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11th Circuit Court of Appeals

SEARCH OF VEHICLE ABANDONED BY DRIVER WHO FLED ON FOOT

On January 26, 2018, Corporal Jessie Bourque of the Orange County Sheriff's Office ("OCSO") was on duty, running vehicle license tags through a law enforcement database from her patrol car. She ran the tag on a Mercedes parked across the street at a gas station**. Willie Johnson was the driver and only occupant of the Mercedes. The database indicated that the vehicle tag was stolen, leading Corporal Bourque to think the car itself was too.**

Corporal Bourque and backup Deputy Timothy Parkhurst, each driving marked patrol cars, boxed in the Mercedes, with Corporal Bourque's car in front of the Mercedes and Deputy Parkhurst's car directly behind it. Johnson then glanced at Corporal Bourque, put the Mercedes in reverse, and backed into Parkhurst's patrol car. Johnson made eye contact a second time with Corporal Bourque and leaned down toward the Mercedes' floorboard. **Believing that Johnson was reaching for a weapon, Bourque pointed her firearm at Johnson. Johnson then opened the driver's side door of the Mercedes and fled on foot.**

Deputies Parkhurst, Baggs and Howard-Campbell, caught up with Johnson several blocks away. Johnson was handcuffed and arrested for the stolen license tag and resisting arrest without violence.

Soon afterwards, Deputy Baggs approached the Mercedes, since Johnson had fled with the car still running and in reverse. As Deputy Baggs entered the Mercedes through the open driver's side door, he saw the handle of a firearm sticking out from underneath the driver's seat. He and another deputy made note of the firearm's location and retrieved the weapon, which was loaded with a live round of ammunition.

The deputies then searched the Mercedes, uncovering one baggie containing almost 110 grams of powder cocaine, another baggie containing 26.5 grams of crack cocaine, a cigar pack containing marijuana, Ziploc bags, a digital scale, a razor blade, and cash. Upon completion of the search, the Mercedes was towed and impounded.

The deputies also obtained a warrant to search the contents of a cell phone that Johnson dropped during the foot chase. The phone contained text messages discussing drug sales, drug quantities, and meet-up locations.

Although the federal trial court record was unclear as to the timing, the deputies ran the Mercedes's vehicle identification number ("VIN"), which indicated that the car was not stolen, and Johnson was not the registered owner. When one of the deputies contacted the Mercedes' registered owner a few months after Johnson's arrest, the owner claimed to have sold the car to "an unknown person."

After a jury trial, Johnson was convicted on charges of possession with intent to distribute cocaine and cocaine base and possession of a firearm or ammunition by a convicted felon. Johnson appealed his convictions, asserting that the district court erroneously denied his motion to suppress. Johnson argued that the evidence found inside the Mercedes should be suppressed because: "(1) the officers did not have probable cause or reasonable suspicion to search the car; (2) there were no exigent circumstances; (3) the search was

not incident to arrest; and (4) the plain view exception did not apply."

The government countered that:

> (1) Johnson fled, abandoned the car, and thus lacked standing to challenge the search of the car; (2) the officers had probable cause to search the car; and (3) even if they lacked probable cause, they would have conducted an inventory search of the car prior to towing and the inventory search would have inevitably revealed the contraband within the car.

At the suppression hearing, Corporal Bourque testified that she frequently had cars towed after a driver's arrest. Pursuant to the OCSO's vehicle inventory policy, deputies must confirm that a vehicle to be towed is properly inventoried, "so long as…the totality of the circumstances do not indicate that the inventory was conducted for the sole purpose of investigation." The policy requires that a deputy conducting an inventory search must "remove any personal property inside the car for which he has probable cause to believe may be contraband or evidence of a crime."

Corporal Bourque testified that the Mercedes needed to be towed because it was obstructing a gas pump; there was no one to lawfully take possession of the car; Johnson refused to say whose car it was; and it could not be lawfully driven with a stolen tag. Corporal Bourque conceded that, although the inventory search was conducted before the decision to tow the Mercedes, the deputies still would have had to conduct an inventory search of the car before towing it regardless.

The district court denied Johnson's motion to suppress, finding that Johnson had effectively abandoned the Mercedes when he opened the car door and fled on foot, leaving the door open. The court found that the deputies' search of the abandoned vehicle and the contraband discovery fell within the inevitable discovery exception to the warrant requirement. The court reasoned that, after Johnson's arrest, the deputies decided that the Mercedes must be impounded, which inevitably would have resulted in an inventory search under the OCSO's inventory policy. "The district court also concluded that the plain view exception applied as to the firearm, which Deputy Baggs plainly saw sticking out from under the driver's side seat on the floorboard."

The Eleventh Circuit Court of Appeals analyzed whether Johnson had abandoned the Mercedes, thereby forfeiting any reasonable expectation of privacy in the vehicle protected by the Fourth Amendment at the time of the search. The Court looked at factors including Johnson's intent, the facts and circumstances existing at the time of the alleged abandonment, and post-abandonment events. The Court of Appeals found that "the district court did not clearly err in finding that Johnson 'opened the driver's side door and took off running, abandoning the vehicle and leaving the door open.'"

The Court also reviewed Johnson's post-abandonment behavior of fleeing on foot from the deputies for several blocks and determined that he "relinquished his interest in [the Mercedes] so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." Therefore, the Court of Appeals held, the district court properly denied Johnson's motion to suppress the contraband discovered during the search of the Mercedes.

The Court of Appeals also considered the district court's conclusion that the deputies' search of the abandoned Mercedes and the contraband discovery fell within the inevitable discovery exception to the warrant requirement: "[T]he discovery of the contraband inside the Mercedes was inevitable because the officers were already

investigating the car's stolen tag and ownership and determined that the car had to be towed and impounded, which would have triggered an inventory search and revealed its contents in any event."

The Court concluded that the district court did not clearly err in finding that the officers had multiple valid reasons for towing and impounding the Mercedes. Among these reasons were the Mercedes' being improperly parked next to a gas pump; the investigation into whether the Mercedes was stolen, which began when Corporal Bourque ran a search on the tag; there was no one to take lawful possession of and remove the car since the driver was arrested for a stolen tag; and the deputies had not yet found the car's owner.

Johnson also argued—for the first time on appeal--that the deputies had "unreasonably seized" him at the gas station by boxing in the Mercedes "without a warrant, probable cause, or reasonable suspicion." **The Court stated that "the ultimate question is whether the defendant's 'freedom of movement was restrained by physical force or by submission to a show of authority.'"** Since Johnson immediately fled on foot after the deputies boxed in the Mercedes and Corporal Bourque drew her weapon, "Johnson did not submit to their show of authority at that point and therefore was not yet seized…It was not until after Johnson fled from the Mercedes, and ran several blocks away from the gas station, that he was physically detained and seized by officers." **Therefore, the Court determined, the deputies' tactical decision to box in the Mercedes was not tantamount to a "seizure" for Fourth Amendment purposes.**

Lastly, the Court of Appeals considered Johnson's argument—also raised for the first time on appeal—"that Corporal Bourque unreasonably searched the Mercedes's license tag by running it through the law enforcement database without a **warrant or any articulable and reasonable suspicion to search the tag."** The Court rejected this argument, stating the well-settled law "that a motorist can have no reasonable expectation of privacy in the license tag information he is required by law to display in plain view."

The Court also rejected Johnson's contention that because he was parked in a privately owned gas station and not traveling on a public road, Corporal Bourque's running the Mercedes' license tag through the law enforcement database was illegal. The Court reasoned that this argument "ignores that the gas station was open to the public and Johnson was parked in a public area of the gas station."

For the foregoing reasons, the Court of Appeals held that the district court did not err either in its factual findings or its denying Johnson's motion to suppress. *U.S. v. Johnson*, No. 19-10200, 2020 WL 2029741 (11th Cir., April 28, 2020).

Georgia Court of Appeals

COUNSEL INEFFECTIVE DUE TO FAILURE TO FILE SUPPRESSION MOTION REGARDING DUI BLOOD TEST RESULTS

On the evening of June 17, 2017, Kemar Henry, was stopped by a Georgia State Patrol Trooper for driving with his bright lights on while driving in the opposite direction of the trooper. Upon making contact with Henry, the trooper observed he had bloodshot and watery eyes, and slurred speech. Henry performed field sobriety tests and exhibited four clues on the horizontal gaze nystagmus test, three clues on the walk and turn test, two clues on the one-leg stand test, and was positive for alcohol on the preliminary breath test.

Henry was arrested for DUI and the trooper read him the implied consent notice and requested a blood test. Henry responded, "[s]o you're gonna let me do the breathalyzer one more time?" The trooper stated, "[w]e're past that bridge. We're past it." The trooper read the implied consent notice again, and Henry asked, "so you are saying I

can take, my blood, my blood, my doctor can do my blood test and all that?" The trooper responded, "I need a yes or a no right now. I did not ask anything about your doctor. I said the State. Yes or no." Henry's response was inaudible on the video. The trooper asked Henry, "[i]s that a yes?" and Henry's response on video was again inaudible. The trooper testified that Henry consented to the blood test.

The GBI tested the blood that was drawn from Henry at the jail, determining that Henry's blood alcohol concentration was .085 grams. Henry was charged with DUI alcohol per se, DUI alcohol less safe, failure to maintain lane, and failure to dim headlights. Following Henry's conviction on the DUI per se and failure to dim headlights charges, he filed a motion for new trial. The trial court denied his motion, and Henry appealed his DUI conviction to the Georgia Court of Appeals.

Henry contended "that his trial counsel was ineffective for failing to object to the introduction of the blood test result because he was denied the independent testing he requested." On appeal, the Court agreed with Henry.

According to OCGA 40-6-392(a)(3), "[A]n accused's right to have an independent test performed does not attach until the State performs its test, but the right to request an independent test may be exercised when the accused is read [his] informed consent rights….An accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test." The Court stated that

> [b]y its terms, 'reasonably could' means we must treat a defendant's statements as a request if reasonable people could disagree about whether those statements expressed a desire for an independent test. The fact that [an ambiguous statement] reasonably could support two different interpretations – either as a request for an independent test or not – requires us to resolve the ambiguity in [the defendant's] favor, because his statements 'reasonably could' be construed as a request for an independent test.

The Court further stated that, "[i]f an individual requests an independent test but is unable to obtain it, the results of the State-administered test cannot be used by the State as evidence against him unless the failure to obtain the test is justified."

In Henry's case, the trooper read him the implied consent notice twice, requesting a blood test both times. After the second time the notice was read, Henry asked the trooper, "so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?" **The Court found that Henry's response was "arguably ambiguous" as to whether he wanted his doctor to perform an independent blood test or whether he wanted the blood from the state's test forwarded to his doctor to test.**

Since the trooper did not answer Henry's question or seek clarification regarding what he was asking—and no attempt was made to accommodate Henry's request—the trial court, under current law, would have been compelled to resolve any ambiguity in Henry's statement in his favor. **Therefore, the Court of Appeals determined that "Henry has made a strong showing that, had his counsel filed a motion to suppress the blood test result, it would have been granted, and thus trial counsel was deficient for failing to so move."**

The Court of Appeals then considered whether Henry was prejudiced by his trial counsel's failure to file the motion to suppress and concluded that he did suffer prejudice. The Court reasoned that, if the blood test results of .085 grams had been suppressed, the State could not have established

the elements of the DUI per se charge to convict him of that offense.

The Court held that there was both "deficient performance of trial counsel and prejudice." Therefore, the Court reversed the trial court's denial of Henry's motion for new trial and remanded the case to the trial court. *Henry v. State,* No. A20A0501, 2020 WL 2747975 (Ga. Ct. App. May 27, 2020).

ALS REMINDER

OSAH has scheduled ALS Hearings in some locations for the month of June. Telephone ALS Hearings have also been scheduled in some cases and you will receive a notice from OSAH with that information. If you have any questions regarding the scheduling of an ALS case or need any assistance with an ALS case, please contact Dee.

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