



# DPS Legal Review

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## 11<sup>th</sup> Circuit Court of Appeals

### TACKLING OF AND USING TASER ON SUSPECT WERE NOT UNCONSTITUTIONAL EXCESSIVE FORCE

After 12AM on July 8, 2016, Deputy William Thacker was on patrol in Dawson County when he pulled over a speeding red Ford Mustang. The vehicle pulled over at a busy and well-lit gas station. The four occupants included Ethan Charles, the front-seat passenger. While running a check on the occupants' IDs, Thacker learned that there was an outstanding warrant for Charles' arrest.

**Thacker asked Charles to exit the Mustang. Charles did so while holding a cell phone to his ear. When Thacker told Charles—four times—to hang up the phone, Charles did not comply. Thacker then instructed Charles to place his hands behind his back, yet another directive Charles ignored.**

Charles began to move away from Thacker and pulled away when Thacker reached for him. Thacker commanded Charles to put his hands behind his back an additional five times, and then said, "I'm about to tase you. Hands behind your back! I'm about to tase you." Thacker was eventually able to grab hold of Charles, who continued to resist and shout as Thacker told him, "Ethan—you're gonna get tased, Ethan! Stop! Put the phone down!"

During the scuffle, Ryan Leckie, a civilian onlooker, asked Thacker: "Sir, can you get a cuff on him?" Leckie then assisted Thacker in restraining Charles by putting him in a "full nelson." Deputy Thacker ordered Charles twice more to place his hands behind his back. Charles continued to resist, at which point Thacker tackled him to the pavement.

When Deputy Brantley responded as backup, he saw Thacker, Leckie, and Charles tussling on the ground. Brantley drew his taser and knelt by Charles's chest. Brantley told Leckie to "get behind" him, which Leckie did after standing up. Brantley then said to Charles, "You move and I will tase you. You got me? Got it?" Brantley again said, "Move, and you will get tased. You got it?" Charles responded, "yes sir" four times.

At some point during the fray, Charles' arms were handcuffed to the front of his body, which was all the deputies could manage, due to his thrashing motions. While Thacker and Brantley discussed how to reposition the handcuffs, Charles tried to get up from the pavement. This prompted one of the deputies to say, "Do it. I'm fixin' to tase you. Do it. Do it. Move again. Move again and I will tase you." Charles continued to be belligerent. Brantley told him, "We gone [sic] put these cuffs on the back of you. You move, I will tase you. You got it?"

While the deputies tried to readjust the cuffs, Charles attempted to stand up. Deputy Brantley ordered him four more times to get on the ground. The deputies were unable to recuff Charles' arms behind his back because he "had his hands pulled into his body and would not relax his hands." Charles continued to shout and resist.

**Deputy Brantley uncuffed Charles, in an effort to reposition the handcuffs behind Charles' back. As Brantley started to direct Charles where to place his hands, Charles managed to lift himself from the pavement to a standing position. Brantley pressed his taser into Charles's back. Then**

Deputy Brantley pressed his taser into the right side of Charles's back,

and the taser audibly engaged. As Charles fell to the ground, the sound of the taser briefly stopped, resuming shortly after Charles reached the pavement. Brantley remarked: “I told you I didn’t wanna tase you.” The taser was deployed for five seconds in the “drive stun” mode, a less potent application of the taser device that is only intended to stun the target.

Despite being tased and falling to the pavement, Charles’ shouting and resisting continued unabated. The deputies cautioned Charles that he would get tased again, at which point they succeeded in cuffing him behind his back and placing him in the back seat of Thacker’s patrol car. Undeterred, Charles continued thrashing around and beating his head against the metal partition in car: “Sixteen staples were needed to treat Charles’s self-inflicted head injuries.”

Subsequently Charles pled guilty to felony obstruction and later filed a § 1983 lawsuit against the sheriff’s deputies and Leckie, arguing that they violated his Fourth Amendment rights by using excessive force. The District Court for the Northern District of Georgia granted summary judgment in favor of Leckie and the deputies. Charles appealed to the Eleventh Circuit Court of Appeals.

On appeal, Charles argued that Deputy Thacker’s “tackle” and Deputy Brantley’s “use of a taser” were excessive force. In reviewing the deputies’ actions, the Court cited Eleventh Circuit precedence from *McCullough v. Antolini*, a 2009 decision:

**In determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts, and**

**balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate.**

(Citations omitted.)

The Court also considered the “totality of the circumstances” of the arrest, evaluating several factors set out by the United States Supreme Court in *Graham v. Connor* (1989). Among the *Graham* factors are: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (Citations omitted.) The Supreme Court explained that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” (Citations omitted.)

In assessing whether the deputies’ use of force was “unconstitutionally excessive” the Eleventh Circuit Court of Appeals considered: (1) whether the force used was “categorically unconstitutional”; and (2) if not categorically unconstitutional, whether, based on the *Graham* factors, “the amount of force was excessive.”

**The Court of Appeals determined that Deputy Thacker’s tackling of Charles was not an excessive use of force.** Among the factors the Court noted were the outstanding warrant for Charles’ arrest; Charles’ erratic behavior and actively resisting arrest; that the other occupants of the Mustang were young and agitated; and that “[b]y the time Deputy Thacker tackled Charles, Charles had ignored at least thirteen commands from Thacker and had gone nearly a minute without complying.” The Court concluded: “Considering all the circumstances of the situation with which Thacker was faced, a tackle was among the least forceful

ways to advance the arrest and gain control of the situation.”

**The Court of Appeals then reviewed Deputy Brantley’s use of a taser on Charles: “The use of a taser is not categorically unconstitutional. We have found that the use of a taser can be appropriate in a wide array of situations.” The Court determined, after applying the Graham factors, “that Deputy Brantley’s use of the taser was not clearly excessive under the circumstances. Two crimes were at issue by the time the taser was deployed: Charles had an outstanding warrant for his arrest, and he had already begun his active and loud obstruction of the arrest.”**

Further, the Court reasoned, when Charles was tased, he had already been ignoring commands for “five minutes and six seconds.” Additionally, in that timeframe, Charles had “ignored twenty-one commands from the officers and was warned nine times that a taser would be used.” Therefore, the Court ruled that the *Graham* factors authorized Deputy Brantley’s use of force.

Therefore, the Court affirmed the District Court’s grant of both deputies’ motions for summary judgement based on qualified immunity. *Charles v. Johnson*, No. 20-12393, 2021 WL 5313668 (11th Cir. Nov. 16, 2021).

## ***Georgia Court of Appeals***

### **THREE MINUTE TRAFFIC STOP WAS UNNECESSARILY PROLONGED**

A sheriff’s sergeant and deputy were on patrol when they noticed a vehicle drive past them. The sergeant performed a U-turn and began following the vehicle. The sergeant observed the vehicle cross over a double yellow line in the middle of the road and performed a traffic stop. The sergeant made contact with the driver, Magnum Neely, and noticed that he was smoking a cigarette and appeared nervous. Neely was informed that he was stopped

due to a lane violation, to which he replied that he “had been messing with his cell phone.”

The sergeant requested Neely’s license, which was provided, and returned to the patrol vehicle to run a search. Dispatch confirmed that Neely’s license was valid and that he did not have any active warrants. The sergeant then returned to Neely and ordered him to get out of his vehicle. Neely was asked “if there was anything in the car.” Neely admitted that he “had just smoked” and that “there were pills and a blunt in his car.” At this point, three minutes had elapsed since the stop. Neely was detained and the officers searched the vehicle. They found “methamphetamine, marijuana, cocaine, over \$3,000 in cash, a digital scale, and plastic baggies.”

Neely was arrested and indicted for trafficking methamphetamine, possessing cocaine and marijuana with the intent to distribute, and failing to maintain a lane. He pled not guilty and filed a motion to suppress the seized evidence, arguing that “the arresting officer had prolonged the stop past the point of completion without reasonable suspicion of criminal activity.” The sergeant testified at the hearing, and the trial court denied the motion to suppress. At trial, Neely was convicted on all counts. His motion for a new trial was denied, and he appealed.

The Court of Appeals noted that this case falls into one of the two general categories involving prolonged detention from a traffic stop where:

**[T]he officer allegedly extended the stop beyond the conclusion of the investigation that warranted the detention in the first place[.] In such cases, courts have generally concluded that even a short prolongation is unreasonable unless good cause has appeared in the meantime to justify a continuation of the detention to pursue a different investigation. An officer**

may continue to detain a driver after the investigation of the traffic violation is complete only if the officer has a reasonable, articulable suspicion that the driver was engaged in other illegal activity.

It was undisputed that the time that the sergeant took to run Neely's license and to return it to him did not unreasonably prolong the traffic stop. **"A reasonable time to conduct a traffic stop includes the time necessary for the officer to run a computer check on the validity of the driver's license and registration, and to check for outstanding warrants and/or criminal histories on the driver and other occupants."** The Court, however, did find fault when the officer, after finding a valid license and no warrants, failed to conclude the traffic stop for the lane violation and allow Neely to leave. The officer began to err when he ordered Neely to get out of the vehicle and questioned him on matters unrelated to a lane violation. Such conduct would have only been permissible if the officer had reasonable, articulable, suspicion that Neely was engaged in other illegal activity.

The sergeant claimed that he questioned Neely due to him having a lit cigarette, which can sometimes be used to mask the odor of drugs, and his nervousness. In reference to the cigarette, the Court of Appeals concluded that **"[Cigarettes] are themselves legal substances that can be used for a legal purpose and thus do not justify the officer's further detention of [Neely] under the facts of this case."** In reference to Neely's nervousness, the Court cited previous rulings where, **"[N]ervous behavior, even coupled with [...] looking away and shifting around – conduct consistent with nervousness – was not sufficient to constitute reasonable suspicion of other illegal activity."**

The Court reasoned that, although the stop lasted only three minutes, **"there is no bright-line rule for determining when the length of a**

**detention becomes unreasonable[.] [E]ven a short prolongation is unreasonable unless good cause has appeared in the meantime to justify a continuation of the detention to pursue a different investigation."** As a result, the Court of Appeals determined that the trial court abused its discretion in denying Neely's motion to suppress and that he was entitled to a new trial. *Neely v. State*, No. A21A1216, 2021 WL 5577779 (Ga. Ct. App. November 30, 2021).

#### ALS REMINDER

If you are unavailable for an ALS Hearing and need assistance with an ALS continuance motion, email **both** Dee ([dbrophy@gsp.net](mailto:dbrophy@gsp.net)) and Grace ([gmatthews@gsp.net](mailto:gmatthews@gsp.net)) and provide the court date, location, and case name in your email. A written continuance motion must be filed with the Court at least ten days prior to the ALS Hearing date so please notify us before the ten-day deadline to allow sufficient time for the motion to be filed.

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