DPS Legal Review

May 2021|Volume 20 No. 5

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

11th Circuit Court of Appeals

TRAFFIC STOP WAS NOT UNREASONABLY PROLONGED; NO WARRANT WAS REQUIRED FOR INVENTORY SEARCH OF BACKPACK

On October 10, 2018, detectives with the Naples (Florida) Police Department ("NPD") were on a stakeout at a hotel for drug-related activity. Detective Holmberg observed Jeffrey Forget and another man drive off from the hotel in a red pickup truck. Later, Forget and the other man returned to the hotel with food and a black backpack. Shortly thereafter Forget, the other man, and a third man left the hotel in the same red pickup truck.

Detective Holmberg alerted Detective Davenport, who was surveilling the hotel from a nearby location, that the pickup truck was leaving the hotel. As the pickup truck passed by, Detective Davenport noticed that Forget, sitting on the passenger side, was not wearing a seatbelt. Detective Davenport initiated a traffic stop on the pickup truck at 1:03 p.m.

After approaching the red pickup, Detective Davenport asked all three occupants for identification. When Detective Davenport asked if the driver, Nicholas Cronin, would consent to a search of the vehicle, Cronin refused. Once Detective Holmberg arrived on the scene of the traffic stop, he spoke with Forget, at which time Forget said "that his name was Jason Farber and provided a birthdate, but said he had forgotten his wallet, did not have another form of identification, and did not know his social security number." Holmberg contacted dispatch, asking them to run a search of the drivers' license database for "Jason Farber." The information provided by dispatch hit on a Jason Farber "who lived on the other side of the state, but Farber's identification picture did not fully match Forget's appearance."

Holmberg needed to verify Forget's identity to issue him a ticket for the seatbelt violation. At 1:10 p.m., seven minutes after the traffic stop was initiated, Holmberg requested a fingerprint scanner from the county sheriff's department, via radio. At about 1:30 p.m., Deputy Creamer arrived on the scene with a fingerprint scanner. Forget's fingerprint scan revealed that there were two outstanding warrants for his arrest. At about 1:36 p.m., Forget was placed under arrest for the two outstanding warrants and for the crime of providing a false name to the police.

Detective Davenport performed a warrantless search incident to Forget's arrest, during which time two counterfeit one-hundred-dollar bills were discovered in Forget's wallet—which was on his person. After Forget was placed under arrest, Detective Holmberg questioned the pickup truck driver, Cronin, "about the backpack Forget had been carrying, which had been between Forget's legs on the passenger floorboard during the stop." Cronin said that the backpack was Forget's and that Cronin "did not wish to keep it." Further, Cronin denied even knowing Forget, saying that he "had only given him a ride."

At this point the detectives conducted an inventory search of the backpack, pursuant to a Naples Police Department policy requirement "that all property taken into custody be documented on a receipt, regardless of whether the property was evidence or personal property." The detectives found "hard-covered books with counterfeit bills between the pages" in Forget's

backpack. Another officer on the scene completed a property receipt to document the backpack's contents.

Forget was indicted on federal charges of counterfeiting currency and possession of counterfeit currency. He filed a motion to suppress the evidence found during the traffic stop, contending that the detectives unreasonably prolonged the stop by, among other things, asking for consent to search the pickup truck and requesting that the county sheriff's department respond to the scene with a fingerprint scanner.

> Forget also argued that the evidence of the contents of his backpack should have been suppressed because the police should have waited for a warrant before searching it, he had a reasonable expectation of privacy in the backpack, and the police had no reasonable belief that it contained anything illegal.

The district court ruled that the police did not "unlawfully prolong the traffic stop," and, therefore, denied Forget's motion to suppress based on its findings that: (1) The officers could not issue Forget a ticket for the seatbelt violation without verifying his identity and, therefore, Detective Holmberg's request for the fingerprint scanner "was directly related to the stop's purpose"; and (2) Neither the officers' request to search the vehicle nor their request for a K-9 unit to come to the scene (a request that was subsequently canceled) unlawfully prolonged the stop, as "both requests were made before the police identified Forget and because Forget himself prolonged the stop by lying about his identity."

The district court also determined that the warrantless inventory search of Forget's backpack did not violate his Fourth amendment rights:

> Once Cronin disowned the backpack, the officers had to either take it into custody or leave it by the roadside. The officers followed standard procedure to itemize Forget's property so it was protected from interference and so the police were protected from any unknown but dangerous items inside. Additionally, the court explained, the officers were not required to complete the inventory at the station per NPD standard procedure and, even if the backpack had been searched at the station, the counterfeit bills would have been discovered anyway.

After a bench trial, Forget was found guilty on both charges and was sentenced to 30 months to serve, followed by three years of supervised release. Forget appealed the district court's denial of his motion to suppress.

The Eleventh Circuit Court of Appeals concluded that the officers did not unlawfully prolong the traffic stop:

> Viewing the facts in the light most favorable to the government, Davenport requested all three passengers' identification before asking Cronin if he could search the truck, and Holmberg simultaneously began discussing Forget's identification with him so he could issue a citation for the seatbelt offense. Although Davenport's request to search the car was not related to the purpose of the stop, it occurred simultaneously with Holmberg's inquiries into Forget's identification, and thus it did not add any time to the stop beyond the time it took to complete inquiries incident

> to the seatbelt violation . . . There is no evidence that Holmberg's request [for a K-9 unit] lengthened the process of identifying Forget. Some time elapsed while the fingerprint scanner was brought to the scene, but because Forget lied about his identity and the picture for Jason Farber was not an exact match, that delay was necessary to identify Forget so Holmberg could issue a traffic citation. The K-9 unit did not show up at the scene and the request was cancelled, so the original call did not add any time to the stop beyond the time it took to identify Forget.

The Eleventh Circuit also rejected Forget's argument that the officer's basis for the traffic stop was pretextual. Forget contended that the officer's "only pulled the truck over to look for drugs without reasonable suspicion." The Court held that the officers had probable cause to conduct a traffic stop of the pickup truck due to Forget's not wearing a seatbelt, and that "the officer's motive in making the traffic stop does not invalidate what is otherwise objectively justifiable behavior under the Fourth Amendment."

The Court also determined that "[t]he district court properly found that the inventory search exception [to the Fourth Amendment warrant requirement] applied to Forget's backpack."

> The officers knew that the backpack belonged to Forget because Cronin told them that it was not his and that he did not want to keep it. And, as the officers had already arrested Forget, they had a duty to take the backpack and could not leave it unattended at the scene. [citation omitted]. The detectives complied with the NPD's standard operating procedures by searching the backpack and they recorded the backpack's contents on an inventory receipt.

For these reasons, the 11th Circuit Court of Appeals affirmed the district court's denial of Forget's motion to suppress. *United States v. Forget,* No. 20-10585, 2021 WL 1626499 (11th Cir. Apr. 27, 2021).

Georgia Court of Appeals

EVIDENCE WAS SUFFICIENT TO CONVICT ON DUI CHARGE; PRIOR DUI CONVICTION WAS ADMISSIBLE AT TRIAL

On August 26, 2015, a deputy with the Towns County Sheriff's department responded to a one-car accident on State Route 2. Upon the deputy's arrival, he saw a truck driven by Stephen Webb that had seemingly crossed the center line of the road and struck a guardrail. Both the deputy and an emergency medical technician ("EMT") who arrived on the scene helped remove Webb from his car, which had been damaged during the collision.

Webb told the EMT that he did not need medical treatment, and he told the deputy that "the accident was a result of him blacking out from a coughing fit caused by chronic obstructive pulmonary disease ("COPD")." The deputy smelled the odor of an alcoholic beverage on Webb's person. Although Webb attempted to attribute the cause of the crash to a COPD-induced black out, the deputy asked Webb to perform field-sobriety tests. These tests included the horizontal gaze nystagmus ("HGN"), the walk-and-turn, and the one-leg stand.

Before administering the field-sobriety tests, the deputy asked Webb whether he'd taken any medications that day. Webb said that he had taken prescription Alprazolam. Based on Webb's performance on the HGN, the deputy concluded that Webb was impaired. Webb also "had difficulty

completing" both the walk-and-turn and one-leg stand tests. Webb consented to the deputy's request that he provide an alco-sensor breath sample, which was "positive for the presence of alcohol." The deputy placed Webb under arrest for DUI and read him the Georgia implied consent notice for suspects 21 or over, requesting that Webb submit to a state-administered test of his blood. Webb agreed, and the EMT on scene performed the blood draw.

The GBI toxicology test of Webb's blood sample "indicated a blood-alcohol content of 0.088 grams per 100 milliliters, with a margin of error of plus or minus 0.005 grams per 100 milliliters." Subsequently, Webb was charged with DUI alcohol per se, DUI less safe (under the combined influence of alcohol and Alprazolam), and failure to maintain lane. At trial, the State's evidence included testimony from the GBI forensic toxicologist who tested Webb's blood sample.

The jury also heard testimony from a White County Sheriff's deputy regarding a DUI per se arrest of Webb approximately two weeks before the Towns County DUI arrest for which Webb was on trial. The trial court ruled that evidence of Webb's White County DUI arrest could be admitted at trial on the Towns County DUI charge, after a finding that the probative value of the evidence regarding the White County arrest outweighed any prejudicial impact. During the White County deputy's testimony, the State admitted into evidence Webb's guilty plea and conviction on the White County DUI charge.

At the conclusion of the State's case, Webb moved for a directed verdict on all counts, arguing that the State had failed to prove its case. Although the court granted a directed verdict on the DUI less safe charge, the court denied the motion as to the DUI per se violation and the failure to maintain lane charge. Therefore, both of those charges were considered by the jury during its deliberations. The jury returned a guilty verdict on the DUI count but voted to acquit on the failure to maintain lane charge.

Webb subsequently filed a motion for new trial, which the trial court denied, following a hearing. Webb then appealed his conviction on the DUI per se charge to the Georgia Court of Appeals. Among the grounds upon which Webb appealed his conviction were "that the evidence supporting his DUI per se conviction was insufficient and, additionally, that the jury's guilty verdict was strongly against the weight of the evidence."

In considering Webb's appeal, the Court of Appeals cited its 2010 decision in *English v. State*, 301 Ga. App. 842. The *English* Court held that, "[w]hen a criminal conviction is appealed, the evidence must be viewed in the light most favorable to the verdict, and the appellant no longer enjoys a presumption of innocence." In reviewing the sufficiency of the evidence presented at trial in Webb's case, the Court found:

> [T]he evidence shows that Webb was involved in a one-vehicle accident, in which he veered across the road and collided with a guardrail. In addition, the arresting deputy testified that he helped pull Webb—the only occupant—from his wrecked truck, that he smelled an alcoholic-beverage odor emanating from Webb, that most of the field-sobriety tests indicated Webb was impaired, and that the EMT drew Webb's blood for testing at the scene. Furthermore, the GBI forensic toxicologist testified that Webb's blood had a blood-alcohol content of 0.088 grams per 100 milliliters, with a margin of error of plus or minus 0.005 grams per 100 milliliters—placing that content over the legal limit of 0.08.

The Court also considered Webb's assertion "that his blood sample could have fermented prior to testing, which would render the forensic toxicologist's test inaccurate." The Court was not persuaded by Webb's argument. Rather, the Court pointed out, the GBI toxicologist "specifically testified that fermentation of a person's blood was rare and only occurs if an organic substance contaminates the blood sample."

Webb also argued on appeal that the trial court erred in admitting evidence of his White County DUI conviction. In its consideration of this enumeration of error, the Court applied a three-part test* adopted by the Supreme Court of Georgia to evaluate the admissibility of "other acts" evidence**: "(1) the evidence must be relevant to an issue other than defendant's character; (2) the probative value must not be substantially outweighed by its undue prejudice; [and] (3) the government must offer sufficient proof so that the jury could find that defendant committed the act." ****U.S. v. Ellisor*, 522 F.3d 1255 (11th Cir. 2008)

As to the first factor, the Court reviewed the trial court's finding that Webb's prior (White County) DUI per se conviction constituted evidence of Webb's "intent" with respect to his Towns County DUI charge. On this point, the Court cited precedent from the Georgia Supreme Court's 2015 holding in *State v. Jones*, 297 Ga. 156, that:

> "[b]ecause the same state of mind [is] required for committing the prior act and the charged crime [ ], i.e., the general intent to drive while under the influence of alcohol, evidence of [a defendant's] prior conviction [is] relevant under Rule 404 (b) to show [the defendant's] intent on [the subject] occasion."

Turning its attention to the second factor, the Court found that the trial court's order denying Webb's motion for new trial "specifically stated . . . that it found the probative value of the prior conviction was not outweighed by the danger of unfair prejudice. As a result, Webb has not shown that the trial court failed to perform its duty in this regard."

As to the final factor in the Georgia Supreme Court's three-part test, the Court of Appeals determined that "the evidence supporting Webb's DUI per se conviction was substantial."

For the foregoing reasons, the Court of Appeals affirmed Webb's conviction on the DUI per se charge and the trial court's denial of his motion for new trial. *Webb v. State,* No. A21A0524, 2021 WL 1960201 (Ga. Ct. App. May 17, 2021).

ALS REMINDER

On Intoxilyzer 9000 cases, a copy of your permit to operate the Intoxilyzer 9000 and the **original** test results are required for the ALS Hearing. The permit must be the one that was in effect at the time of the Intoxilyzer test. The copy of your permit and the **original** test results must be provided to the Court at the ALS Hearing.

Published with the approval of
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