DPS Legal Review

March 2021|Volume 20 No. 3

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

United States Supreme Court

WHEN IS A PERSON "SEIZED", FOR PURPOSES OF THE FOURTH AMENDMENT?

At daybreak on July 15, 2014, four New Mexico State Police officers, including Officers Janice Madrid and Richard Williamson, attempted to execute an arrest warrant at an Albuquerque apartment complex. In addition to being accused of white-collar crimes, the female subject of the arrest warrant was "suspected of having been involved in drug trafficking, murder, and other violent crimes."

Roxanne Torres was standing in the apartment complex parking lot when the four officers arrived. She and another person were standing near a Toyota FJ Cruiser. After determining that neither Torres nor the other individual were the subject of the arrest warrant, Officer Williamson and the other officers approached the Toyota. At this point, Torres's acquaintance walked away. Unbeknownst to the officers, Torres was in the throes of methamphetamine withdrawal. Torres entered the Toyota at about the same time that the officers tried to talk to her. Torres, however, "did not notice their presence until one of them tried to open the door of her car."

"Although the officers wore tactical vests marked with police identification," Torres mistook them for carjackers—seeing only that they had guns. Believing herself to be the target of a carjacking, Torres "hit the gas to escape [the officers]." Officer Madrid and Officer Williamson fired a total of thirteen shots as Torres drove off. Two of the rounds struck Torres in the back.

Despite the spray of gunfire, Torres managed to drive out of the apartment complex. When she stopped in another parking lot close by, she asked a passerby to report a carjacking. Torres then proceeded to abandon the Toyota, steal a car that was idling nearby, and drive approximately 75 miles to Grants, New Mexico. A hospital in Grants airlifted her back to Albuquerque, to a facility that could treat her level of injury.

The police arrested Torres the following day, and, subsequently, "[s]he pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle."

Torres filed a cause of action against Officers Madrid and Williamson under 42 U.S.C. § 1983, claiming "that the officers applied excessive force, making the shooting an unreasonable seizure under the Fourth Amendment." The District Court granted the officers' motion for summary judgement, on the grounds that they had qualified immunity. Torres appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the District Court's ruling "on the ground that 'a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim.'"

Torres then petitioned the United States Supreme Court for a writ of certiorari, the primary method by which a party petitions the Supreme Court to hear a case. The U.S. Supreme Court granted Torres' petition. The Supreme Court considered the main issue to be as follows:

> The Fourth Amendment prohibits unreasonable "seizures" to safeguard "[t]he right of the people to be secure in their persons." Under our cases, an officer seizes a person when he uses force to apprehend her. **The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. *The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.***
> (Emphasis added.)

The Court held that neither the officer's "subjective motivation" nor the suspect's "subjective perception" is the "appropriate inquiry." Rather, the Court focused on "whether the challenged conduct objectively manifests an intent to restrain." The Court also determined that "force applied by accident or for some other purpose" is not tantamount to a "seizure."

By "shooting [Torres] with the intent to restrain her movement," she was seized by Officers Madrid and Williamson. However, the Court stressed:

> **The rule we announce today is narrow. In addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any "*continuing* arrest during the period of fugitivity."**

The Supreme Court also emphasized that its decision in this case was limited to a determination of whether Torres was "seized" by the officers: "This Court does not address the reasonableness of the seizure, the damages caused by the seizure, or the officers' entitlement to qualified immunity."

Therefore, the Supreme Court vacated the Tenth Circuit's ruling and remanded the case for a determination on these issues. *Torres v. Madrid*, No. 19-292, 2021 WL 1132514 (U.S., March 25, 2021).

Georgia Court of Appeals

TRIAL COURT DID NOT ERR BY ADMITTING EVIDENCE OF DEFENDANT'S REFUSAL TO SUBMIT TO BLOOD OR URINE TEST

On May 7, 2016, Joshua Davis was driving an orange and black truck, traveling westbound on McGinnis Ferry Road. Scott Blake, a motorist driving behind Davis' truck, saw Davis' truck "weave in and out of its lane approximately three to five times." Mr. Blake passed Davis' truck in an attempt to avoid any contact with it. Shortly thereafter, once both vehicles had turned onto Old Atlanta Road, Mr. Blake observed—in his rearview mirror—as Davis drove his truck "straight into the oncoming lane of travel." Davis collided with a truck driven by Aldolfo Mendoza, which carried several passengers.

Mr. Blake stopped his car and attempted to render aid. Davis failed to respond to Mr. Blake's knocking on the window of his truck. When Mr. Blake attempted to enter Davis' truck, he discovered that the driver's side door was jammed shut and the passenger-side door was locked. Since Davis' truck was "leaking fluids and smoking," Mr. Blake broke out the passenger-side window to try to free Davis from the truck. Davis was bleeding a little from his lip but "did not complain about any injuries".

Forsyth County Sheriff's Deputy John Hiott arrived on the scene. Deputy Hiott determined that Mr. Mendoza was trapped in his truck and "appeared to be severely injured." The other occupants of Mendoza's truck also appeared to be

injured. Davis, however, declined medical treatment several times when he was questioned by emergency medical service workers on the scene.

Given the seriousness of the accident, Deputy Hiott requested assistance from the Forsyth County Sheriff's Office traffic specialist unit. Deputy Andrew Ives responded to the scene and, based on his initial investigation, "concluded that Davis' vehicle had crossed over the center line." When Deputy Ives interacted with Davis, he noted that Davis' speech was "somewhat thick and a little slow" and that Davis' pupils were "unusually" constricted. Deputy Ives requested the assistance of the Forsyth County Sheriff's Office DUI Task Force. Deputy Mike Downing arrived at the scene to handle the DUI portion of the investigation.

Deputy Downing noticed that Davis' pupils were constricted, both when he was sitting in direct sunlight and when he was sitting in the shade. Davis gave consent to perform field sobriety tests requested by Deputy Downing. Davis "exhibited zero clues out of six" on the horizontal gaze nystagmus ("HGN") evaluation. This led Deputy Downing to rule out alcohol or inhalants as a cause of impairment. Additionally, when Davis gave a breath sample on a portable breath test, "the results indicated [he] was not under the influence of alcohol."

Deputy Downing then had Davis perform the walk and turn test, on which "Davis exhibited three out of eight clues indicating possible impairment; Deputy Downing testified that two clues were indicative of impairment." On the one-leg stand test, "Davis exhibited three out of four clues . . . and Deputy Downing testified two out of four clues indicates possible impairment."

In addition to observing Davis' performance on the three field sobriety tests and his pinpointed pupils, Deputy Downing observed "that Davis' tongue was green [and] his eyes were red."

Based on his observations Deputy Downing arrested Davis for DUI as a less safe driver "due to being under the influence of cannabis or some sort of narcotic analgesic." Deputy Downing read the Georgia implied consent warning to Davis, asking Davis to consent to testing of his blood and urine. Davis refused, stating "that his attorney had told him never to take those tests."

Mr. Mendoza, the driver of the work truck that Davis hit head on, succumbed to his injuries at Grady Memorial Hospital several weeks after the crash. Davis was indicted and charged with two counts of vehicular homicide (with Mendoza as the named victim on both counts). He was also charged with four counts of serious injury by vehicle based on the injuries sustained by two of the passengers in Mr. Mendoza's truck, and with driving under the influence and reckless driving.

At trial, in addition to Deputy Downing's testimony regarding the DUI charge, Sergeant Bobby Francis, a certified Drug Recognition Expert ("DRE") employed by the Forsyth County Sheriff's Office, testified that

> he observed Davis at the detention center and he also reviewed the video recording of Davis performing the field sobriety tests and his contact with officers at the scene. Based on his review of the video, Sergeant Francis opined that Davis was under the influence of a drug to the extent it was less safe from him to drive. Sergeant Francis also noted Davis appeared relaxed despite the severity of the situation, as well as the fact that he appeared to be in a semi-conscious state while being transported to the jail. Sergeant Francis also testified that he personally observed that Davis was drowsy and that his eyes were droopy and his pupils were constricted; according to Sergeant Francis, these manifestations were

> consistent with Davis having ingested a narcotic analgesic.

After his conviction at trial on all charges, Davis appealed. The grounds upon which Davis based his appeal included his contention that, based on the Supreme Court of Georgia's holdings in the *Olevik* (2017) and *Elliott* (2019) cases, "the trial court erred by admitting evidence that he refused to submit to a State-administered test of his blood or urine."

The Georgia Court of Appeals rejected Davis' argument:

> [A]s the special concurrence in *Elliott* points out, the holdings of *Olevik* and *Elliott* are limited to chemical tests of a driver's breath; they do not apply to tests of a driver's blood . . . Subsequently, this Court has addressed whether *Olevik* and *Elliott* prohibited admission of a suspect's refusal to consent to blood testing, and held that it did not. See *State v. Johnson*, 354 Ga. App. 447, 454 (1) (b) . . .; see also *State v. Voyles, 355 Ga. App. 903, 904-905* . . . (2020). And more recently, this Court reached the same conclusion with regards to a State-administered urine test. See *State v. Awad*, 357 Ga. App. 255, 256-257 (1) . . . (2020). The trial court did not err by admitting evidence concerning Davis' refusal to submit to a State-administered blood or urine test.

For the foregoing reasons, the Court of Appeals affirmed Davis's convictions on all counts. *Davis v. State,* No. A20A1727, 2021 WL 911878 (Ga. Ct. App. March 10, 2021).

ALS REMINDER

1205 S Form – When a DUI defendant submits to a state administered blood test pursuant to a request under the implied consent law, complete the 1205 S form when the results are received from the crime lab if the results meet the per se statutory requirements for alcohol (0.08 grams or more if 21 years of age or over; 0.02 grams or more for a person under 21 years of age; 0.04 grams or more if operating a commercial motor vehicle). Send the completed 1205 S form to the Department of Driver Services (DDS) and DDS will notify the DUI driver regarding the license suspension form.

Published with the approval of
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