



DPS Legal Review

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NO TIMES = NO TIME or SIX X NO(THING) = NOTHING

Defendant was convicted by a jury of DUI. At 5 p.m. on the date of the incident, Wendy's employee reported to work and later, "at some point during his shift," observed Defendant behind the "wheel of auto with gray-haired woman in passenger seat...stopped outside the drive-through window with its engine running... and smelled strong odor of alcohol coming from the car..." and called 911. A short time later, the employee saw the same vehicle in the parking lot of Pizza Hut. At approximately 7 p.m., an officer was dispatched to the defendant's location. Upon arrival, the officer observed the defendant seated in the driver's seat of the parked vehicle. The officer observed that the defendant's eyes were bloodshot and watery, he had a strong odor of alcoholic beverage on his breath, he exhibited clues on the HGN Test, and he was positive on the Alco-Sensor test indicating he was under the influence of alcohol. Defendant was arrested for DUI, read implied consent, and agreed to submit to a blood test, which revealed an alcohol concentration of above the "legal limit." (So far so good.)

The 5 p.m. arrival at work of the Wendy's employee and the 7 p.m. dispatch of the officer to the scene at Pizza Hut was the only information introduced at trial regarding the time period.

The Georgia Court of Appeals reversed the conviction because the available evidence could not reveal that Defendant's alcohol concentration was an amount that is prohibited by any provision of O.C.G.A. § 40-6-391 at any time within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended.

There was **no** evidence of how long it took the officer to arrive on the scene after dispatch; **no** evidence of the amount of time that the officer was on the scene at Pizza Hut; **no** evidence of how long it took to drive from the scene to the hospital for the blood test; **no** evidence of

how long after the officer arrived that the blood was drawn; **no** evidence of how long it took to perform the toxicology test or what time the results were obtained; and **no** expert evidence to establish that Defendant's alcohol concentration level, as revealed by the blood test, exceeded the "legal limit" during the relevant three hour period. (Not so good!)

In short, there was insufficient evidence to show that Defendant's blood alcohol level exceeded the "legal limit" within three hours of when he last had control of a moving vehicle. *Peters v. State*, No. A06A1630, *Ga. Court of Appeals* (8/30/2006).

TWO IN ONE: ROADBLOCK & EQUAL ACCESS RULE

Defendant stopped his vehicle at a roadblock set up by Atlanta Police at Juniper and 5th Streets at 3 a.m. on March 26, 2006. The officer approached and asked for driver's license and proof of insurance. Instead, Defendant handed the officer his United States passport which, upon checking information on the passport, the officer found that Defendant's license was suspended. Defendant was arrested for driving with a suspended license. During a search incident to arrest, the officer found in Defendant's left pocket a pill containing Ecstasy for which he was further charged with possession. Defendant also had in his pocket a small plastic bag containing a crystal substance like that later found in the vehicle. Upon searching the vehicle in connection with impounding it, the officer found a bag containing more than 28 grams of Meth between the driver's seat and the console for which he was charged with trafficking. The trial court denied a Motion to Suppress the evidence and Defendant was convicted on all three charges.

The Georgia Court of Appeals affirmed the convictions and upheld the trial court's denial of the motion to suppress and found that the decision to set up the roadblock was made by supervisory personnel for a permissible purpose. A Lieutenant who was the watch commander in charge of operations of the Zone 5 Precinct at the time of Defendant's arrest testified that he implemented the roadblock for the purpose of "check[ing]

for drunk drivers and for people with suspended driver[‘s] license and with no insurance on their vehicles.”

The Lieutenant also testified: that under department policy supervisors are required to decide whether to have a roadblock and that he was such a supervisor; that he had been provided training concerning roadblocks; that he followed the protocols for roadblocks set forth by the department regarding identification of officers, safety measures, and traffic control at the site of the roadblock; that he was present at the roadblock in his capacity as supervisor; that the roadblock was planned in advance and was coordinated with and included officers from another unit; and that he did not himself screen, search or otherwise interact with motorists. The Court noted that the Lieutenant’s mere presence at the roadblock did not deprive him of his supervisory status.

Defendant objected to the Meth evidence because there was a passenger in the vehicle that had “equal access” to the Meth. The Court of Appeals upheld the trial court’s decision overruling Defendant’s objection and allowed the evidence. A driver in possession and control of a vehicle gives rise to an inference that he is in possession of contraband found in the vehicle. Application of the “equal access” rule may dissolve that inference, i.e. “evidence showing that a person other than the driver of the automobile had equal access to the contraband” found in it. However, the rule applies only where the “sole” evidence of possession of such contraband found in the vehicle arises from Defendant’s ownership or possession of the vehicle. Here, the fact of Defendant’s possession of the car is not the sole evidence linking him to the Meth found next to the driver’s seat; he also had a small bag in his pocket at the time of his arrest which contained a “crystal-like” substance that “looked just like” the Meth found in the car. There was also evidence that tended to negate possession by the passenger. *Giacini v. State*, No: A06A1586 Ga. Court of Appeals (9/1/2006).

ALS REMINDERS

1. Please remember to follow the GBI Intoxilyzer 5000 Operator’s Training Manual rules regarding the 20 minute waiting period on intoxilyzer tests. The failure to wait the required 20 minutes goes to the weight of the test as opposed to the admissibility of the test so the test results may still be admissible in court if the required 20 minute waiting period is not followed. However, the failure to follow the 20 minute waiting period probably will result in the revocation of the Intoxilyzer Operator’s permit by the GBI Crime Lab.

2. The arresting officer is subpoenaed by OSAH for the ALS Hearing. If you need an additional witness, please fill out a subpoena and provide it to the witness. The witness subpoena can be obtained by going to the OSAH website at www.osah.ga.gov, select the “Forms” Icon and then “Subpoena.” Print the subpoena, fill out all of the requested information, and then serve the necessary witness with the subpoena.

3. If you have agreed to withdraw the 1205 Form in exchange for Petitioner entering a DUI guilty plea, the withdrawal form can be located on OSAH’s website at www.osah.ga.gov. Select the “Forms” icon, then select “Motions,” and then select “Joint Motion to Withdraw Sworn Report.” The form will need to be signed by the arresting officer and the attorney for the Petitioner. If the Petitioner is not represented by an attorney, then the Petitioner will need to sign the form. Once the form is signed by the arresting officer and the attorney or Petitioner, provide the form to the Court.

A WORD FROM THE DEPARTMENT OF DRIVER SERVICES

The DDS Law Enforcement Update - Summer 2006 is now available directly at their Business Partners Link <http://www.dds.ga.gov/business>, and other good stuff at homepage <http://www.dds.ga.gov/index.aspx>.

HUMOR WORKS

What’s the definition of *waste*? A bus load of lawyers going off a cliff with one spare seat!

Published with approval of the Office of Colonel Bill Hitchens.
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