



DPS Legal Review

October 2015 Legal Services (404) 624-7423 Volume 14 No. 10

PROBABLE CAUSE FOR LESS-SAFE DUI

On the evening of January 1, 2012, after the conclusion of an Atlanta Falcons game, two off-duty police officers were directing pedestrians and traffic at an intersection. The officers stopped traffic and signaled pedestrians to cross the street by means of the pedestrian crosswalk. A group of approximately 50 people, including the victim who was a child, and his father, began to cross the street. When the victim crossed approximately half of the street, a large SUV emerged from the stopped traffic. One of the officers attempted to get the SUV to stop by waving his hands over his head at the vehicle. The SUV drove into the crosswalk, narrowly missing one of the officers, striking the father's hand, and striking the victim, who flew into the air and landed on the pavement sustaining serious injuries. The two officers flagged down another officer who was on duty. The two officers did not speak to the driver of the SUV. The on duty officer walked up to the defendant, who was standing by the side of the SUV, and noticed a "slight smell of alcohol." The officer asked the defendant whether he had been drinking and he responded "yes." The officer learned from one of the other officers that the defendant had struck the victim in the crosswalk. The officer detained the defendant in the back of his patrol car and asked him if he would submit to field sobriety tests. The defendant refused. The officer then read the defendant his Miranda warning and the Georgia Implied Consent notice and arrested the defendant. The defendant did not respond to either of the readings.

The defendant was charged with less-safe DUI, serious injury by vehicle, failure to obey a police officer, and failure to yield to a pedestrian in a crosswalk. The defendant moved to suppress any statements he may have made to the police claiming he was stopped, detained, and arrested without probable cause and that there was insufficient evidence to authorize a prosecution. The trial court suppressed the evidence relating to the charges of less-safe DUI and serious injury by

vehicle. The State appealed arguing the trial court erred when it concluded that the police lacked probable cause to arrest the defendant for DUI.

HOLDING: The Court held that probable cause existed to arrest the defendant based on the totality of the circumstances. In considering whether an officer has probable cause to arrest a suspect, "the court must focus on the facts and circumstances then known to the officer, and it must inquire whether those facts and circumstances *could* lead a prudent person – that is a reasonable officer – to conclude that the suspect probably has committed an offense." In this case, the offense was less-safe DUI which may be proven by such evidence of "... (i) erratic driving behavior, (ii) refusal to take field sobriety tests and the breath or blood test, and (iii) the officer's own observations (such as smelling alcohol and observing strange behavior) and the resulting opinion that the alcohol made it less safe for the defendant to drive."

In determining whether the officer had probable cause to arrest the defendant the Court considered the officer's testimony that he actually smelled alcohol on the defendant when first encountering him and that the defendant told the officer that he had been drinking along with the undisputed fact that the defendant drove his SUV into the crosswalk, injuring the victim. The Court further explained that "... even if any of these or other facts, standing alone, might be susceptible to an 'innocent explanation', [the Court] does not consider any fact or circumstance standing alone. The Court concluded the totality of the circumstances would have authorized a reasonable officer to conclude that the defendant was driving under the influence. State v. Young, 2015 WL 5945767 (Ga.App.).

REASONABLE ARTICULABLE SUSPICION OF PASSENGER LEADING TO EVIDENCE

At 3:30 a.m., an officer responded to a noise complaint in a neighborhood. While investigating the noise complaint, the officer made a mental

note of a vehicle parked in front of a house that had no cars in the driveway. The officer observed that the vehicle contained two occupants and its windows were fogged. After concluding his investigation of the noise complaint, the officer passed the vehicle and decided to make contact. The officer approached the vehicle on foot and noticed that the windows were still foggy. The officer detected an odor of marijuana and saw that the passenger was beginning to exit the vehicle. The officer instructed the passenger to sit back down in the vehicle and the passenger complied. The officer made contact with the defendant at the driver's side window and detected an even more overwhelming odor of marijuana when the defendant rolled down the window. The officer also observed a hollowed out tobacco wrapper on the ground outside of the driver's door. The officer confronted the occupants about the odor and they both denied having marijuana. He asked the occupants to exit the vehicle separately, conducted a pat down of the passenger, and located marijuana and drug paraphernalia on the passenger. The officer conducted a pat down of the defendant and did not find anything on her; however, he did discover marijuana in a container on her side of the vehicle during a subsequent search.

The defendant was charged with possessing less than one ounce of marijuana. She filed a motion to suppress the evidence arguing that she was illegally detained after the officer illegally detained the passenger by ordering the passenger back into the vehicle without reasonable articulable suspicion of criminal activity. The trial court denied the motion and the defendant was convicted. The defendant appealed.

HOLDING: The Court held that the officer had the reasonable articulable suspicion required to justify brief detention of the defendant and the passenger based on the totality of the circumstances. Articulable suspicion requires a "particularized and objective basis for suspecting that a citizen is involved in criminal activity." To make a determination of reasonable suspicion, a court must look at the totality of the circumstances. The Supreme Court of the United States has set forth three tiers of encounters between police and citizens: "(1) communication between police and citizens involving no coercion or detention, (2) brief seizures that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable

cause." The Court reasoned that the officer's initial approach to the vehicle was a first-tier encounter. If the situation escalated to a second tier encounter upon the officer asking the passenger to stay in the vehicle, the Court reasoned, at that point, the officer had reasonable articulable suspicion to detain them both. In this case, the officer observed a vehicle, with two occupants and foggy windows, in a residential area at 3:30 a.m. and upon approaching the vehicle, he smelled the odor of marijuana. The Court concluded that these facts provided the officer with reasonable articulable suspicion to briefly detain both the defendant and the passenger to conduct an investigation. Myers v. State, 2015 WL 5131261 (Ga.App.).

ALS REMINDERS

⚠ A defendant must be under arrest before the implied consent notice is read unless the case involves a wreck with a serious injury or fatality. In a DUI case that involves a wreck with a serious injury or fatality, the defendant does not have to be under arrest before the implied consent notice is read. However, there must be probable cause to believe that the defendant was DUI of alcohol or drugs. The serious injury must be one of the following injuries: one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness. See Hough v. State, State v. Handschuh, 279 Ga. 711 (2005)

QUOTABLE WORKS

"What lies behind you and what lies in front of you, pales in comparison to what lies inside of you."

~ Ralph Waldo Emerson

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