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11th Circuit Court of Appeals

OFFICER HAD REASONABLE SUSPICION TO JUSTIFY SEIZURE; WEAPON WAS NOT FRUIT OF THE POISONOUS TREE

Bibb County Sheriff's Deputy Cota was on patrol in his marked police cruiser in the early morning hours of September 15, 2014. Cota received a call shortly after 2 A.M. about a homeowner's report that lawn equipment had been stolen from his garage and placed beside the road. Other neighbors had similar complaints about stolen items being placed alongside the road, presumably for someone to load into a vehicle and drive away.

At about 3 A.M., Deputy Cota saw Hunter walking along a two-lane road with no sidewalk, which was surrounded by woods. Cota rolled down his window and, from the opposite side of the road from Hunter, asked Hunter where he was going. Hunter said he was walking to his girlfriend's house, a location that Cota knew was over five miles away. Cota drove off but, based on a gut feeling, drove back to the location of his encounter with Hunter. Cota exited his cruiser, again asked Hunter where he was going, and told Hunter that he was investigating a burglary report. Cota and Hunter talked for a few minutes, at which point Cota offered Hunter a ride, given that he would otherwise be walking five miles. Hunter accepted the offer of a ride, at which point Cota told him that he would have to pat down Hunter's outer clothing, pursuant to protocol. Hunter's body language became tense and Cota, about five feet away from Hunter, moved closer and asked if Hunter was carrying any weapons. Hunter replied that he had one tucked in his belt loop. Cota pulled up Hunter's shirt and removed a revolver.

Cota placed Hunter in the back of his patrol car but did not handcuff Hunter. Cota then contacted dispatch to run a check on the firearm. Hunter told Deputy Cota that he was carrying the gun for his safety and that his cousin owned the gun. When Cota called Hunter's cousin, the cousin denied owning the firearm. Within nine to fifteen minutes of contacting dispatch, Deputy Cota was informed that Hunter had an active arrest warrant for a violation of probation. Cota then had Hunter step out of the patrol car so that he could be arrested and handcuffed.

After being charged with illegal receipt of a firearm by a person under indictment, Hunter filed a motion to suppress. **Hunter argued that Cota "unjustifiably seized" him and, therefore, evidence of the gun found on Hunter's person was fruit of the poisonous tree.** Hunter asserted that Cota lacked reasonable suspicion that Hunter was involved in any criminal activity. Hunter further "argued that Cota exceeded the scope of any permissible investigatory detention by requiring him to accept a ride in the police car." The federal district court denied Hunter's motion to suppress, determining that the encounter between Cota and Hunter was consensual "until, at the earliest, when Hunter reacted to Cota's statement about the frisk, and that reasonable suspicion supported the seizure." Hunter appealed the court's order.

The Eleventh Circuit Court of Appeals affirmed the district court's decision on the motion to suppress. The Court found that Hunter was not seized until he informed the deputy that he was carrying a firearm and that Deputy Cota's seizure was supported by reasonable suspicion. **In determining whether, under the totality of the circumstances a "reasonable person" would have felt free to decline Deputy Cota's requests or to**

terminate the encounter, the Court considered factors including: “(1) whether the individual’s path is blocked or impeded; (2) whether identification is retained; (3) the individual’s age, education and intelligence; (4) the length of the individual’s detention and questioning; (5) the number of police officers present; (6) the display of weapons; (7) any physical touching of the suspect; and (8) the language and tone of voice of the police.”

Although Hunter asserted that Cota blocked his path by stopping his patrol car directly in front of him, Cota had few options but to come to a stop in the road, especially where Hunter was walking on a two-lane road with no sidewalk. The Court also pointed out that Cota “did not maneuver the vehicle in a way that clearly obstructed Hunter’s walking path. Moreover, Hunter concedes that he could have simply walked around Cota’s car.” The Court was also unpersuaded by Hunter’s argument that Deputy Cota’s activating his patrol car’s blue lights was tantamount to a seizure: “In our view, the mere act of turning on rear blue lights does not automatically signal that a person has been seized.”

Hunter further claimed that Cota made a “show of authority” by exiting his vehicle, approaching Hunter, and asking questions. The Court observed that “Cota remained calm throughout the encounter, never threatening Hunter or raising his tone of voice, and asked reasonable questions regarding Hunter’s presence in the area and his destination. Hunter answered Cota’s questions, and Cota did not ‘by means of physical force or show of authority’ restrain Hunter’s liberty.” Additionally, Cota did not brandish his weapon, block Hunter’s path, touch Hunter, or ask for identification.

Hunter additionally argued that, even if the encounter remained consensual, it escalated into a seizure when Deputy Cota offered him a ride. **The Court found that “[t]he seizure began only when Hunter informed Cota that he was armed, when Cota closed the gap between him and Hunter, made physical contact by frisking Hunter, and seized the firearm. At this point, a reasonable person would not have felt free to decline Cota’s request, or terminate the encounter.”**

The Court analyzed Deputy Cota’s investigatory

stop using the *Terry* standard, finding that his seizure of Hunter was supported by reasonable suspicion: “[O]nce an officer has legitimately stopped an individual, the officer can perform a frisk 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.’” **The Court agreed with the government that the following “multiple articulable facts” were properly considered in determining whether Deputy Cota had reasonable suspicion to justify a brief investigatory stop of Hunter:**

“(1) Hunter was walking alone at nearly 3 A.M., on a two-lane road with no sidewalks that was hardly ever used by pedestrians; (2) Cota encountered Hunter in an area relatively close to where he had received the report of a burglary; (3) when Cota indicated that he would need to frisk Hunter before transporting him to his destination, Hunter became noticeably tense; and (4) Hunter informed Cota that he was armed.” The Court concluded that, once Hunter admitted to carrying a weapon, Cota’s seizure of him “was objectively reasonable, given the dangers inherent in concealed firearms.”

The Court concluded that Cota had reasonable suspicion to detain Hunter and that the district court’s denial of Hunter’s motion to suppress was proper. *United States v. Hunter*, No. 16-16982, 2020 WL 104340 (11th Cir. Jan. 9, 2020).

Georgia Court of Appeals

HOSPITAL BLOOD TEST IN DUI ACCIDENT CASE— WAS SEARCH WARRANT AFFIDAVIT SUFFICIENT?

On January 1, 2014, an officer with the Savannah Chatham Metropolitan Police Department responded to a single-car accident. A second officer with specialized DUI training also arrived at the scene of the accident. He interviewed a witness to the accident and spoke with the first officer on the scene. Based on the information he obtained, **the DUI officer prepared an affidavit and an application for a search warrant for the blood of Mason, the driver of the vehicle. The affidavit stated, in part:**

OFFICER LACKED REASONABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY DETENTION OF JUVENILE

“The facts tending to establish probable cause that a crime has been, or is being committed ... are as follows: On 1/1/14[,] I responded to a serious injury wreck on Montgomery Crossroads near Abercorn St. An SUV driven by Mr. Mason was traveling westbound on Montgomery Crossroads when it left the roadway. The SUV went up onto a grass median and struck a large tree. The SUV rotated and came to rest back on the westbound side of Montgomery Crossroads. The driver of the SUV sustained two broken legs and extensive facial injuries. A witness that arrived on scene shortly after the collision advised that he could smell the odor of an alcoholic beverage when he approached the SUV.”

The results of the blood sample obtained from Mason at the hospital indicated a blood alcohol level of .23 grams. Mason was charged with driving under the influence of alcohol.

Mason’s attorney moved to suppress his blood test results, arguing that the search warrant affidavit used to obtain the warrant failed to establish probable cause of a crime. The trial court denied Mason’s motion to suppress the blood test results, finding that probable cause existed to suspect Mason of driving under the influence of alcohol. Mason was subsequently found guilty of DUI at a bench trial. The trial court denied Mason’s motion for a new trial, from which he appealed. The Georgia Court of Appeals affirmed the trial court’s decision.

The Court stated that there was probable cause to search based on the odor of alcohol and the fact that Mason lost control of his vehicle and hit a tree. Therefore, “there was a fair probability that a test of Mason’s blood would reveal evidence that Mason was driving under the influence of alcohol at the time that he ran off the road.” *Mason v. State*, No. A19A2167, 2020 WL 89548 (Ga. Ct. App. Jan. 8, 2020).

A police officer on patrol at 10 P.M. in Glenwood, Georgia, was aware of a rash of break-ins within the past two weeks in the vicinity of Highway 19, along which he saw C.B. walking. It raised the officer’s suspicion that C.B. was walking at night with a backpack in this area, so he activated his blue lights, pulled over in front of C.B., and asked for his name. As the officer exited his patrol car he smelled alcohol on C.B.’s breath and “the odor of marijuana on him.”

C.B. refused to give the officer his name, so the officer instructed C.B. to wait while he called for backup; instead, C.B. left the scene. As the officer followed C.B. in his car, C.B. returned towards the car. C.B. resisted when the officer attempted to handcuff him, but he was eventually handcuffed with the assistance of backup officers. A search of C.B.’s backpack turned up a grinder containing marijuana residue and a bottle of alcohol.

C.B. was arrested and charged with obstruction of an officer, possession of less than an ounce of marijuana, underage possession of alcohol, and possession and use of drug-related objects. C.B. moved to suppress all evidence gathered as part of his arrest, arguing that the officer lacked “reasonable articulable suspicion that he was engaged in illegal activities to justify stopping him.” The Juvenile Court granted C.B.’s motion to suppress. The State appealed and argued that the totality of the circumstances justified the officer’s investigative stop.

The Georgia Court of Appeals affirmed the Juvenile Court’s granting C.B.’s motion to suppress: “Supreme Court holdings sculpt out ... three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief seizures that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause.”

The Court of Appeals agreed with the juvenile court that the officer’s initial interaction with C.B. was a “first-tier encounter” that did not implicate the Fourth Amendment. Even though the officer activated his vehicle’s blue lights, “the use of the officer’s blue lights as he pulled over to the side of the road did not necessarily raise the level of interaction, as a reasonable person would still feel free to continue walking away from the officer.”

The Court found that the interaction escalated to a second-tier encounter in which C.B. was no longer free to leave when the officer told him to stay in front of the patrol car. The State contended that “the officer had reasonable suspicion based on the totality of the circumstances, including the location, the time of night, C.B.’s refusal to identify himself, and the odor of alcohol and marijuana.”

The juvenile court’s order on C.B.’s motion to suppress stated that the officer did not establish that he was qualified or trained to detect the odor of marijuana. Therefore, his testimony regarding the odor of marijuana on C.B. failed to support a reasonable suspicion of illegal activity. The Court of Appeals agreed, finding that “[w]ithout such evidence, we cannot determine whether the officer was acting on a subjective hunch of what marijuana may smell like or an objective deduction founded on his previous training and experience.”

The Court of Appeals also found that the other facts relied on by the State—including C.B.’s walking on the side of the road at night in a high-crime area, wearing a backpack, and smelling of alcohol-- did not support a reasonable suspicion of illegal activity. Additionally, the Court stated that the “mere refusal to identify oneself to an officer in a tier-one encounter is not a crime and cannot establish reasonable suspicion of [a] crime.”

For all these reasons, the Court of Appeals affirmed the juvenile court’s granting of C.B.’s motion to suppress. *In the Interest of C.B., a Child*, No. A19A2095, 2020 WL 63950 (Ga. Ct. App. Jan. 7, 2020).

ALS REMINDER

Please remember to submit the 1205 Form to the Department of Driver Services **within ten days** after the arrest of the DUI driver.

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