DPS Legal Review

February 2020|Volume 19 No. 2

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

Georgia Court of Appeals

EVIDENCE PRESENTED AT TRIAL SUPPORTED FELONY OBSTRUCTION CONVICTION

At approximately 1:30 AM on October 30, 2016, Gwinnett County Police Department Officer Hall was patrolling on Old Norcross Road in a marked patrol vehicle. He came upon a white vehicle stopped in the center turn lane of this five-lane road. The white car was positioned perpendicular to the roadway, and its back end was sticking out into the eastbound lanes. Officer Hall testified that, given that the area was quite dark, he would have struck the white car if he had not been attentive.

Due to Officer Hall's concern for the safety of any occupants of the white car and other drivers, he stopped his patrol car behind the white car so that the two travel lanes were blocked. He also activated the patrol car's lights to alert any other drivers to the hazardous situation. Officer Hall smelled "an overwhelming amount of unburnt marijuana" as he approached the white car. He further testified that the driver, Sexton-Johnson, shouted, "[W]hy the [f-word] are you pulling me over?"

At this point Officer Hall saw that there were two occupants in the vehicle besides Sexton-Johnson, one in the passenger seat and one sitting behind the driver's seat. Officer Hall explained to Sexton-Johnson that he had not pulled her over; rather, he came upon her car stopped in the road. Sexton-Johnson responded that she had picked up her intoxicated friends at a party. Sexton-Johnson stated that, when one of the friends threw her wig out the window as they were driving down the road, she stopped the car to retrieve it. Officer Hall testified that a wig was located "a decent way behind [his] patrol vehicle."

Officer Hall asked all three vehicle occupants for their names, dates of birth, and identification, and ran the information on his mobile computer. A second officer, Officer Bezon, arrived on the scene at this time. As Officer Hall returned to the white car, he told the clearly intoxicated back-seat passenger to exit the vehicle, as she was being arrested for providing a false name and date of birth. The passenger screamed, "I'm not getting out of the [expletive deleted] car." The passenger braced herself against the door jamb when Officer Hall again ordered her to exit the car.

As both Officers Hall and Bezon attempted to remove the passenger from the car, Sexton-Johnson, still in the front seat, turned around and "sucker punched [Officer Hall] in the left eye with [her] closed right fist." When Officer Hall let go of the passenger at this point, Sexton-Johnson tried to punch him again. As Officer Hall walked around to the front door on the driver's side, Sexton-Johnson kicked the door open, striking the officer. As Officer Hall ordered Sexton-Johnson to exit the car, she continued to scream profanities and said that her passenger was not going to be taken to jail.

Although Officer Bezon did not see Sexton-Johnson punch Officer Hall, he testified that the "red puffiness" to Officer Hall's eye was consistent with being punched in the face. Both Sexton-Johnson, who did not seem to be intoxicated, and her intoxicated passenger were arrested at the scene. A search of the vehicle yielded marijuana from a purse inside the car and two bottles of liquor on which the seals were broken. Both bottles were wedged under the front passenger seat. Officer Bezon testified that both bottles were "readily accessible"

to both Sexton-Johnson and her back-seat passenger.

After a jury trial, Sexton-Johnson was found guilty of felony obstruction of an officer and possession of an open container of alcohol while operating a vehicle. Sexton-Johnson appealed her convictions and denial of her motion for a new trial. Sexton-Johnson argued that the evidence at trial was insufficient to support her felony obstruction conviction because "(a) the State failed to prove that Officer Hall was in the lawful discharge of his official duties and (b) the State failed to produce evidence of her criminal intent."

The Georgia Court of Appeals found that Officer Hall did have probable cause to arrest Sexton-Johnson and her passenger. The Court described "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 reasoned that Officer Hall was lawfully present at the scene during a first-tier encounter with Sexton-Johnson and her two passengers, given the danger posed by Sexton-Johnson's car being parked perpendicular to the five-lane roadway at 1:30 AM. The Court found that the overwhelming odor of marijuana coming from the vehicle, coupled with the smell of alcohol, authorized Officer Hall's brief investigative *Terry* stop: "Here, the State presented first-hand testimony that Officer Hall smelled marijuana and alcohol emanating from the vehicle. Thus, there were specific, articulable facts that gave rise to a reasonable suspicion of criminal activity, and . . . Officer Hall was authorized to conduct the second-tier encounter and investigatory stop of the vehicle and its occupants." The check that Officer Hall ran on his mobile computer, which showed that the passenger had given a false name, was sufficient to establish probable cause for the passenger's arrest.

The Court also rejected Sexton-Johnson's contention that there was no evidence to support a finding that she knew that her passenger gave false information to Officer Hall. The Court stated, "Here, there was sufficient evidence from which the jury could find that Sexton-Johnson knowingly and willfully obstructed Officer Hall in the lawful discharge of his official duties. Sexton-Johnson and her two passengers all provided their names, dates of birth, and identification to Officer Hall, and **Officer Hall testified that after he returned from running their information through his computer, he twice advised the backseat passenger — in the presence of Sexton-Johnson and the other passenger — that she was being arrested for giving a false name. Officer Hall also testified that during the incident — and *after* he twice advised the backseat passenger that she was being arrested for giving a false name — Sexton-Johnson expressly stated that her passenger was not being taken to jail."**

For these reasons, the Court affirmed Sexton-Johnson's conviction for felony obstruction of an officer. *Sexton-Johnson v. State,* No. A19A2066, 2020 WL 913444 (Ga. Ct. App. Feb. 26, 2020).

EVIDENCE INSUFFICENT TO SHOW VOLUNTARY CONSENT TO ENTER CAMPER

In February 2017 Gary Campbell, a Chattooga County Sheriff's Department Narcotics Agent, received a tip that Travis Little was "moving large amounts of methamphetamine." Campbell was aware that Little was already on probation for possession of methadone and methamphetamine. On March 7, 2017, Campbell and two other agents arrived at the camper Little lived in behind his mother's house. Little opened the door after the agents knocked, at which point Campbell identified himself and the other agents.

Campbell told Little that he'd been tipped off that Little was selling large amounts of methamphetamine. Campbell asked if he and the agents could enter the camper to speak with him.

"Little backed up into the camper, and the agents followed him in. As the agents followed him in, Little turned around and began walking away while trying to empty his pockets."

Upon entering the camper, the agents saw, in plain view, hunting knives, brass knuckles, a small ziplock bag, a "meth pipe," and a set of electronic scales. Campbell then "requested and received consent from Little to search the camper." During a pat-down search, one of the other agents found over $3,000 in Little's pockets and wallet.

When Campbell asked Little where "the rest of the methamphetamine" that he possibly had in the trailer was, "Little directed the agents to a black bag on a bed, in which they found various controlled substances and drug paraphernalia. Little subsequently made several incriminating statements to the agents after being informed of, and waiving, his *Miranda* rights."

Little was indicted on charges of trafficking in methamphetamine, possession with intent to distribute methamphetamine, and possession of methamphetamine, oxycodone, hydrocodone, alprazolam, and clonazepam. Little filed a motion to suppress the evidence uncovered during the search of his camper.

The trial court conducted a joint bench trial and suppression hearing, at which Agent Campbell testified. The court denied Little's motion to suppress "after concluding that the agents knew when they visited Little's camper that he was on probation, he 'in essence' allowed the agents to enter the camper, and he subsequently voluntarily consented to the search." The trial court found Little guilty on all counts in the indictment.

Little appealed and argued "that the trial court erred when it denied his motion to suppress because the agent's warrantless entry into his camper was unauthorized by either the conditions of his probation or his purported consent." The Court of Appeals agreed.

The Court of Appeals reasoned that **"**acquiescence cannot substitute for free consent", particularly when the State didn't present evidence that the officers identified themselves before Little opened the door. Additionally, the State presented no evidence "that Little was aware of the officers' presence or identity before he opened the door. Consequently, the act of opening the door, by itself, was not indicative of consent for law enforcement to enter. . . Moreover . . . the evidence shows that, when the agents subsequently requested permission to enter, Little made no effort to engage in any discussion of the matter and instead continued to back up into the camper and turn his back on the agents. Nothing in Campbell's testimony indicates that Little affirmatively or voluntarily granted consent for the agents to enter." **Therefore, the Court of Appeals held that the evidence was insufficient to show that Little voluntarily consented to the agents' entry.**

Regarding whether the conditions of Little's probation possibly authorized the officers to enter his residence without his consent, the Court found that the State did not present any evidence that the officers were aware that Little was subject to any such probation conditions. Therefore, any such probation conditions could not support the entry into Little's home. "A waiver of Fourth Amendment rights as a condition of parole, probation, or pretrial release . . . cannot be used to justify a search by law enforcement officers who were unaware of the waiver at the time of the search."

The Court also rejected the argument that Little's consent to search the camper after the agents' entry authorized the subsequent search. "Evidence obtained as a result of a consent to search that itself is a result of an illegal entry into one's home must be suppressed as the 'fruit of the poisonous tree.'" The Court found that Little's consent to search was "inextricably intertwined with the agents' illegal entry and their immediate observation of drug paraphernalia and weapons in plain view."

The Court further reasoned that "the State has pointed to no intervening events between the

agents' initial entry into Little's home and the subsequent collection of evidence that would attenuate the taint of the initial entry. Consequently, the discovery of all evidence in plain view inside the camper, as well as evidence obtained from Little's consent to search the camper and his ensuing incriminating statements, were 'the product of and tainted by the illegality' of the initial entry." **For these reasons, the Court reversed the trial's courts denial of Little's motion to suppress and reversed his convictions.** *Little v. State,* No. A19A1758, 2020 WL 613743 (Ga. Ct. App. Feb. 10, 2020).

U.S. District Court – Southern District of Georgia

SHERIFF'S DEPUTY DID NOT USE EXCESSIVE FORCE DURING VEHICLE CHASE

On June 17, 2016, Schantz was driving his motorcycle through Appling County when he passed an Appling County deputy, who noticed that Schantz's motorcycle did not have a registration tag. When the deputy activated his patrol car's lights to get Schantz to pull over, Schantz "took off". Schantz admitted that he traveled in excess of 100 miles per hour. An Appling County lieutenant joined the chase and saw Schantz run a red light in downtown Baxley. When he lost sight of Schantz, Appling County discontinued the chase.

At about the same time, Captain Poppell, with the Wayne County Sheriff's Office, heard over his radio that Schantz was entering Wayne County. Poppell drove his patrol car at 90 miles per hour in an attempt to stop Schantz, but Schantz "passed him traveling well in excess of that speed." Poppell's deposition testimony referenced Schantz's weaving "in and out of traffic" in a "race mode stance."

Poppell gave chase for about thirty miles, at which point Schantz--when confronted by another officer—"turned around and began traveling in the other direction while riding only on the back wheel of his motorcycle (a "wheelie")." Poppell witnessed Schantz veer into oncoming traffic, running other vehicles off the road in the process.

When Sheriff DeLoach and the Appling County lieutenant heard over the radio that Schantz was returning to Appling County, DeLoach exited his patrol car with a shotgun, hoping that this would motivate Schantz to stop. DeLoach fired a shot as Schantz crossed his position. Schantz's motorcycle spun around and came to a stop, at which point DeLoach racked his shotgun again. Schantz proceeded to take off again, prompting DeLoach to fire his weapon. Schantz, struck by the gunfire, fell off his motorcycle. Schantz survived his injuries.

Schantz brought a § 1983 action against DeLoach, seeking payment for his crash-related injuries. DeLoach moved for summary judgment, arguing that he used appropriate force under the circumstances. DeLoach also alleged that he was "entitled to qualified immunity for his actions because there is no binding authority clearly establishing that the course of action he chose to end the chase was unlawful."

The U.S. District Court for the Southern District of Georgia determined that "the question before this Court is not whether DeLoach chose the best course of action to end the chase but instead whether DeLoach's decision fell within the broad scope of behavior deemed acceptable under the Fourth Amendment. Because the Court answers this question in the affirmative, it must grant DeLoach's Motion for Summary Judgment and dismiss Schantz's Complaint."

The District Court examined DeLoach's use of force as an investigatory stop or arrest, under the Fourth Amendment's protection against unreasonable seizure of a person. Neither party disputed "that DeLoach was acting within his discretionary authority when he shot Schantz." Therefore, the Court considered only "whether Schantz has satisfied his burden to show that DeLoach was not entitled to qualified immunity."

The Court used the "objective reasonableness" standard to determine whether DeLoach's use of force was excessive: "That is, courts ask 'whether a reasonable officer would believe' that the level of force used to stop the suspect was 'necessary in the situation at hand.' Reasonableness is adjudged 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" The Court found that Schantz failed to meet his burden of showing "that the unreasonableness of DeLoach's actions were 'clearly established' at the time of the incident."

The Court was unpersuaded by Schantz's argument that DeLoach's use of deadly force violated the "clearly established" principle that Schantz was not a "fleeing felon" and posed "no immediate threat to the officer or others." The Court determined that Schantz, by his own admission, "led officers on an extended chase down major roadways, ran a red light, did wheelies, and drove at least 100 miles per hour. Schantz was plainly a 'fleeing felon' in that, at the time of the chase, he was violating O.C.G.A. § 40-6-395, which expressly states that it is a felony to flee from police while driving 'in excess of 20 miles an hour above the posted speed limit.'"

Further, the Court determined that "irrespective of whether Schantz considers himself such a special driver that he can do such things [as drive 100 miles per hour and run a red light] safely, DeLoach reasonably *perceived* Schantz to have driven in such a way that put others in danger at the time Schantz sought to flee from DeLoach's presence. DeLoach had no way of knowing that Schantz was so special that he can "safely" drive at least 30 miles over the speed limit, run red lights, and flee from police through multiple counties. That is, an officer hearing of such behavior would have arguable probable cause to believe that deadly force was justified." **The Court also found that DeLoach's perception, not Schantz's characterization, "ultimately governs whether DeLoach acted reasonably in choosing to fire his weapon."**

The Court also considered the broader danger that Schantz's reckless driving posed and would continue to pose to other drivers if the chase had continued: "Schantz in this case does not dispute many of the facts that arguably justified DeLoach's use of force, such as his extraordinarily high rate of speed, his having run a red light, and his doing wheelies during the pursuit. While he does dispute certain facts about his reckless behavior, such as his having swerved into oncoming traffic, he cannot dispute that the police radio described such behavior. **Such reports reasonably led DeLoach to believe—and thereby created arguable probable cause to believe—that Schantz was placing others in immediate danger."**

The Court cited the United States Supreme Court's finding that "qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'" **Based on its review of relevant use-of-force caselaw, the Court "simply [could not] find . . . that DeLoach was on notice that it was unlawful to fire at Schantz as he took up yet another effort to evade arrest.** To the contrary, the authoritative cases that present facts most similar to the present case tend to suggest that DeLoach's actions were lawful." *Schantz v. DeLoach*, 2:17-CV-157, 2020 WL 564568 (S.D. Ga., Feb. 4, 2020).

ALS REMINDER

If a 1205 Form is issued to the DUI driver, the form must be accurately and completely filled out. Please remember the following: 1) put the DUI Citation Number on the 1205 form and no other citation number, 2) if a breath test was given, include the breath test results on the 1205 Form, 3) do not serve a 1205 Form on Blood test cases and do not write under test results section "pending", 4) under the Service of Report and Notice of License Suspension section of the 1205 form, sign and indicate the "Serve Date" on the 1205 Form, and 5) if the DUI driver refuses the state test under implied consent and then a search warrant is obtained for blood, issue a 1205 form and not a 1205 S Form.

Published with the approval of
Commissioner Gary C. Vowell.

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