



# DPS Legal Review

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## CIVIL RIGHTS CASE STEMMING FROM PRECISION IMMOBILIZATION TECHNIQUE DISMISSED

This month, the Court dismissed a civil rights action against a Georgia State Patrol trooper and two of his supervisors. Katie Sharp ("Sharp") and her passenger were killed when the trooper attempted to employ a Precision Immobilization Technique ("PIT") maneuver to stop her SUV as she and her passenger fled from South Carolina and Georgia police. The action, brought by Sharp's parents on behalf of Sharp's estate and her surviving child, alleged that she had been subjected to an unreasonable seizure in violation of the Fourth Amendment. The suit also asserted Eighth and Fourteenth Amendment claims against the trooper's supervisors.

The Court rendered its decision based upon the following facts: Two South Carolina officers were clocking speeders on I-95 South, north of the Georgia border when Sharp's SUV drove past them at 86 miles per hour in a 70 mile per hour zone. One of the South Carolina officers pulled out and attempted to stop the SUV. Sharp accelerated and began weaving through traffic on I-95's two lanes. The officer notified the police dispatch of a pursuit in progress, and the other officer joined the pursuit. Sharp drove erratically, at speeds of up to at least 107 miles per hour over 75 miles, into Georgia. At one point, she narrowly missed a pedestrian and a parked car.

South Carolina officers notified Georgia that a pursuit on I-95 South was heading for the Carolina/Georgia border. The trooper and his supervisor, in separate patrol cars, joined the southbound chase. The trooper knew that the chase had been in progress for at least 20 miles. The trooper did not have radio contact with the other agencies and never communicated with the South Carolina officers. The trooper based his decision to perform the PIT maneuver on the 53 seconds he spent observing Sharp's driving and the assumption

that Sharp had committed some type of serious crime in order for the South Carolina officers to continue the pursuit across state lines into Georgia.

**HOLDING:** Since the **Eighth Amendment** does not protect individuals who have not been tried and convicted, that claim was dismissed. The **Fourth Amendment** claims, based upon supervisory liability, were also dismissed because the supervisors did not know the circumstances surrounding the trooper's pursuit, and allowing him to exercise his discretion to perform the PIT maneuver was not a Fourth Amendment violation.

In determining whether **qualified immunity** applies, courts consider whether the officer's conduct violated a constitutional right. If a court finds a violation of a constitutional right, it then must determine whether the right was clearly established in light of the specific context of the case. In this case, the Court wrestled with whether to view the governmental interests: 1) based upon the trooper's point of view or 2) based upon the collective knowledge of all of the officers (even though it was conceded that such knowledge was not communicated to the trooper).

In the end, the Court refused to impute the South Carolina officers' knowledge to the trooper. Viewing the facts from the point of view of a reasonable officer in the trooper's position, the Court held that the facts alleged established a Fourth Amendment violation. The governmental interest in stopping a "recalcitrant but controlled driver" does not justify taking actions that put that driver, any passengers, and numerous other travelers at substantial risk of serious harm. It is unreasonable for an officer to take his own public-endangering action before he sees or hears information that corroborates that a fleeing driver poses a serious threat to the public.

Since a violation of a constitutional right was established, the Court then sought to determine whether the right was clearly

established. Officers are only held liable for actions that violate *clearly established law*. The Court held that stopping a recalcitrant but controlled driver by initiating a PIT maneuver was a *not* a clearly established violation of the Fourth Amendment in August of 2004. Thus, the trooper was entitled to qualified immunity, and the case was dismissed. Sharp v. Fisher, Docket No. 406CV20 (S.D.Ga. July 26, 2007).

### CHARGING ALL-TERRAIN VEHICLES

The Attorney General's office has issued an Official Opinion regarding the proper way to charge all-terrain vehicles ("ATVs") operating on the roadways of the State of Georgia. The opinion holds that ATVs are vehicles that are covered by the Uniform Rules of the Road. The definitions of both "vehicle" and "motor vehicle" found in O.C.G.A. §40-6-3(a) are broad definitions that include ATVs. An ATV is simply a particular kind of vehicle. Thus, operators of ATVs should be charged based upon the Uniform Rules of the Road when a violation occurs. 2007 Att'y Gen. \_\_\_.

### INTERVENING FAILED BREATH TEST

The 18-year-old defendant was arrested by a Lawrenceville Police Officer for DUI and failure to maintain her lane. The officer took her to the police station to administer an Intoxilyzer 5000 alcohol breath test. The first test yielded a test result showing an alcohol concentration of 0.126 grams. However, the defendant was unable to produce an adequate breath sample in the second test because she was upset and crying. The State stipulated that her failure to complete the test was not a refusal. Once the defendant calmed down, the officer administered a third test which yielded a test result showing an alcohol concentration of 0.126 grams. The defendant argued the results should be suppressed because the two breath samples taken were not sequential as required by law.

**HOLDING:** An intervening failed test due to the defendant's inability to provide an adequate breath sample will not render otherwise valid breath alcohol test results inadmissible. The existence of an intervening failed breath test goes to the weight, not the admissibility, of the test results. Davis v. State, \_\_\_ S.E.2d \_\_\_, 2007 WL 1965928 (Ga. App. 2007).

### REFUSAL TO PROVIDE A BREATH SAMPLE

After being stopped for speeding by a Fulton County Police Officer, the defendant was given the field sobriety tests, and he was placed under arrest for DUI. He was told that he was being arrested for DUI, and he repeatedly replied that he "did not understand." The officer read him the implied consent notice several times, and the defendant responded that he "did not understand" each time it was read.

When given the breathalyzer test at the jail, the defendant plugged the hole with his tongue and refused to blow a breath sample into the tube. Eventually the machine "timed out" and gave a reading of "insufficient sample" to determine the defendant's blood alcohol level. The defendant moved to suppress the evidence arguing that his failure to understand the implied consent warnings invalidated any consent he had given to take the test.

**HOLDING:** The defendant's actions could be construed as a refusal to take the test. Drivers are only entitled to be advised of their rights under the implied consent law by having the notice read to them. The law *does not* require the arresting officer to ensure that the driver *understands* the implied consent notice. State v. Stewart, \_\_\_ S.E.2d \_\_\_, 2007 WL 1761427 (Ga. App. 2007).

### ALS REMINDER

When testifying, always explain the process involved in the set up and preparation of the Intoxilyzer 5000 test. Your testimony should include: 1) whether a diagnostic check of the instrument was done, 2) whether the check indicated that everything was working properly, and 3) whether all parts were attached. Your testimony should detail that two breath samples were taken and the time that they were taken. Please be sure to establish on the record that the defendant's level of alcohol concentration was within 3 hours of driving.

### PROVERBIAL WISDOM WORKS

"I don't know the key to success, but the key to failure is trying to please everybody."

Bill Cosby

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