



# The Trooper Legal Update

December 2004

Legal Services 404/624-7423

Volume 3, No. 12

**DPS Welcomes a New Commissioner: Colonel W. "Bill" Hitchens, Jr.** Col. Hitchens served 4 years on active duty with the U.S. Marine Corps before joining the Patrol in 1969. At the time of his retirement from GSP in 1997, he had achieved the rank of major. He also served 24 years in the U.S. Coast Guard Reserve & was appointed the State's first director of homeland security in January 2003. Welcome Home!

## **HANDSCHUH, a Not So Happy New Year for Implied Consent...**

The Ga Court of Appeals solidified *Cooper*, 277 Ga. 282 (2003) which found that the Implied Consent law gives "a suspect an opportunity ...to refuse to take a blood-alcohol test." There is now a clearly recognized "right" to refuse testing. *Handschuh*, A04A0838 (12/01/04) gives some very strict mandates for law enforcement to follow when using implied consent (IC). The Court contradicted itself - overruling 3 recent pro-law enforcement DUI decisions & disapproving language in 7 other pro-law enforcement DUI decisions. The results after *Handschuh*:

- IC must be read AFTER the suspect is under formal arrest as soon as reasonably possible. (Any warning given prior to formal arrest will be disregarded.)
- There must be a probable cause arrest before IC may be used. (Serious injury + reasonable suspicion of DUI is no longer enough.)
- There must be a probable cause DUI arrest before using IC. (Arrest for another offense + reasonable suspicion of DUI is no longer enough.)
- Warrants to compel a blood test following a refusal are likely to be overturned. See also *Collier*, 266 Ga.App. 762 (2004).

**Impact:** *Handschuh* will likely hurt law enforcement in the more serious DUI cases where there is serious injury/death. It is often difficult to conduct standard field sobriety on the seriously injured. It may be difficult to get testimony when the victim is deceased. But without an arrest for DUI, there is no basis for reading implied consent & now, even if you have a basis to read IC, if the suspect refuses, there is no basis for obtaining a warrant to compel the blood draw.

### **Recommendations:**

- Put as many details in DUI reports as possible. Don't be afraid to rely on the little things to build PC for a DUI arrest. Include-glassy eyes, slurred speech, erratic heartbeat, smells, dilation of pupils, anything that sounds like an admission of consumption, contents of vehicle, driving patterns, your expert opinion, unsteady, rude speech, etc....
- Although it may seem callous or indifferent, sometimes the seriously injured will have to be placed under arrest & implied consent read to them in order to satisfy the Court's requirements.
- The law still permits obtaining blood samples from the unconscious.
- The law still permits warrants to obtain medical records if the suspect was treated.

**The Future:** *Handschuh* was a split decision with only 6 of the 12 judges agreeing to the reasons for the decision & a 7<sup>th</sup> justice agreeing to the results only. Thus, a change in judges could easily change the legal interpretation. But for now, absent some legislative change or further decision, Georgia Implied Consent law, rather than being a waiver of rights and a requirement that drivers consent to testing, is now a recognized right of drivers to refuse testing.

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## Legal Quickies:

### Misdemeanor Obstruction:

Two Georgia cases in November upheld misdemeanor obstruction charges. In the first, the charges were upheld even though the suspect did not threaten or strike the officers. Yelling & confrontational behavior were sufficient where the defendant stood face-to-face with one officer while yelling and pointing her finger in the face of another after being told to sit down. *Cooper*, A04A1647 (11/05/04).

In the second misdemeanor obstruction case, the court upheld charges where the defendant was much larger than the officer, uttered profanities & walked towards the officer in a hostile manner & verbally attempted to deny the officer from speaking to possible victims/witnesses. *Berrian*, A04A2250 (11/22/04).

**Field Sobriety:** Attacks on the scientific reliability of the HGN & walk & turn test failed. The court confirms HGN is scientifically recognized & walk & turn is based on common sense so that the scientific reliability does not have to be established. *Mullady*, A04A1388 (11/15/04).

## ON THE CIVIL SIDE

**\*Where a suspect agrees not to sue officers in exchange for dismissal of domestic violence charges – the agreement or release is legally enforceable. *Penn v. City of Montgomery*, 381 F.3d 1059 (11<sup>th</sup> Cir. 2004).**

**\*Officer did not use unreasonable force in shooting & killing unarmed motorist who had crashed his car into an officer's police vehicle & then continued to rev his engine, pushing the police vehicle backwards toward a ditch. *Vanvorous*, 96 Fed. Appx. 312 (6<sup>th</sup> Cir. 2004).**

## QUALIFIED LAW ENFORCEMENT OFFICERS Active Law Enforcement Qualifying to Carry a Firearm Nationwide

Several have asked, "What are the requirements for an active officer to carry a concealed firearm nationwide pursuant to the Law Enforcement Officers Safety Act of 2004?" These requirements are set forth in 18 USCS § 926B:

- An employee of a government agency.
- Has Photo-ID from employing agency.
- Has the power of arrest.
- Authorized to prevent, detect, investigate or prosecute or incarcerate criminals (or supervise the same).
- Authorized by the employing agency to carry a firearm.
- Not under the influence of alcohol/drugs.
- Not the subject of any disciplinary action.
- Meets agency standards for firearms qualifying, if any.
- Not prohibited by any federal law from receiving a firearm.

Note that this provision does not override any state law that allows private persons to restrict possession of concealed firearms on their property or the power of government to restrict possession of firearms on government property.

**We at Legal Services wish you safety for the coming New Year!**

Published with approval of the Office of the Colonel.  
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**HUMOR WORKS:** A vengeful man went to lawyer Abraham Lincoln. The man wanted to sue a man living in poverty for \$2.50. Lincoln could not talk him out of suing, so he charged him \$10.00 as a legal fee. Lincoln gave half of that to the defendant, who openly confessed to the dept & paid the \$2.50. The dispute was settled. Moral: Lawyers profit the most from revenge.

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