



DPS Legal Review

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PROBABLE CAUSE FOR DUI ARREST

An officer observed a car driven by the defendant with its license plate partially obscured by the frame surrounding the tag. The officer initiated a traffic stop and noticed that the defendant's eyes were bloodshot and watery. The officer asked the defendant if he had been drinking. The defendant responded that he had consumed one beer approximately one hour earlier. In response to other questions, the defendant admitted that his driver's license was currently suspended as a result of a previous DUI charge. The officer asked if the defendant would be willing to take some tests and the defendant agreed. The officer told the defendant to exit the vehicle and walk to his patrol car where the officer administered an alco-sensor test. The alco-sensor test showed that alcohol was present on the defendant's breath. The officer did not conduct any field sobriety tests because he was not certified at that time to conduct such tests. Based on the defendant's admission that he had consumed a beer earlier in the evening, the appearance of his eyes, and the positive alco-sensor test, the officer arrested the defendant for DUI less safe. The officer then read the implied consent notice to the defendant. After being asked three times, the defendant agreed to an alcohol breath test. The results of the test showed that the defendant had a blood alcohol level above the legal limit.

The defendant was indicted for improper display of license plate, driving without a license, DUI per se, and DUI less safe to drive. The defendant filed a motion to suppress the results of his alcohol breath test on the grounds that the officer lacked probable cause to arrest him for DUI. The trial court denied the motion. The defendant appealed.

HOLDING: The Court held that the officer lacked probable cause to arrest the defendant for DUI. Probable cause exists for an arrest where the objective facts known to the officer establish a probability that the suspect has been engaged in illegal activity. To arrest a suspect for DUI less safe to drive, an officer must "have knowledge or reasonably trustworthy information that a suspect was actually in physical control of a moving vehicle, while under the influence of alcohol to a degree which renders him incapable of driving safely. Mere presence of alcohol is not the issue."

In this case, the officer initiated the traffic stop due to the defendant's license plate and not his driving. Video of the stop shows that the defendant answered

all of the officer's questions promptly and that his speech was clear. The defendant is seen on the video exiting his vehicle and walking to the patrol car with a steady gait and otherwise normally. The Court distinguished the facts in that the only evidence of potential impairment available to the officer was the defendant's admission that he had consumed a beer earlier in the evening, the appearance of his eyes, and the alco-sensor test showing the presence of alcohol. The Court reasoned that while the evidence could give rise to the suspicion or possibility that the defendant was an impaired driver, "it [was] insufficient as a matter of law to constitute probable cause to arrest [the defendant] for driving under the influence." Bostic v. State, 2015 WL 3895695 (Ga.App.).

TRAFFIC VIOLATION ARREST OUTSIDE OF JURISDICTION BY CAMPUS POLICE OFFICER

On May 5, 2013, at approximately 1:42 a.m., a POST-certified, university police officer was returning to the campus after delivering an arrestee to the Cobb County Adult Detention Center. It was dark and raining heavily. The officer observed the defendant driving without activated headlights or taillights and "severely failing to maintain lane." The officer initiated a traffic stop. The officer approached the defendant who smelled of alcohol, had bloodshot, watery eyes, was unsteady on his feet, and admitted to consuming two beers. At the request of the officer, the defendant blew into an Alco-sensor which registered positive for alcohol. The officer concluded that the defendant was under the influence of alcohol to the extent he was less safe to drive. The defendant was arrested. The defendant submitted to a state-administered chemical breath test on the Intoxilyzer 5000 at 3:16 a.m. which revealed a blood alcohol level of 0.08.

The defendant was charged with two counts of driving under the influence, failing to maintain lane, and operating a vehicle without headlights. The defendant moved to suppress the evidence of the breath test arguing that the officer lacked jurisdiction to arrest him because the traffic stop did not occur on or near university property. The trial court granted the motion. The State appealed.

HOLDING: The Court held that the officer was authorized to arrest the defendant based on traffic offenses committed in his presence more than 500 yards from the campus. O.C.G.A. §17-4-23(a) provides "[a] law enforcement officer may arrest a person accused of violating any law or ordinance

governing the operation... of motor vehicles...by the issuance of a citation, provided that the offense is committed in his presence..." In a prior decision, the Court held that POST-certified campus police officers have authority to arrest, outside of the territorial limits for campus officers, for traffic violations committed in their presence on campus thus, such officers fell within the scope of O.C.G.A. §17-4-23(a).

O.C.G.A. §20-3-72 prohibits a POST-certified campus police officer from making an arrest for offenses committed more than 500 yards from campus. The Court relied on a basic rule of statutory construction that requires "statutes relating to the same subject matter [be] construed together and harmonized wherever possible" to conclude that POST-certified campus police officers may arrest for moving traffic offenses committed in their presence more than 500 yards from campus. State v. Zilke, 2015 WL 4098548 (Ga.App.).

WARRANTLESS SEARCH OF PASSENGER SIDE OF VEHICLE

On December 16, 2014, a home was broken into and one of the occupants of the home was shot in the face. The police department identified the defendant as a suspect and obtained a warrant for his arrest on aggravated assault and burglary charges. Given the violent nature of the crime and the defendant's criminal record, all five members of the county's Narcotics Unit were tasked with securing his arrest. A detective spent the next two months interviewing witnesses in an effort to locate the defendant. Each of the witnesses interviewed reported that the defendant always carried a firearm and let people know that he was armed. Several witnesses told the detective that they overheard the defendant state that he did not intend to be taken alive by law enforcement.

On January 31, 2015, an officer conducting a routine traffic stop encountered the defendant as a passenger in the vehicle. Due to a distinctive tattoo on the defendant's forehead the officer recognized that the defendant was the subject of an outstanding arrest warrant. Upon exiting the vehicle, the defendant fled into a cow pasture and disappeared into a wooded area. Law enforcement was unsuccessful in locating him.

On February 18, 2015, a confidential informant alerted a detective that the defendant was traveling from Augusta to Liberty County in a green Ford Explorer with a black male and female. The defendant and the other two occupants were spotted at a convenience store in Pembroke, Georgia along the Explorer's expected route of travel. Several law enforcement vehicles descended upon the Explorer and blocked its passage. Officers exited their vehicles with weapons drawn, approached the Explorer, and extracted the occupants. One of the detectives pointed his shotgun directly at the defendant while he was being removed from the vehicle. The defendant

was placed on the ground next to the still-open door of the vehicle. The detective stepped over the defendant's legs and began to search the area where the defendant had been seated for any weapons. Other officers were patting down the defendant and had yet to place him in restraints. The detective observed the butt of a handgun located in a golf bag directly behind the defendant's seat. A further search of the bag revealed clothing containing a Georgia Department of Corrections identification in the defendant's name.

The defendant was arrested. The defendant filed a motion to suppress the evidence arguing that the officers who arrested him violated the Fourth Amendment when they proceeded to conduct a warrantless search of the vehicle in which he was riding as a passenger.

HOLDING: The Court held that the safety and evidentiary interests that underpin the search-incident-to-arrest exception under Arizona v. Gant apply to the search in this case. In Gant, the Supreme Court of the United States concluded that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." In this case, the officers were arresting a suspect who they had reason to believe was not only armed and dangerous but who had told several witnesses that he would not be taken alive by law enforcement. The defendant had not been restrained yet at the time of the search and was still "within reaching distance" of the passenger compartment during the search. Thus, there was a possibility that the defendant could break free from the officers, seize a weapon from the vehicle, and endanger the safety of the officers. The Court found that the forcible take-down of the defendant immediately next to the vehicle and the simultaneous search of that vehicle incident to his arrest were reasonable and necessary protective measures under the unique circumstances that confronted the arresting officers. United States v. Lewis, 2015 WL 4041145 (S.D.Ga.).

ALS REMINDERS

⚠ If you are unavailable for an ALS Hearing, a written Motion for Continuance needs to be filed with the OSAH Judge approximately ten days prior to the scheduled ALS Hearing. The form for a continuance motion is located on the MyDPS website in the ALS Form folder under DPS Forms.

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, Christina Calloway, Legal Officer, and Dee Brophy, ALS Attorney. Send questions/comments to ccalloway@gsp.net.