



DPS Legal Review

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Georgia Court of Appeals

MIRANDA WARNING NOT REQUIRED

At about 7am on a March 2015 morning, Quincy Smith dropped his wife off at church. On his drive home, Smith failed to yield to an oncoming motorcyclist when turning left into his subdivision. Smith's car collided with the motorcycle, resulting in the motorcyclist's death at the scene.

Douglas County Sheriff's Deputy Joseph Pounds was one of the first officers to respond to the crash. As he spoke to Smith, he detected the odor of alcohol on his breath and called Georgia State Patrol for assistance. When Georgia State Patrol Trooper Sheldon Osby arrived on the scene, Deputy Pounds told him that Smith was "possibly impaired". Since it was raining, Smith—who was not handcuffed--was sitting in the backseat of Sheriff Pounds' patrol car when Trooper Osby arrived.

Upon his first interaction with Smith, Trooper Osby smelled a strong odor of alcohol from Smith's breath. When Osby asked Smith if he'd been drinking, Smith said that "he had consumed two beers approximately two hours prior to driving." Smith consented to performing field sobriety tests when requested by Trooper Osby. Smith's performance on the horizontal gaze nystagmus, walk and turn, and one-leg stand field sobriety tests "readily indicated impairment". When Osby administered an Alco-Sensor test, Smith's breath showed a positive result for alcohol.

Following these tests, Trooper Osby arrested Smith and read the implied consent warning, requesting a test of Smith's blood. This test indicated that, approximately 1.5 hours after the

accident, Smiths' blood alcohol concentration was .136. Smith was charged with first degree vehicular homicide through DUI less safe and DUI per se; DUI less safe; and DUI per se. The jury convicted Smith on all charges, and the judge imposed a 12-year sentence.

Smith appealed his conviction to the Georgia Court of Appeals. Among the bases for his appeal was his contention that the trial court erred by denying his motion to suppress evidence, including his performance on field sobriety tests, his blood test results, and statements he made to officers at the scene. **Smith asserted that this evidence should have been suppressed "because he was not *Mirandized* at the time the evidence was obtained."**

Smith argued that his sitting in the back of Sheriff Pounds' cruiser amounted to his being "formally arrested." **The Court of Appeals found this argument unconvincing:**

[T]his overlooks the evidence that he entered the cruiser voluntarily to avoid the rain, was free to leave the vehicle and did leave to urinate and smoke, and was never handcuffed or told he was under arrest. Under these circumstances, the record supports a finding that Smith was not "in custody" to the extent that a *Miranda* warning was required before officers spoke with Smith to ascertain the situation.

As to the results of Smith's blood test, the Court found that Trooper Osby was not required to

give a *Miranda* warning and that the record supported a finding “that Smith’s subsequent blood test was properly and voluntarily administered.”

The Court of Appeals affirmed Smith’s conviction based on its holding (among other reasons) that Smith was not in custody for *Miranda* purposes. *Smith v. State*, No. A20A0512, 2020 WL 3168547 (Ga. Ct. App. June 15, 2020).

VOLUNTARINESS OF CONSENT TO BREATH TEST

In early 2017 Francis Kallon was charged with DUI per se, DUI less safe, and failure to maintain lane. The charges arose from an incident in which he struck a curb while driving. He called a tow truck to help change his tire and was found unresponsive when the tow truck driver arrived. When the officer dispatched to the scene knocked on Kallon’s car window, Kallon struggled to roll down the window.

After smelling a strong odor of alcohol coming from Kallon and noticing his glazed, bloodshot eyes, the officer administered field sobriety tests: Kallon exhibited six out of six clues on the horizontal gaze nystagmus; seven out of eight clues on the walk-and-turn, and three out of four clues on the one-leg stand. The officer arrested Kallon for DUI and read him the relevant Georgia implied consent notice, which read, in part: “Your refusal to submit to the required testing may be offered into evidence against you at trial.”

Kallon consented to the breath test requested by the officer, and his blood alcohol level was .115 grams. **The trial court denied both Kallon’s motion to suppress his breath test results and an oral motion in limine to exclude the results. After being found guilty on all counts, Kallon appealed.**

Kallon asserted that his DUI convictions warranted reversal citing the “inherently coercive” nature of the “unconstitutional implied consent notice” read to him by the arresting officer. Kallon cited the Georgia Supreme Court’s decision in the *Elliott* case in support of his claim. He reasoned that “because a suspect’s refusal to consent to a breath test can no longer be admitted into evidence in

criminal proceedings under *Elliott*, the former implied consent notice is inherently coercive because it provides that one’s refusal ‘may be’ so admitted.”

The Court of Appeals rejected Kallon’s argument that the implied consent notice read to him upon his arrest was “unconstitutionally coercive.” In support of its finding, the Court cited the *Olevik* case, in which the Georgia Supreme Court found “that former OCGA § 40-5-67.1 is not per se coercive and rejected the defendant’s argument that the notice is unconstitutional on its face.”

The Court of Appeals also looked to the decision in the *Elliott* case, in which the Georgia Supreme Court held “that, in a criminal prosecution, the Georgia Constitution ‘precludes admission of evidence that a suspect refused to consent to a breath test.’” Importantly, the Supreme Court made clear that the *Elliott* decision “was not nullifying its numerous prior holdings — including *Olevik*’s holding — that the implied consent notice itself is not per se coercive.”

Kallon also argued that “the threat within the notice unlawfully coerced him into submitting to the State’s breath test and that the State forced him to choose between waiving his Georgia constitutional right against self-incrimination and being incriminated by invoking it.” **The *Elliott* case had not yet been decided at the time of Kallon’s trial or the suppression hearing. Therefore, the Court of Appeals remanded Kallon’s case to the trial court “for the trial court to reconsider whether Kallon’s consent was voluntary under the totality of the circumstances in light of *Elliott*.”** *Kallon v. State*, No. A20A0030, 2020 WL 3286406 (Ga. Ct. App. June 18, 2020).

TRAFFIC STOP WAS UNLAWFULLY PROLONGED

Sergeant Holly with the Commerce City Police Department pulled over a vehicle driven by Drake after witnessing an improper lane change. This led to Drake’s arrest for possession of oxycodone and morphine and an open container violation. Drake

moved to suppress the evidence found during the search of his car and person.

At the suppression hearing, Sergeant Holly testified that he thought he detected a faint odor of alcohol on Drake's person but that he did not believe Drake was an impaired driver. Neither the second nor third backup officer who assisted in the traffic stop testified at the hearing.

While Sergeant Holly was filling out a warning citation for improper lane change, he asked the third officer to see if Drake would consent to a search of his vehicle. After Drake agreed, the third officer finished writing the warning citation while Holly and the second officer conducted the search. **The third officer completed the citation about nine minutes after Holly initiated the traffic stop but the citation was not then given to Drake. Instead, Holly and the second officer began the vehicle search right as the other officer completed the ticket.**

A search of the vehicle yielded an open container of alcohol and a white substance that Holly thought might be crack cocaine. However, a field test of the substance did not detect cocaine. **No more than 14 minutes after the traffic stop began, the officers had completed both the vehicle search and the field test. Instead of issuing the warning ticket to Drake at this time, however, Sergeant Holly asked for permission to search Drake's person.** During the search, Holly reached into Drake's pocket and removed a small bottle. Drake admitted that the bottle contained morphine and oxycodone.

At the suppression hearing, Drake testified that he did not consent to the search of his vehicle. He also testified that he agreed to the search of his person but "did not feel that he had a choice, as he had not been told he was free to leave and he did not understand why he was being detained." Sergeant Holly testified that Drake was not free to leave when he asked whether Drake would consent to a search of his person.

In ruling on Drake's motion to suppress, the trial court found that Drake's consent to search his vehicle was "freely and voluntarily" given.

However, the court granted Drake's motion to suppress the evidence found during the search of his person. The court found that "any consent Drake gave was neither voluntary nor freely given and was the result of an illegally prolonged traffic stop."

The State appealed from the part of the trial court's order granting Drake's motion to suppress the drugs found during the search of his person. In considering the State's motion, the Georgia Court of Appeals distinguished the search of Drake's vehicle from the search of his person. The Court found that the officer's request to search Drake's vehicle "did not impermissibly prolong the stop and, therefore, did not violate the Fourth Amendment." In reaching this conclusion the Court considered that the officers asked for consent to search the vehicle "shortly after initiating the traffic stop and before any traffic citation issued."

In contrast, the Court determined that detaining Drake longer to request a search of his person violated his Fourth Amendment rights:

The evidence shows that the traffic citation had been written and therefore the purpose of the stop completed at least five to six minutes before police finished their search of Drake's vehicle. By seeking Drake's permission to conduct a second search after that time (and at least seven minutes after the completion of the traffic citation), the State "exceeded the scope of a permissible investigation of the initial traffic stop."

The Court dismissed the State's contention that Drake's consent to a search of his vehicle "legally justifies any delay between the time necessary to fill out the citation and the time in which [Drake] granted consent to search his person." Rather, the Court concluded that once the vehicle search was

finished, the traffic stop was at an end. **Since Sergeant Holly did not have “a particularized reason to suspect that [Drake was] engaged in some other criminal activity,” his continued detention of Drake impermissibly prolonged the traffic stop.** In reaching this conclusion the Court rejected the State’s argument that the following factors provided the basis for suspecting that Drake was involved in illegal drug activity:

Holly thought he smelled alcohol on Drake; police recovered a partially-consumed container of alcohol in Drake’s car; inside of Drake’s car, police found a white substance that Holly believed resembled crack cocaine; and in response to police questions, Drake stated that he had previously gotten “in trouble” because of methamphetamine.

The court was unpersuaded that any of these facts would lead a reasonable person to suspect that Drake was involved in activity related to illegal narcotics for the following reasons:

1. Holly testified at the suppression hearing that he determined that Drake was not intoxicated (“Holly concluded that Drake may have had ‘a little bit to drink [,] but he [was] not ... DUI.’”);
2. A field test of the substance that Holly thought might be crack cocaine “did not indicate the presence of cocaine”; and
3. The “mere fact” of Drake’s admitting to getting “in trouble” due to methamphetamine in the past “does not provide a basis for suspecting that the person is somehow currently involved in illegal narcotics activity.”

For these reasons, the Court of Appeals affirmed the trial court’s decision to grant Drake’s motion to

suppress oxycodone and morphine seized by Sergeant Holly during a search of Drake’s person. *State v. Drake*, No. A20A0248, 2020 WL 3445712 (Ga. Ct. App. June 24, 2020).

ALS REMINDER

OSAH has scheduled in-person ALS Hearings in some locations for the month of July. 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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