DPS Legal Review

June 2021|Volume 20 No. 6

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

United States Supreme Court

FLIGHT OF MISDEMEANOR SUSPECT DOES NOT CATEGORICALLY JUSTIFY WARRANTLESS ENTRY INTO A HOME

A California highway patrol officer observed Arthur Lange driving in Sonoma while "listening to loud music with his windows down and repeatedly honking his horn." The officer followed Lange and activated his overhead lights "to signal that Lange should pull over." Lange—who at this point was approximately one hundred feet from his home—did not pull over. Rather, he pulled into his driveway and then into his home's attached garage.

The highway patrol officer followed Lange into the garage and "began questioning him." Since Lange seemed intoxicated, the officer conducted field sobriety tests, and "Lange did not do well[.]" Lange was charged with misdemeanor driving under the influence of alcohol and a noise violation. Lange's blood test results indicated "that his blood-alcohol content was more than three times the legal limit."

Lange filed a motion to suppress "all evidence obtained after the officer entered his garage, arguing that the warrantless entry had violated the Fourth Amendment." The State argued that Lange's failure to obey "a police signal", a misdemeanor offense, gave the officer probable cause to arrest. The State also contended "that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry."

The Superior Court denied Lange's motion to suppress the evidence, and its appellate division affirmed this ruling. The California Court of Appeals also affirmed:

> In the court's view, Lange's 'fail[ure] to immediately pull over' when the officer flashed his lights created probable cause to arrest him for a misdemeanor. And a misdemeanor suspect, the court stated, could 'not defeat an arrest which has been set in motion in a public place' by 'retreat[ing] into' a house or other 'private place.' . . . Rather, an "officer's 'hot pursuit' into the house to prevent the suspect from frustrating the arrest" is always permissible under the exigent-circumstances 'exception to the warrant requirement.'
> (Citations omitted.)

The California Supreme Court denied review of Lange's case, and the Supreme Court of the United States granted certiorari to resolve the conflict "over whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect." Based on its review of Supreme Court case law, the Court concluded that its Fourth Amendment precedents

> point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not most,

> cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances. . . include the flight itself. ***But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.***
> (Emphasis added.)

The Court acknowledged that, in many instances, law enforcement must respond quickly, while also recognizing: "Misdemeanors run the gamut of seriousness, and they may be minor." The Court pointed to "minor" misdemeanors under California law, including littering on a public beach, negligently cutting a plant "growing upon public land", and applying "artificial color" to live chicks or rabbits.

On the other end of the spectrum, the Court recognized that "[A]cross the country, 'many perpetrators of domestic violence are charged with misdemeanors,' despite 'the harmfulness of their conduct.'" However, the Court reasoned:

> **The question presented here is whether the pursuit of a fleeing misdemeanor suspect always—or more legally put, categorically—qualifies as an exigent circumstance. We hold it does not. A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case.**

For these reasons, the Supreme Court held: "Because the California Court of Appeal applied the categorical rule we reject today, we vacate its judgment and remand the case for further proceedings not inconsistent with this opinion." *Lange v. California,* No. 20-18*,* 2021 WL 2557068 (U.S. Sup. Ct. June 23, 2021).

Georgia Court of Appeals

EVIDENCE SUPPORTED CONVICTION FOR DUI LESS SAFE, MULTIPLE SUBSTANCES

Shortly after midnight on May 18, 2019, Georgia State Patrol Trooper Alan Rhodes saw Justice Michelle Soles driving a vehicle without a license plate. After Rhodes saw Soles drive the wrong way down a one-way street, he pulled over the vehicle. While talking to Soles, "[t]he trooper observed that Soles had bloodshot, glassy eyes, the odor of an alcoholic beverage emanated from her breath, and her speech was slow."

Soles told Trooper Rhodes that she'd recently drunk one beer. Rhodes administered the Horizontal Gaze Nystagmus ("HGN") field sobriety test and observed two out of six clues. At this point, the trooper noticed that Soles' pupils were dilated, and she had "marked reddening of the conjunctiva." These manifestations led Rhodes to ask Soles about her drug use. Soles divulged that she had smoked "a 'bowl' of marijuana with a friend about 45 minutes earlier" and said "that she would not have felt comfortable driving her children in her condition, having consumed marijuana and alcohol."

Soles was charged with DUI under the combined influence of alcohol and marijuana to

the extent that she was less safe to drive, in violation of O.C.G.A. § 40-6-391 (a) (4), driving the wrong way on a one-way street, failure to display license plate, and no license on person. At Soles' bench trial, "[t]he trooper testified that, based on his experience and observations at the scene, he believed Soles to be under the influence of marijuana and alcohol to the extent that she was a less safe driver."

Two Georgia Bureau of Investigation ("GBI") forensic toxicologists also testified at trial: Duriel McKinsey, who analyzed Soles' blood for the presence of alcohol, and Dr. Thao Dang, who performed a drug analysis on Soles' blood sample. McKinsey testified that Soles' blood sample showed an alcohol concentration of 0.023 grams per 100 milliliters. McKinsey also testified regarding "the combined effects of alcohol and marijuana on the human body, explaining that marijuana can operate as a central nervous system depressant and when combined with alcohol there can be an additive effect."

Dr. Dang testified that the drug analysis of Soles' blood sample showed "5.6 nanograms of delta-9-tetrahydrocannabinol ("THC"), the psychoactive ingredient in marijuana, per 100 milliliter[s] of blood." Like McKinsey, Dang also testified that "generally speaking, combining alcohol with marijuana has an additive effect that would further impair a driver."

The trial judge also admitted as an exhibit a July 2017 National Highway Traffic Safety Administration ("NHTSA") document entitled "Marijuana-Impaired Driving – A Report to Congress" ("NHTSA Report") that Soles herself tendered as evidence.

Soles was convicted on all counts after the bench trial and appealed based on a single enumeration of error, i.e., that the evidence was insufficient to support her conviction on the DUI charge. On appeal, the Georgia Court of Appeals reviewed the evidence "in a light most favorable to the verdict," as required by law.

Despite Soles' argument that "her blood alcohol concentration and the inference afforded by O.C.G.A. § 40-6-392 (b) (1)" compelled the Court "to find that the opinion testimony that she was less safe lacks evidentiary support," the Court was unpersuaded. O.C.G.A. § 40-6-392 (b) (1) provides, in pertinent part:

> [U]pon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood . . . may give rise to inferences as follows:
> If there was at that time an alcohol concentration of 0.05 grams or less, **the trier of fact in its discretion may infer therefrom that the person was not under the influence of alcohol**, as prohibited by paragraphs (1) and (4) of subsection (a) of Code Section 40-6-391[.]
> (Emphasis added.)

The Court of Appeals determined that Soles' reliance on the statutory inference "ignore[d] the fact that this Court does not re-weigh evidence." Further, the Court pointed out that the inference is permissive not mandatory: "Under OCGA § 40-6-392 (b) (1), a trier of fact is authorized, *but not required*, to presume that a defendant was not under the influence of alcohol if chemical analysis shows alcohol concentration of 0.05 grams or less."

Similarly, the Court rejected Soles' claim that information contained in the NHTSA Report did not provide evidentiary support of the trial court's finding that she was a less safe driver due to marijuana use. Rather, the Court concluded, "[T]he trial court specifically referenced the NHTSA Report, indicating that Soles would have had 'about a 20

percent impairment. So that's consistent with my finding, plus that would be combined with the alcohol and be a more significant impairment.'"

The Court was also not swayed by Soles' contention that, in addition to the statutory inference and the NHTSA Report, the video evidence did not provide evidentiary support that she was less safe to drive:

> The trial court expressly noted that it considered the testimony of the trooper as well as the video evidence. And while the NHTSA report includes some equivocal statements on impaired driving based on marijuana ingestion, it is clear from the trial court's oral pronouncement and written verdict that it weighed this evidence in deciding Soles' guilt. 'The fact that the [factfinder] resolved the conflicts in the evidence or the credibility of the witnesses adversely to [Soles] does not render the evidence insufficient.'
> (Citations omitted.)

The Court held that the evidence, including Soles' own statements, was "sufficient to authorize a rational trier of fact to find that she was less safe to drive due to the marijuana and alcohol she consumed":

> Here, the evidence included the less safe act of driving the wrong way on a one way street, which the trial court expressly found to be evidence of impairment; physical manifestations of impairment including slow speech, red, glassy eyes, marked reddening of the conjunctiva and dilated pupils; Soles' admission that she recently consumed a beer and smoked marijuana 45 minutes before the stop; testimony from the trooper that he believed Soles to be less safe due to the combined influence of marijuana and alcohol; the testimony of the GBI toxicologists as to Soles' blood test results and the possible effects of marijuana ingestion and the additive effect of introducing alcohol.

Based on the foregoing, the Court of Appeals affirmed Soles' DUI conviction. *Soles v. State,* No. A21A0580, 2021 WL 2587807 (Ga. Ct. App. June 24, 2021).

DRIVER'S CONSENT TO VEHICLE SEARCH WAS NOT VOLUNTARY

Sheriff's deputy Corporal Colt Young was on patrol in October 2017 when he saw Thomas Hill driving a 2004 Acura at an excessive speed. Cpl. Young's radar unit confirmed that Hill had been traveling at 87 miles per hour in a 55 mile per hour zone. Cpl. Young activated his vehicle's emergency equipment and initiated a traffic stop on Hill's vehicle. Young relayed to dispatch that he was pulling over the vehicle and, by 12:46 p.m., Young had made roadside contact with Hill.

After informing Hill of the reason for the stop, Young asked Hill to furnish his driver's license. During this time, Young observed "that Hill was breathing heavily, he could see Hill's heartbeat through his shirt, and Hill would not make eye contact." Hill said that "he was just worried about how much the ticket [would] cost" when Young inquired regarding whether he was ok.

Young then relayed Hill's driver's license and registration information to dispatch. Young's police vehicle was not equipped with a computer, and he was therefore unable to verify the information himself. Due to Hill's nervousness, Young also

requested any officers in the vicinity to respond as backup. At 12:48 p.m., Sgt. Scottie Waldrip radioed that he was en route to the scene.

By 12:57 p.m., dispatch communicated with Cpl. Young via cell phone, due to some interference with the radio communications. After this, Young completed writing the speeding citation in his patrol vehicle. Sergeant Waldrip, the backup officer, arrived on the scene at 12:59 p.m. Within a few minutes, Cpl. Young re-engaged Hill, asking him "to exit and stand at the back of his vehicle." Young then conducted a pat-down search of Hill's person to check for weapons. No weapons were discovered.

Young then provided Hill with the citation, advised him of the court date, and returned Hill's driver's license and registration to him. Right after handing Hill the speeding citation and his license, Young asked Hill "if there was anything illegal inside the vehicle." Hill replied, "No," and then Young asked Hill if he could search Hill's vehicle; Hill replied, "Go ahead."

During the vehicle search, Young found a plastic bag holding approximately 28.3 grams of suspected powder cocaine. At 1:07 p.m., Young alerted dispatch "that he was detaining Hill while he field tested the substance. Two minutes later, after receiving a positive result for cocaine, Young arrested Hill at 1:09 p.m."

After his indictment for cocaine trafficking, possession of cocaine with intent to distribute, and speeding, Hill filed a motion to suppress the evidence discovered during the vehicle search. The trial court denied both this motion and a renewed motion and issued a certificate of immediate review. The Georgia Court of Appeals granted Hill's application for interlocutory review. (An interlocutory application is an appeal from a trial court order that does not end or dispose of the case, i.e., the case remains pending in the trial court while the trial court's ruling on the issue is being appealed.)

In reviewing Hill's application for interlocutory review, the Court of Appeals looked to its 2020 decision in *State v. Drake*, 355 Ga. App. 791: "With respect to a consensual search arising from a traffic stop, '[t]he State bears the burden of proving that a defendant's consent to search is valid — i.e., that it was given freely and voluntarily.'"

The Court of Appeals' 2017 holding in *Batten v. State*, 341 Ga. App. 332, provided further guidance: "The appropriate inquiry is whether a reasonable person would feel free to decline the officers' request to search or otherwise terminate the encounter. Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent." The *Batten* Court explained further: "The voluntariness of consent is determined by the totality of the circumstances; no single factor controls."

With respect to Hill's case, the Georgia Court of Appeals reasoned:

> **We do not (and cannot) hold that the mere act of asking Hill to exit his vehicle actually exceeded Young's authority, but it does inform the totality of the circumstances that ensued, particularly in light of the delayed timing of asking Hill to exit his vehicle, the pat-down, and the arrival and presence of a backup officer on the scene. Nothing up to that point indicated to Hill that the stop was de-escalating; instead, the circumstances objectively indicated the opposite.**

The Court also considered Cpl. Young's testimony from the suppression hearing:

> Although requesting Hill to exit his vehicle and pat him down ordinarily would not exceed Young's authority to conduct the traffic stop, Young

> candidly testified that he did so at the end of the stop because he was 'trying to determine if something else was going on other than speeding.' Young was transparent about the fact that from the moment he initially encountered Hill, he believed 'there was possibly another crime afoot.'

The Court also looked to precedent from its 2005 decision in *State v. McMichael*, 276 Ga. App. 735:

> **[Although] an officer is not required to advise the driver that he is "free to go" before a consent to search will be recognized as voluntary. . . , [t]he moment at which a traffic stop concludes is often a difficult legal question, not readily discernible by a layperson. It is understandable that a driver would believe that he is validly in a police officer's custody as long as the officer continues to interrogate him.**

In *Heard v. State*, 325 Ga. App. 135 (2013), the Court concluded: "If an officer continues to detain an individual after the conclusion of the traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity, the officer has exceeded the scope of a permissible investigation of the initial traffic stop."

Based on its review of both the evidentiary record from Hill's suppression hearing and Georgia Court of Appeals' precedent, the Court of Appeals held: "[T]he facts as found by the trial court do not support the legal conclusion that the encounter had become consensual and that Hill's acquiescence was voluntary. Accordingly, we reverse the denial of Hill's motion to suppress the evidence obtained in the search that followed the traffic stop." *Hill v. State,* No. A21A0264, 2021 WL 2659266 (Ga. Ct. App. June 29, 2021).

ALS REMINDER

If you do not receive an ALS Hearing notice and your case is dismissed, a Motion to Vacate Default Order can be filed, requesting that the case be reset for an ALS Hearing. The motion must be filed within ten days of the Court's Final Decision/Order of Dismissal. If you need a motion filed, please email **both** Dee (dbrophy@gsp.net) and Grace (gmatthews@gsp.net).

Published with the approval of
Colonel Christopher C. Wright

Legal Services
Joan Crumpler, Director
Clare McGuire, Deputy Director
Dee Brophy, ALS Attorney
Nkenge Green, Open Records Attorney Manager

Send questions/comments to cmcguire@gsp.net