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Georgia Court of Appeals

ARMED ROBBERY SUSPECT HAD REASONABLE EXPECTATION OF PRIVACY IN HIS DRIVEWAY

On January 30, 2019, DeKalb County Police responded to a Memorial Drive gas station in response to an armed robbery in the vicinity. The victims told the officers that a white Ford F-150 truck pulled up to where they were parked. A male they did not know exited the truck, approached their car, and robbed them at gunpoint. The robber stole “a wallet and its contents, Apple headphones, a gold necklace, and a cell phone.”

The robber then got back in the rear passenger side of the truck, and the driver left the scene. The victims described the robber’s height, build and clothing to the DeKalb officer on the scene. The officer used the “Find My Phone” app to attempt to pinpoint the general location of the stolen cell phone.

About an hour later, the app indicated that the phone was “pinging” near Memorial Drive and Carter Road. DeKalb County patrol units focused on that area, at which time an officer saw a white truck backed into a driveway at a house on Monterey Drive. The phone was pinging in the area where the truck was parked (later determined to be Davis’ residence), but not directly upon this location. The DeKalb officer parked his patrol car and walked towards Davis’ house.

The officer testified that he could not tell if there was anyone in the truck until he was standing in the driveway of [Davis’ house]. Once the officer

walked onto the driveway, he could not identify who was in the truck or even how many people were inside the truck. He did not approach the truck and ask to speak with the individuals inside, but just grabbed [Davis] from the front driver seat of the truck, detained him, and placed him in the back of his patrol car.

The police found a cell phone case, earbuds, and a firearm in the truck. The officer questioned Davis while he was detained, and Davis conceded that the weapon in the truck was his.

Davis was arrested and charged with armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. The trial court granted Davis’ motion to suppress the evidence against him. The court found that the police lacked reasonable suspicion to enter Davis’ property; that no exigent circumstances justified the warrantless search; and that “Davis had a reasonable expectation of privacy in his truck in his driveway at the time police searched his truck.” The State appealed the trial court’s decision, arguing that:

(1) the police were authorized to be on Davis’ property when the search occurred; (2) the trial court erred in finding that Davis had a reasonable expectation of privacy when in his truck in his driveway; (3) the trial court erred in finding that the truck

was searched while still in the driveway of Davis' home; and (4) portions of the trial court's findings of fact are not supported by the record.

The Georgia Court of Appeals affirmed the trial court's decision to grant Davis's motion to suppress. The Court of Appeals relied upon a 2018 United States Supreme Court decision in *Collins v. Virginia*, which held:

it is a settled rule that warrantless arrests in public places are valid, but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, *even when they have probable cause*. That is because being arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. Likewise, searching a vehicle parked in the curtilage* involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of *the sanctity of the curtilage*.

(*Curtilage is the area immediately surrounding and associated with the home.)

The Court of Appeals agreed with the State's assessment "that the prohibition against such entry into the curtilage of a home 'is subject to the exception that any visitor, including a police officer, may enter the curtilage of a house when that visitor takes the same route as would any guest, deliveryman, postal employee, or other caller.'" However, the Court pointed out, the cases that support this exception involve first-tier encounters (e.g., where the officer only seeks to "knock and talk" with someone in their home). The State did

not, however, cite any caselaw in support of an officer's right "to traverse the driveway of a home for the purpose of initiating a second-tier encounter and detention." The Court concluded that "the background social norms which would have permitted police to traverse Davis' driveway **to knock on his door** did not permit them **to traverse his driveway for the purpose of forcibly removing him from his truck to detain him.**" (Emphasis added)

The Court of Appeals summed up its decision to affirm the trial court's denial of Davis's motion to suppress as follows:

Simply stated, the police were not legally present on Davis' driveway at the time he was detained. The officers were not authorized to enter the curtilage of Davis' home for the purpose of initiating a second-tier encounter absent an exception to the warrant requirement. Accordingly, because all of the evidence against Davis was obtained as a result of an unlawful search and seizure, the trial court did not err in suppressing it.

State v. Davis, No. A20A1204, 2020 WL 5639992 (Ga. Ct. App. Sept. 22, 2020).

U.S. District Court – Northern District of Georgia

TERRY STOP ON SLEEPING DRIVER WAS PROPER

On June 18, 2018, Officer Mogavero responded to a call of a "person down and possibly intoxicated at a gas station." Once at the gas station, Mogavero approached a car in which Hubbard was asleep. Since it was approximately 4:20 AM, Officer Mogavero used his flashlight to illuminate the inside of the car. Despite a bright light shining into the car, Hubbard remained asleep.

Officer Mogavero also observed a handgun on the passenger seat and “a glass drink with a lime in it.” When examining the car’s exterior, Mogavero noticed that some of its tires were damaged. Officer Miller arrived on the scene after Mogavero called for backup. Among the officers’ concerns were Hubbard’s welfare and whether any crimes might have occurred, such as driving under the influence or hit and run.

Hubbard awoke and took hold of the pistol when Mogavero tapped on the driver’s window but put it down at the officers’ command. When the officers told Hubbard to open the car door, Mogavero detected the odor of alcohol.

Hubbard filed a motion to suppress evidence discovered during a search. He contended that the officers lacked probable cause to order him to exit his car at gunpoint. Instead, Hubbard asserted that “Officer Mogavero could not have felt endangered, as required for a wellness check, or have had a reasonable suspicion of criminal activity, as required for a *Terry* stop.”

A federal Magistrate Court was unpersuaded by Hubbard’s arguments. The Magistrate Judge concluded that, although it is not illegal to sleep in a car, “it is unusual to sleep in a running car in the middle of the driving area in a gas station.” Further, the Magistrate Judge found that “even if that did not create probable cause, then the facts were enough to generate a reasonable suspicion, which is all that is required for a *Terry* stop.” Therefore, the Magistrate Judge recommended that Hubbard’s motion to suppress be denied.

In its review of the Magistrate Court’s decision, the District Court relied on a 2018 holding in the *Alexander* case (Southern District of Georgia). In *Alexander*, officers approached the passenger side of a vehicle that had been “stopped at a stop sign for an unusually long time.” After seeing that the driver was armed, the officers ordered him to place his hands on the dashboard. The *Alexander* court concluded that the “officers were well within their authority to conduct a wellness check to determine

whether the vehicle’s occupants were safe.” The District Court reasoned:

Similarly, here the officers first saw Defendant passed out (or at least nonresponsive) in a car parked askew in a gas station in the middle of the night and then saw Defendant had a gun on the passenger seat next to him. They were within their authority to check on Defendant’s safety and wellness and then to remove him from the car to protect themselves while conducting this inquiry, particularly after he first motioned to the gun.

The District Court also considered the totality of the circumstances in determining that the officers were authorized to perform a *Terry* stop. The Court concluded the officers had the requisite “reasonable suspicion that criminal activity is afoot.” These circumstances included that Hubbard was asleep in an improperly parked car; the car’s tires were damaged; there was a firearm on the passenger seat; and he had a glass containing clear liquid, garnished with a lime. The Court found that this constellation of facts “provide[d] a minimal level of objective justification that Defendant was driving while intoxicated.”

For the foregoing reasons, the District Court adopted the Magistrate Court’s recommendations and denied Hubbard’s motion to suppress. *U.S. v. Hubbard*, Case No. 1:19-cr-00179, 2020 WL 5511880 (N.D. Ga., Sept. 14, 2020).

OFFICER NOT ENTITLED TO QUALIFIED IMMUNITY

This is a civil suit brought by Antraveious Payne and his mother, Zabora Brown, in the U.S. District Court for the Northern District of Georgia. **The Defendants are former City of Atlanta Police Department (“APD”) Officer Matthew Johns and**

the City of Atlanta. (This summary focuses on the case against Johns.) The civil suit proceeded after Johns' indictment in Fulton County on four counts of aggravated assault, two counts of making false statements and writings, and two counts of violating his oath of office. Johns pleaded guilty to all counts, including the four aggravated assault charges based upon his actions directed at Plaintiff Payne. He was sentenced to twenty years in prison, with five years to serve.

On September 15, 2016, two APD officers patrolling in downtown Atlanta observed a black BMW with a stolen license plate. The officers radioed a description of the BMW and its direction of travel while pursuing the speeding vehicle. APD officers, including Johns, gave chase. In doing so, Johns violated a direct order to all officers in his specialized unit not to join in the pursuit.

During the pursuit, the BMW reached speeds of almost 110 miles per hour on highways, surface streets, in residential neighborhoods, and in commercial areas. About 15 minutes into the chase, a Georgia State Patrol Trooper stopped the BMW by using a Precision Immobilization Technique ("PIT") maneuver. APD officers arrived on the scene, drew their weapons, and approached the car. Police dashcam video captured most of the events immediately following the chase, including interactions between law enforcement and the BMW's occupants.

The U.S. District Court for the Northern District of Georgia reviewed all dashcam footage. Per the District Court's review of the video, three people immediately exited the BMW and laid on the ground. Payne, the front-seat passenger, "quickly flopped out of the car and laid on his belly." The Court also observed:

Defendant Johns exited his patrol vehicle and ran up to Payne. With forward momentum, Defendant Johns kicked Payne in the head...Johns then used his foot, lifting it vertically and stomping

down on the back of Payne's head as Payne was lying face down on the ground...Defendant Johns then knelt on Payne's back near his head and struck him in the left side of his body while trying to handcuff him. He punched Payne again in the head with a closed left-handed fist... The video also appears to show that, at the time of the incident, Payne was not struggling, trying to flee, or resisting arrest.

A Senior Patrol Officer who arrived on the scene within a minute of the stop called for an ambulance after observing "blood on Payne's mouth and near one of his ears." Payne was transported to Grady Hospital, where he was treated for a concussion and abrasions to his head and face.

The APD's Office of Professional Standards ("OPS") investigated the incident, determining that "Payne had not struggled with Defendant Johns, resisted arrest, or disregarded orders." The OPS concluded that Defendant Johns used "unreasonable, unnecessary, and unauthorized" force. APD terminated Johns' employment.

Although Johns entered a guilty plea in the criminal case, he claimed, in this civil case, that "he did not commit the acts attributed to him" and only pleaded guilty "because his lawyer at the time quit the day of the trial" and "we only had 30 days to prepare for trial." In the District Court civil suit, Plaintiffs Brown and Payne seek "compensatory damages for violating Plaintiff Payne's constitutional and statutory rights."

In considering whether Defendant Johns was entitled to qualified immunity with respect to his actions, the District Court determined

that a reasonable jury could find that Payne was not resisting arrest when Defendant Johns applied significant and excessive force...As soon as

Defendant Johns reached Payne, he kicked him in the head. He did not bend down or try to restrain the boy — he simply kicked him in the head. Defendant Johns took a brief moment to regain his balance and then stomped viciously on the back of Payne’s head. The facts certainly would allow a jury to conclude the boy was not struggling, resisting, or trying to get away. It could find that, regardless of the high-speed chase, Payne had given himself up when the officer used significant force against him. As Payne was neither resisting arrest nor posed a danger, Defendant Johns was likely not entitled to use any force at that time.

qualified immunity analysis, no reasonable police officer could have believed that doing so was lawful under the circumstances, particularly not with *Smith’s* [a 1997 Eleventh Circuit Court of Appeals case] principle that gratuitous force used on a subdued suspect crosses the line into excessive.

Despite its finding on qualified immunity, the Court determined that Johns was “still entitled to present the disputed factual issues to a jury.” Therefore, the Court denied Plaintiffs’ motion for summary judgment as to Defendant Johns. *Brown and Payne v. City of Atlanta and Johns*, Case No. 1:17-cv-04850, 2020 WL 5633399 (N.D. Ga., Sept. 21, 2020).

A qualified immunity defense only attaches when an officer is “acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.” The parties to the civil case agreed that “Johns acted within the scope of his discretionary authority at the time of the incident.” The District Court then considered, as required by law, whether Plaintiffs had met the burden of showing that Johns was not entitled to a qualified immunity defense.

The District Court held that, although qualified immunity “is typically a broad shield for law enforcement officers... this case remains an outlier where Defendant Johns’s conduct brought him ‘so far beyond the hazy border between excessive and acceptable force that [he] had to know he was violating the Constitution...’” The Court concluded that Johns was not entitled to qualified immunity:

Kicking and stomping on Payne as he lay on the ground compliant and having given himself up was by any measure unnecessary and gratuitous. For purposes of the

ALS REMINDER

Most of the OSAH Judges have staggered the times for the ALS Hearings. Some of the Judges are scheduling telephone/video ALS Hearings and some Judges are scheduling in-person ALS Hearings. Some Judges have also scheduled two Court dates for the telephone/video ALS Hearings: one court date for a prehearing status conference and a second court date for the hearing on the case.

**Published with the approval of
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Legal Services

Joan Crumpler, Director
Clare McGuire, Deputy Director
Dee Brophy, ALS Attorney
Send questions/comments to:
cmcguire@gsp.net