



DPS Legal Review

December 2019 | Volume 18 No. 12

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

11th Circuit Court of Appeals

PROTEST MARCH – DISORDERLY CONDUCT OR NOT?

In November 2014 Corey Toole took part in a march through downtown Atlanta, protesting a Missouri grand jury's decision not to indict Ferguson, Missouri, police officer Darren Wilson in the shooting death of Michael Brown. The Atlanta Police Department (APD) implemented "rolling closures" of city streets as the protesters reached them, as doing so minimized the protest's impact on traffic. Although some protesters ". . . engaged in violence and vandalism as the protest progressed," no evidence indicated Toole's involvement in such behavior.

The APD became concerned ". . . that the protesters might vandalize businesses or breach a highway," and ordered that the marchers should be dispersed. APD officers, including Officer Aaron Zorn, carried out this directive near the intersection of Ivan Allen Boulevard and Peachtree Street. Protesters were instructed to clear the street and individuals who failed to comply with this direction were to be arrested.

According to Toole, he heard the officers' commands to get out of the street and he immediately got on the sidewalk. Toole was recording a video of APD officers breaking up the march, at which time he claims that Zorn ". . . pulled him off of the sidewalk and into the street, throwing him to the ground and causing several injuries, including a chipped tooth[.]" Zorn, who disputed Toole's claim that he was on the sidewalk, alleged that Toole was still in the street when Zorn arrested him.

During his arrest by Zorn, Toole's phone continued to record, and Toole can be heard telling officers that he was on the sidewalk when Zorn arrested him. Toole was cuffed and arrested, and his phone was returned to him before he was placed in a police transport vehicle. While in the police vehicle, Toole used his phone to record the injuries to his face.

Toole's videos of the incident did not clearly indicate whether he was on the sidewalk or in the street when arrested by Zorn. However, the videos ". . . do show that many APD officers and vehicles were in the street, that he was seized after filming Officer Turner's name and face, and that he consistently contended that he had been on the sidewalk at the time of his arrest." Officer Zorn claims he did not know that Toole was filming on his phone when he was arrested.

Toole was charged with disorderly conduct under an Atlanta City Ordinance, on the basis that he ". . . [stood] or remain[ed] in or about any street, sidewalk, overpass or public way so as to impede the flow of vehicular or pedestrian traffic, and to fail to clear such street, sidewalk, overpass or public way after being ordered to do so by a police officer or other lawful authority . . .". The disorderly conduct citation against Toole was ultimately dismissed.

Toole sued the City of Atlanta and a group of APD employees on claims including violation of his First and Fourth Amendment rights under federal law. The federal district court denied Zorn's motion for summary judgment on the claims, despite his putting forth a qualified immunity defense.

In its finding that Zorn had neither actual nor arguable probable cause to arrest Toole, the district court ". . . held that since the portion of the road where Toole would have been standing had been

blocked off by the APD, ‘it [was] impossible for Toole to impede traffic’ at the time of his arrest, regardless of whether he had been standing on the sidewalk. Indeed, the court stated that ‘logic dictates that police cannot stop traffic—using patrol cars and barriers—to allow protestors to march in the street, and then arrest Toole for blocking traffic.’ In addition, the evidence was not clear as to whether Toole was on the sidewalk or the road at the time of his arrest.”

The district court also held that Toole’s First Amendment rights to protest and film the police had been violated.

The Eleventh Circuit Court of Appeals evaluated Zorn’s defense using a standard of “arguable probable cause,” that is “. . . whether ‘reasonable officers in the same circumstances and possessing the same knowledge as [Zorn] *could have believed* that probable cause existed to arrest’ Toole.” The court found that Zorn did not have arguable probable cause, as “[n]o reasonable officer could have believed that there was probable cause to arrest Toole for standing in the street and impeding traffic if Toole was on the sidewalk and the streets were closed to traffic.” **In its holding, as required by Eleventh Circuit precedence to “. . . constru[e] all facts and mak[e] all reasonable inferences in the light most favorable to the non-moving party [Toole],” the Court also held that Zorn violated Toole’s First Amendment rights to protest and to film police conduct at the time of his arrest.** *Toole v. City of Atlanta et al.*, No. 19-11729, 2019 WL 7183437 (11th Cir. Dec. 26, 2019).

***United States District Court, Northern
District of Georgia***

TRAFFIC STOP NOT UNLAWFULLY PROLONGED

On the evening of September 23, 2018, Atlanta Police Department (APD) Officers Dougherty and Grant were on patrol in a marked APD car when they observed McIntosh riding a motorbike without a helmet and without lights on. The officers, who were both wearing body cameras, initiated a traffic

stop using blue lights and siren due to McIntosh’s not wearing a helmet.

Officer Dougherty’s body camera recording showed that McIntosh was stopped at one minute and forty-one seconds into the video. When asked why he was not wearing a helmet, McIntosh said that he had gone to get gas and lived nearby. Dougherty requested McIntosh’s driver’s license, which McIntosh said was “at home.” After McIntosh provided his name and date of birth to the officers, they told him to step away from the motorbike. When McIntosh did so, Dougherty saw that McIntosh was wearing a holster with a firearm. McIntosh asked whether he was being arrested or detained, at which point Dougherty told him that he was being detained for not wearing a helmet.

Dougherty returned to his patrol car at three minutes and forty seconds into the traffic stop to check whether McIntosh had a valid driver’s license. To verify the information, Dougherty used the ISIS program on his mobile data terminal; ISIS is a reporting program able to run driver’s license files and vehicle registrations to check for warrants and whether an individual is a probationer or parolee. At four minutes and forty-nine seconds into the traffic stop, the ISIS system registered a “hit” for “federal probation/supervised parole”. Since Dougherty could not tell the charge for which McIntosh was being supervised, he called for backup “. . . because McIntosh was a large man, had a firearm, and was agitated.”

Dougherty accessed the OMNIXX program, another online database at which he could obtain a photo and run a criminal history, six minutes and twenty-five seconds after stopping McIntosh. About a minute later, Dougherty accessed McIntosh’s driver’s license photo and verified his identity; the OMNIXX search yielded the same supervised federal parole/probation hit as the ISIS database search.

When McIntosh inquired as to what was happening, “. . . Dougherty lied and said he was trying to verify who McIntosh was because he was

not carrying his driver's license. Dougherty testified he was delaying McIntosh with this lie until backup arrived." Further research conducted by Dougherty on his mobile data terminal before backup arrived confirmed that McIntosh was a convicted felon. At this point, "[a]pproximately three minutes had elapsed since [Dougherty] initially received notification of a probation hit" and "[s]lightly less than twelve minutes had elapsed since the initial stop."

Given a further delay in the backup officer's arrival and the fact that McIntosh started walking towards a civilian vehicle that had arrived on the scene, Dougherty made the decision to place McIntosh under arrest. McIntosh resisted officers' Dougherty and Grant's attempt to arrest him, fleeing before Dougherty apprehended him and tased him twice. Hanson, the backup officer, tased McIntosh a third time when he arrived on scene. McIntosh was charged with possession of a firearm by a convicted felon, not wearing a helmet, and misdemeanor obstruction.

The United States District Court for the Northern District of Georgia reviewed the Magistrate judge's recommendation to deny McIntosh's motion to suppress evidence of the firearm seized during the traffic stop. McIntosh had argued that ". . . the officers' investigation and delay were unrelated to the purpose of the traffic stop and thus violated the Fourth Amendment."

The District Court accepted the Magistrate's recommendation and denied McIntosh's motion. The Court considered whether the traffic stop had been unlawfully prolonged: "To unlawfully prolong a traffic stop, 'the officer must (1) conduct an unrelated inquiry aimed at investigating other crimes (2) that adds time to the stop (3) without reasonable suspicion.'"

The District Court found that McIntosh's lack of a license justified the officer's extending the traffic stop to determine whether, in fact, McIntosh had a license, as "[t]heir initial decision to stop him was reasonable based on their belief he had violated Georgia law [by not wearing a helmet]." Further,

the Court found that, when McIntosh was unable to produce his driver's license, the officers ". . . had additional reason to believe he had violated Georgia law."

The "critical question" the court considered was ". . . whether Dougherty impermissibly prolonged the stop by opening the tabs in the ISIS program and by conducting his search of McIntosh's criminal history after confirming McIntosh's identity in the OMNIXX system." The Court found that Dougherty's decision to check the ISIS database ". . . was an 'ordinary inquir[y] incident to the traffic stop' performed before the tasks tied to the traffic infraction were completed."

The Court also found that Dougherty's decision to verify McIntosh's identity and the basis for his supervision in OMNIXX was proper: "It did not prolong the time necessary to investigate the traffic offense as it was all part of Dougherty's effort to confirm McIntosh's identify [sic]. Perhaps he prolonged the stop for the moments it took him to call for backup after seeing McIntosh might be on supervised release. But, by then, the information he received in ISIS combined with the firearm McIntosh carried gave Dougherty reasonable suspicion of criminal activity necessary to prolong slightly the duration of the stop. But the evidence shows there really was no delay as Dougherty called for backup while still trying to confirm McIntosh's identity in OMNIXX."

The Court stressed that **less than twelve minutes** elapsed from the time the officers stopped McIntosh to the time Dougherty obtained McIntosh's criminal history report, confirmed he was a convicted felon, and arrested him. **The Court found that Dougherty ". . . did not conduct an inquiry unrelated to the traffic stop" and that "[t]he Eleventh Circuit has approved traffic stops of much longer duration, particularly when (as here) the officer acted expeditiously."** *U.S. v. McIntosh*, Case No. 1:18-cr-00431, 2019 WL 7184540 (N.D. Ga., Dec. 26, 2019).

Georgia Court of Appeals

DUI ARREST – MIRANDA WARNING NOT REQUIRED FOR BREATH ALCOHOL TEST

Officer Michael Ricks, Gwinnett County Police Department, responded to a called-in complaint that Brian Lee Blazek was operating an 18-wheel tractor-trailer “while highly intoxicated.” The caller told dispatch that the driver smelled of alcohol, had trouble walking, and had slurred speech.

Blazek, who was standing next to the 18-wheeler, confirmed his identity and said he was the driver when approached by Officer Ricks. While interacting with Blazek, Officer Ricks could see that Blazek’s eyes were bloodshot and that there was a strong odor of alcohol emanating from his person. Blazek consented to Officer Ricks’ request that he perform voluntary field sobriety tests. Officer Ricks observed six out of six clues on the horizontal gaze nystagmus test, five out of eight clues on the walk-and-turn test, and two out of four clues on the one-leg-stand test. Blazek consented to providing a breath sample into the Alco-Sensor, which indicated positive for alcohol.

Officer Ricks determined that Blazek was a less safe driver due to alcohol impairment and placed him under arrest. Officer Ricks read Blazek the appropriate implied consent notice, requesting a state-administered test of his breath, and Blazek consented to the test. Neither Officer Ricks nor any other officer read Blazek a *Miranda* warning before transporting him to the Gwinnett County Sheriff’s Office for a breath test on the Intoxilyzer 9000.

During his prosecution Blazek filed a motion to suppress the results of the state-administered test of his breath. The court initially denied Blazek’s motion but, upon reconsideration, the court granted his motion to suppress the test results. The trial court cited the Georgia Supreme Court’s 1998 ruling in *Price v. State* for the proposition that “. . . binding precedent requir[es] *Miranda* warnings to precede an officer’s request for a breath sample

from an in-custody suspect[.]” The State appealed the trial court’s ruling.

The Georgia Court of Appeals agreed with the State and remanded the case to the trial court for further proceedings. The Court of Appeals cited the Georgia Supreme Court’s recent decision in the *Turnquest* case that “. . . neither the Georgia right against compelled self-incrimination, the Georgia right to due process, nor a Georgia statute prohibiting self-incrimination requires law enforcement to provide similar [*Miranda*] warnings to persons arrested for DUI before asking them to submit to a breath test.” Therefore, **the officers were not required to read *Miranda* warnings to Blazek before asking him to submit to a breath test.** *State v. Blazek*, No. A19A2409, 2019 WL 5955931, (Ga. Ct. App. Nov. 13, 2019).

ALS REMINDER

If you do not receive an ALS Hearing notice and your case is dismissed, a Motion to Vacate Default Order can be filed requesting that the case be reset for an ALS Hearing. The motion must be filed within ten days of the Court’s Final Decision/Order of Dismissal. If an ALS case is continued while you are in Court, a new hearing date is typically provided at that time and a new hearing notice is not mailed to you. If you need a motion filed, please email **both** Dee (dbrophy@gsp.net) and Grace (gmatthews@gsp.net).

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 cmcguire@gsp.net