# DPS Legal Review

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## *11th Circuit Court of Appeals*

### PROLONGING OF TRAFFIC STOP

While patrolling Interstate 20 at approximately 9 PM on a December 2013 night, Deputy Sheriff Robert McCannon saw a Nissan Maxima driven by Erickson Campbell cross the fog line. McCannon turned on his vehicle's dashcam, and saw the Maxima cross the fog line again. McCannon also observed that the Maxima's "left turn signal blinked at an unusually rapid pace." Deputy McCannon initiated a traffic stop and explained to Campbell why he'd been pulled over.

Campbell provided his driver's license and exited the Maxima at Deputy McCannon's request. McCannon planned to issue Campbell warning citations for: failure to maintain signal lights in good working condition in violation of O.C.G.A. § 40-8-26 and failure to stay within the driving lane in violation of O.C.G.A. § 40-6-48.

Deputy McCannon had dispatch run a check on Campbell's driver's license and continued to write the citations. The deputy's conversation with Campbell revealed that Campbell was driving to Augusta to visit family, had a DUI arrest from about 16 years ago, and did not have a weapon in his vehicle. McCannon then inquired as to whether Campbell had, among other items, any counterfeit CDs or illegal drugs in his car. Campbell responded that he did not, at which point the deputy requested permission to search Campbell's car for any of the items. Campbell consented to the vehicle search.

Another deputy who had arrived on the scene searched the Maxima while McCannon filled out the warning citations. After Campbell signed the warning ticket, McCannon gave him back his driver's license. McCannon then joined the other deputy in searching the vehicle. The search uncovered "a 9mm semi-automatic pistol, 9mm ammunition, a black stocking cap, and a camouflage face mask in a bag hidden under the carpet in the Maxima's trunk." When pressed, Campbell said he lied about having a firearm in the car because he was a convicted felon.

**After his indictment for possession of a firearm by a convicted felon, Campbell filed a motion to suppress the evidence discovered during the search. Campbell argued that: (1) McCannon lacked reasonable suspicion to conduct the traffic stop; and (2) Even assuming reasonable suspicion that a traffic offense had occurred, Campbell contended that**

> **his seizure became unreasonable when McCannon prolonged the stop by asking Campbell questions unrelated to the purpose of the stop. In turn, the unreasonable seizure tainted any consent he had given the officers to search his car, requiring that the evidence uncovered during the search be suppressed.**

Campbell pointed to the Supreme Court's decision in the *Rodriguez* case in support of his argument "that if McCannon prolonged the stop at all through these inquiries, the stop became unlawful." At the suppression hearing, the District Court reviewed the dashcam video, in addition to hearing testimony from Deputy McCannon. The

timestamps on the video indicated that thirteen minutes transpired between the time Campbell was pulled over and McCannon's fellow deputy began searching the car. After searching the car for almost seven minutes, the deputies found the weapon and a ski mask. The video timestamp also showed that "[f]rom the time McCannon began writing the warning ticket to Campbell's consent to the search, a total of 6 minutes and 7 seconds elapsed. Campbell consented 8 minutes and 57 seconds after McCannon made the stop."

The District Court concluded that McCannon had reasonable suspicion to conduct the traffic stop, as Georgia law "requires turn signals to be in good working condition." In reaching its determination, the Court considered "McCannon's testimony that in his experience a rapidly blinking turn signal indicates either a bulb is out or is about to go out." Since the District Court determined that the rapidly blinking turn signal alone justified McCannon's decision to pull over Campbell's car, the Court did not go on to consider the failure to maintain lane offense.

**With respect to whether McCannon prolonged the traffic stop, the District Court concluded that some of his inquiries were proper, i.e., those that pertained either to the traffic offense or to legitimate safety concerns. In contrast, the Court found that McCannon's inquiries about whether there were drugs or counterfeit items in the car were improper, as they were unrelated to the purpose of the traffic stop. Despite the Court's finding regarding McCannon's questions about contraband, the District Court determined "that the overall length of the stop was reasonable and that McCannon conducted the stop expeditiously." In support of its finding, the Court pointed out that the portion of the stop during which McCannon improperly questioned Campbell lasted "all of 25 seconds."**

After entering a conditional guilty plea, Campbell appealed the District Court's denial of his motion to suppress to the Eleventh Circuit Court of Appeals. The Court of Appeals agreed with the District Court that Deputy McCannon had reasonable suspicion to conduct a traffic stop of Campbell's car. However, unlike the District Court, **the Court of Appeals held that the deputy did unlawfully prolong the stop under the United States Supreme Court's 2015 decision in the *Rodriguez* case:**

> Deputy McCannon had reasonable suspicion to stop Campbell for a traffic violation. He unlawfully prolonged the stop when he asked unrelated questions without reasonable suspicion about whether Campbell was trafficking contraband. Because these questions were permitted under binding precedent at the time, however, the good faith exception** applies, and we decline to invoke the exclusionary rule. Thus, there is no need to consider whether Campbell's consent purged the taint from the unlawfully prolonged seizure.

(**The exception provides that, if an officer had a good faith belief that he was acting in accordance with the law, the illegally seized evidence is admissible.)

For these reasons, the Court of Appeals affirmed the District Court's denial of Campbell's motion to suppress. *U.S. v. Campbell,* No. 16-10128, 2020 WL 4726652 (11th Cir., Aug. 14, 2020).

## *Georgia Court of Appeals*

### WAS CONSENT TO BREATH TEST VOLUNTARY?

On June 16, 2018, an on-duty sheriff's deputy witnessed Brandon Henderson back his car into another car parked in a bar parking lot. Henderson then exited his car and got in line to enter the bar, at which point the deputy asked Henderson to step out of line so they could talk. The deputy observed

that "Henderson was unsteady on his feet, smelled of alcohol, and was slurring his words." Henderson claimed to have "had a couple of beers". Henderson was arrested and charged with driving under the influence.

The deputy read Henderson the Georgia implied consent notice, which included the following language: "Your refusal to submit to the required testing may be offered into evidence against you at trial." Henderson "responded affirmatively" when the deputy asked, "Will you submit [to] the state-administered chemical test of your ... breath under the Implied Consent law?"

Henderson was transported to the jail, where the breath test was administered. Before testing, another sheriff's deputy confirmed that Henderson "was freely submitting to the tests." Henderson's breath test samples indicated a blood-alcohol level that exceeded the legal limit.

**Before trial, Henderson filed a motion to exclude his breath test results, contending "that the implied consent [notice] read to him was misleading." The trial court granted the motion, citing the Georgia Supreme Court's 2019 decision in the *Elliott* case. The trial court found that "the implied consent notice given 'was materially and substantially misleading because it suggested that if [Henderson] exercised his constitutional right to refuse the state-administered breath test, such refusal could be used against him at trial.'"**

The trial court did not address any other evidence in finding that, under the totality of the circumstances, Henderson's consent was not voluntary. The State appealed the trial court's ruling on the motion, contending that the court's reliance "solely on the reading of the implied consent notice by the deputy" was an incorrect application of the totality of the circumstances test: "Absent evidence showing that a defendant was, in fact, misled, the State argues that suppression of test results is not warranted."

**In its review of the State's appeal, the Court of Appeals considered the Georgia Supreme Court's 2017 holding in the *Olevik* case. In that case, "the Supreme Court recognized that requiring a defendant to submit [to] a breath sample violates Georgia's constitutional right against compelled self-incrimination." The Court pointed out that the implied consent notice read to Olevik was the same notice read to Henderson. In *Olevik*, the Supreme Court rejected the argument that "the implied consent notice…was so inherently coercive that the mere reading of the statute precluded use of any breath test obtained."**

Instead, the Supreme Court adopted a "totality of the circumstances" test in the *Olevik* case to determine the voluntariness of a defendant's consent to a breath test:

> [T]he voluntariness of a consent to search is determined by such factors as the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.

The Georgia Court of Appeals concluded that the Henderson trial court's focus "solely on the misleading nature of the implied consent warning" ignored the *Olevik* holding that no single factor is controlling in determining voluntariness. Rather, the Court of Appeals held, "the trial court also must consider factors such as a defendant's age, education, capacity, the nature of questioning, and any threats employed" in determining the voluntariness of consent to a breath test.

**Therefore, the Court of Appeals remanded Henderson's case to the trial court: "Where a trial court's order does not reflect consideration of voluntariness under the totality of the**

**circumstances, remand is required."** *State v. Henderson,* No. A20A1293, 2020 WL 5011864 (Ga. Ct. App. Aug. 25, 2020).

## FLEEING OR ATTEMPTING TO ELUDE CONVICTION UPHELD

On August 17, 2012, at approximately 8:30 PM, Thelusma was driving his vehicle in an apartment complex and had an argument with Josteen Mosley, a security guard for the complex. According to witnesses, Thelusma fired multiple rounds as he drove away from Mosley. Thelusma testified that: "Mosley threatened him and pointed a gun in his face; he heard gunshots as Mosley was heading away from him; and he only fired his gun into the air in self-defense."

Police officers in the vicinity observed or heard the gunshots, and multiple patrol cars—including one driven by Deputy Matthew Holbrook with the Newton County Sheriff's Department--pursued Thelusma. The patrol cars' lights and sirens were activated as they pursued Thelusma. During the chase, Thelusma drove about 90 miles per hour in a residential area where the speed limit was 25 miles per hour. Once Thelusma wrecked his car, he fled on foot.

**Thelusma testified at trial "that he did not know police officers were pursuing him, and he believed Mosley had placed a portable siren on his own vehicle and was pursuing Thelusma." Thelusma was convicted of charges including fleeing or attempting to elude an officer and discharging a gun near a highway or street. Thelusma appealed, arguing, among other things, that the evidence was insufficient to support his fleeing or attempting to elude conviction.**

Thelusma contended "that the State did not prove Deputy Holbrook's uniform prominently displayed his badge of office and that his vehicle was appropriately marked as an official police vehicle." Georgia's fleeing or attempting to elude statute states:

> It shall be unlawful for any driver of a vehicle willfully to fail or refuse to bring his or her vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer when given a visual or an audible signal to bring the vehicle to a stop. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such signal shall be in uniform prominently displaying his or her badge of office, and his or her vehicle shall be appropriately marked showing it to be an official police vehicle. O.C.G.A. § 40-6-395(a)

**The Court of Appeals found that the evidence contradicted Thelusma's argument. At trial, Deputy Holbrook testified "that at the time he heard the gunshots at the apartment complex, saw Thelusma's vehicle, and began to pursue Thelusma, he was on duty and responding to an incident across the street from the complex." Holbrook's account was corroborated by witness testimony that the deputy was driving a police vehicle. Holbrook testified further that his patrol car's blue lights and siren were activated as he pursued Thelusma, as were those of two other police vehicles that joined in the chase.**

In reaching its conclusion that the evidence supported Thelusma's conviction on the fleeing or attempting to elude charge, the Court of Appeals applied precedence from a 1986 decision in which the Court concluded: "When the evidence shows that the officer was on patrol and in his patrol car and had his blue light flashing and siren sounding, the jury may rationally conclude the elements of the code section are proved beyond a reasonable doubt."

For the foregoing reasons, the Court of Appeals affirmed Thelusma's conviction on the fleeing or attempting to elude charge. *Thelusma v. State,* No. A20A1076, 2020 WL 5050646 (Ga. Ct. App. Aug. 27, 2020).

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**ALS REMINDER**

If you are unavailable for an ALS Hearing, a **written** continuance motion must be filed. The ALS Court does **not** accept continuance requests by telephone or in the body of an email. The continuance request must be in writing and emailed to the Court as an email attachment or faxed to the Court. If you need assistance with a continuance motion, please email **both** Dee (dbrophy@gsp.net) and Grace (gmatthews@gsp.net). Provide the court date, location, and case name in your email. Continuance motions must be filed with the Court at least ten days prior to the ALS Hearing date, so please notify us **before** the ten-day deadline to allow sufficient time for the motion to be filed.