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11th Circuit Court of Appeals

OFFICER'S USE OF FORCE WAS REASONABLE

On June 16, 1015, Officer Brady Dover with the Ellijay Police Department attempted to make a traffic stop of Cantrell, who was driving under the influence. Instead of stopping for Officer Dover, Cantrell sped up and a chase ensued. After almost colliding with an oncoming vehicle, Cantrell crashed into a park, exited his vehicle, and fled on foot.

Officer McClure was in the passenger seat of a second Ellijay police vehicle, which was also pursuing Cantrell. Dashcam video from the second police vehicle recorded the following events: "[A]t 16:00:46 the second police car arrived at the park; at 16:00:48 Cantrell, spotting the officers, turned and began walking away. At 16:00:51, McClure exited the police vehicle and began running towards Cantrell; and at 16:00:53, Cantrell stopped, turned around towards the approaching officers, and began to raise his hands over his head. Less than a second later, McClure, already sprinting towards Cantrell, tackled him to the ground. Fewer than four seconds passed between the moment that McClure exited the police car, and when he tackled Cantrell; only at the last second did Cantrell gesture an apparent surrender."

Cantrell sustained intracranial bleeding and a closed head injury as a result of being tackled by Officer McClure and was in a coma for twelve days. **Cantrell brought a 42 U.S.C. § 1983 action against McClure for excessive force in violation of the Fourth Amendment. The United States District Court for the Northern District of Georgia granted defendant McClure's motion to dismiss Cantrell's claims, finding that McClure was entitled to qualified immunity.** The District Court observed that "qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." Cantrell appealed the district court's order.

The 11th Circuit Court of Appeals also concluded that McClure was entitled to qualified immunity. The Court found that Cantrell "failed to establish that a constitutional violation took place. The force McClure used in the course of Cantrell's arrest was objectively reasonable." The Court considered the fact pattern "from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and balance[d] the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate."

The Court considered that Officer McClure knew that Cantrell was non-compliant and posed a serious risk to public safety for myriad reasons:

> In the moments leading up to the instant before the tackle, Cantrell had evaded a traffic stop; had forced Officer Dover into a dangerous car chase; had narrowly missed colliding with an oncoming vehicle; had crashed his vehicle into a park; had evaded arrest by the first officer he encountered; and had indicated an intent to evade the second set of officers attempting to detain him. Furthermore, McClure had literally a split second to change both his mind, and the momentum of his body in

> midair, to avoid tackling Cantrell after Cantrell's apparent last-second surrender.

Given these facts, the Court affirmed the district Court's granting of qualified immunity, finding that the force used by Officer McClure was not excessive and did not rise to the level of a constitutional violation. *Cantrell v. McClure*, No. 18-12516, 2020 WL 1061333 (11th Cir. March 5, 2020).

OFFICER'S UNREASONABLE USE OF FORCE VIOLATED SUBJECT'S CONSTITUTIONAL RIGHTS

Officer Sonnenberg with the City of Melbourne (Florida) Police Department observed a sedan driving in excess of the posted speed limit. This led Sonnenberg and his partner, who were riding in the same patrol vehicle, to follow the sedan into an apartment complex parking lot. After shining a spotlight from their police cruiser onto the sedan, both officers exited their vehicle and approached on foot. Officer Sonnenberg's partner was the first to reach the sedan. Sonnenberg was getting a flashlight out of the patrol car and therefore trailed behind. As Sonnenberg's partner reached the sedan "it started to move forward at four to five miles per hour." Sonnenberg was still approximately 60 feet away from the sedan at this point.

Officer Sonnenberg was standing in an approximately six-foot gap between the side of the patrol car and a row of parked cars. At this time, the sedan drove through this narrow gap, but "was not angled directly at Officer Sonnenberg" and did not hit him as it drove by. Sonnenberg fired ten rounds at the sedan as it approached and passed him. Five of the rounds "entered the front of the car, four entered the driver's side, and one apparently missed entirely." Vicente-Abad, the sedan's passenger, was struck by one of the rounds and sustained injuries to his neck and bicep. The sedan came to a stop approximately 130 feet past the police cruiser. Vicente-Abad exited the sedan and was placed under arrest.

In his 42 U.S.C. § 1983 claim against the officer, Vicente-Abad argued that Sonnenberg used excessive force in violation of the Fourth Amendment when he shot Vicente-Abad. The District Court denied in part Sonnenberg's motion for summary judgment. On appeal to the 11th Circuit, Sonnenberg contended that he was entitled to qualified immunity on Vicente-Abad's claim.

The 11th Circuit Court considered the "totality of the circumstances" laid out by the Supreme Court in deciding whether excessive force was used, including: "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight." The 11th Circuit also looked to its own decision in the 2012 *Terrell* case, in which it distilled "three key factors concerning the reasonableness of the use of deadly force":

> **[A]n officer may use deadly force to stop a fleeing felony suspect when the officer: (1)** has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; **(2)** reasonably believes that the use of deadly force was necessary to prevent escape; **and (3)** has given some warning about the possible use of deadly force, if feasible.

The Court found that Officer Sonnenberg was not entitled to qualified immunity, as the force he used when opening fire on a vehicle "not on a trajectory to collide with him" was "constitutionally unreasonable."

> **At the time of the shooting, Officer Sonnenberg had no reason to believe that any serious crime had been committed.** At most, he had witnessed a violation of a speed limit, although taking the facts in the light most favorable to Vicente-Abad, he was mistaken even as to that violation. **Additionally, Officer Sonnenberg could not have reasonably believed that his life was in danger;** although he was nearly in the path of an oncoming car, it was moving slowly and was far enough away to give him plenty of time to react. Indeed, the sedan ultimately passed Officer Sonnenberg by without striking him. **He had time enough not only to get out of the way, but to fire ten rounds in the process. And finally, while it does appear that the driver of the sedan was attempting to evade the police, the officers had not informed the occupants that they were under arrest or being detained.** The officers had not even used the lights or sirens on their patrol vehicle to pull the sedan over. Instead, they followed the car, shined a spotlight on it, and approached on foot without giving any instructions to its occupants.

Regarding his decision to use **deadly force, the Court explained that**, even if Sonnenberg may have believed that deadly force was necessary to apprehend the occupants of the sedan, **"preventing escape was not an important enough goal in the circumstances for a reasonable officer to believe that deadly force was justified."** Additionally, the Court pointed out that Sonnenberg failed to issue a warning to the occupants of the sedan before firing ten rounds, even though he "had time to warn the occupants of the car that he would employ deadly force."

The Court concluded that Vicente-Abad's constitutional right not to be fired upon under these circumstances was "clearly established." Therefore, the Court affirmed the district court's decision to deny in part Officer Sonnenberg's motion for summary judgment. *Vicente-Abad v. Sonnenberg*, No. 19-13080, 2020 WL 1320879 (11th Cir. March 20, 2020).

Georgia Court of Appeals

APPARENT WINDOW TINT VIOLATION SUFFICIENT BASIS FOR TRAFFIC STOP

At about 7 PM on September 24, 2017, Officer Fikes with the Brookhaven Police Department was on duty in his patrol vehicle in DeKalb County, Georgia, when he observed "a dark-colored Mercedes with mirror window tint." Officer Fikes "noticed [his] reflection in the mirror — the windows of [his] patrol car," which indicated to him "[t]hat the window tint was too dark."

Officer Fikes pulled in behind the Mercedes, which promptly turned into a gated entrance to the Peachtree-DeKalb Airport. The Mercedes then pulled back onto Clairmont Road, in the opposite direction of travel. As Officer Fikes continued to observe the Mercedes, he noticed that "brake lights kept coming on ..., which made [him] think the [driver] was trying to find somewhere to turn around and come back in the same direction as the airport."

Just as Officer Fikes expected, the Mercedes changed direction again, heading back towards the airport. At this point, Fikes conducted a traffic stop of the vehicle, approximately two-and-a-half minutes after he first noticed the Mercedes' window tint. As he approached the Mercedes, Officer Fikes instructed the driver, Sergio Kitchens, to roll down all the windows so that he could see whether there were any other occupants. Fikes, who had extensive training in drug interdiction and

narcotics cases, smelled "raw green marijuana coming from inside the car."

Upon Fikes' request, Kitchens, the driver, produced identification, but neither Williams, in the front seat, or Jones, in the back seat, furnished IDs. Williams told Officer Fikes that they "had left their identification on an airplane."

Fikes told Kitchens that he could smell raw marijuana coming from the Mercedes and asked if there was marijuana in the car or on his person. Kitchens answered that there was not, and no contraband was found on Kitchen's person when Officer Fikes conducted a consensual search. Passenger Williams consented to a search of his person, which uncovered about $3,000 in cash. Passenger Jones admitted that "they just got done smoking marijuana earlier" when Fikes inquired as to whether Jones had any marijuana.

Officer Fikes placed Kitchens, Williams, and Jones under arrest after a preliminary search of the Mercedes uncovered marijuana residue on the floorboard, a half-full alcoholic beverage, marijuana, and two bottles of codeine syrup in an armrest compartment. A further search of the vehicle revealed weapons, miscellaneous pills, MDMA, and cash.

Both Jones and Williams were charged with possession of methamphetamine, hydrocodone, and marijuana with intent to distribute; possession of amphetamine, alprazolam, and codeine; and possession of a firearm during the commission of a felony. Kitchens, the driver, was charged with window tint violation and possession of less than an ounce of marijuana.

Jones and Williams moved to suppress the evidence seized during the traffic stop. (Kitchens pled guilty to the window tint violation and the State entered a nolle prosequi on the marijuana charge against him.) The DeKalb County Superior Court granted Jones' and Williams' motion to suppress, from which the State appealed.

At the suppression hearing, Officer Fikes testified that the only reason he stopped the Mercedes was his observation of the window tint violation. He explained that "[t]he legal limit is 32 but the law actually reads plus or minus [3]. And that was way below 32 percent.'" Fikes also testified that he told one of the backup officers on the scene "about the suspicious maneuvers ... with the turning the opposite direction and the brake lights[,] ... that when [he] made contact with the car ... [he] smelled raw green marijuana coming from inside the car."

In considering the State's argument that the trial court erred in granting the defendants' motion to suppress, the Court discussed the requirement that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." The Court of Appeals found that Officer Fikes' traffic stop was justified, despite his not giving any testimony at the suppression hearing as to whether the window tint was applied to the vehicle after being delivered by the manufacturer.

OCGA 40-8-73.1, Tinting of windows or windshields, carves out an exception to the prohibition on ". . . material and glazing applied or affixed to the rear windshield or the side or door windows, which material and glazing when so applied or affixed reduce light transmission through the windshield or window to less than 32 percent, plus or minus 3 percent, or increase light reflectance to more than 20 percent." The exception states:

> The provisions of subsection (b) of this Code section shall not apply to ... [t]he rear windshield or the side or door windows, except those windows to the right and left of the driver of ... [a]ny other vehicle, the windows or windshields of which have been tinted or darkened before factory delivery or permitted by federal law or regulation.

The trial court had concluded that "without credible evidence that the window tint was placed

on this vehicle after being delivered by the manufacturer, the stop of ... Williams's vehicle and the seizure of [the defendants] was illegal. ..." In the same vein, the trial court found that:

> [T]he only evidence presented was that Officer Fikes could see himself in the window's reflection. This evidence does not convince this [c]ourt that there were specific, articul[able] facts sufficient to give rise to a reasonable suspicion of a violation of OCGA § 40-8-73.1 (b).... This is not the type of "good faith" belief that a traffic violation is actually being committed[,] which would legally permit a stop of this vehicle as the credible evidence failed to articulate a factual basis for believing that this vehicle was in violation of OCGA § 40-8-73.1 (b).

In its review of the State's appeal, the Court of Appeals found that the trial court erred by basing its decision to suppress the evidence on the grounds that "there was no credible evidence that the window tint was placed on this vehicle after being delivered by the manufacturer." **The Court of Appeals found that there is no requirement for a law enforcement officer to "determine whether the windows were darkened before factory delivery or as permitted by federal law *before* stopping a vehicle for a window tint violation**." Similarly, the Court determined that an officer's failure to do so does not necessitate "suppression of evidence found during a search subsequent to such a stop based on a lack of probable cause."

The Court of Appeals cited a 2004 Georgia Supreme Court decision, in which the Court was unpersuaded by a defendant's argument that:

> a traffic stop based on OCGA § 40-8-73.1 could not be valid because the statute contains too many elements which cannot be ascertained by an officer merely observing a vehicle with tinted windows[, s]pecifically, ... that an officer cannot determine before stopping the car whether ... the tint was applied by the manufacturer or as an after-market modification.

For these reasons, the Court of Appeals held that the trial court erred in granting the defendants' motion to suppress. *State v. Williams,* No. A19A1893, 2020 WL 1181268; *State v. Jones,* No. A19A1894, 2020 WL 1181268 (Ga. Ct. App. March 12, 2020).

ALS REMINDER

OSAH has canceled all **in-person** ALS Hearings in all hearing locations for the month of **April.** OSAH has also updated their website (www.osah.ga.gov) with the cancellation information. Telephone ALS Hearings may be scheduled in some locations and you will receive a notice from OSAH with that information. If you have any questions or need any assistance with an ALS case, please contact Dee.

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