DPS Legal Review

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U.S. Supreme Court

EXCLUSION OF EVIDENCE – DISCOVERY OF WARRANT DURING ILLEGAL DETENTION

Utah narcotics detective Douglas Fackrell received an anonymous tip that a particular residence was involved in drug trafficking. He surveilled the house and discovered many visitors arriving, staying for brief periods, and leaving, in a manner he believed to be consistent with drug sales. One such visitor was Edward Strieff. Det. Fackrell followed Strieff to a convenience store and detained him there as part of his investigation. Det. Fackrell requested Strieff's identification, and once Strieff provided it, Fackrell called the information in to the dispatcher, who told Fackrell that Strieff had an outstanding warrant. Det. Fackrell arrested Strieff on the basis of the warrant and, during the search incident to arrest, discovered methamphetamines on Strieff's person.

Strieff moved to suppress the evidence discovered after his arrest. Strieff argued and the State conceded that his detention was not lawfully supported by reasonable, articulable suspicion. The State, however, argued that the evidence should not be suppressed because the discovery of the valid arrest warrant mitigated the connection between the unlawful stop and the discovery of the contraband. The trial court agreed and allowed the evidence. On appeal, the Utah Supreme Court reversed the decision, holding that the evidence was not admissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. Strieff appealed to the U.S. Supreme Court.

The Supreme Court held that the evidence seized by Det. Fackrell during Strieff's arrest was admissible. Although evidence seized after an unconstitutional stop is generally inadmissible, one exception to that rule – known as the "attenuation doctrine" – provides that when the connection between unconstitutional police conduct and the evidence obtained is sufficiently remote or has been interrupted by some intervening circumstance, the evidence is admissible. In determining whether that doctrine applies, courts consider three factors: (1) the time between the initially unlawful stop and the search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the police misconduct.

The U.S. Supreme Court determined that while the first factor supported exclusion of the evidence, the other two factors strongly supported the State's use of the evidence. The existence of a valid arrest warrant for Strieff was a critical intervening circumstance which had no relationship to the unlawful stop, and Det. Fackrell's conduct was for the legitimate purposes of investigating drug trafficking, and was not a flagrant violation of constitutional rights. Moreover, Det. Fackrell's conduct after the stop was lawful, and there was no evidence that the stop was part of any systemic or recurrent police misconduct. The Court rejected the contention that only a defendant's voluntary conduct could break the connection between an illegal stop and the discovery of evidence so as to make the evidence obtained admissible. **Thus, barring flagrant police misconduct, evidence obtained incident to arrest for a pre-existing warrant should not be excluded, even where the officer's initial stop of the suspect was unconstitutional.** *Utah v. Strieff*, No.14-1373, 2016 WL 3369419 (U.S. June 20, 2016).

DUI / IMPLIED CONSENT – CRIMINAL PENALTIES FOR TEST REFUSALS

The U.S. Supreme Court addressed three cases – *Birchfield, Bernard, and Beylund* – out of two states (North Dakota and Minnesota) which had enacted laws making it a crime to refuse to consent to a state-administered BAC test following a DUI arrest. Defendants in each case were arrested for DUI and

read implied consent warnings informing them that refusing to submit to a state-administered test would or could result in separate criminal charges solely as a result of that refusal. After this warning, Birchfield refused a blood test, Bernard refused a breath test, and Beylund agreed to a blood test, after which his license was administratively suspended. In all three cases, the arresting officer did not obtain a warrant prior to requesting that the defendants submit to the state administered tests. The defendants later challenged the constitutionality of the criminal penalties for failure to submit to the tests. The Court collectively addressed laws criminalizing implied-consent refusals and considered whether the Fourth Amendment permits a warrantless breath or blood test in the context of a DUI arrest. The Court reviewed the "search incident to arrest" doctrine and considered a number of factors in determining whether a blood or breath test could be administered without a warrant pursuant to that doctrine.

Regarding breath tests, the Court stated that: (1) the impact on privacy is slight; (2) the physical intrusion is almost negligible; (3) the test does not require piercing of the skin, (4) the inconvenience is minimum; (5) no biological sample is left in the government's possession at the conclusion of the test; and (6) the test is not likely to enhance the embarrassment that is inherent in an arrest. Blood tests, by comparison: (1) require the piercing of the skin; (2) are an extraction of a part of the subject's body; (3) are more intrusive than blowing into a tube; and (4) can be preserved for later use by the government and further information beyond a blood alcohol reading can be extracted. Based on these factors, the Court held that:

1. Breath tests are significantly less intrusive than blood tests; therefore, **a breath test, but not a blood test, may categorically be administered as a search incident to a lawful arrest for DUI. A warrant is not required for a breath test, and a criminal penalty may lawfully be imposed for refusing to submit to a breath test.**
2. Because blood tests are significantly more intrusive than breath tests, **a blood test does not fall under the "search incident to arrest" exception to a search warrant requirement.**

Applying these holdings, the Court reversed Birchfield's conviction and stated that the search that he refused could not be justified as a search incident to an arrest or on the basis of implied consent. Since no basis existed for the warrantless blood test, the Court concluded that Birchfield was threatened with an unlawful search and was unlawfully convicted for refusing the search. With respect to Bernard, the Court found that the warrantless breath test which he refused was a lawful search incident to arrest, and upheld his conviction for failing to consent to the lawful search. Finally, the Court found that Beylund only submitted to a blood test after being informed by law enforcement that his submission was required by law. The Court remanded Beylund's case for the state court to reevaluate whether Beylund's consent was actually voluntary given the partial inaccuracy of this advisement under the Supreme Court's ruling. *Birchfield v. North Dakota*, No. 14-1468, 2016 WL 3434398 (U.S. June 23, 2016)

Georgia Supreme Court

JURISDICTION OF CAMPUS POLICE OFFICER

While returning at night from dropping off an arrestee to a detention center, a Kennesaw State University Police Officer observed a vehicle operating without headlights and failing to maintain its lane in Cobb County, far removed from the KSU campus. The officer initiated a traffic stop and, after an investigation, arrested the defendant for DUI. The defendant submitted to a breath test which revealed a BAC of 0.08. The defendant subsequently moved to suppress the results of the breath test, arguing that the officer lacked jurisdiction to arrest him because the traffic stop did not occur on or within 500 yards of the KSU property, which were the limits of the officer's jurisdiction under O.C.G.A. § 20-3-72.

The trial court granted the motion to suppress and the State appealed. The Court of Appeals reversed, relying upon O.C.G.A. § 17-4-23 and a line of cases which held that "a POST-certified campus police officer is authorized to make arrests for traffic offenses committed in his presence though outside the territorial limits of the campus at issue." The defendant appealed to the Georgia Supreme Court.

The Georgia Supreme Court overruled the Court of Appeals and disapproved of the line of cases giving campus police officers the authority to make traffic arrests outside of their territorial jurisdiction. The Court held that the KSU officer in this case and **campus police officers generally have "no authority to effect a custodial arrest… outside the jurisdiction conferred by O.C.G.A. § 20-3-72."** *Zilke v. State*, No. S15G1820, 2016 WL 3390448 (Ga. June 20, 2016)

Georgia Court of Appeals

DUI ARREST – MERE PRESENCE OF ALCOHOL NOT SUFFICIENT PROBABLE CAUSE

On July 23, 2014, a Dawson County Sheriff's Deputy noticed defendant's vehicle merge into the gore area of a highway and pulled over to assist with what he believed was a motorist having vehicle trouble. The defendant stated she had run out of gas and the deputy agreed to transport her in his car to a gas station. While en route, the deputy discovered that the defendant's license was suspended and arrested her for driving with a suspended license. The deputy then questioned the defendant, who admitted that she had an open alcoholic beverage in her purse, that she had a few drinks before she left her house earlier that day, and that she was mixing a drink in the car to consume when she got back home.

Upon arriving at the detention center, the deputy Mirandized the defendant. He then noticed that the defendant's eyes were bloodshot and watery and that she had a slight odor of alcoholic beverage about her person. The defendant admitted to consuming one and a half drinks that day, tested positive for alcohol on a portable breath test, and was arrested for DUI.

The trial court granted the defendant's motion to suppress the statements she made after being arrested for driving on a suspended license but before she was Mirandized, finding that she had not properly been advised of her rights prior to custodial interrogation. The trial court further held that the deputy lacked probable cause to arrest the defendant for DUI because there was no admissible evidence that the defendant's driving ability was impaired by alcohol consumption, but only evidence that she had *consumed* alcohol. The State appealed this ruling to the Georgia Court of Appeals.

The Court of Appeals affirmed and held that the trial court's conclusions were supported by admissible evidence. **The Court of Appeals reiterated that the mere presence of alcohol is insufficient probable cause for a DUI absent evidence of impairment, and pointed out that while evidence of bloodshot and watery eyes *can* support a finding of impairment, it does not *compel* a finding of impairment**. In this case, the trial court permissibly attributed the condition of defendant's eyes to the fact that she had indisputably been crying. The Court also found it relevant that the deputy, by his own testimony, had detected no impairment prior to or immediately after encountering the defendant. *State v. Blanchard*, No. A16A0086, 2016 WL 2891359 (Ga. Ct. App. May 18, 2016).

DUI ARREST- CONSENT TO BLOOD TEST NOT FREELY AND VOLUNTARILY GIVEN

A Gwinnett County DUI task force officer responded to a single-vehicle accident after 1:00 A.M. on January 26, 2014, and encountered the defendant driver, who had had only minor injuries despite being in a relatively serious accident. The officer observed that the suspect (1) was unsteady on his feet; (2) emanated a strong odor of an alcoholic beverage; and (3) had blood-shot eyes and slurred speech. The defendant admitted to consuming several beers and stated that he was 20 years old. The officer asked defendant if he would submit to field sobriety tests and defendant responded that he was "going to jail anyway." Defendant allowed the task-force officer to conduct an HGN test, which indicated impairment. Defendant then refused a portable breath test, again stating that he was "going to jail anyway."

Defendant was arrested for DUI, read the implied consent for suspects under the age of 21 twice for breath, and responded, "F*** it man, why not?" During transport to the jail, defendant vomited on the back seat of the patrol car and appeared to be choking at one point. The nurse at the jail refused to admit the defendant and directed the officer to take him to the

hospital for evaluation. At the hospital, the officer reread implied consent, requesting a blood test. Defendant, while lying in a hospital bed, responded, "yeah, whatever you got to do." Defendant's blood was then drawn by hospital personnel.

Defendant moved to suppress the blood test results, arguing that under Georgia law such as *Williams v. State*, 296 Ga. 817 (2015), he did not voluntarily consent to the blood draw, but merely acquiesced. The trial court granted the motion to suppress, and the State appealed.

The Georgia Court of Appeals upheld the trial court's ruling, finding that the evidence supported the trial court's findings. The Court re-affirmed the principle that in evaluating the voluntariness of consent to draw blood, courts must consider the totality of the circumstances, including "factors such as prolonged questioning, the use of physical punishment, the accused's age, level of education, intelligence, length of detention, and advisement of constitutional rights; and the psychological impact of these factors on the accused." **Applying those factors, the Court found that while there was no evidence of threatening conduct or prolonged questioning by any officer, there was significant evidence nonetheless that defendant's consent was not voluntary.** Specifically, the evidence showed that defendant (1) had been in a significant accident and had a cut to his head; (2) was very unsteady on his feet; (3) was of unknown educational intelligence at the time he consented to the blood draw; (4) was not advised of his *Miranda* rights; (5) did not provide affirmative responses to many of the officers' questions but rather responded that nothing mattered and he "was going to jail anyway;" and (6) was obviously intoxicated and was in a severe enough condition that the jail nurse refused to admit him.

Finally, the Court dismissed the State's argument that "the trial court's mere consideration of whether [the defendant's] intoxication affected his ability to voluntarily consent allows DUI suspects to employ the very behavior the State is attempting to thwart as a shield to any prosecution of such behavior." **The Court held that "we see no logic to any argument that intoxication should not… be a factor in determining whether a suspect's consent to a search is truly voluntary."** The Court also reasoned that officers attempting to obtain a blood sample in situations such as this have the option of obtaining a warrant or articulating non-consent exceptions to the warrant requirement which may apply, such as exigent circumstances. *State v. Bowman*, No. A16A0555, 2016 WL 3181981 (Ga. Ct. App. June 7, 2016).

PROBABLE CAUSE FOR SEARCH WARRANT

Defendant was shot in his mobile home by an unknown assailant and responding Cherokee County Sheriff's Deputies received consent to search defendant's home for evidence related to the shooting. While conducting that search, deputies observed baggies, a propane tank, and scales and observed both a room lined with shelves of electronic equipment and surveillance equipment around the perimeter of the home. While investigating the shooting, the deputies also received information from an investigator in another jurisdiction that defendant may be involved in drug trafficking. Based upon this information, the deputies applied for and obtained a search warrant to search defendant's home, outlying buildings, and curtilage for evidence of the shooting and drug trafficking.

The deputies executed the search warrant and, based upon evidence found in defendant's house and in an outside shed, charged defendant with possession of methamphetamine with intent to distribute and other charges. Defendant moved to suppress the evidence obtained as a result of the search warrant, arguing that the deputies failed to establish probable cause for the search in their warrant affidavit. The trial court ruled that certain facts in the warrant affidavit should be discounted "as unsubstantiated rumor," including the averment in the affidavit that an investigator from a different jurisdiction "told [the deputies] that [the defendant] was under prosecution for the sale of methamphetamine without identifying when the underlying offense took place." Despite the issues with the affidavit, the trial court allowed the evidence, finding that probable cause still existed. Defendant then appealed.

The Court of Appeals held that because, at the time the affidavit was written, the investigation into the underlying shooting was still ongoing and no suspect had been arrested, "the need for continued

investigation in[to] the circumstances surrounding the shooting" justified the search of defendant's house. The Court also found that while the shooting investigation alone did not justify the search of the outlying buildings, the additional evidence related to defendant's possible involvement in drug distribution, including the baggies, propane tank, scales, surveillance equipment, corroborated the information that the deputies received from another investigator about defendant's involvement in drug distribution. The Court concluded that under the totality of the circumstances, "the magistrate had a substantial basis for concluding that a search of [defendant's] residence would produce evidence of the methamphetamine." *Jones v. State*, No. A16A0559. 2016 WL 3453143 (Ga. Ct. App. June 23, 2016).

U.S. District Court – Northern District of Georgia

CIVIL LIABILITY – USE OF FORCE TO PREVENT SUSPECT FROM SWALLOWING DRUGS

An arrestee sued a Rockdale County Sheriff's Deputy and several other parties following a traffic stop of a car in which the arrestee was a passenger. Deputies performing the traffic stop stated that during the stop they smelled marijuana inside the vehicle and had the passenger step out, frisked him, and had him sit on the front of a patrol car while the vehicle was searched. During this time the passenger was recorded on the patrol car's in-car camera. The video appears to show the passenger being responsive, and he is never seen putting his hands near his mouth.

After several minutes, a deputy re-approached the passenger and observed the passenger attempting to swallow something, which the deputy believed to be marijuana. The deputy put his hand on the passenger's throat and pushed him backwards by the throat onto the patrol car. The deputy repeatedly told the passenger to open his mouth, and the passenger responded that his mouth was open and that he hadn't swallowed anything. After about 15 seconds, the deputy released the passenger. No drugs were found, and the passenger was arrested and charged with disorderly conduct. The charge was later dismissed.

The passenger sued the deputy in question alleging, among other things, excessive use of force. The deputy moved for summary judgment, and the Court denied the deputy's motion. The Court recognized that **it is generally "constitutional for officers recognizing an attempt to swallow and destroy what appears to be narcotics to hold the suspect's throat and attempt to pry open the suspect's mouth by placing pressure against his jaw and nose." In this case, however, (1) the deputy did not actually *see* anything he believed to be marijuana prior to grabbing the passenger's throat, (2) the passenger spent an extended amount of time talking with deputies on the hood of the patrol car, and (3) the passenger had given no indication that he would resist or flee. Given those circumstances, the Court held the deputy's sudden grab of the passenger's throat was arguably unreasonable and allowed the lawsuit to proceed to trial.** *Moon v. Rockdale County*, No. 1:14-CV-3926, 2016 WL 3035552 (N.D. Ga. May 27, 2016).

ALS REMINDERS

Decisions on ALS cases can be obtained from the OSAH website at www.osah.ga.gov. The docket number and petitioner's zip code will be needed to obtain a copy of the decision. In addition, you will need to know if the petitioner was represented by an attorney. If you need assistance in obtaining a copy of a final ALS decision, please contact Dee.

The OSAH website also has an Administrative Law Report section that has decisions on various ALS cases. To view decisions on other ALS cases, click on the "Administrative Law Report" and under "Topics," click on "DUI."

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