching firearm on Bishop's person. It was later discovered that the firearm was stolen.

Bishop was later charged with possession of a firearm and ammunition as a convicted felon. During his prosecution, he moved to exclude the evidence discovered during the pat-down search, arguing "that Dunsford lacked any reasonable, articulable suspicion that he was armed and dangerous to justify the pat-down search." The U.S. District Court for the Northern District of Florida denied this motion, stating that "there was 'overwhelming' evidence that the pat-down search was supported by reasonable suspicion." Bishop was later convicted, but he appealed his conviction to the Eleventh Circuit, arguing in part that his motion to suppress was improperly denied.

The Eleventh Circuit first confirmed that during the course of a traffic stop, "[o]nce a vehicle is lawfully stopped, an officer may order the occupants to exit the vehicle." The Court then explained that "[i]f the officer has a reasonable suspicion that the person may be armed and dangerous, the officer is then permitted to conduct a limited search of an occupant's outer clothing for weapons. Reasonable suspicion that an individual is armed and dangerous exists so long as 'a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'"

In this case, the Eleventh Circuit held that "**[v]iewed in totality, Bishop's known criminal history, non-compliance, argumentativeness, and nervous, agitated behavior following lawful orders to exit the truck would cause a reasonably prudent officer in the circumstances to believe that his safety or that of his fellow officers was in danger**." While any of these factors *alone* may not have justified the pat-down, together, they created reasonable articulable suspicion that Bishop may be armed. Moreover, **although there was no definitive evidence that Bishop was armed at the time of the pat-down, "[r]easonable suspicion is not concerned with 'hard certainties, but with probabilities' and law enforcement officers may rely on 'common sense**

conclusions.'" As such, the Court held that Bishop's motion was properly denied. *United States v. Bishop*, No. 17-15473, 2019 WL 5090019 (11th Cir., Oct. 11, 2019)

CONSENT TO ENTER HOME BASED UPON NON-VERBAL CONDUCT

During the course of investigating the suicide of a 12-year-old girl, Polk County, Florida, Sheriff's Deputies obtained evidence that led them to believe that the victim may have been harassed and bullied by a classmate identified in court proceedings as KCR. On October 14, 2013, one of the investigating deputies, Jonathan McKinney, attempted to convince KCR's mother to bring KCR "down to the sheriff's department for questioning. He did not tell her that he planned to arrest her daughter, though that was his plan." KCR's mother refused to bring her, and so, Deputy McKinney and other deputies later traveled to KCR's home to arrest her. Deputy McKinney did not obtain a warrant, although he admitted that he had time to obtain one. He stated that the deputies' "plan was to go to the house and ask permission to enter, and if that didn't work they would post a deputy at the front door while they went and obtained a warrant."

The deputies arrived in unmarked vehicles and wearing plainclothes, but also wore bulletproof vests with "SHERIFF" written on the front and were equipped with visible but holstered weapons. Deputy McKinney and several other deputies approached the front door of the home, knocked, and announced "Polk County Sheriff's Department." "KCR's father answered the door. McKinney told him they were there to arrest KCR." KCR's father asked the deputies to wait while he put up the family's dog. He then closed the door and went back into the house briefly. He then returned to the front door, opened it, and stepped back without saying anything. The deputies subsequently entered and placed KCR under arrest.

KCR was charged with aggravated stalking, but that charge was eventually dismissed. KCR subsequently filed suit against the involved deputies, alleging among other things that the warrantless arrest in her home violated her constitutional rights. KCR argued that her warrantless arrest was not justified because her father had not given actual consent to enter the home, but rather had been coerced. This question was eventually put before a jury, which concluded that KCR's father had, in fact, consented to allow the deputies into the home without being coerced. KCR then appealed this ruling to the Eleventh Circuit.

The Eleventh Circuit reviewed the law relating to consent as an exception to the Fourth Amendment warrant requirement, explaining that "the fact that a person answers a knock at the door doesn't mean he agrees to let the person who knocked enter." The Court went on to explain that "[c]onsent is not always to be inferred from the absence of an objection, although it is a factor to consider." Rather, "[a] factfinder must 'analyze all the circumstances' of an individual's action to determine whether in fact there was consent and 'whether in fact it was voluntary or coerced.'" Critically, the Court explained, "courts must not 'misinterpret acquiescence to an officer's demands as consent,' particularly when those demands are based upon authority the officer does not actually have. Thus, for instance, an officer cannot lie by telling a homeowner that he has a warrant to search a residence when he does not, but then argue that the homeowner consented to the search by allowing the officer in. Such consent is invalid because it is based on the coerced belief that the homeowner cannot refuse.

In this case, however, the Court found that the consent provided by KCR's father was *not* coerced. "[T]he deputies made no show of authority to coerce KCR's father into consenting to their entry. All of the deputies testified that they did not have their guns drawn. All of them testified that they didn't use or threaten to use any kind of force. And there is no evidence that any of them claimed to have a warrant." Furthermore, the Court explained "that **consent need not be verbal to be valid. Non-verbal cues can signal consent. And here, the evidence at trial showed that the combination of both verbal and non-verbal cues was sufficient for a jury to find that KCR's father consented to the officers entering his home."** The Court explained that given KCR's actions in putting the dog up after being told the deputies were there to arrest his

daughter, then returning, opening the door wide for them, and stepping out of the way could cause a jury to reasonably conclude "that KCR's father consented to the deputies' entry." As such, the Court found that the jury's conclusion was supported by the evidence, and the entry into KCR's home was based upon valid consent. *Gill v. Judd*, No. 17-14525, 2019 WL 5304078 (11th Cir., Oct. 21, 2019).

Supreme Court of Georgia

AIRBAG CONTROL MODULE – REMOVAL AND DATA RETRIEVAL IS A SEARCH

On December 15, 2014, the Henry County Police Department responded to a two-vehicle traffic accident between a Dodge Charger and a Chevrolet Corvette. While the driver of the Charger, Victor Mobley, survived, the driver and a passenger in the Corvette were both killed. Investigating officers initially believed that the driver of the Corvette was at fault. Before the vehicles were removed from the scene, however, "Sergeant David Gagnon – a supervisor in the Traffic Division… - directed officers to retrieve any available data from the airbag control modules (ACM) on the Charger and Corvette. Investigator Jason Hatcher entered the passenger compartments of both vehicles, attached a crash data retrieval (CDR) device to data ports in the cars, and used the CDR to download data from the ACMs." This data later revealed that Mobley was driving at "nearly 100 mph" just before the collision. The vehicles were then removed and stored at an impound lot as evidence.

The next day, Investigator Bryan Thornton was assigned to the team. He spoke with the responding officers and inspected the scene. Thornton was made aware that the ACM data had already been retrieved and that the data demonstrated "that the Charger had been traveling at an excessive rate of speed." Thornton "then applied for a warrant to search the Charger and Corvette and to physically remove and seize the ACMs from both vehicles." However, he "did not rely on the data [already obtained from the ACM] to establish probable cause for the seizure of the ACMs in the warrant affidavit. The warrant was issued and the ACMs were subsequently removed and seized.

Mobley was later charged with several crimes, including vehicular homicide, as a result of the incident. During his prosecution, Mobley moved to suppress the ACMs and the data obtained from them, arguing that the ACM data retrieval was a search and seizure under the Fourth Amendment that was not justified by either a warrant or an exception to the warrant requirement. The trial court, however, did not decide the issue, but rather rejected Mobley's motion by finding under the "inevitable discovery rule," the data retrieved from the ACM would have ultimately been admissible because of the warrant applied for and obtained by Investigator Thornton. Mobley was subsequently convicted and appealed his conviction to the Georgia Court of Appeals, arguing that his motion to suppress should have been granted. The Georgia Court of Appeals upheld the trial court's decision, and Mobley then sought review from the Georgia Supreme Court, which agreed to hear the case.

The Georgia Supreme Court explained that, in recent years, the deciding test for whether a government action constitutes a search or a seizure is whether the government has intruded "into a private sphere marked by a 'reasonable expectation of privacy.'" This is different, however, from the test that existed for many years prior, which was based upon whether the government action involved obtaining "information by **physically intruding** on a constitutionally protected area" (emphasis added). The Court explained that this "reasonable expectation of privacy" test has *added to* rather than *replaced* the "physical intrusion" test, and thus an act that violates *either* test should be considered a search. Thus, **the Court concluded that the retrieval of data from the ACM in this case constituted a search *regardless* of whether Mobley had a reasonable expectation of privacy in that data. The Court explained that the data retrieval required the officer to enter the passenger compartment of the vehicle and connect a device to the vehicle's data port, thereby physically intruding upon the vehicle, which is an area subject to constitutional protection.**

The Court went on to hold that the search in this case was unreasonable and unconstitutional because it was conducted without a warrant and was not justified by an exception to the warrant requirement. The automobile exception did not apply to this search

because the automobile in question was disabled and was not "readily mobile." The "exigent circumstances" exception did not apply because officers could not articulate any circumstances that existed that would require the search occur prior to a warrant being obtained. As such, the warrantless search was unconstitutional.

Finally, the Court held that the "inevitable discovery rule" did not apply in this case. The Court explained that for that rule to apply, "there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police **and were being actively pursued prior to the occurrence of the illegal conduct**" (emphasis added). **In this case, there was no question that Investigator Thornton did not begin to seek a warrant until *after* the data had already been retrieved from the ACM, and he was aware of the data retrieval when he began seeking a warrant. As such, the evidence could not be admissible on the grounds of this rule.** As such, the Court held that Mobley's motion to suppress should have been granted, and reversed the Court of Appeals ruling. *Mobley v. State*, No. S18G1546, 2019 WL 5301819 (Ga. Oct. 21, 2019).

Georgia Court of Appeals

SEARCH OF VEHICLE NOT JUSTIFIED BY PASSENGER'S POSSESSION OF DRUGS

Savannah Police Department Officer's conducting surveillance of a home based upon an anonymous tip that a resident of the home was selling drugs at the home observed a vehicle depart from the address and sought to identify the individuals in the vehicle. The officers made contact with other officers in a marked unit and requested that they conduct a traffic stop on the vehicle if they could obtain independent probable cause to do so. Officers eventually observed the vehicle change lanes without signaling, and then conducted a traffic stop based upon that observation.

During the officers' subsequent interaction with the driver, Susan Lowe, the officer speaking with the driver noted that Lowe was nervous and shaking. While this conversation was taking place, another officer approached the passenger and asked for her identification. As she reached for it, he observed that "in her hand… she had a black mesh pouch and sticking out of that pouch was a plastic baggie" upon which the officer saw a green leafy substance. The officer removed the plastic bag from the pouch, suspecting that it contained marijuana. He asked the passenger if there was anything else he needed to know about in the vehicle. The passenger said there was not. Officers removed Lowe and her passenger from the car and searched the vehicle. During that search, the officers discovered "a plastic Ajax container under the driver's floorboard containing methamphetamine."

Lowe was subsequently charged in relation to the discovered drugs. She filed a motion to suppress, arguing "that the search of her car was unlawful because it was not based on any exception to the Fourth Amendment's warrant requirement." The trial court, however, rejected Lowe's motion, stating that the search was valid under the automobile exception because "the mesh bag and alleged marijuana were observed inside of Lowe's car." This discovery, the trial court held, generated probable cause to search the car and authorized a search without a warrant because the car was readily mobile. Lowe appealed this ruling to the Georgia Court of Appeals.

The Georgia Court of Appeals explained that while the automobile exception does generally allow warrantless searches of vehicles due to the highly mobile nature and diminished expectation of privacy in vehicles, the search must *still* be supported by probable cause. In this case, although the vehicle was being surveilled by officers in connection with a anonymous drug tip, that tip did not form the basis of the stop. Rather, "[t]he vehicle was stopped for failure to signal before changing lanes – Lowe and her passenger were not suspected of any crimes before that time, officers did not smell marijuana in the car, they did not observe any items inside the car indicative of contraband use, or observe furtive or suspicious movements between the two women." Furthermore, "[o]ther than proximity there is no evidence that linked Lowe to the marijuana in the passenger's wallet." In short, the Court concluded that there were no "circumstances which

might under the totality of the circumstances, justify the search of Lowe's car…. That her passenger had marijuana in her wallet and was riding in Lowe's vehicle is not sufficient to establish probable cause for a warrantless search under the automobile exception."

The Court also explained that no other exception to the warrant requirement would apply in this case. The search incident to arrest exception did not apply, the Court explained, because "Lowe and the passenger had been removed from the vehicle at the time of the search and police had secured their location," thus negating any need to search the vehicle incident to arrest. Although the state asserted that the "plain view" exception also justified the search of the vehicle, the Court explained that exception only justified the initial seizure of the suspected marijuana, but could not be used to justify the search of the entire car. As such, the search was invalid and Lowe's motion to suppress should have been granted. *Lowe v. State*, No. A19A1095, 2019 WL 5417288 (Ga. Ct. App. Oct. 23, 2019).

ALS REMINDER

The implied consent notice must be read into the record at the ALS Hearing. In addition, provide testimony regarding how you determined the age appropriate implied consent notice to read to the DUI defendant.

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