



DPS Legal Review

April 2011 Legal Services (404) 624-7423 Volume 10 No. 4

SPOILIATION OF EVIDENCE

In June 2003, an officer in Forest Hill, Pennsylvania, was shot and the bullet penetrated a 100% Zylon vest manufactured by Second Chance Body Armor. The Zylon fiber is a product manufactured by Toyobo America, Inc. and Toyobo Co. (hereafter "Defendants.") The officer survived the incident. The vest worn by the officer was less than one year old at the time of the incident.

In October 2003, the Defendants retained a public relations firm to assist with possible litigation concerning Zylon fiber and litigation communications, strategic counseling, and reputation management support in connection with possible litigation concerning Zylon. Beginning in November 2003, the Defendants were sued across the country in numerous cases involving Zylon-containing vests. In November 2003, the United States Department of Justice began its investigation into Zylon-containing body armor in the United States.

In November 2003, Defendants' counsel sent a list of documents it wanted the Defendants to gather and provide in connection with litigation. In April 2004, Defendants and Armor Holdings were jointly sued in a class action seeking \$77.5 million involving all Armor Holdings vests containing Zylon. At that time, Armor Holdings and Point Blank were the two largest armor manufacturers in the United States.

In August 2004, Defendants were served with a subpoena from the United States requesting "All records pertaining, referring, or related to communications with or about any vest manufacturer other than Second Chance concerning Zylon or vests made, at least in part, with Zylon." In January 2005, Point Blank started recalling its high Zylon content vests and issued a nationwide notice campaign the following month. In August 2005, the National Institute of Justice issued NIJ Body Armor Standard Advisory Notice #01-2005 which indicated that it identified Zylon as a material that

appears to create a risk of death or serious injury as a result of degraded ballistic performance when used in body armor. NIJ decertified all Zylon-containing vests and no vest containing Zylon has since been certified by the NIJ. Point Blank Solutions, Inc. and Point Blank Body Armor, Inc. (hereafter "Plaintiffs") sued the Defendants. The Plaintiffs sought sanctions against the Defendants for their alleged destruction of electronic evidence.

HOLDING: The Court held that spoliation refers to the destruction of evidence or the significant and meaningful alteration of a document or instrument. In this circuit, sanctions for spoliation of evidence may include: (1) dismissal of the case, (2) exclusion of expert testimony, or (3) a jury instruction on spoliation which raises a presumption against the spoliator. Even if all three elements are met, Courts will not sanction a party unless the party purposely tampers with the evidence in bad faith.

The Court held that mere negligence in losing or destroying records or evidence will not justify an adverse inference instruction for spoliation. The Court held that parties have an obligation to retain relevant documents, including emails, once litigation is reasonably anticipated. The Court also held that parties are well advised to retain all relevant documents in existence at the time the duty to preserve attaches. In a business setting, managers are responsible for conveying to the employees the requirements for preserving evidence.

Under the facts, the Court held that the Defendants did take some steps to preserve evidence. The Court held that it received no evidence that any of the Defendants' employees intentionally destroyed or were ever instructed to destroy documents related to the use of Zylon fiber in ballistic vests. The Court held that the Plaintiffs failed to show that evidence crucial to the case was destroyed in bad faith. Point Blank Solutions, Inc. v. Toyobo America, Inc., Slip Copy, 2011 WL 1448137 (S.D.Fla.).

FOURTH AMENDMENT

Officers observed the Defendant and a male companion exit a known drug-distribution location and walk toward them. The Defendant alleged that he walked on the sidewalk. The Officers testified they walked down the middle of the street in violation of an Atlanta ordinance. The Officers exited their vehicle, approached the men, and asked them to stop. The Defendant fled.

As the Officers gave chase, they observed the Defendant reach into his pocket and discard an item. After apprehending the Defendant, the Officers found a firearm and ammunition on his person. They retrieved the discarded item, which was later identified as a bag of marijuana and crack cocaine. The Defendant made incriminating statements after his arrest. His motion to suppress the evidence was denied. A jury found him guilty of being a felon in possession of a firearm, possession with intent to distribute crack cocaine, and possession of a firearm in furtherance of a drug-trafficking offense. He appealed.

HOLDING: The Court held that the Defendant's argument that the stop was unlawful lacked merit. The Officers' initial approach did not restrain the Defendant's liberty by physical force or a show of authority. Hence, the Court held that the initial approach did not constitute a stop under the Fourth Amendment. The Court held that the motion to suppress was properly denied. U.S. v. Shepard, Slip Copy, 2011 WL 1496404 (C.A. 11 (Ga.)).

STOP UNJUSTIFIED

An Officer of the City of Riverdale Police Department was on patrol when he observed six males on the sidewalk who appeared to be in a heated debate or discussion. He could not actually hear the conversation. He said that their general body language and expressions indicated to him that it was not a typical conversation and things were becoming heated. He parked his patrol car in the roadway near the group and activated his blue lights as a safety precaution.

After seeing the Officer, the group dispersed. The Officer asked them to come back so that he could speak with them. The Defendant hesitantly complied. The Officer asked what they were doing there. The Defendant told him they were discussing a recent shooting in the area. The Officer asked the Defendant if he had any weapons or contraband on him. The Defendant

admitted that he had marijuana in his pocket. The Defendant moved to suppress the evidence.

HOLDING: The Georgia Court of Appeals held that the Officer did not see the Defendant do anything unlawful. There is nothing illegal about standing on a sidewalk at 10:30 a.m., engaging in a discussion with others, and walking away upon the Officer's arrival. The Court held that the fact that the Defendant merely walked away from the Officer "did not create an objective articulable suspicion. A citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter. Such conduct may not provide the basis for elevating the encounter to a second-tier stop." Gattison v. State, ___ S.E.2d ___, 2011 WL 1486622 (Ga. App.).

INQUIRING MINDS

QUERY: May a violator who refuses to sign a traffic citation be required to post a bond?

ANSWER: Yes. The language in O.C.G.A. § 40-13-2.1(a) requires an officer issuing a citation to follow the procedures and requirements set forth in the statute. The statute mandates that anyone who refuses to sign a traffic citation must be informed that: 1) signing is not an admission of guilt and 2) failing to sign constitutes a reasonable cause to bring them before a judicial officer to post bond. State v. Torres, 290 Ga. App. 804, 660 S.E.2d 763 (2008).

ALS REMINDER

⊗ On Intoxilyzer 5000 cases, **always bring a copy of your permit** to operate the Intoxilyzer 5000 along with the **original printouts of the test** results to the ALS Hearing. Your permit to operate the Intoxilyzer 5000 must be the permit that was in effect **at the time that the test was administered**. Both the permit and the original test results must be provided to the court at the hearing.

⊗ If you need special assistance with an ALS Hearing, please remember to contact Dee in advance to discuss your case.

QUOTABLE WISDOM WORKS

"Carry out a random act of kindness, with no expectation of reward, safe in the knowledge that one day someone might do the same for you."

~ Princess Diana

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