



DPS LEGAL REVIEW

November 2019 | Volume 18 No. 11

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

11TH CIRCUIT COURT OF APPEALS

SEARCH OF HOTEL ROOM AFTER GUEST CHECKOUT TIME

On the morning of July 21, 2017, members of a joint state-federal task force were surveilling a Pensacola motel where it was believed a narcotics trafficker, Wali Ross, was staying. The task force members had already obtained warrants for Ross's arrest but were not certain of the room in which Ross was staying. Ross was a known fugitive with a history of violence. The agents eventually observed Ross going back and forth between his vehicle and Room 113, but in the process, Ross observed the agents and fled from the motel on foot. Agents pursued him but eventually lost track of him. Special Agent Jeremy England then realized that the motel was no longer under surveillance, and thus it was possible that Ross had doubled back and was in the room.

Agent England returned to the motel with Detective William Wheeler and found that the door to Room 113 was closed and Ross's vehicle was still on the scene. Detective Wheeler then "obtained a room key and a copy of the room's registration from the front desk." The room was registered to a woman whose name the agents did not recognize. The agents then used the key to enter the room "to execute the warrants and arrest Ross; they entered without knocking, as they believed that someone inside – Ross, a third party, or both – might pose a threat to them." The agents performed a protective sweep of the room, and although they did not locate Ross, Agent England observed "in plain view a grocery bag in which the outline of a firearm was clearly visible. Agent England seized the gun, touched nothing else, and left."

Shortly thereafter, the motel's manager, Karen Nelson, told a federal agent on the scene "that she

could search Room 113 after the motel's standard 11:00 a.m. checkout time." Nelson was unaware that the agents had already been in the room and, once on the scene, stood in the doorway of the room to ensure that no one entered prior to 11:00 a.m. "Nelson explained that if it looked like a guest was still using his room at checkout time, she might place a courtesy call to ask if he wanted to stay longer; otherwise, she said, motel management assumed that every guest had departed by 11:00 a.m., at which point housekeepers would enter the room to clean it. Nelson also explained that it was the motel's policy to inventory and store any items that guests left in their rooms and to notify law enforcement if they found any weapons or contraband."

By 11:00 a.m., Ross had not returned to the room, and Nelson gave the agents permission to enter and search. Agents discovered evidence of narcotics distribution including numerous controlled substances, a digital scale, and a cell phone. Ross was eventually charged with numerous crimes relating both to the firearm that was recovered during the initial entry and the evidence that was discovered after agents re-entered the room. During his prosecution, Ross argued that both searches violated his Constitutional rights and moved to suppress the evidence discovered as a result. The U.S. District Court for the Northern District of Florida denied Ross's motion to suppress, and Ross later appealed the ruling.

The Eleventh Circuit Court of Appeals considered both the initial "protective sweep" entry and the subsequent search of Room 113 conducted with the consent of the motel manager. The prosecution argued that Ross did not have standing to argue that the protective sweep violated his Fourth Amendment rights because, at the time the protective sweep occurred, he had abandoned any privacy interest he had in the motel room when he fled on foot in response to

the police presence. The Court explained that the “critical inquiry” to determine whether Ross had abandoned the motel room and thus could not object to the protective sweep was “whether Ross ‘voluntarily discarded, left behind, or otherwise relinquished his interest in his motel room so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.’” The Court explained that, in some circumstances, such as when a suspect flees from a vehicle following a police pursuit and leaves the vehicle on a public highway, he has abandoned that vehicle under the Fourth Amendment and cannot complain about a search of that vehicle. Here, however, the Court explained that **merely fleeing the motel room in response to the police presence did not mean he had abandoned his privacy interest. The Court found that (1) motel rooms, like homes, are entitled to more Fourth Amendment protection than vehicles; and (2) given the facts of this case, including that Ross locked the room and kept his key with him when he fled, and officers returned only 10 minutes later, no abandonment had occurred.**

Despite the fact that Ross had *standing* to allege a violation of his Fourth Amendment rights due to the officers’ initial entry into the hotel room, the Court held that the search was nevertheless justified under the Fourth Amendment. The Court explained that, in this case, the agents had a warrant for Ross’s arrest, and thus were justified in entering his motel room to arrest him *if* they had a reasonable belief “both (1) that the room is in fact the suspect’s and (2) that the suspect is inside.” The Court concluded that there was clear evidence that the room was being used by Ross and also explained that given the short duration of the chase and the fact that Ross’s truck was still on site, it was reasonable to conclude that Ross may be inside the room. As such, **the agents’ initial entry into the hotel room was permissible, as was their seizure of the weapon in plain view during that entry.**

The Court then considered the more exhaustive search that was performed with the manager’s consent shortly after 11:00 A.M. In this instance, the prosecution alleged that Ross had no standing to object to the search because “Ross’s reasonable expectation

of privacy in his motel room expired—lapsed—as of the motel’s standard 11:00 a.m. checkout time.” After considering existing case law on the issue, the Court concluded “that **a short-term hotel guest like Ross has no reasonable expectation of privacy in his room after checkout time, and thus no standing to object to a room search that police conduct with the consent of hotel management after checkout time has passed.**” While a hotel guest has a reasonable expectation of privacy during his tenancy in the hotel, that right ends at the established checkout time (provided that if the guest has sought and received from the hotel a late checkout time, his expectation of privacy ends at that time). Because the agents in this case waited until checkout time to conduct the search, and did so with the manager’s consent, Ross did not have standing to challenge the search and his motion was properly denied. *United States v. Ross*, 941 F.3d 1058 (11th Cir., Oct. 29, 2019).

REASONABLE ARTICULABLE SUSPICION – TERRY STOP OF PARKED MOTORIST

On the afternoon of August 27, 2017, Georgia Department of Natural Resources Game Warden David Brady observed a man later identified as Joe Young parked in his truck “in a gravel parking lot underneath the bridge” in a public park. Young was resting in the vehicle and Brady observed “a green-and-grey-colored sleeping bag in the bed of his truck.” Brady parked his truck and approached Young, “asking Young if he was ‘okay’ and asking him to roll his window down.” Young, indicating that he did not want to speak to Brady, waved his arms at him and drove off at a slow speed. Brady returned to his vehicle and “radioed in that Young was ‘pulling off’ from him.” Young drove his vehicle to another nearby parking lot in the park and “Brady pulled up behind him less than thirty seconds later.”

Brady then approached Young’s truck again. Young had become agitated at this point, and Brady told Young he was stopping him. Brady then “asked Young to get out of the vehicle and Young inquired as to why. After about a minute of back and forth, Young got out of the truck and Brady handcuffed him. He reached into

Young's pocket, pulled out his wallet, and ran Young's driver's license. After uncovering no outstanding warrants or other issues, Brady uncuffed Young and allowed him to leave." Young was never criminally charged as a result of the incident.

Young later filed suit against Brady alleging that Brady had violated his Fourth Amendment rights by stopping him and injuring him during the stop. In response, Brady filed for summary judgment, arguing that the stop was constitutional and based upon reasonable articulable suspicion. In particular, Brady argued that "Young had a large bag in the bed of his truck, which appeared to be the type used by illegal palmetto berry harvesters in southern Georgia during that time of year; it was the middle of palmetto berry harvesting season; Young drove away from him; and Young exhibited 'highly agitated and uncooperative behavior.'" The district court, however, concluded "that the 'observance of an unfurled, flattened sleeping bag in the bed of a parked truck in a public park in the middle of the day is not a particularized and objective basis establishing reasonable suspicion of criminal activity—no matter what berry-picking season it is.'" The Court "further concluded that Young driving away from Brady when Brady approached him was not enough to establish reasonable suspicion," and thus Brady was not entitled to summary judgment. Brady appealed this ruling to the Eleventh Circuit.

The Eleventh Circuit first reiterated that a law enforcement officer "may conduct a brief, investigatory stop, otherwise known as a 'Terry stop,' if," but only if, "he has a reasonable suspicion of criminal activity." The court further explained that while "reasonable suspicion is a less demanding standard than probable cause, the Fourth Amendment nonetheless requires a minimum level of objective justification for an official to make a Terry stop." Furthermore, "[t]his objective justification must exist at the onset of the stop." In this case, the Court held that a Terry stop occurred "when Brady approached [Young's] car for the second time, because a reasonable person would not have felt free to leave at that point. Indeed, Officer Brady verbally confirmed to Young at this point-and not before-that he was pulling

Young over." As such, at this point, Brady was required to possess reasonable, articulable suspicion to justify the seizure.

The Eleventh Circuit concluded, however, that this required Constitutional basis for the stop did not exist. First, the Court explained that there was not reasonable, articulable suspicion to believe that Young was engaged in illegal palmetto berry harvesting. Brady conceded that no illegal harvesting was known to take place within the park in which Young was pulled over. The Court concluded that reasonable articulable suspicion could not be shown solely because illegal harvesting occurred within the local region of the state and during the given time of year. Moreover, Brady's argument that Young's sleeping bag created reasonable articulable suspicion because it appeared similar to a kind of bag used by illegal berry harvesters was unpersuasive. Rather, **the evidence – which included body camera footage – showed that the sleeping bag was unfurled, flat, and easily identifiable as a sleeping bag well before the seizure occurred. Moreover, the video indicated that Brady's basis for his initial interaction with Young was in the nature of a welfare check as opposed to being based upon suspicion of illegal berry harvesting.**

The Court further held that Young's alleged flight from Brady following the initial encounter did not create reasonable, articulable suspicion to justify the stop. The Court explained that "a person approached by law enforcement is entitled to 'ignore his interrogator and walk away.' **Refusal to answer an officer's questions does not, without more, establish reasonable suspicion.**" **Although the speed at which one flees may factor into the totality of the circumstances in establishing reasonable articulable suspicion, here, Young fled only a short distance to another parking lot, at a slow speed, and "immediately yielded to Officer Brady once he realized he was being stopped."** Because Brady lacked reasonable, articulable suspicion to perform a Terry stop based upon the alleged facts, he was not entitled to summary judgment. *Young v. Brady*, No. 19-11475, 2019 WL 5829507 (11th Cir., Nov. 7, 2019).

GEORGIA COURT OF APPEALS

PASSING A "PACING" POLICE CAR NOT SUFFICIENT BASIS FOR TRAFFIC STOP

On July 27, 2018, Larry Shaw was pulled over by a police officer when he passed the officer's vehicle while the officer was attempting to "pace" traffic behind him. The officer in question was traveling on a multi-lane highway and had activated his blue lights while weaving across three lanes of travel in attempt to slow traffic behind him while approaching the scene of an accident that officers ahead were working. Although the vehicles behind him generally did not try to pass him, three cars did so. One vehicle passed using the right shoulder, one used the left lane, and one used the right lane. Shaw then "passed the officer on the right about ten seconds after the third car and within view of the third car. As the police officer drifted back towards the far right lane, he came very close to [Shaw's] car."

The officer then performed a traffic stop on Shaw's car and explained to Shaw "that he had stopped the car because Shaw had not obeyed the officer's traffic directive to stay behind the patrol car. Shaw responded that he passed the officer 'because everyone else was doing it.'" As a result of the traffic stop, Shaw was eventually charged with DUI. During the prosecution, however, Shaw argued that all evidence from the stop should be suppressed because there was no reasonable, articulable suspicion upon which to base the initial traffic stop. The trial court agreed and granted Shaw's motion. The prosecution then appealed this ruling.

On appeal, the Georgia Court of Appeals explained that "[f]or a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity." In this case, the prosecution argued that the officer had reasonable articulable suspicion that Shaw had violated O.C.G.A. § 40-6-2, "which provides that 'no person shall fail or refuse to comply with any lawful order or direction of any police officer with authority to direct, control, or regulate traffic.'" The Court found, however, "that **the officer's manner of slowing down traffic, by slowly**

driving from left to right over three lanes with his lights on, did not constitute a clear police order to stay behind the officer's vehicle. Additionally, the trial court determined that the officer's traffic directive was ambiguous because the officer allowed three cars to pass him... **Because the officer did not give a clear directive that cars must not pass him and even allowed three cars to pass him without stopping them, Shaw did not violate any clear directive by passing the patrol car. Additionally, there was no objective basis for the officer to reasonably believe that Shaw violated any such directive."**

The Court went on to explain that, after reviewing the evidence, including dash camera footage of the incident, the prosecution had failed to demonstrate that the officer had reasonable, articulable suspicion that Shaw had violated any other law. As such, the trial court correctly concluded "that the traffic stop was unreasonable and not based on the officer's observation of a traffic offense," and therefore Shaw's motion was properly granted. *State v. Shaw*, No. A19A1655, 2019 WL 5851874 (Ga. Ct. App., Nov. 8, 2019).

ALS REMINDER

Please email **both** Dee (dbrophy@gsp.net) and Grace (gmatthews@gsp.net) if you need a continuance on an ALS Hearing. Provide the court date, location, and case name in your email. Continuance motions must be filed with the Court at least ten days prior to the ALS Hearing date, so please notify us **before** the ten-day deadline to allow sufficient time for the motion to be filed.

Published with the approval of
Colonel Mark W. McDonough.

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

Send questions/comments to zhoward@gsp.net