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11th Circuit Court of Appeals

FACTS WERE INSUFFICIENT TO SHOW OFFICER FAILED TO INTERVENE IN TRAFFIC STOP

Ricky Giddens was traveling home at night "on a lonely highway" when he passed Officer Frye traveling in the opposite direction. Officer Frye noticed that Giddens was traveling at a high rate of speed and his tag light was inoperable. Frye performed a U-turn and pursued Giddens at "a high rate of speed" in order to catch up with him. Frye stopped the vehicle in front of the driveway of Gidden's home.

Frye asked Giddens "in a hostile manner" for his license and registration. When Giddens asked why he had been stopped, Frye informed him that his tag light was not working, but eventually conceded that it was working now. Giddens accused Frye of lying. After arguing "back and forth", Giddens was informed that he had been pulled over for an inoperable tag light and speeding. Giddens responded to this with "You can't be serious man." He then began to argue with Frye as to why he failed to initially mention he was speeding. Frye retrieved the registration and license from Giddens and returned to his patrol vehicle. Frye's patrol vehicle was a K-9 unit, and a police dog was present.

After about ten to fifteen minutes, Officer Brown arrived at the scene. Frye walked his K-9 around the vehicle and the dog "alerted to possible contraband." Giddens was informed and asked to step out of his vehicle. Brown and Frye both performed a pat-down search of Giddens. Frye then searched the vehicle, and no contraband was found. Giddens continued to argue that his tag light was working, and that Frye had fabricated the reasons for the stop. He also stated that he intended to file a complaint. Frye issued Giddens two traffic citations, one for the inoperable tag light and one for speeding. The tag light violation was subsequently dismissed.

After Giddens filed an amended complaint against Frye and other defendants, the district court found that there were sufficient facts alleged against Frye to establish: lack of probable cause and reasonable suspicion to stop Giddens' vehicle, unreasonable search and seizure, unlawful detention, and false imprisonment. The district court ordered Giddens to serve the amended complaint on Officer Frye.

The district court later dismissed Giddens' case against Officer Frye, based on Giddens' inability to effect service of process upon Frye. Upon Giddens' appeal to the 11th Circuit Court of Appeals, the 11th Circuit found that the district court "err[ed] in failing to show that it considered whether other circumstances might exist that would warrant a permissive extension of time to serve Officer Frye." Therefore, the Court of Appeals vacated the district court's dismissal on this point and remanded the matter to the district court.

The remainder of this summary focuses on Plaintiff Giddens' appeal of the district court's dismissal of his claims against Officer Brown. The Court of Appeals held that the district court did not err in dismissing Giddens' claims against Officer Brown for failure to state a claim:

> Construed liberally, Plaintiff's complaint purports to assert against Officer Brown claims for conspiracy to violate Plaintiff's Fourth Amendment rights, failure to intervene, and for an unconstitutional pat-down search. About Plaintiff's conspiracy claims, Plaintiff alleged no facts supporting his conclusory allegations that Officer

> Brown conspired with Officer Frye (1) to conduct an unlawful pretextual traffic stop unsupported by reasonable suspicion; (2) to prolong unlawfully the duration of the traffic stop by conducting a dog sniff; and (3) to deprive Plaintiff of his right to be free from unreasonable searches and seizures. These conclusory allegations are insufficient to state a claim for relief and merit no further discussion.

The Court of Appeals then addressed Giddens' claim that Officer Brown could have prevented Officer Frye's "purportedly unlawful traffic stop and dog sniff" by telling Officer Frye that Giddens' tag lights were working. The Court first noted that its failure-to-intervene precedent did not yet "extend to an unlawful traffic stop." Rather, the Court noted, its previous holdings only recognized such a claim in two circumstances: (1) In cases involving claims of excessive force and false arrest where an officer "was in a position to intervene yet failed to do so"; and (2) In instances in which a non-arresting officer "knew the arrest lacked any constitutional basis and yet participated in some way."

As to whether Officer Brown "failed to intervene" in any unlawful behavior by Officer Frye, the Court explained:

> Even assuming (without deciding) that our failure-to-intervene precedent would extend to an unlawful traffic stop, Plaintiff has failed to allege facts sufficient to show that Officer Brown would be liable for failing to intervene under the circumstances of this case. By the time Officer Brown arrived, Plaintiff had already been stopped for more than 10 or 15 minutes. Plaintiff has alleged no facts from which we can infer plausibly that Officer Brown participated in -- or was in a position to intervene in -- Officer Frye's decision to initiate the traffic stop.
>
> Nor can we infer that Officer Brown was on sufficient notice that the ongoing traffic stop was unlawful. Although Plaintiff's tag lights were working when Officer Brown arrived, Plaintiff never alleged that Officer Brown knew or had reason to know that Officer Frye's second stated reason for pulling Plaintiff over (speeding) was untrue.

(Citations omitted.)

The Court of Appeals also cited Giddens' failure to allege any facts "showing that Officer Brown had 'the requisite information to put him on notice' that the duration of the traffic stop had been or was being unduly prolonged." Rather, the Court found: "Plaintiff never alleged that Officer Brown knew when Plaintiff was stopped. Nor has Plaintiff alleged facts from which we might infer that Officer Brown knew -- when Officer Frye conducted the dog sniff -- that the 'ordinary inquiries incident' to the traffic stop had already been completed." (Such "ordinary inquiries" include running a driver's license check to see whether there are any outstanding warrants for the driver's arrest and checking to see that the vehicle is properly registered and insured.)

Next, the Court evaluated the reasonableness of the pat-down search, which was jointly conducted by Officers Frye and Brown. The objective standard under which the Court assessed the reasonableness of this search considered "whether the facts known to the officers at the time of the search would cause a reasonable officer under the circumstances to believe that the search was constitutional." The Court looked to precedent from both the United States Supreme Court and the Eleventh Circuit Court of Appeals:

> An officer may conduct a pat-down search of a driver or a passenger during a lawful traffic stop when the officer 'harbor[s] reasonable suspicion

> that the person subjected to the frisk is armed and dangerous.' Reasonable suspicion does exist when 'a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' 'To determine whether suspicion was reasonable, we evaluate the totality of the circumstances surrounding the stop, including the collective knowledge of all officers involved in the stop.' . . . We have concluded that reasonable suspicion exists to support a pat-down search of a driver during a traffic stop when (1) officers smelled marijuana and alcohol coming from the car and (2) 'the driver argued with [the officer] at the initiation of the stop.'
>
> (Citations omitted.)

In its decision to affirm the district court's dismissal of Giddens' claims against Officer Brown regarding the pat-down search, the Court noted:

> From the moment Officer Frye first approached Plaintiff's car, Plaintiff was argumentative with Officer Frye, including accusing Officer Frye of lying. Officer Frye's dog later alerted to the presence of possible contraband inside Plaintiff's car, at which point Officer Frye ordered Plaintiff to exit the car and both officers are said to have conducted a pat-down search. The circumstances within the collective knowledge of the officers – Plaintiff's immediate argumentativeness, the officers' detection of the odor of possible contraband emanating from Plaintiff's car, that the traffic stop occurred at night in an isolated location, and that Plaintiff was on his home ground -- are objectively dangerous circumstances the totality of which would give rise to reasonable suspicion that Plaintiff might be armed and dangerous. Under these circumstances, an officer in Officer Brown's place could have believed reasonably that his safety or that of others was in danger and that a pat-down search was warranted.

Giddens v. Brooks County, Georgia, No. 21-11755, 2022 WL 836273 (11th Cir. March 21, 2022).

Georgia Court of Appeals

COULD DUI DEFENDANT QUESTION OFFICER ABOUT WHETHER OFFICER SOUGHT WARRANT FOR TEST OF DEFENDANT'S BLOOD?

Thomas Petty was stopped by a Fayetteville City police officer for several traffic violations. During the stop, the officer noticed the smell of alcohol emanating from Petty's breath. He was asked to perform field sobriety tests but refused and was subsequently arrested for driving under the influence ("DUI") less safe. The officer read Petty the implied consent notice and asked for a State administered chemical test of his breath to which he refused. The officer searched Petty's vehicle after Petty's arrest and recovered less than an ounce of marijuana.

Petty was charged by accusation with three counts of DUI less safe: combined influence of drugs and alcohol, drugs only, and alcohol only. Prior to trial, he filed a "particularized motion to suppress evidence and motion in limine" requesting the suppression of any evidence related to his refusal of chemical testing. **On January 16, 2020,** the trial court entered an order denying Petty's motion generally but granted the motion as to the issue raised in *Elliott v. State*, which bars the State from entering evidence of Petty's breath test refusal.

In **April 2021**, a day before his trial, Petty filed a motion in limine requesting clarification as to whether he would be able to cross examine the officer on certain topics including "the officer's failure to acquire a search warrant for [his] blood." Petty was concerned that this line of questioning would "inadvertently open the door", thereby allowing the State to bring in the

suppressed evidence (i.e., his refusal to submit to the state breath test). At the hearing, the trial judge stated:

> [W]hat I think would be fair and reasonable in this case would be ... to keep it very limited at least as to drugs, why didn't [the officer] seek a blood test.... I don't want to get into why didn't [the officer] seek a test because then I think that would actually not be an honest question because [the officer] did seek a test. But why didn't you seek a blood test as to drugs, I want to keep it very limited to that and maybe the mechanism [the officer] could've gone for a magistrate to do that.

The judge issued an order on **June 3, 2021,** ruling that such questions would not "undo" the suppression of Petty's refusal so long as he "asked questions pertaining to the issue of obtaining a warrant through a magistrate for a blood sample." Petty was not allowed to "ask whether or not a blood test would have shown the amount of alcohol in his system."

The state appealed from the order issued in **June,** arguing that the trial court erred in ruling "that Petty could question the arresting officer about the lack of a search warrant to obtain Petty's blood, without opening the door to evidence of Petty's refusal to submit to chemical testing." The State cited to authority in OCGA § 5-7-1 (a)(4) and (a)(5) outlining when the State may appeal.

Pursuant to OCGA § 5-7-1 (a)(4) the State may appeal "[f]rom an order, decision, or judgment suppressing or excluding evidence illegally seized or excluding the results of any test for alcohol or drugs in the case of motions made and ruled upon prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first[.]"

OCGA § 5-7-1 (a)(5) also authorizes an appeal by the State when, "an order, decision, or judgment excluding any other evidence to be used by the state at trial on any motion filed by the state or defendant at least 30 days prior to trial and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first[.]"

The State attempts to link the **June** decision to the **January** decision to satisfy OCGA § 5-7-1 (a)(4) by claiming that it "relates back" to the suppression issue. Petty contends that the argument fails under either statutory provision because his motion in limine "was not seeking to exclude evidence," but, rather, to clarify the scope of evidence that could be entered, and that the State was appealing the **June** decision only.

The Georgia Court of Appeals agreed with Petty's argument and asserted that it did not have jurisdiction over this case. OCGA § 5-7-1 (a)(4) only permits an appeal on issues *of* ***exclusion of evidence***, whereas Petty's motion sought ***clarification*** regarding the questions he could ask the officer on the witness stand. Furthermore, OCGA § 5-7-1 (a)(5) requires that the appealable issue must be filed 30 days prior to trial. Since Petty's motion was filed the day before trial, (a)(5) could not apply. The Court did not agree with the State's attempt to link the **June** and **January** decisions and ruled that even if the two decisions were linked, OCGA § 5-6-38 (a) requires a party to appeal within 30 days of a decision and the State was well past that deadline. As such, the Court dismissed the case for lack of jurisdiction. *State v. Petty*, No. A21A1711, 2022 WL 600766 (Ga. Ct. App. March 1, 2022).

ALS REMINDER

If a Petitioner fails to abide by an ALS plea agreement, it may be possible to reinstate the ALS. Please notify Dee and Grace if the Petitioner fails to follow through with the ALS plea agreement. A copy of the joint withdrawal form with your signature on the Affidavit and a brief explanation of how the ALS agreement was violated will be needed to reinstate the ALS. The paperwork will then be prepared and submitted on your behalf to the Administrative Court to reinstate the ALS. If the DUI case is dismissed or reduced to a charge other than DUI (such as Reckless), the ALS cannot be reinstated.

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