



The Trooper Legal Update

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A Suspect Does Not Have to be Advised of His Right to Refuse a Consent Search

In two separate cases, the Court explains that a suspect does not have the right to be advised of his "right to refuse" a request to search. *Kinsey*, A05A0135 (4/12/05) & *Goodman*, A05A0021 (4/6/05). In both cases, the consent search was upheld. The suspects later objected, claiming that their consent was not freely/voluntarily given. In *Goodman*, after the driver said he didn't have anything illegal in the car, an officer asked, "Would you have a problem if we took a quick search of the vehicle?" The driver responded, "I don't care." A trooper searched the vehicle while the officer wrote out a warning. In *Kinsey*, the suspect admitted that he consented to a search of his person at his residence and cocaine was found inside the waistband of his pants. The Court held that, while there is a right to refuse, there is no requirement that the suspect be told of his right to refuse. The only test is whether consent was freely/voluntarily given based on the totality of the circumstances & the burden remains on the officer to prove voluntary consent.

Requesting Consent Search DURING Traffic Stop Does Not Unlawfully Expand the Stop

The Court re-affirms that an officer may ask for consent to search a vehicle *during* a traffic stop and no PC or reasonable articulable suspicion is required. Consent "obtained during the traffic stop, rather than afterward,...is permissible," regardless of suspicion. There is no basis to contend that the stop was unlawfully expanded. *Salmeron*, A05A0636 (4/20/05).

CONSENT Still Voluntary Where Suspect is Told Officer will Get a Warrant if Suspect Doesn't Consent -- But only if Officer has PC for a Warrant

A consent search was upheld where the officers told the suspects that they had enough evidence to get a warrant to search the home. The Court noted that officers can threaten to go get a drug dog if they have a lawful basis for getting the warrant/dog. [Note: For a Warrant, you must have PC; & for a drug dog, you must at least have reasonable suspicion.] In this case, the officers saw marijuana in plain view which provided PC for obtaining a warrant even if the suspect did not consent to the search. *Butler*, A05A0013 (3/29/05).

2005 Legislative Update

See the attached for a summary of legislation relevant to DPS Employees which passed in the 2005 Session of the Georgia General Assembly.

MONTHLY MINDERS:

OFFENSIVE BUMPER STICKERS: O.C.G.A. § 40-1-4 (offensive stickers, decals or emblems) is unconstitutional. *Cunningham*, 260 Ga. 827 (1991).

DWSL – SERVE DATES: The only time a serve date is required on a citation for a DWSL charge is when the license was suspended for FTA (failure to appear) or the license was suspended due to an insurance cancellation. 40-5-121 (Note: DMVS no longer does license suspensions based on insurance cancellations, but there are many old cases out there.)

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HIPAA & Law Enforcement

The Health Insurance Portability and Accountability Act outlines privacy protections which govern the release of medical records. 45 C.F.R. § 164.512. While the Federal Regulations prohibit many types of disclosures, there are also many exceptions. The standard "Law Enforcement" exceptions are provided in subsection (f). The Section (f) exceptions are provided in the attached handout for easy reference, should you have a HIPAA question. Questions regarding the application of HIPAA may also be directed to Legal Services. Keep in mind, if you do not find an exception in Section (f), there may be other exceptions available.

HELP YOUR PROSECUTOR

Don't forget to ID the person drawing blood in your DUI cases. Put as much information about them somewhere in the report/citation. If the prosecutor is unable to locate them, the case will likely be dismissed.

HUMOR WORKS: What is the difference between a vulture and a lawyer?

--- A vulture can't take his wing-tips off.

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Legal Quickies:

EDR: The scientific reliability of the "Black Box" commonly referred to as an "event data recorder" (EDR), was upheld in a recent Florida Case. *Matos*, 2005 WL 713248 (03/30/05). Attached is a model consent form utilized by SCRT to take custody of the EDR.

PAT DOWNS: Court reminder – Unless you have articulable suspicion or consent, "The [only] justification for a pre-arrest pat-down search is officer safety." The only two ways to remove items from the pocket (on a non-consensual, pre-arrest pat-down) is with either 1) a good faith belief that the objects removed were weapons (or could be used as weapons) or 2) "plain feel doctrine," i.e., feels like contraband (an illegal substance). Removal of rolling papers is improper. Rolling papers are not illegal & thus, not contraband. *Wilson*, A04A2260 (3/18/05).

HGN: An officer failed to perform the maximum deviation component of the HGN test according to applicable guidelines, which accounted for two of the six clues (failed to hold the stimulus at maximum deviation for a minimum of four seconds). No error was found with regard to the remaining two components of the HGN test, which accounted for four of the six clues. Therefore, results of HGN were admissible. *Tousley*, A04A1880 (3/3/05).

DUI Less Safe: The following factors supported a DUI less safe case: 1) erratic driving; 2) refusal to take field sobriety tests &/or state test; 3) officer's observation such as smell of alcohol & observing strange behavior; & 4) officers opinion based on his experience. *Drogan*, A05A0202 (4/6/5).

No Signal Basis for Stop: Failure to signal when changing lanes is a good basis for a stop. "[I]f the arresting officer witnessed the driver breaking even a relatively minor traffic law, a motion to suppress ... arguing that the stop was pretextual must fail." *Wright*, A04A2290 (3/23/5).

Weaving Within the Lanes: Weaving within the lanes is still a good basis for a stop. "It is well established that weaving, both out of one's lane and within one's own lane, particularly when combined with other factors, may give rise to reasonable articulable suspicion on the part of a trained law enforcement officer that the driver is violating the DUI laws." *Veal*, A05A0750 (4/19/05).