



# *DPS Legal Review*

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## **OBSTRUCTION CHARGE DISMISSED**

An officer with the Toccoa Police Department stopped a vehicle for a brake light violation. When the officer approached the vehicle, he saw a male driver, a female passenger, and the Defendant seated in the back seat. The male and female said they were giving the Defendant a ride, but they did not know him. The officer learned that the driver lacked a valid license. He arrested him. The female owned the vehicle, and she consented to a search. When she consented, the officer removed the Defendant from the vehicle. The officer was suspicious of the Defendant because no one knew him. There was no basis for detaining him. However, before allowing the Defendant to leave the scene, the officer asked permission to frisk him "for officer safety."

The Defendant consented. During the pat-down, the officer felt the corner of a hard object in the front pocket of the Defendant's pants. He pulled the object from the Defendant's pocket and identified it as a cigar box with an open space covered by cellophane. He saw what he believed to be crack cocaine inside the box. At that point, the Defendant fled. A backup officer apprehended the Defendant. He was charged with cocaine possession with intent to distribute, two counts of obstructing an officer, and giving a false name. The Defendant moved to suppress the evidence.

**HOLDING:** The motion to suppress was granted. The Court held that the officer exceeded the permissible scope of the search by reaching into the Defendant's pocket. During a weapons pat-down, officers must follow a two-step process: "(1) The officer must pat down first, and (2) then intrude beneath the surface only if he comes upon something that feels like a weapon." Nothing indicated that the object felt like a gun or other weapon. Since the state offered insufficient admissible

evidence of cocaine possession with intent to distribute, that charge failed.

The accusation also charged that the Defendant committed obstruction by (1) fleeing from one officer on foot, and (2) resisting the other officer's efforts to arrest him. These two counts of obstruction were dismissed as unsupported by the evidence. Obstruction results when a person knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties.

As to the first obstruction count, the Court held that the Defendant ran after the officer patted him down and removed the cocaine-filled cigar box from his pocket. Discovery of that cocaine was improper. The officer testified that once he determined the Defendant had no weapons, he was free to leave. The officer did not find a weapon, and he should not have discovered the cocaine. Thus, the Defendant would have been free to go at the time he fled, and his flight could not hinder or obstruct the officer in the lawful discharge of his official duties.

As to the second obstruction count, the second officer failed to testify in connection with this charge. The first officer testified in connection with this charge, but he failed to offer evidence regarding the other officer's effort to arrest the Defendant. Thus, conviction was not authorized. The false name charge was set aside and sent back for retrial. Brown v. State, \_\_ S.E.2d \_\_, 2008 WL 4211119 (C.A. 11(Fla.)).

## **OBSTRUCTION CHARGE SUSTAINED**

An officer with the Dalton Police Department stopped the Defendant's truck for a broken taillight. The officer told the Defendant the basis for the stop and secured his driver's license and proof of insurance. As the officer

was going to run the license check, the Defendant opened the door of his truck. The officer returned to the truck and told him that for officer safety purposes, the Defendant should keep the door of his truck closed. The officer returned to his car. The Defendant opened the door to his truck, exited the truck, and walked to a nearby building. The officer approached him and told him he needed to return to his truck. The Defendant refused. The officer told him that he would be arrested if he did not return to his truck. The Defendant told the officer that he “wasn’t going to take him to jail.” The officer grabbed the Defendant to effectuate the arrest. The Defendant jerked away. The officer grabbed the Defendant and arrested him for obstruction. He was charged with misdemeanor obstruction. He appealed his conviction.

**HOLDING:** The conviction was upheld. The accusation filed against the Defendant alleged that he “did knowingly and willfully obstruct [the officer] in the lawful discharge of his official duties by refusing to obey verbal commands to remain in his vehicle during a traffic stop(.)” The evidence showed that the officer instructed the Defendant to remain in his truck, and that the Defendant failed to comply. Officers are authorized, for their own safety, to request that an individual remain in a vehicle until their investigation is complete. A refusal to comply with an officer’s lawful demand will sustain a conviction for misdemeanor obstruction. Council v. State, 291 Ga. App. 516, 662 S.E.2d 291 (2008).

### **INQUIRING MINDS**

**QUERY:** What is required to properly identify a police checkpoint?

**ANSWER:** The Court has held that identifying markers (such as flashing lights and signs on the cars) are sufficient. These markers are routinely used. In Harwood v. State, 262 Ga.App. 8181, 586 S.E.2d 722 (2003), the Defendants argued that a checkpoint was not adequately identified. The Court disagreed. In that case, the record showed that there were police cars on each side of the roadway. There were blue lights flashing. The officers were in full uniform with some orange and some chartreuse and blue reflective vests that said “police.” The officers also placed “Click-it or Ticket” signs on their parked cars. Given these identifying markers, the Court held that it was

unlikely that a motorist would have taken the activity to be anything other than a police checkpoint. The Court also held that there is “no authority for the proposition that the Fourth Amendment requires that roadblocks be identified with orange cones and that officers working there wear reflective hats.”

### **ALS REMINDER**

**HORIZONTAL GAZE NYSTAGMUS (HGN)** – HGN is the involuntary jerking of the eyes as they move toward the side. There are six possible clues to look for when evaluating the HGN (three in each eye.) If a suspect is wearing eyeglasses, you should ask for the eyeglasses to be removed prior to starting the test. Prior to checking for the clues, you should look for: equal pupil size, resting nystagmus, and equal tracking to medically qualify the suspect to perform the test. The time period for equal tracking is one second out and one second back. Remember to hold the stimulus 12-15 inches from the suspect’s nose, slightly above eye level. You should check the left eye first, and then check each eye twice for the clues listed below.

### **The Six Clues (3 clues for each eye):**

- (1.) Lack of smooth pursuit – the time period is 2 seconds out and 2 seconds back.
- (2.) Distinct and sustained nystagmus at maximum deviation – you should hold the stimulus for a minimum of 4 seconds at maximum deviation.
- (3.) Onset of nystagmus prior to 45 degrees – it should take approximately 4 seconds to reach 45 degrees.

Remember that clue number 2 will not be present unless clue number 1 is present, and that clue number 3 will not be present unless clues number 1 and 2 are present. Four of six clues are needed on HGN to indicate a suspect’s blood alcohol concentration (“BAC”) is above 0.08.

### **QUOTABLE WISDOM WORKS**

**"Efforts and courage are not enough without purpose and direction."**

**President John F. Kennedy**

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