

GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

our mission

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

contents



Headspace gas chromatograph mass spectrometer
Photo courtesy: Georgia Bureau of Investigation

feature article >

In Georgia it is illegal to be under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive. (O.C.G.A. § 40-6-391(a)(3).

These "volatile" substances are mainly abused by adolescents and young adults and contribute to illness and death in this population. Read how the Crime Lab has resumed the testing of these substances and obtain information regarding submission of volatile substances for testing.

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Volatiles Testing at the Georgia Bureau of Investigation Division of Forensic Sciences

By Leigh Champion, Volatiles Specialist, Georgia Bureau of Investigation, Division of Forensic Sciences, and Kasey Wilson, Volatiles Specialist, Georgia Bureau of Investigation, Division of Forensic Sciences

IN APRIL 2008, THE GEORGIA BUREAU OF Investigation Division of Forensic Sciences (GBI DOFS) Toxicology Section resumed analytical testing for volatile compounds after several years of not performing the service. Volatile compounds are chemicals such as aerosols and solvents which can be abused and may lead to legal consequences such as a DUI or even result in death.

The GBI DOFS Toxicology Section is currently testing for a wide range of volatile compounds. These compounds include, but are not limited to, propellants and solvents. A propellant is a chemical used to expel material from an aerosol container and examples include 1,1-difluoroethane and norflurane which are commonly used in aerosol dust removers. Examples of solvents include toluene, methylene chloride, hexane and heptane which are ingredients in paints, paint thinners and glues. Other volatile compounds may also be identified during blood alcohol testing. The GBI DOFS Toxicology Section routinely tests for four compounds during a blood alcohol test. Those four compounds include methanol which is found in portable canned cooking fuels, ethanol which is commonly known as "drinking alcohol", acetone which is an ingredient in paint, paint thinner and glue, and isopropanol which is commonly referred to as "rubbing alcohol."

From April through July 2008, DOFS has completed volatiles testing on 22 cases. Sixteen of these cases are antemortem cases and the other six are postmortem. Of the 22 cases, 14 are positive for one or more volatile compounds. The other seven cases are negative for common volatile compounds.

Thirteen of the 14 positive cases contain 1,1-difluoroethane which is a common propellant in aerosol dust removers such as Dust-Off®.

Nine of the cases that are positive for 1,1-difluoroethane involve motor vehicle accidents; three are suspected DUIs; and one is a drowning-related to inhalant abuse. Of the MVAs, three involve injuries; three are without injuries; one does not indicate if there are any injuries; and two are fatalities from the same accident. One of the fatality cases also contains norflurane which suggests the individual may have been huffing two different types of aerosols.

In the submission paperwork for one suspected DUI case, the officer indicates the subject was "huffing paint." This case was analyzed and contains toluene which is a solvent commonly found in paints, paint thinners and glue. Submission paperwork for another suspected DUI case requested a test for "paint thinner". Subsequent conversation with the officer revealed the subject was suspected of huffing paint thinner. The case was tested and was negative for toluene; however, a significant amount of acetone (another constituent of paint thinner) was found and reported during the blood alcohol analysis.

Blood is the specimen of choice for volatiles analysis; therefore, the Toxicology Section requests that blood be submitted on any suspected volatiles case and "Volatiles" indicated on the submission form. Most volatile compounds are eliminated from the body very rapidly; therefore, it is strongly suggested that blood be collected quickly in situations where a volatile compound is suspected. In addition, if a specific volatile is suspected, please provide as much information as possible (e.g. brand name or type of compound if known) on the submission form. If you have any specific questions related to volatiles testing, please contact the GBI DOFS Toxicology Section.

This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The "Georgia Traffic Prosecutor" encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fmccormack@pacga.org.

The Use of Speed Detection Devices and Unmarked Vehicles

By Marie Green, Prosecuting Attorneys' Council of Georgia, Intern, University of Georgia, JD 2010

Can an unmarked police vehicle make a traffic stop?

The Georgia Courts have answered “yes” to this question despite the wording of O.C.G.A. § 40-8-91, which states: “any motor vehicle which is used on official business by any person authorized to make arrests for traffic violations in this state...shall be distinctly marked on each side and the back with the name of the agency responsible therefore, in letters not less than four inches in height.” Recently, however, the Courts have carved an exception in this statute for unmarked vehicles. In *The State v. Carter*, an officer working on a narcotics case in an “unmarked vehicle not ordinarily used to make traffic stops” observed a truck weaving and running off of the road. 215 Ga. App. 647, 647 (1994). The defendant in this case challenged the traffic stop, claiming that it violated O.C.G.A. § 40-8-91, since the officer who made the stop was in an unmarked vehicle. *Id.* at 648. The court disagreed, claiming that “unmarked police cars are authorized for other investigations,” and that “nothing in this code section . . . invalidates traffic arrests made in unmarked vehicles.” *Id.* at 648. This case has since been incorporated into the “Judicial Decisions” section following O.C.G.A. § 40-8-91.

The Georgia Court of Appeals, in *Gilbert v. State*, again upheld a traffic stop made by an

“off-duty detective in an unmarked police car” who observed the “defendant driving erratically.” 222 Ga. App. 787, 787 (1996). The court held that this stop was not in violation of O.C.G.A. § 40-8-91, since this statute “does not invalidate traffic arrests made in unmarked vehicles.” *Id.* at 787. The Court of Appeals in 2003 reiterated that “nothing in O.C.G.A. § 40-8-91 invalidates traffic arrests, or investigatory stops, made in an unmarked vehicle” in *Thomas v. State*, 261 Ga. App. 493 (2003).

In an analysis of the available case law, one will notice that in the majority of situations, as in *State v. Carter*, *Gilbert v. State*, and *Thomas v. State*, an unmarked vehicle will attempt to contact uniformed patrol officers to make an arrest or a traffic stop or will request that the uniformed officer in the marked vehicle actually make the stop. See: *Robinson v. State*, 226 Ga. App. 406 (1997) (unmarked car observes potential drug deal, contacts uniformed patrol officers to make the arrest); *Wright v. State*, 272 Ga. App. 423 (2005) (officers in unmarked vehicles observe several traffic violations and contact patrol officers in a marked vehicle to make the traffic stop); *Noble v. State*, 283 Ga. App. 81 (2006) (officers in an unmarked vehicle contacted officers in a marked vehicle to make a traffic stop after a suspected drug deal); *Valle v. State*, 282 Ga. App. 223 (2006) (officers in an unmarked vehicle observe suspicious drug activity, contact uniformed po-

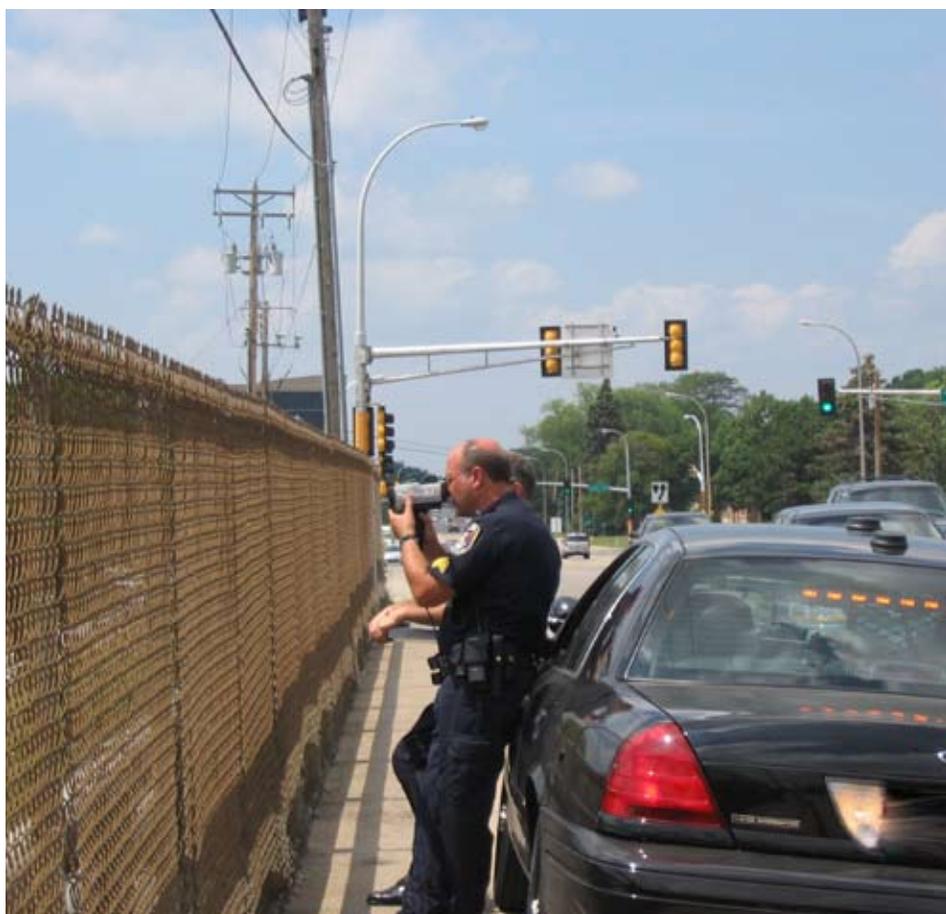
lice officer to make the traffic stop); *Barrino v. State*, 282 Ga. App. 493 (2006) (officers conducting surveillance on a known drug suspect contact uniformed police to make a traffic stop, but exited their unmarked vehicle in plain clothes to make an arrest when they felt the uniformed officer’s life was in danger); *Garmon v. State*, 271 Ga. 673 (1999) (officers in an unmarked car contacted uniformed officers to make the traffic stop).

An analysis of the case law suggests that an officer in an unmarked vehicle should at least attempt to contact any uniformed officers in the area in marked cars to make the stop in order to assure a successful arrest. If no such officers are available to come to the aid of the undercover officer, or the situation at hand escalates to the point that a traffic stop or arrest is necessary, then the officer in the unmarked vehicle may, according to the courts, make a valid stop.

Another key to a successful stop in an unmarked car is to have a basis for the stop that is outside of any previously known information (known drug dealer, high drug area, etc.). This is to assure that the defendant cannot claim that the reason for the stop was pretextual, something that the Georgia courts frown upon.

Can an unmarked police vehicle make a traffic stop using speed detection radar?

Georgia courts have yet to address this specific question, but the Courts’ previous interpretations of the language of O.C.G.A. § 40-14-7 and O.C.G.A. § 40-8-1 seem to suggest that such a stop would not be valid. O.C.G.A. § 40-8-1, as stated earlier, requires that “any motor vehicle which is used on official business by any person authorized to make arrests for traffic violations in this state...shall be distinctly marked on each side and the back with the name of the agency responsible therefore, in letters not less than four inches in height.” While the courts have been lenient in allowing unmarked vehicles to make traffic stops in certain situations, the courts may not be so lenient in upholding a traffic ticket based upon stationary radar results in an undercover car, because the wording of another statute O.C.G.A. § 40-14-7. O.C.G.A. § 40-14-7 requires that “no stationary speed detection device shall be employed...where the vehicle from which the device is operated is obstructed from the view of approaching motorists or is otherwise not visible from a distance of at least 500 feet.” (2008). This means that the vehicle must see the “police vehicle” for at least



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500 feet in order for the radar detection to be effective. If one is not able to tell that the vehicle is operated by police, then pulling over a vehicle strictly based upon radar results could result in the Courts overturning the conviction or arrest.

The courts have addressed this issue in *Ray v. State*, when a Georgia State Patrol Trooper had completed his shift and was driving home in his patrol car. He noticed a vehicle speeding, checked the speed by radar, and arrested the driver after a short chase. 233 Ga. App. 162 (1998). The court had no problem with the use of the radar because the vehicle was “appropriately marked.” *Id.* at 164.

If an agency chooses to operate radar from an unmarked vehicle, it is recommended that an officer that makes a traffic stop based upon radar results have the ability to articulate other reasons for pulling the vehicle over or be able to testify to the approximate speed of the defendant in case the radar results are thrown out. The courts have upheld convictions for speeding based upon officer testimony after the radar results were found to be inadmissible. *Stone v. State*, 257 Ga. App. 492, 571 S.E.2d 488 (2002).

In order to assure that the courts do not overturn a conviction, one should make sure that a police vehicle equipped with radar has markings on the side and back of the vehicle indicating the particular department with letters at least 4 inches high. This is to ensure that the vehicle operating radar is visible to oncoming motorists and that it follows the requirements for traffic enforcement vehicles. Otherwise, the court may overturn a conviction of a traffic violation issued by an officer driving an unmarked vehicle. While the courts have in the past upheld traffic stops from officers in unmarked vehicles, those officers were not operating radar, and one would not want to risk losing a conviction because of a traffic stop initiated using radar detection in unmarked vehicle.

Can a police vehicle use radar at night?

The Courts have never stated that radar or speed detection devices could not be used at night, and the Georgia Courts have upheld speeding convictions obtained by using radar at night. See: *Lucas v. State*, 192 Ga. App. 231 (1989) and *Ray v. State*, 233 Ga. App. 162 (1998). Vehicles choosing to operate stationary radar at night, however, must be sure that they follow O.C.G.A. § 40-14-7 in that they are “visible for a distance of at least 500 feet” or do not use “stationary radar.” If the police vehicle is not visible to the oncoming vehicle, then the Court may dismiss the case as they did in *State v. Cobb*, 208 Ga. App. 752 (1993). In *State v. Cobb*, the officer was operating stationary radar from his patrol car at approximately 2:49 a.m. while parked at the lower end of an incline to the right side of the shoulder off of I-75. There were no street lights in the area and the patrol car had no lights on. Based upon the time of night, the

dark conditions of the road, and the fact that the car had no lights on, the judge decided that the police vehicle could not have been visible to the defendant and threw out the radar results. *Id.*

In order to uphold a stop made at night using radar, one should make sure that the vehicle is visible from 500 feet. This can be done by leaving the lights on, putting the parking lights on, parking the vehicle in a lighted area, or use the radar in a moving vehicle not a stationary one.



Flagman Required on Construction Sites?

By Marie Green, Prosecuting Attorneys' Council of Georgia, Intern, University of Georgia, JD 2010

FAILING TO PROVIDE A FLAGMAN AT A CONSTRUCTION SITE WOULD BE A QUESTION OF negligence or a failure to use reasonable care to protect the public, and therefore, a civil liability question. There is no statute on the books requiring the Department of Transportation or an independently contracted construction company to provide a flagman at a construction site. Since there is no requirement, and the Georgia legislature has left that decision up to DOT in O.C.G.A. § 32-6-50(B) which requires the DOT “to place and maintain, or cause to be placed and maintained, such traffic control devices upon the public roads of the state highway system as it shall deem necessary to regulate, warn, or guide traffic.”

The Georgia Department of Transportation does require “necessary traffic signs, barricades, lights, signals, cones, and other traffic control devices; and all flagging and other means of traffic protection and guidance as required by the Standard Specifications.” The standard specifications state that “it shall be the decision of the Engineer as to what will assure the least interference with traffic and smooth, safe traffic flow.” In most contracts, the DOT states that the contractor will furnish all traffic control devices, which would include flagmen. The Specifications explain that two-way traffic should flow at all times unless approved by the Engineer. The Standard Specifications also state, “When one-way traffic is approved, the Contractor shall provide the necessary flagmen to direct such traffic. When specified in the Proposal, the Contractor shall furnish pilot vehicles.” “Standard Specifications Construction of Transportation Systems,” Georgia Department of Transportation, June 21, 2001.

The DOT is required by O.C.G.A. § 32-2-2(a)(3) to provide “plans, maps, specifications, and other things necessary for work on public roads...” (2008) These standards are guidelines, however, and not requirements by law. This means that if a company fails to follow these standards, it may be used against them in a civil suit, but not in a criminal case.

The county would be expected to follow similar guidelines as recommended by the DOT. O.C.G.A. § 32-4-41 explains that a county is in charge of its county road system “and shall have control of and responsibility for all construction, maintenance, or other work...such work may be accomplished through the use of county forces . . . by contract. . .” (2008). Provision 32-4-41 also allows the county to enter into a contract with a municipality to “maintain an extension of the county road system within the municipal limits.” (2008). The same principal would apply to a municipality.

Case Law:

In *Watkins v. First South Utility Construction*, 284 Ga. App. 547 (2007), Bellsouth, a utility company, obtained a DOT permit to install cable along a highway. The DOT permit expressly required that the “permittee shall, at all times, maintain flagmen, signs, lights, flares, barricades, and other safety devices.” *Id.* at 550. When the contractor did not, he was subject to liability. *Id.*

In *Comanche Construction v. Dept. of Transportation*, 272 Ga. App. 766 (2005), an independent contractor doing construction on a county road failed to take down detour signs and a motorist was injured. The contractor lost his motion for summary judgment, and the Court decided that since the contractor “handled all aspects of the [traffic control] plan’s design and implementation,” and that the DOT’s actual involvement with the detour “was limited to approving traffic control design plans,” the DOT was immune from the complaint. *Id.* at 773.

In *Adams v. Apac-Georgia, Inc*, 236 Ga. App. 215 (1999), the court stated that “a contractor constructing a road or bridge owes a duty to the public to exercise ordinary care to protect it from injuries arising by reason of such construction.” *Id.* at 217

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---> fact:

Drunk driving is the nation's most frequently committed violent crime, **killing someone every 30 minutes.** Because drunk driving is so prevalent, about three in every ten Americans will be involved in an alcohol-related crash at some time in their lives. In 2006, an estimated 17,602 people died in alcohol-related traffic crashes in the USA. These deaths constituted 41 percent of the nation's 42,642 total traffic fatalities.

-Statistics courtesy NHTSA (www.nhtsa.gov)

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Fay McCormack at PAC.