



The Trooper Legal Update

April 2005

Legal Services 404/624-7423

Volume 4, No. 3

A Warrant to Force a Blood Draw In Implied Consent Cases is Expressly Prohibited Obtaining Consent or a Warrant for Medical Records Remain Good Options

In DUI cases, especially ones involving serious injuries, some obtain warrants to force the suspect to provide a blood sample (if the suspect refused the state's test). This process of forcing the draw was expressly disapproved of by the GA Courts.

Collier, S04G1409 (4/26/05). "[O]fficers did not have the right, after his refusal, to obtain a search warrant and forcibly conduct the tests. ... the remedy for the officer's misdeeds is the exclusion of the results of those tests..." *Harris*, A04A2124 (3/22/05). In the same opinion, however, the Appeals Court reiterated that a warrant to obtain the medical records of a suspect was an acceptable practice. The Court held that the results of medical treatment records AND evidence of the refusal were both admissible to support the DUI conviction. *See also, King*, 276 Ga. 126 (2003). [Remember, you need PC to obtain a warrant for the suspect's medical records.] In a separate opinion, the Appeals Court also re-affirmed the power of getting a consent form signed. A valid consent form prevents a suspect from objecting to a search. Although not a blood test case, the Court reinforced the legality of obtaining a *voluntary* consent from the suspect. *Nelson*, A04A1882 (2/16/05) (Where home resident voluntarily consented to search of home, there is no valid basis to object to the search). Consent must be freely given and not coerced.

ALS NOTE: A cheat sheet to help you better prepare for ALS hearings is attached. Thanks Dee Brophy of the Legal Services Office for your work on updating the checklist.

Preparing for Court in

Speeding Cases: To help prepare for speeding cases, the "Speeding Prosecutions" case preparation sheet was developed. Copy attached. Hopefully, this checklist will make the process smoother. Thanks to CPL Chris Bryan, Post 20, Dublin for your suggestion. Thanks also to Mr. Robert Donovan, Attorney at Law in Marietta, and Ms. Fay McCormack, Traffic Safety Coordinator of PAC, for their assistance in preparing the checklist.

Legal Quickies:

PAT DOWNS: Officer safety reasons justified pat down where officer confronted suspicious person (with headlamp) reportedly looking in several car windows in a parking lot at night. Upon being stopped, the suspect gave conflicting stories & the officer noticed large bulges in his pockets. Once the officer removed a rock with a two-inch point on the end, the officer was justified in removing all objects from the pockets for officer safety concerns (of possible additional weapons). Motion to suppress marijuana found in pocket denied. *Whitener*, A05A0086 (3/7/05).

IMPLIED CONSENT: There is no requirement to re-read implied consent again at the jail or just prior to administering the test. A suspect was unsure whether they would take the test when implied consent was first read at the scene. Later, at the jail, the suspect was still unsure whether to take the test. The officer said, "... it's

time for me to get a breath sample. Do you want to?" The officer was not required to re-read the warning again at the jail. *Allen*, A04A2128 (2/21/05).

[CONTINUED ON PAGE -2-]

Page -2-

Trooper LEGAL UPDATE **[April 2005 Issue]**

HOME Search: Officers may conduct a "protective sweep" of a residence if justified for officer safety reasons. *Nelson*, A04A1882 (2/16/05). Here, residents were suspected drug dealers and were being held following a controlled delivery. Officer safety concerns that other suspects may be in the home justified doing the sweep prior to getting a warrant.

Compare a second case decided by the Court the next day: Officers made a vehicle stop and, during the stop, acquired PC to get a warrant to search the driver's home for drugs. The officers were not justified in going directly to the home and doing a "protective sweep" and then getting a warrant. *Curry*, A04A1632 (2/17/05). There was no evidence of an emergency need to go to the home to prevent loss of evidence or to prevent potential threats to officers. In *Curry*, the officers should have gotten the warrant first.

Probable Cause for DUI: The Court clarified that strong odor of alcohol + watery/bloodshot eyes + admission to drinking + refusal to cooperate in field sobriety was sufficient to establish probable cause of DUI. However, the Court explained that a trial court does not have to find probable cause. "We have previously found that bloodshot and watery eyes, as opposed to mere presence of alcohol, can support a finding of impairment. However, such evidence does not require a finding of impairment." *Ellison*, A04A2268 (3/3/05). Thus, the decision whether there is enough evidence to establish probable cause is left within the discretion of the local trial judge. Your credibility with your local judge is important to winning DUI cases.

MONTHLY MINDER: Once a vehicle is towed to a private lot, an officer has no legal duty to place a hold on the vehicle. Where a vehicle is towed to a private impound lot due to a driver's suspended license, no insurance or no registration, there is no statutory authority for the officer to place a hold on the vehicle. Holds may be placed if the vehicle is needed for evidence or subject to forfeiture

proceedings. *Strickland v. Vaughn*, 221 Ga. App. 636 (1996). See also 49 MER LR 215 (Fall 1997) (no support in the law for a sheriff to place a hold on a vehicle indefinitely). Note: If the vehicle is released directly from the custody of the Department, the Trooper is authorized to verify insurance/registration and valid license prior to releasing the vehicle. Towing codes: 40-6-206, 40-6-275 & 40-11-3. Thanks TFC Charles Chapeau (Post 32 Athens) for your question.

ON THE CIVIL SIDE

OFF DUTY OFFICERS HAVE IMMUNITY PROTECTIONS

A civil lawsuit against a Cobb Cnty officer was dismissed. The Court held the officer was "immune from suit" because he was performing his duties as a police officer, even though he was off-duty at the time. Officer E. H. Delong with Cobb PD stopped a suspect in front of a neighbor's house after he saw the suspect driving erratically. He was in uniform & identified himself as an officer. Physical force had to be used to arrest the suspect. The Court found that there was a reasonable basis to justify an arrest, he had identified himself as an officer, and the suspect could not show that Officer Delong had malice or intent to injure. Therefore, he was entitled to immunity just as an on duty officer. *Delong v. Domenici*, A04A2222 (2/23/05).

HANDCUFFING DURING SEARCH The U.S. Supreme Court supported the power of officers to detain people in handcuffs during a search, even if they are not suspects. *Muehler v. Mena*, 125 S.Ct. 1465 (2005). The justices unanimously held that an 18 year old woman (not a suspect) occupying the home could be handcuffed for 2-3 hours while the search was conducted for weapons & evidence of gang activity. The Court emphasized that handcuffing should not be routine nor unduly prolonged but must be supported by genuine officer safety concerns. *Id.* Factors the courts look at include: the nature of the suspected offense, the number of persons present, whether the officer is by himself, etc. See also *Jackson*, 236 Ga.App. 492 (1999).

HUMOR WORKS: A doctor told his patient that she only had six months to live. The distraught patient asked the doctor what she could do to have more time. The doctor advised, "Marry a lawyer. It will be the longest six months of your life."

Published with approval of the Office of the Colonel.
Legal Services: Melissa Rodgers, Director;
Terry L. Long, Deputy Director.
Questions/Comments to tlong@gsp.net