

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 23, 2013

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THIS WEEK:

- **Search & Seizure; Anonymous Individual**
- **Search & Seizure; No Knock Warrants**
- **In-Court Identification**
- **Search & Seizure**

Search & Seizure; Anonymous Individual

Lewis v. State, A13A1263 (8/13/13)

Appellant was charged with DUI and VGCSA. He contended that the trial court erred in denying his motion to suppress. Specifically, that the deputy lacked reasonable, articulable suspicion to justify the traffic stop that led to appellant's arrest. The Court agreed and reversed.

The evidence showed that around 1 a.m., a deputy was dispatched to an area in response to an anonymous tip about a suspicious vehicle driving very slowly. The caller described the vehicle as a red Chevrolet Blazer and provided the license-plate number. The deputy then located the vehicle and observed it driving at 10 miles per hour. The deputy observed that the vehicle was traveling slowly in an area that had several metal thefts and had relatively little traffic during the early morning hours. The deputy suspected that the vehicle may have been "casing" a location for theft and initiated a stop. The deputy noticed that appellant was disoriented and suspected appellant was driving impaired. The deputy administered field-sobriety tests and following them, arrested appellant for DUI. The deputy then searched the vehicle and discovered marijuana, needles, and spoons with suspected methamphetamine residue.

The Court stated that a brief investigative stop of a vehicle is justified when an officer has a reasonable and articulable suspicion that the driver or vehicle is subject to seizure for violation of the law. In this regard, reasonable and articulable suspicion must be an objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. Such a determination can only be made after considering the totality of the circumstances. In viewing the totality of the circumstances, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, provide a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The State maintained that the deputy had reasonable and articulable suspicion to justify the stop based on a concerned citizen's tip, the slow speed at which appellant's vehicle was traveling, and the vehicle's presence late at night in an area known for recent metal thefts. The Court disagreed and noted the anonymous nature of the tip rendered an insufficient basis to provide reasonable and articulable suspicion of criminal activity. A tip from an anonymous informant may exhibit sufficient indicia of reliability to provide reasonable suspicion of criminal activity when such information is detailed enough to provide some basis for predicting a suspect's not easily predicted future behavior, or if it provided corroborating detail showing similar inside information about the subject's affairs. Here, the Court held, the information necessary to predict appellant's behavior was not present from the evidence. Further, the mere fact that appellant was present in an area of recent criminal activity did not rise to reasonable and articulable suspicion of criminal activity to justify the stop. Consequently, the

taint of the illegal stop required the suppression of the evidence seized from appellant's car because there was no intervening circumstance or event to purge the taint of the illegal stop. Thus, the Court reversed the trial court's denial of appellant's motion to suppress.

Search & Seizure; No Knock Warrants

Braun v. State, A13A1106 (8/16/13)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a special agent with the Sheriff's Department began investigating appellant after receiving a tip that appellant, who kept rifles and shotguns at his residence, was selling methamphetamine to middle school students. In the course of his investigation, the special agent did not observe significant vehicular or foot traffic at appellant's residence, although he could only watch the house for fifteen or twenty minute intervals due to low traffic on the residential street. He noted two residential structures on the property and assumed that appellant lived in the smaller of the two after seeing him leave it. One driveway, mailbox, and trash can served both houses.

After developing probable cause to search through a "trash-pull," the special agent applied for and received a search warrant for both houses with a "no-knock" provision using an affidavit that cited appellant's prior arrests for battery, various drug charges, and possession of a firearm during the commission of a crime, along with the agent's experience that the subjects of such search warrants often possess firearms and package illegal narcotics for easy destruction. Upon execution of this warrant, agents recovered a digital scale, several pipes, plastic bags containing methamphetamine residue, and methamphetamine from appellant's home.

Appellant contended that his motion to suppress should have been granted because the "no-knock" provision was not justified and the affidavit did not provide probable cause for searching both residences on the property. The Court stated that generally, police must make a good faith attempt to verbally announce their authority and purpose before entering a building to execute a search warrant. However, a warrant can authorize a "no-knock" entry where police seeking the warrant demonstrate

a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by allowing the destruction of evidence. Blanket provisions based on the generalized experience of an officer seeking the warrant do not authorize no-knock provisions. Further, an affidavit based on the general ease of destroying drug evidence and the officer's experience is also insufficient. Nonetheless, the standard for establishing the reasonable suspicion necessary to justify a no-knock entry, as opposed to the standard for establishing probable cause, is not high.

The Court rejected appellant's contention that the warrant was not supported by probable cause and that the magistrate should not have considered his arrest record in the no-knock provision because he had not been convicted of those crimes. The Court reasoned that because appellant's prior arrests were supported by probable cause, it was sufficient for the officer to believe that appellant was a man of violence and could have harmed officers if they knocked before entering his residence. And even though the tip alone could not have supported probable cause for the warrant, the totality of the circumstances provided sufficient support for the magistrate's finding.

The Court also held that the warrant particularly described the place to be searched in accordance with the Fourth Amendment. In determining whether probable cause supports the issuance of a search warrant, the issuing magistrate must evaluate all the circumstances set forth in the affidavit before him or her and make a practical, common-sense decision whether there is a fair probability that evidence of a crime will be found in a particular place. The warrant must describe the place to be searched with sufficient particularity by giving the street address, city, county, and state. Here, appellant argued that the separate residential structures were in fact a multi-unit structure where tenants shared a trash can. However, the evidence showed that both residences shared a driveway and mailbox in addition to the trash can, and both appellant's and his father's discarded mail were discovered in the trash along with the indicators of drug activity. The drug remnants and residue found in the shared trash provided the magistrate with sufficient evidence that drugs could have been found in either residence. Thus, the affidavit provided

the magistrate with enough information to conclude that evidence of crime was likely to be found at either residential structure and the trial court properly denied appellant's motion to suppress.

In-Court Identification

Pitts v. State, A13A1424 (8/9/13)

Appellant was convicted of two counts of armed robbery and one count of aggravated assault. The evidence showed that appellant and two other individuals robbed two victims while they were performing landscape work at an apartment complex. While all three were jointly indicted, appellant's accomplices plead to lesser offenses and testified on behalf of the State. At trial, the accomplices identified appellant as the gunman in the robbery. Also, the victim driver of the landscape truck was able to positively identify appellant in the courtroom. However, the other victim testified that he did not remember the faces of the robbers.

Appellant contended that his motion to exclude the in-court identification should have been granted because the police did not have the two workers participate in a pre-trial lineup and the courtroom environment for the identification was suggestive because the workers believed the gunman was African American, and appellant happened to be the only African American in the courtroom. First, the Court noted that a line-up identification, or identification from a group of photographs, is not a prerequisite for in-court identification. Thus, appellant's contention was meritless. Second, the Court specifically rejected the argument that because appellant was the only African American in the courtroom, the identification was suggestive. Nevertheless, an in-court identification is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial, and the problematic aspects of an in-court identification go to the identifying witness's credibility, which is solely a question for the jury. Here, the record showed that appellant's counsel cross-examined the landscape worker about the fact that appellant was the only African-American man in the courtroom and also raised the issue of suggestive in-court identifications during closing arguments. Thus, the trial court committed no error in denying appellant's motion to exclude the in-court identification.

Search & Seizure

Thammasack v. State, A13A1391 (8/16/13)

Appellant was convicted of possession of methamphetamine. The evidence showed that appellant, a Florida driver, was driving at night with red headlights when the officer observed his vehicle. Further, the officer became suspicious of appellant's vehicle when dispatch revealed that the vehicle tag belonged to the same model vehicle, but was described as a different color. When the officer pulled over appellant, he discovered that appellant had a suspended license and arrested him. A subsequent inventory search of the vehicle revealed a half gram of methamphetamine.

Appellant contended that there was no reasonable basis for the officer to have initiated the traffic stop that led to his arrest. Specifically, he argued that O.C.G.A. § 40-8-34, the traffic code section governing the color of headlights, was void for vagueness because it did not give motorists fair warning that headlights could not be red. According to appellant, because O.C.G.A. § 40-8-34 was unconstitutionally vague, a traffic stop predicated on a perceived violation of that statute was likewise unconstitutional and required suppression of the evidence seized during the stop. At the motion to suppress, the State conceded that O.C.G.A. § 40-8-34 was void for vagueness, but argued that the stop nevertheless was proper under the Fourth Amendment because the officer had an honest belief that a traffic violation had been committed in his presence. The trial court denied appellant's motion and held that the stop of the vehicle was reasonable and not arbitrary or harassing.

The Court stated that before stopping a car, an officer must have specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. The State carries the burden of establishing the lawfulness of a traffic stop and can meet its burden if the statute upon which the stop was based is later declared unconstitutional. Police are charged to enforce laws until they are declared unconstitutional because society would be ill-served if its police officers took it upon themselves to determine which laws are constitutionally enforceable. Further, an officer's mistaken-but-honest belief may nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for the stop. To determine an officer's

honest belief that a traffic violation occurred, a court must determine whether the officer's motives and actions at the time and under all the circumstances were reasonable and not arbitrary or harassing.

Here, the Court held, the trial court was authorized to find that the officer had reasonable articulable suspicion for stopping appellant's vehicle. The officer was confronted with red headlights and based on his training and experience, he believed that the headlights constituted a traffic violation because the lights were confusing and dangerous to other drivers. Further, the Court noted, the purpose of police deterrence would not be served by suppressing the evidence found in appellant's case, which was the product of a stop prompted by the officer's legitimate concern for public safety. Additionally, separate from the headlight issue, the evidence showed that the officer had an alternative reasonable suspicion justifying the stop because it would be reasonable for an officer to infer that the license plate observed on appellant's vehicle may have been illegally switched from another vehicle.