

# DPS Legal Review

## TOLLING DOCTRINE DOES NOT APPLY IN THE PRE-CONVICTION CONTEXT

The plaintiff was pulled over by officers of the Cobb County Sheriff's Department after a short pursuit. After he stopped his vehicle, the plaintiff exited, and he was approached by officers who ultimately placed him under arrest. He was then indicted by the Cobb County Grand Jury on charges of obstructing an officer (by resisting lawful arrest) and fleeing or attempting to elude a police officer.

After being indicted, the plaintiff pled guilty to speeding, and the prosecutor entered a *nolle prosequi* for the obstruction counts. More than three years after his arrest, the plaintiff initiated a civil rights action claiming that his arrest was unlawful. He also alleged that he was handcuffed and beaten before being arrested. Plaintiff asserted claims under the Fourth Amendment, the Equal Protection Clause, the Due Process Clause, and multiple state laws. The defendants moved to dismiss the claims asserting, among other things, that they were time-barred.

With the exception of the unlawful-arrest claim, the court dismissed all of the claims as time-barred by Georgia's two-year statute of limitations. However, relying on previous cases, the court held that the unlawful arrest claim remained viable because the statute of limitations had been tolled by the pending criminal proceedings.<sup>1</sup> Later, while the unlawful arrest claim was proceeding, the United States Supreme Court rendered a decision that makes it clear that (regardless of its potential effect on pending or future criminal proceedings) a plaintiff must file a § 1983 civil rights action within the relevant statute of limitations period.

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<sup>1</sup> See Heck v. Humphrey, 512 U.S. 477 (1994); Uboh v. Reno, 141 F.3d 1000 (1998) (holding that, because the plaintiff's allegation of an unlawful arrest necessarily undercut the viability of the criminal charges, a § 1983 claim did not accrue until the criminal proceedings against the claimant terminated)

In Wallace v. Kato, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1091 (2007), the Supreme Court held that when a plaintiff files a civil rights claim before he or she has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial) the court has the power to stay the civil action until the criminal case or the likelihood of the criminal case has ended. The issuance of the stay (not the tolling of an action) is the appropriate prophylactic device to prevent federal courts from undercutting state criminal convictions by preordaining the constitutionality of arrests or seizures in § 1983 actions.

**HOLDING:** Based upon Wallace, the court revisited and dismissed the unlawful arrest claim. The court held that the plaintiff's § 1983 action (which was brought over three years after the arrest in question) was neither timely under the relevant statute of limitations nor preserved by the tolling doctrine. Watts v. Epps, \_\_\_ F.Supp.2d \_\_\_, 2007 WL 594929 (N.D.Ga. Feb. 27, 2007).

## OFF-DUTY ESCORT LIABILITY

The plaintiff was injured when the car that she was driving collided with a house being moved along Roswell Road in Fulton County. Two off-duty Fulton County officers operated police escort vehicles for the house. At the time of the accident, the plaintiff was eighteen-years-old and had three friends in her car. She sued the house mover and the two off-duty officers for damages. At the close of the plaintiff's case the court granted the officers a directed verdict based upon official immunity. The jury returned a verdict for the house mover. The plaintiff appealed.

On appeal, the plaintiff's sole argument against the officers was that they failed to follow the Georgia Department of Transportation regulations for moving houses. Specifically, she contended that the police cars: 1) did not have wide load signs in front of their cars, 2) did not have amber lights on top of their cars, and 3) did not have two-way radios to communicate

with the truck carrying the house. She argued that failing to follow these requirements constituted ministerial acts for which the officers would be liable.

**HOLDING:** A suit against a public officer acting in his official capacity will be barred by official immunity unless the public officer 1) negligently performed a ministerial duty, or 2) acted with actual malice or an actual intent to cause injury while performing a discretionary duty. A ministerial act is one that is simple, absolute and definite arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty.

In contrast, a discretionary act calls for the exercise of personal deliberation and judgment. In this case, there was no allegation and no evidence that the officers acted with actual malice or intent to injure. There is no ministerial duty as it relates to the Georgia Department of Transportation regulation since those regulations do not apply to police officers. State law mandates the proper markings for police cars, and, under state law, the officers could not have operated amber lights on top of their police vehicles. The officers performed discretionary acts since controlling traffic is a discretionary function. Hersh v. Griffith, \_\_\_ S.E.2d \_\_\_, 2007 WL 677833 (Ga. App. March 7, 2007).

### ALS REMINDERS

➤ If one agency investigates a DUI case and GSP is later called to assist, it may be necessary for the original investigating agency to testify at the ALS hearing as well as GSP. The officer from the other agency must be subpoenaed to testify. The subpoena can be located at the OSAH website ([www.osah.ga.gov](http://www.osah.ga.gov)). To secure a subpoena, go to the website, select "Forms", and then select "Subpoena." Fill out the subpoena and provide it to the officer from the other agency. If you need any assistance with preparing the subpoena, simply contact Dee or Debi in legal services.

➤ In a DUI cases (where the defendant attempted to take or took the Intoxilyzer test), **always** provide a copy of your Intoxilyzer permit and the original Intoxilyzer test printout to the Judge at the ALS hearing.

➤ If a 1205 Form is withdrawn in exchange for a DUI plea agreement and the defendant does not plea, notify Dee or Debi **immediately**. This will help ensure that a motion may be filed in a

timely manner with the ALS Judge to request that the plea agreement be set aside and the case rescheduled for an ALS hearing.

➤ ALS/DUI update training will begin soon. Please notify Dee or Debi if there are particular topics that you would like to see covered in conjunction with the training.

### KUDOS

This month Assistant Attorney General Aaron Mason and Senior Assistant Attorney General Eddie Snelling successfully defended Trooper Billy Cope in a civil rights lawsuit. The case was tried before a jury in the federal district court in Valdosta, Georgia. Because he was shot three times, the plaintiff alleged that Trooper Cope had used excessive force. At trial, in the high speed chase, the plaintiff could be seen on the videotape driving the wrong way down I-75.

The plaintiff's toxicology report established the presence of marijuana, cocaine, and alcohol. In connection with the chase, the plaintiff caused several accidents and wrecked his own car. At that point, he fled on foot through a field, swam through a pond, and then refused to surrender after being cornered near a line of pine trees. Instead of surrendering, the plaintiff raced to the open door of Trooper Cope's patrol car and tried to get the shotgun beside the driver's seat.

The trooper tried to pull the plaintiff out of the patrol car, and, during the struggle, he shot the plaintiff three times in the buttocks. Despite being shot, the plaintiff managed to push away the trooper and a sheriff's deputy and crash the patrol car into two parked vehicles before being apprehended. It took the jury less than 30 minutes to return a defense verdict.

### PROVERBIAL WISDOM WORKS

Man perfected by society is the best of all animals; he is the most terrible of all when he lives without law and without justice.

Aristotle

Published with the approval of Colonel Bill Hitchens. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and Dee Brophy, ALS Attorney. Send questions/comments to [jbunn@gsp.net](mailto:jbunn@gsp.net).