



# DPS LEGAL REVIEW



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## **GEORGIA COURT OF APPEALS**

### **POST CERTIFICATION SUFFICIENT TO ESTABLISH INTOXICATION EXPERTISE**

On July 19, 2015, Latisha McCoy was stopped at a police roadblock by a Henry County Police officer. The screening officer suspected McCoy was impaired from marijuana, and he involved a second officer who eventually arrested McCoy for DUI. During McCoy’s prosecution, she argued that the evidence against her should be excluded because the manner in which the roadblock was operated was contrary to Georgia law. Among other things, McCoy argued that the screening officer who initially stopped her did not have the proper training and experience to qualify him to make an initial determination as to whether her or other motorists should be given field tests for intoxication. Such training and experience is required under Georgia law by *LaFontaine v. State*.

The screening officer did not testify at the hearing on McCoy’s motion, but the Henry County Police sergeant who authorized the roadblock testified that the officers making screening determinations were qualified to do so because they “go through a certification during their police academy, the Georgia POST.” The trial court held that POST certification and training “allows the officers to judge which drivers may or may not be under the influence of alcohol and which need to be further investigated,” and was thus sufficient to meet the requirements of *LaFontaine*. As such, the trial court denied McCoy’s motion, and she was eventually convicted. McCoy appealed her conviction, arguing that the trial court erred in its determination.

The Georgia Court of Appeals upheld the trial court’s ruling, and held that any POST-certified police

officer may act as a screening officer at a roadblock under the requirements of *LaFontaine*. The Court concluded that “it is commonly known and cannot reasonably be questioned that any police officer, to obtain certification in Georgia, has received training in law enforcement activities that concern impaired drivers.” The Court then explained that “[g]iven that any person may give an opinion, on the basis of personal observation of another person on a given occasion, that the other person did or did not appear to be intoxicated, and given that any POST-certified officer will have had some training in law enforcement activities that concern impaired drivers, **we conclude... that the trial court in this case did not err in... its finding that the POST-certified screening officer had training and experience sufficient to enable him to make the initial determination as to which motorists should be given the field tests for intoxication.**” *McCoy v. State*, No. A17A0534, 2017 WL 1371278 (Ga. Ct. App., Apr. 11, 2017)

## **U.S. COURT OF APPEALS - ELEVENTH CIRCUIT**

### **K-9 HANDLER ENTITLED TO IMMUNITY FOR DOG BITE (& DOG CAN’T BE SUED)**

On the night of July 6, 2013, Gwinnett County Police officers responded to a domestic dispute between Randall Jones and his ex-girlfriend. Jones ex-girlfriend reported that he had broken into her apartment, stolen a television, and was carrying it to his car. Officers arrived and began searching the area for Jones, eventually coming to believe that he “had fled to a ‘steep ravine pond area with high concert [sic] walls, boulders, and vegetation.’” Officer Scott Fransen then arrived with his police K-9 Draco and issued “K-9 warnings” in the area, to which there was

no response. Fransen and Draco then entered the ravine with backup officers to find Jones. Fransen released Draco to search and, at some point thereafter, “saw Jones motionless, at the bottom of the ravine.” Draco then “ran loose and savagely attacked and tore’ Jones’s left arm, even though Jones lay motionless during the attack.” After some time, Officer Fransen reached and attempted to pull Draco off of Jones. Fransen was unsuccessful at first but eventually separated Draco from Jones. The incident result in injuries which permanently disfigured and led to limited use of his arm.

Jones filed suit against Fransen, alleging excessive use of force in violation of the Fourth Amendment and state law, and against the back up officers on scene, alleging that their failure to intervene was also a violation of the Fourth Amendment. In an unusual move, Jones also filed suit against the K-9, Draco. The defendant officers moved to dismiss all claims against them on the basis of official immunity with respect to Jones’s state law claims and qualified immunity with respect to Jones’s constitutional claims. The U.S. District Court for the Northern District of Georgia denied the defendants’ motion, and they appealed.

With respect to Jones’s constitutional claims against the responding officers, the Eleventh Circuit court of appeals explained that the officers would be entitled to qualified immunity if (1) they did not violate Jones’s Fourth Amendment rights; or (2) the allegedly-violated rights were not clearly-established at the time force was used. The Court decided that, in this case, the officers were entitled to qualified immunity because no *clearly-established* right of Jones had been violated. The Court first reviewed two cases which established what the boundaries of acceptable use of force are with respect to K-9 deployments. It then held that “Jones’s case is **not directly on all fours with [either, and as] a result, neither case alone could have provided Defendant Officers with the type of ‘fair notice’ necessary to breach qualified immunity.” Moreover, no broad, clearly-established principle guiding the use of force by police officers prohibited the conduct of the officers when they encountered Jones. As such, the court concluded that Fransen and the other responding**

**officers were entitled to qualified immunity with respect to Jones’s constitutional claim.**

Furthermore, the Court concluded that Jones’s claim against the defendant officers under state law was barred by official immunity. Official immunity protects government actors acting in a discretionary function from being sued unless they act with a “deliberate intention to do wrong.” In this case, **Jones’s complaint did not set forth any facts showing that any officer intended to unlawfully harm Jones (as opposed to justifiably protecting themselves from his potential threat and apprehending him). As such, the officers were entitled to official immunity under state law.**

Finally, the Court held that the claims against K-9 Draco must fail because “**under the express terms of Georgia law, only a person may be held liable for breaching a legal duty**” (emphasis added). Setting aside this clear limitation of Georgia law, the court held that allowing the action would create an abundance of logistical issues, such as how to affect service, how to determine whether a dog had a “deliberate intention to do wrong” and how to collect damages. *Jones v. Fransen*, No. 16-10715, 2017 WL 2198126 (11th Cir., May 19, 2017).

### **ARREST OF INCORRECT PERSON BASED ON PRE-EXISTING WARRANT**

An Atlanta Police officer on patrol saw a vehicle which was legally parked and occupied by Renardo Hudson. The officer suspected the vehicle may be stolen and ran the license plate number through GCIC. The search revealed that the registered owner of the vehicle, Charles Gray, had an active arrest warrant. The officer claimed that the warrant listed “Renardo Hudson” as an alias for Charles Gray. Hudson and Gray are in fact different people, though Hudson did have a close relationship with Gray.

The officer initiated a traffic stop and obtained Hudson’s license and vehicle registration. The officer stated in his report that “he cross-checked the warrant against Hudson’s driver’s license, and found the name, date of birth, social security number, height, and weight all matched. He also said he compared photos of Hudson and Gray, and then confirmed the warrant’s

validity.” The officer arrested Hudson on the basis of the warrant. Hudson told the officer he was not Gray, and that Gray was in fact serving a prison sentence, but the officer replied “I don’t care whether you are or not, I’m locking you up.” The officer did not take Hudson’s fingerprints or check to see if Gray was actually incarcerated. Hudson was taken to the Fulton County jail where it was eventually determined that he was not Gray, and he was released without charge.

Hudson later sued his arresting officer and the Atlanta Police Department, alleging that the officer fabricated probable cause and that the arrest violated his constitutional rights and constituted a false arrest under state law. Hudson submitted evidence to the trial court contradicting many of the officer’s claims, including his driver’s license and a copy of the warrant for Charles Gray. “The name, date of birth, height, and weight listed on the warrant did not match Hudson’s driver’s license,” and Hudson’s driver’s license did not contain his social security number. The warrant also showed that it had been administratively closed since 2011. Hudson also provided a vehicle registration showing that the vehicle was registered under his name, not Gray’s as the officer claimed. Finally, Hudson claimed that he “does not resemble Charles Gray, who is heavier and has much darker skin.”

The officer moved for summary judgment with respect to Hudson’s claims, arguing that he was entitled to qualified immunity under federal law and official immunity under state law. The trial court denied the motion and the officer then appealed.

The Eleventh Circuit Court of Appeals upheld the trial court. The Court first explained that at the summary judgment stage, it was obligated to assume Hudson’s version of events as true. The Court went on to hold that, in this case, particularly, “Hudson’s version of events... is... thoroughly supported by objective, documentary evidence that Hudson provided to the district court. **This Court ‘cannot allow a probable cause determination to stand principally on the unsupported statements of interested officers, when those statements have been challenged and countered by objective evidence.’” The Court held that “[a]ccording to Hudson’s version of the facts... [the**

**officer] intentionally lied about Hudson matching an arrest warrant for someone else. That is undoubtedly a constitutional violation.”** Finally, the Court explained that **Hudson’s constitutional right against an arrest based on fabricated probable cause was clearly established, and therefore the officer in this case was not entitled to summary judgment.**

In addition, the Court held that the officer was not entitled to official immunity under Georgia law with respect to his state law claims such as false imprisonment. Government officials in Georgia are generally entitled to official immunity when committing a discretionary act (such as an arrest) unless they act with “malice or an intent to injure,” which requires the actor to have “a deliberate intention to do wrong.” **The Court held that Hudson’s claim that the officer intentionally fabricated probable cause to arrest him on a baseless charge satisfied this standard, and therefore the officer was not entitled to summary judgment on these claims either.** *Hudson v. City of Atlanta*, No. 16-16184, 2017 WL 1352086 (11<sup>th</sup> Cir., Apr. 13, 2017).

## **TAKEDOWN OF HANDCUFFED ARRESTEE EXCESSIVE EVEN ASSUMING RESISTANCE**

On May 25, 2014, Orlando, Florida, police officers responded to a report from a man who stated that his wife, June Scott, had pulled a knife on him, thrown the knife over a fence and run away from their apartment. Eventually, one responding officer located Scott leaving the apartment complex. The officer ordered her to stop and return to the apartment complex. Scott verbally protested but complied. During this time, Officer Ossie Battle arrived at Scott’s location. Officer Battle handcuffed Scott without incident and in the presence of at least two other officers.

After being handcuffed, Scott stated that she responded to and obeyed Officer Battle’s commands, but that Battle nevertheless aggressively jerked her arm, causing her pain, and that in response she jerked her arm back. Officer Battle then “picked Scott up and ‘slammed’ her on the pavement.” Officer Battle, however, testified that after being handcuffed, Scott was verbally abusive and that she “was consistently

pulling away from him.” He stated that he asked Scott to sit down and she refused, so he “placed her on the ground.” Scott was then arrested and taken to jail.

As a result of the incident, Scott suffered a fracture of her tibial plateau and was wheelchair bound for the next five days. She received leg surgery immediately following her release from jail and required the use of crutches for six months afterwards.

Scott sued the officers involved, including Battle, and their department. While Scott admitted that probable cause existed for her arrest, she contended that the force used to execute her arrest was excessive and violated her Fourth Amendment rights. Officer Battle moved for summary judgment, arguing that he was entitled to summary judgment either because he had not violated Scott’s constitutional rights or because those rights were not clearly established. The district court denied his motion.

The Court first noted that it was obligated to credit Scott’s version of events during the summary judgment stage. Under those set of facts, the Court held that Officer Battle was not entitled to qualified immunity. First the Court held, Officer Battle’s alleged conduct constituted a violation of Scott’s Fourth Amendment rights. “At the time she was slammed to the ground with enough force that it broke her shin bone, Scott was in handcuffs and secured. Although she was a suspect in an aggravated assault, there is no evidence in the record that she posed any threat to the much larger Battle or the other officers or that she was attempting to flee. To the contrary, after dispatch informed the officers that Scott had discarded her weapon, Scott walked back to the apartment complex in compliance with... command[s], was placed in handcuffs uneventfully, and was being held in the presence of several officers. **Under these circumstances, Scott’s verbal protestations (which, she testified, included no threats or suggestions that she might flee or attempt to harm the officers) and her pained reaction, the “jerking” of her handcuffed arm, did not warrant such a disproportionate use of force.**” The Court also held that – even assuming Scott’s “jerking” of her arm constituted resistance, the force used upon her was

disproportionate to that level of resistance under the circumstances and was thus still unconstitutional.

The Court also held that Scott’s constitutional right not to be subjected to this level of force was “clearly established.” After reviewing prior related case law, the Court explained that **“no objectively reasonable officer in Battle’s position could have thought that slamming a physically outmatched, handcuffed, secured suspect— who was surrounded by multiple officers, not resisting arrest, and making no attempt to flee—was a constitutionally permissible use of force.”** As such, the Court held that Officer Battle was not entitled to qualified immunity and the case should be heard by a jury. *Scott v. Battle*, No. 16-15542, 2017 WL 1959000 (11th Cir., May 11, 2017).

### ALS REMINDERS

When filling out the Arresting Officer Data section of the 1205 form, please include your first and last name instead of your initials and last name.

**Beginning July 1, 2017**, the new law regarding the ALS process will become effective. Some of the changes include: 1) the option to waive an ALS Hearing and obtain an ignition interlock device limited permit (IIDLP) in certain circumstances, 2) 30 calendar days to request an ALS Hearing instead of 10 business days, and 3) extension of the temporary driving permit on the 1205 form from 30 days to 45 days. The Department of Driver Services has revised the 1205 form and the new form must be used **beginning July 1, 2017**.

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