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11th Circuit Court of Appeals

OFFICER'S SEARCH OF DRIVER'S PERSON AND CIGARETTE PACK SUPPORTED BY REASONABLE SUSPICION

Officer Kaufmann and a trainee officer were on duty at about 2:15 AM when they initiated a traffic stop on Williams, a speeding motorcyclist. Williams was wearing an "Outcast Motorcycle Club" ("OMC") leather jacket at the time of the stop and his female passenger wore an OMC vest. There was an OMC rally in town and, earlier this same night, Kaufmann and his trainee were backup officers on a traffic stop involving another motorcycle rider outfitted in an OMC jacket. During this earlier stop, the responding officer located three firearms on the driver's person, and a group of OMC riders converged on the scene.

Officer Kaufmann also recalled that someone was "severely beaten" during a brawl at the previous year's OMC rally. As Kaufmann executed a traffic stop on Williams for exceeding the speed limit by 17 miles per hour, he was cognizant of both the earlier traffic stop of an OMC motorcyclist and the large fight at last year's rally.

As Officer Kaufmann approached Williams, he observed Williams secretly hand off a pack of cigarettes to his female passenger named "Mack". When Kaufmann inquired as to why Williams passed the cigarette pack to Mack, "Williams asked why he needed to know." Kaufmann then requested that Mack hand him the cigarette pack. Mack was unresponsive at first but turned over the pack to Officer Kaufmann when Williams directed her to do so. Kaufmann observed oxycodone pills and cocaine in the cigarette pack when he opened the lid.

During a pat-down search of Williams, Officer Kaufmann uncovered a pistol. Kaufmann testified that he conducted the pat-down because: (1) Williams was wearing a jacket identifying him as an OMC gang member; and (2) Williams had stealthily handed Mack a cigarette pack containing narcotics. Kaufmann arrested Williams on drug possession and gun charges.

After his indictment on two counts of possessing a controlled substance and one count of possession of a firearm by a convicted felon, Williams filed a motion to suppress the evidence discovered by Officer Kaufmann during the search. After the suppression hearing, the magistrate judge recommended that Williams' motion be denied on the following bases:

[F]irst, that the search of the cigarette pack was consensual; second, if the search was not consensual, the officer still had reasonable suspicion to conduct a *Terry* protective search of the cigarette pack; and third, the officers would have inevitably discovered the drugs in the cigarette pack by patting down Williams to protect their personal safety, at which point they would have found the pistol, arrested him, and conducted a search of the cigarette pack incident to his arrest.

Over Williams’ objection the district court adopted the recommendation of the magistrate court and denied Williams’ motion to suppress. After being convicted at trial on all counts, Williams appealed to the 11th Circuit Court of Appeals. He argued that the district court erred in denying his motion to suppress.

The government countered that, based on the totality of the circumstances, Williams consented to the search. In the alternative, the government contended that Kaufmann possessed the requisite articulable suspicion to justify a protective search of the cigarette pack or, “at the very least, of Williams’s person, which would have inevitably led to a justifiable search of the pack.”

The 11th Circuit concluded that the totality of the circumstances gave rise to reasonable suspicion sufficient to justify both the pat-down search of Williams and the search of the cigarette pack.

Officer Kaufmann stopped Williams for speeding at 2:15 in the morning. Williams and his passenger were both wearing clothing identifying them as members of a motorcycle gang that had been linked to violent activity. Officer Kaufmann knew about a violent fight that occurred at an OMC rally the year before and had just participated in a similar traffic stop hours before in which an OMC member on a motorcycle was carrying three firearms. When Officer Kaufmann approached Williams, he became suspicious when he saw Williams furtively pass the cigarette pack to Mack, who quickly concealed it between her legs. Then, when he asked Williams about the pack, Williams gave an evasive answer that reasonably heightened Officer Kaufmann’s suspicions.

The Court was unpersuaded by Williams’ contention “that a cigarette pack is small and, therefore, not the usual kind of item subject to a protective *Terry* search.” The Court pointed to Officer Kaufmann’s testimony at the suppression hearing “that he was concerned the pack might have held a small, lightweight weapon like a razor blade or pocket knife.” This concern was justified, the Court held, based upon Williams’ surreptitiously passing the cigarette pack to Mack as Officer Kaufmann approached; Mack’s concealing the pack between her legs; and Williams’ asking “why [Kaufmann] needed to know” when the officer questioned why Williams furtively passed the cigarette pack to Mack:

Mack had the pack on her person and, because Williams was stopped on a motorcycle rather than an automobile, the pack remained within his arm’s reach as well. . . In these unique circumstances, Officer Kaufmann reasonably responded by requesting the pack and flipping open the lid to see what it contained.

The Court held “that Officer Kaufmann’s reasonable concern for his safety justified a protective search of the cigarette pack.” Since the search was justified on this basis, the Court found it unnecessary to consider further the other factors the district court examined, i.e., whether Williams gave consent to search or whether the pistol or controlled substances “were admissible under the inevitable discovery doctrine.”

For these reasons, the 11th Circuit Court affirmed the district court’s denial of Williams’ motion to suppress the evidence seized by Officer Kaufmann. *United States v. Williams*, No. 20-10405, 2021 WL 397609 (11th Cir. Feb. 4, 2021).

Georgia Court of Appeals

COURT AFFIRMS FIRST-DEGREE VEHICULAR HOMICIDE CONVICTIONS BASED ON RECKLESS DRIVING

On May 21, 2015, the Troup County 911 center received multiple phone calls regarding a vehicle traveling the wrong way on Interstate 185 (“I-185”) North. Semo, the driver of a white Toyota Sequoia SUV, had driven onto the Interstate via an off ramp at Exit 46. He then drove southbound for approximately five miles on I-185 North at 65 to 70 miles per hour. His travel was ended only when he crashed head-on into a red Toyota Rav4 with three occupants, two of whom were pronounced dead at the scene.

Semo was indicted on two counts of first-degree vehicular homicide, one count of reckless driving, one count of serious injury by vehicle, and one count of possession of a controlled substance (based on a Schedule I synthetic cannabinoid found on his person after the crash).

No fewer than four witnesses who had been traveling on I-185 northbound at the time of the collision testified at trial. Each of these witnesses had called 911 to report Semo’s vehicle traveling the wrong way on I-185 North. One witness testified that she and a friend “nearly got hit” by Semo’s oncoming SUV, which was “in the right lane area swerving. So in order for us to avoid him, because he was coming at us, we – my friend made [a] turn on the left lane.”

A second witness who called 911 testified that he was traveling on I-185 North in the right-hand lane when “[h]eadlights came at me and I swerved to get out of the way.” This witness described the portion of I-185 as “two lanes north, two lanes south, a grassy median in the middle. So generally you shouldn’t see any headlights coming your way.”

A third witness who called 911 on the night Semo slammed his SUV into the Toyota Rav4 testified that he was driving northbound on I-185, traveling from Columbus to Atlanta. A vehicle

approached him “in his same lane of travel,” causing him to move into the right lane to avoid a frontal crash.

Yet a fourth witness who contacted 911 testified that he was driving an approximately 80,000-pound tractor trailer on I-185 North when he saw headlights coming towards his truck. This witness testified that he flashed his vehicle’s headlights at the oncoming car, pressed the truck’s “city horn” on the steering wheel and “blar[ed] the 18-wheeler’s air horn above the driver’s door ‘because I didn’t know what was going to happen at that point.’” The truck driver managed to avert a collision with Semo’s SUV but, moments later, “heard a loud crash behind him.”

A motorist who had been driving *southbound* on I-185 that night testified that he saw a white SUV “us[e] an ‘off ramp to get on I-185 going southbound in the northbound lane.’” This witness recalled:

I was trying to get their attention for a couple of miles, I guess. And I saw other vehicles swerve out of the way, and the 18-wheeler is what really struck me because I heard him blow his horn. And after that, that’s whenever they collided with the red SUV.... [W]henver the collision hit[,] I was right there. I saw it across the road happen.

The sole surviving occupant of the red Toyota Rav4, the front seat passenger, testified that his cousin had been driving and his father was the backseat passenger. The surviving passenger’s injuries included loss of the use of his legs, brain bleeding and damage, a broken arm, nine broken ribs, spinal cord damage, a chipped tooth, and a broken jaw.

The first Georgia State Patrol trooper to arrive at the scene testified that the weather was clear, and the pavement was dry on the night Semo drove headlong into the Toyota Rav4. The trooper

also testified regarding the many visual indicators along the Exit 46 off ramp, which Semo used to enter oncoming traffic flowing on I-185 North:

[A] “Do Not Enter / Wrong Way” reflective sign posted where the off ramp joined the cross street so as to face a potential wrong-way driver; white stop bars painted all across the payment of the off ramp where it joined the cross street; a second “Do Not Enter / Wrong Way” reflective sign posted some distance along the ramp so as to face a wrong-way driver; and two “One Way” signs – one posted on either side of the ramp.

A member of the Georgia State Patrol’s Specialized Collision Reconstruction Team (“SCRT”) testified at trial as an expert in collision reconstruction. When questioned as to his conclusion, based on interviewing witnesses, examining the collision site, and inspecting both Semo’s SUV and the Toyota Rav4, the SCRT expert stated:

The conclusion was that on May 21, 2015, at approximately 9:51 p.m., a traffic collision occurred on I-185 in the northbound lane between mile markers 40 and 41. A 2003 white Toyota Sequoia driven by Humphrey Semo was traveling southbound in a northbound lane. He struck head on with a 2015 red Toyota Rav4....

As a result of the collision, [two occupants of the red Rav4] sustained injuries that resulted in their death. And as a result of the same collision, [the third occupant of the red Rav4] received serious injury. His reckless act contributed to this collision and

contributed to the death[s] of [two of the occupants] and to the serious injury of [the third occupant].

Semo did not testify at trial and did not call any witnesses in his defense. His attorney’s closing argument stated, in part:

This was a horrible accident, a horrible accident. Two people lost their lives and a third’s life is forever changed. By making one wrong turn and driving down the interstate, this happened. It’s a mistake that could happen to anybody. It was dark, it was late at night, and it was an accident. And I ask that you find that it’s an accident. Thank you.

Following his conviction on all counts at trial, Semo filed a motion for a new trial. At the hearing on this motion, Semo’s attorney confirmed that “the trial defense had been that Semo had not driven recklessly, but had ‘made a mistake. He just got on the interstate by accident.’” After the court denied Semo’s motion for a new trial, Semo appealed his conviction on all charges, arguing that his attorney “deprived [him] of effective assistance of trial counsel.”

Semo argued that his counsel was ineffective by not seeking a second-degree [misdemeanor] vehicular homicide charge “on grounds that the predicate traffic offense for the vehicular homicide counts was *not* reckless driving, but merely improper driving upon a divided highway.”

The Court of Appeals rejected Semo’s argument, finding no reasonable probability that, but for his attorney’s failing to request this jury charge, the outcome of his trial would have been any different (i.e., that it might have resulted in acquittal on some or all of the charges): “As detailed above, both counts of first degree vehicular homicide were premised upon allegations of

“reckless driving” that pertained to the manner in which Semo drove his vehicle along Interstate 185.” The Court determined further:

By all accounts put before the jury, after accessing the interstate highway via an off ramp, Semo drove southbound on Interstate 185 North; and despite the plethora of signage and other plain indicators that he was driving the wrong way, Semo proceeded for several miles at approximately 65 - 70 miles per hour directly into oncoming traffic traveling at about that same speed . . . Semo’s continued manner of driving caused motorists to flash headlights, honk horns, blare a fog horn, swerve wildly, and veer into a ditch. His manner of driving caused individuals to call 911 and report immediately the ongoing perilous danger. . . Semo’s manner of driving ended with a head-on collision that left two individuals dead at the scene.

The Court of Appeals also rejected Semo’s argument that his attorney provided ineffective assistance by not objecting to the SCRT expert’s characterization of Semo’s driving as a “reckless act”:

Given the overwhelming evidence that was properly admitted at trial showing that Semo was guilty of reckless driving and that such traffic offense caused the fatal and catastrophic injuries sustained by the three occupants of the red Rav4, Semo has failed to demonstrate that, but for his trial lawyer’s failure to object as complained of here, the

outcome of his trial would have been different.

For the foregoing reasons, the Court of Appeals affirmed Semo’s convictions on all counts. *Semo v. State*, No. A20A1840, 2021 WL 422824 (Ga. Ct. App. Feb. 8, 2021).

ALS REMINDER

Take the implied consent card to the ALS Hearing that was read to the DUI defendant. When testifying at the ALS Hearing, provide testimony regarding how you determined the age-appropriate implied consent notice to read to the DUI defendant. The implied consent notice must be read into the record at the ALS Hearing.

Published with the approval of
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