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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.

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Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

A roadblock is an effective tool used by law enforcement to stop and check drivers and their motor vehicles for inspection and questioning. When specifically aimed at removing impaired drivers, they are referred to as "Sobriety Checkpoints." Striving to protect citizens from violation of their Fourth Amendment right against unreasonable search and seizure, the Courts have placed many restrictions on the procedures used by law enforcement in their implementation of roadblocks.

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Roadblocks:

Road Safety Checks, Safety Checkpoints and Sobriety Checkpoints

By Fay McCormack, Traffic Safety Resource Coordinator, PAC

Constitutionality of Roadblocks

In order to pass constitutional muster, a roadblock must:

(1) Have been implemented for a legitimate primary purpose by supervisory personnel;
(2) Involve stopping all vehicles;
(3) Result in minimal delay to motorists;
(4) Be clearly identified as a police checkpoint;
(5) Be manned by officers sufficiently trained to determine whether motorists should be given field sobriety tests.

***Baker v. State**, 252 Ga. App. 695 (2001); **Lafontaine v. State**, 269 Ga. 251 (1998).*

To satisfy the first requirement for a constitutional roadblock, the State has to prove that the roadblock was ordered by a supervisor and implemented to ensure roadway safety rather than as a constitutionally impermissible pretext aimed at discovering general evidence of ordinary crime. A roadblock contravenes the Fourth Amendment if it is established for the primary purpose of detecting evidence of ordinary criminal wrongdoing, such as illegal drug activities. ***State v. Morgan,** 267 Ga. App. 728 (2004); **Baker v. State, supra**.* The Georgia Court of Appeals affirmed the suppression of 122 lbs of marijuana seized in a roadblock on Interstate 16 in Laurens County because the sergeant from the Interstate Criminal Enforcement Unit (ICE) did not properly articulate the purpose of the roadblock. ***State v. Morgan, supra.***

Roadblocks Have Been Approved for:

- Sobriety checkpoints – removing drunk drivers from the road
- Verify driver's licenses/vehicle registrations
- Seatbelt violations
- Defective equipment
- Traffic law violations
- Catch a dangerous criminal likely to flee by a particular route
- Prevent an imminent terrorist attack
- Intercept illegal aliens

Programmatic Level

***Ross v. State,** 257 Ga. App. 541 (2002):* In order to establish that a roadblock is satisfactory the State must show that the roadblock program was implemented at the programmatic level for a legitimate primary purpose, i.e. proof that the roadblock was ordered by a supervisor and implemented to ensure roadway safety rather than as a constitutionally impermissible pretext aimed at discovering general evidence of ordinary crime. In looking to the programmatic purpose, the appellate court considers all the available evidence in order to determine the relevant primary purpose. That is, the program's ultimate effect is the issue, thus making review of the program's application and implementation pertinent in addition to such evidence as provided by supervisory personnel. See ***City of Indianapolis v. Edmond**, 531 U.S. 32 (2000).*

Primary Purpose

In ***State v. Ayers**, 257 Ga. App. 117 (2002),* the defendant filed a motion in limine to suppress the evidence seized at a roadblock. At the hearing on the motion to suppress, the police officer who set up the roadblock admitted that the primary purpose of the roadblock was general law enforcement. The officer added that there were no specific reasons that the police stopped and checked vehicles and their drivers, and that the roadblock allowed police to check mass quantities of vehicles at one location so Georgia's laws and the local county ordinances could be enforced. The trial court then found the roadblock's purpose was general law enforcement and granted defendant's motion in limine to suppress the incriminating evidence gathered due to the stop of defendant's vehicle. After the State appealed that judgment, the appellate court found that a roadblock having a primary purpose of general law enforcement was constitutionally impermissible as the Fourth Amendment generally required that some measure of indi-

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vidualized suspicion be involved, and none of the limited exceptions to that rule applied.

In ***Britt v. State,*** *294 Ga. App. 142 (2008),* A field officer, in response to a question from defense counsel, agreed that his "purpose out there" was not just to look for DUI's, but "generally to enforce the law." The Court of Appeals held that in determining whether a roadblock was initiated for a legitimate, primary purpose, a court should look to the testimony of the supervisory officer as to the roadblock's purpose, rather than to the testimony of the field officers.

The Court of Appeals held in ***Yingst v. State,*** *287 Ga. App. 43 (2007)* that the form showing the primary purpose of the Henry County roadblock was admissible as a business record.

Supervisor

Knowledge of Supervisor's Decision: In ***Baker v. State, supra,*** the defendant argued that the roadside checkpoint where he was arrested did not pass constitutional muster. The Court of Appeals agreed. While working at a roadblock, the officer stopped defendant and asked for his driver's license and insurance information. Probable cause to arrest defendant developed after the initial stop. The officer testified that he was not present when one of his supervisors decided to implement the roadblock, and that he could not remember which of the two supervisors had made the decision. In light of this testimony and the fact that the officer was the State's only witness, defendant contended that the State failed to prove the roadblock was lawful. The Court of Appeals agreed. The Court of Appeals found that the officer's testimony established clearly that his purpose was "DUI checks." His actions and the actions of the other officers on the scene were consistent with that purpose. But his actions were not conclusive evidence of the supervisor's purpose in implementing the checkpoint.

Supervisor's Testimony: Although recommended, the supervisor does not have to testify as to the purpose of the roadblock. The law only requires that some admissible evidence, whether testimonial or written, show that supervisory officers decided to implement a roadblock, decided when and where to implement it, and had a legitimate primary purpose for it. ***Kellogg v. State,*** 288 Ga. App. 265 (2007).

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

Evidence of Supervisor's Decision: It is the State's burden to present some admissible evidence, testimonial or written, that supervisory law enforcement officers decided to implement the roadblock, decided where and when to implement it, and had a legitimate primary purpose for it. ***Yingst v. State,*** 287 Ga. App. 43 (2007).

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

Supervisor's Participation: In ***Hobbs v. State,*** 260 Ga. App 115 (2003), the supervising officer who ordered the roadblock was also the officer who stopped defendant at the scene. The Court of Appeals held that this fact did not render the roadblock unconstitutional. The sergeant had testified that, at the roadblocks he authorizes, he goes to the location to supervise the other officers and that he takes no direct role unless the other officers are tied up with other motorists. In addition, both the sergeant and another officer testified that, for purposes of the roadblock in question, the sergeant was the supervising officer. In the Henry County case of ***Gonzalez v. State,*** 289 Ga. App. 549 (2008), the defendant argued that Sergeant Harned could not be considered a supervising officer because he participated in the roadblock. Harned testified that although his primary duty was to oversee the roadblock, he did occasionally "step in" and participate when traffic backed up. The Court found that the mere fact that Harned participated in the roadblock is insufficient to transform him from a supervisor into a field officer.

Screening Officer

In ***State v. Golden,*** *171 Ga. App. 27 (1984),* reflecting signs were placed at each approach to the roadblock, identifying the operation as a driver's license checkpoint and requesting motorists to produce their driver's licenses and insurance cards for inspection. The checkpoint was also identified by orange, iridescent traffic cones placed in the roadway and by a patrol car stationed beside the road with its emergency lights flashing. A "chase vehicle" was present to apprehend any drivers who might attempt to avoid stopping.

As each passing motorist reached the checkpoint, one of two designated "screening officers" checked a driver's license, insurance card, and automobile tag for possible irregularities. The screening officers were also instructed to observe each driver for signs of intoxication. If a possible offense was observed, the screening officer noted it on a pre-printed form and asked the driver to pull into an adjacent parking lot, where a "receiving officer" made a determination as to whether the driver should be charged with the offense. In the case of suspected intoxication, this involved ordering the driver out of the vehicle and asking him to submit to a series of "field sobriety tests." Based on the results of these tests, the suspect was then either placed under formal arrest for DUI or allowed to continue on his way. If placed under arrest for DUI, he was transferred to the custody of other officers and asked to consent to a breathalyzer test under the "implied consent" law.

In suppressing evidence of the DUI the trial court concluded that because no specific guidelines existed for use in deciding which motorists should be evaluated for intoxication, the screening officers were allowed to exercise an unconstitutionally excessive amount of discretion in this regard. The Court of Appeals reversed, pointing out that the decision to implement the roadblock was made by supervisory personnel rather than by the officers in the field, and the operation was carried out pursuant to specific, pre-arranged procedures requiring all passing vehicles to be stopped at the checkpoint and leaving no discretion to the officers in this regard. It is clear, the Court continued, that the delay experienced by passing motorists was minimal, lasting only a minute or two unless a violation was noted, and that the operation was well identified as a police checkpoint. Taking all of these factors into consideration, the Court held that the initial detention of the defendant at the roadblock was reasonable and resulted in no violation of his Fourth Amendment rights. In addition, the Court found that the screening officer's experience and training, which included 2 ½ years of police service and attendance at a DUI enforcement school operated by the North Georgia Police Academy, were amply sufficient to enable him to make an initial determination as to which motorists should be given the field tests for intoxication. Indeed, the court asserted, it is the rule in Georgia that any person may testify, on the basis of personal observation, as to whether another person did or did not appear to be intoxicated on a given occasion.

Wrigley v. State, *248 Ga. App. 387 (2001):* In the early hours of May 8, 1998, the Motorcycle Squad of the City of Atlanta Police Department set up a roadblock on Buford Highway as a part of "Operation Street Sweep." At around midnight, Wrigley's car stopped at the roadblock, where he was approached by Officer David Curtis Johnson. When Officer

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Johnson asked Wrigley for his license and insurance card, Wrigley was unable to produce his license and appeared to have difficulty locating his insurance card. Officer Johnson also detected an odor of alcohol on Wrigley and noticed that he had bloodshot eyes, a flushed face, and slurred speech and was unsteady on his feet. Wrigley admitted that he had been drinking. Officer Johnson then asked Officer G. W. Garrison, a member of the DUI countermeasures team, for assistance in administering the field sobriety tests. As a member of the countermeasures team, Officer Garrison had specialized DUI and intoxilyzer training. Officer Garrison also smelled alcohol on Wrigley's person and observed that his eyes were bloodshot and dark and that his speech was impaired. He led Wrigley through the horizontal gaze nystagmus (HGN) test, the nine-step walk and turn test, and the one-leg stand test. Based upon these tests, Officer Garrison determined that Wrigley was intoxicated to the extent that he was a less safe driver. Wrigley was placed under arrest. Wrigley first asserts that the trial court erred in denying his motion in limine to exclude all evidence from the roadblock. Wrigley argues that the roadblock was illegal because there was no evidence that the screening officers were properly trained.

Wrigley challenges the training of the screening officers participating in the roadblock. The evidence showed that Officer Johnson was a ten-year veteran of the Atlanta Police Department. He testified that he had received training in DUI detection at the police academy when he first became a police officer and at several of the annual in-service training sessions he had attended over 10 years. In addition, he said that he had "on-the-job training" dealing with intoxicated people, making, on average, one DUI arrest per month, which he calculated to be over 100 arrests over ten years. The Court found that this experience and training were more than sufficient to qualify Officer Johnson to screen for motorists who should be given field sobriety tests.

Officers from Different Jurisdictions

The roadblock at issue in ***State v. Golden***, *171 Ga. App. 27 (1984)*, was implemented by seven task force officers, on a state highway within the city limits of Powder Springs, between the hours of midnight and 3:00 a.m. A supervisory officer charged with overall responsibility for the operation and described as the "project coordinator" testified that he chose this time period because traffic was light and a greater incidence of DUI offenses could normally be expected during such hours. The Marietta-Cobb County DUI Task Force was comprised of officers from various police jurisdictions within Cobb County. Each officer was deputized to act as an agent of the sheriff's department, in an effort to give him or her county-wide arrest powers.

Kellogg v. State, *288 Ga. App. 265 (2007)*: In May 2005, Lt. Tainter (a supervisory field officer with the City of Snellville Police Department), in consultation with a sergeant in the state highway patrol, decided to conduct a joint roadblock in the City of Snellville on June 18, 2005, which would involve city police, police from a neighboring county, and officers from the state highway patrol. Lt. Tainter, the primary supervisor overseeing the officers on site, testified that the primary purpose of the roadblock was to check for driver's licenses, insurance and impaired drivers. Secondary purposes included checking vehicle tags, observing seat belt use, and noticing whether the condition of the vehicle was safe.

Indicted for DUI (underage per se), DUI (less safe), and underage possession of alcohol, Kellogg moved to suppress the evidence obtained at the roadblock and after his arrest, arguing that the roadblock was unconstitutional because the primary purposes identified by Lt. Tainter were so numerous that they necessarily devolved into an overall purpose of general law enforcement. Kellogg also complains that only Lt. Tainter testified as to the purpose of the roadblock, even though two other law enforcement jurisdictions (a neighboring county police force and the state highway patrol) participated in the roadblock. Kellogg would require the State to present consistent testimony from supervisory officers from the other two police forces.

Held: Each of these purposes had been held to be a legitimate primary purpose. Furthermore, a roadblock that served as a highway safety checkpoint was valid in its primary purpose even if officers were looking for multiple safety violations. There was no requirement that officers from all three jurisdictions testify as to the roadblock's implementation and purpose.

In ***Britt v. State***, *294 Ga. App. 142 (2008)*, the Court upheld the authority of Capt. Lee Clements of the Broxton Police Depart to supervise officers from the Coffee County Sheriff's Department. Where several law enforcement jurisdictions participate in a roadblock, the Court stated, citing ***Kellogg supra***, the law only requires that some admissible evidence, whether testimonial or written, show that supervisory officers decided to implement the roadblock, decided when and where to implement it, and had a legitimate primary purpose for it.

Drug Detection Dog at Roadblock

McCray v. State, *268 Ga. App. 84 (2004)*: While a deputy sheriff who stopped defendant at a vehicle checkpoint was checking the validity of defendant's driver's license, another officer walked a drug detection dog around defendant's vehicle. When the dog alerted on the vehicle, the officer opened the driver's side door and found a bag containing cocaine. Defendant was charged with trafficking in cocaine and possession of cocaine with intent to distribute. He filed a motion to suppress the cocaine. The trial court denied the motion, and a jury found defendant guilty of both charges. The Court of Appeals held that:

(1) The record supported that trial court's judgment that the checkpoint was established for the legitimate purpose of examining driver's licenses, insurance, and registration.
(2) The fact that police had drug detection dogs at the checkpoint did not make the checkpoint unlawful.
(3) The dog handler was free to walk his dog around defendant's car during the period defendant was being lawfully detained; and
(4) The police had probable cause to search defendant's vehicle after the dog alerted on the outside of the vehicle.

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

Temporarily Stopping Roadblock

Every vehicle must be stopped at a roadblock. Not every 3rd vehicle, every 5th vehicle, etc. There are some very limited exceptions.

In the DeKalb County case of ***State v. Manos***, *237 Ga. App. 699 (1999)*, the testimony of a Doraville police officer was that his agency was performing a license and insurance check roadblock on the southbound access road of Peachtree Industrial Boulevard at Tilly Mill Road. The officer confirmed that this roadblock was implemented by supervisory personnel and was clearly identified to motorists as a police check point. Every car that approached was stopped "unless we get too backed up." In that event, the police "let every car go till there's no more vehicles in sight, and then . . . start stopping cars again." That is, when the police are busy and cannot tend to the people approaching the roadblock, they let them all go through, and then later on, the police "just pick up . . . [and] resume the roadblock." The officer confirmed the "roadblock doesn't officially end; [it is] just [that] temporarily [police] let people go through. . . ." A "screening officer" would determine if a driver appeared under the influence of alcohol, although the qualifications of such screening officer do not appear of record. If a driver is able to produce proof of insurance and a driver's license, and police do not smell an odor of alcoholic beverage, the length of the detention is only "fifteen to thirty seconds." .The Court of Appeals affirmed the granting of defendant's motion to suppress all evidence obtained during the roadblock. The court

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concluded that the roadblock was unreasonable because there was no policy implemented to manage the roadblock. As a result, the field officer was given unfettered discretion to stop and start the roadblock.

At the motion hearing in the case of ***Hodges v. State***, *248 Ga. App. 295 (2001)*, Officer Maynard Thompson, Jr. of the Georgia State Patrol testified as follows: On October 23, 1996, Hodges was stopped pursuant to a license and insurance check roadblock initiated by the Nighthawk Task Force of the Georgia State Patrol. Hodges appeared to be "either intoxicated or very, very sleepy," and based on his observations, Officer Thompson asked Hodges to pull into the YMCA parking lot. After conducting field sobriety tests, Hodges was placed under arrest. Officer Thompson further testified that the roadblock had been set up at around 2:00 a.m., approximately 50 feet north of the intersection of Roswell Road and Alberta Road. The area was well lit, and police cars were placed so that their flashing rear lights could be seen by cars approaching in both directions. The roadblock was visible at least 500 to 700 feet before reaching the roadblock to vehicles approaching in both directions. The delay to motorists was minimal. Motorists were stopped for less than a minute to check their "driver's license, proof of insurance, and to take a visual and … using the nose to smell, and see if I could detect an odor of intoxicants. If everything was valid, they were on their way." Officer Thompson confirmed that this roadblock was implemented by Corporal Ned West, who was the supervisor of the Nighthawk Task Force. Officer Thompson further testified that he had received special training in both roadblocks and the detection of motorists who were driving under the influence. Additionally, Officer Thompson testified that all vehicles which approached the roadblock from both directions were stopped. However, because it was drizzling rain and the roads were wet, they made sure they did not allow traffic to back up for safety concerns. If all the officers were "tied up, then we would let traffic go."

Hodges argues that because Officer Thompson testified that anyone could make the decision to allow cars to proceed, the court's decision in ***State v. Manos,*** *supra,* demands reversal of his conviction. The Court explained that in *Manos* the record was silent as to the procedures used by field officers to determine whether public safety required them to halt a roadblock temporarily because of heavy traffic. In contrast, Officer Thompson testified that because it was drizzling rain and the road was slick, a determination had been made that it was unsafe to allow any cars to back up on the roadway, and cars were allowed to proceed through the roadblock only when all the officers on duty were busy with other cars. The court cited ***Gamble v. State***, *223 Ga. App. 653, 655 (2) (1996)* where a potential hazard from traffic backup justified a temporary halting a roadblock. Further, in this case, a supervisor, Corporal West, was present at the scene of the roadblock.

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

In ***Ross v. State***, *257 Ga. App. 541 (2002)*, Lt. Israel of the Clayton County Police Department testified that he stopped and restarted the challenged roadblocks three times to safeguard his officers and the public, each time letting backed-up traffic clear the roadblocks. Otherwise, the Court found, it is undisputed in the record that all vehicles stopped at the roadblocks were checked. The Court reiterated it's holding in ***State v Manos, supra***, that 'common sense recognizes the reasonableness of some type of procedure to suspend or halt a roadblock where the flow of traffic overwhelms the resources dedicated to that roadblock and poses a threat to public safety.'

Secondary Roadblocks, Daytime Roadblocks

State v. Ruiz, *243 Ga. App. 337 (2000)*. On the afternoon of March 13, 1998, Sergeant Martin, a supervisor for the City of Atlanta Police Department, authorized a roadblock on Browns Mill Road. As Sergeant Martin drove down Browns Mill Road on his way to the roadblock, which had already been initiated, he noticed that cars were turning left on Banberry Drive prior to reaching the checkpoint. At that time, Sergeant Martin called for two other officers, Merritt and Griffin, to establish a secondary roadblock on Banberry Drive in order "to catch the cars that were turning off from the roadblock" and to see if the drivers had their driver's license and insurance card.

After the second roadblock was operational, Ruiz approached the roadblock at Browns Mill Road, he made a sharp, sudden turn onto Banberry Drive without using his turn signal, and after seeing Merritt, he stopped his car approximately 20 yards away from the secondary roadblock on Banberry Drive. Merritt then approached Ruiz's car and asked for his driver's license and insurance card. Ruiz told Merritt that he had no license and gave the officer a false name and two dates of birth. Martin then approached, advised Merritt to place Ruiz under arrest for driving without a license, and began to do an inventory search of Ruiz's car prior to impounding it. Martin discovered a duffle bag in the back seat containing approximately nine kilograms of cocaine. Later, following the arrival of a drug dog which Martin requested after opening the duffle bag, an additional 31 kilograms of cocaine were found hidden in the side panels of the car. Ruiz was thereafter arrested for trafficking in cocaine. He was also cited for turning without using his turn signal.

Ruiz filed a motion to suppress the cocaine found in his car, contending that the roadblock established on Banberry Drive was nothing more than a sham established as a pretext whereby law enforcement personnel could randomly stop and illegally detain motorists who, for whatever reason, turned left onto Banberry Drive or legally made a U-turn at the intersection of Banberry Drive and Browns Mill Road. The trial court found that the secondary roadblock was not properly established on Banberry Drive but the Court of Appeals disagreed. The Court found that the decision to implement the roadblock on Banberry Drive was made by Martin, a supervisor for the City of Atlanta Police Department. In addition, all vehicles that encountered the roadblock were stopped, and each driver was asked to produce a driver's license and insurance card. The officers participating in the roadblock were standing next to marked police vehicles in their patrol uniforms. They were also wearing orange traffic vests which had "POLICE" written across the front. Finally, it is undisputed that the officers involved had the appropriate training to check driver's licenses and insurance cards. Under the totality of the circumstances, this roadblock was reasonable.

The Court also disagreed with Ruiz's argument that the police failed to use orange cones and activate the blue lights on their vehicles because the roadblock was accomplished during daylight hours when the police and their cars were clearly visible. A daytime roadblock requires far less "identi-

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fication" by way of lights and reflective gear than a roadblock at night. No need existed during this daytime roadblock for flashlights or flashing lights. The officers were in uniform, and the patrol cars were clearly visible.

Roadblock on One Side of Road:

A checkpoint at which police stop only vehicles proceeding in one direction meets constitutional requirements.

In ***State v. Stearns***, *240 Ga. App. 806 (1999)*, DeKalb County police officers established a roadblock near the Cherokee Plaza shopping center in Atlanta. Numerous drinking establishments are located south of the roadblock in the Buckhead area. All northbound drivers were asked to produce driver's licenses and proof of insurance. Stearns's vehicle was stopped by Officer Fox. Fox testified that when DeKalb County police establish roadblocks along multi-lane thoroughfares such as Peachtree Road, only vehicles traveling in one direction are stopped because of concerns for officer safety. He testified that there was an insufficient number of officers to stop vehicles going in both directions. Fox explained that roadblocks such as the one in this case are established during evening hours, because traffic is light and all vehicles traveling in one direction can be stopped without creating traffic congestion. Fox testified unequivocally that all vehicles traveling northward on Peachtree Road were being stopped on the night in question, although he acknowledged that he was not observing the roadblock while performing field sobriety evaluations on Stearns. He further acknowledged that the officers at the roadblock were looking for drunk drivers.

Because there were at least eight officers on the scene, numerous marked police cars, cones lining the roadway, and very light traffic, the trial court found that there were more than enough officers to stop vehicles traveling in both directions. The trial court found that the purpose of the roadblock was to stop potentially intoxicated drivers leaving the bar scene, and the court concluded that the officers violated the Fourth Amendment by stopping vehicles traveling in only one direction. The court reasoned that, "allowing officers to stop traffic traveling in only one direction gives the police the authority to target particular groups such as Hispanics, Vietnamese, and African Americans which is clearly unconstitutional."

The Court of Appeals noted that the failure to stop "all" vehicles does not necessarily render the stop of remaining vehicles the kind of random exercise of officer discretion condemned in ***Delaware v. Prouse***, *440 U.S. 648 (99 S. Ct. 1391, 59 L. Ed. 2d 660) (1979).*The Court illustrated this by comparing ***State v. Manos*** *237 Ga. App. 699, (1999)*, with ***Ledford v. State***, *221 Ga. App. 238 (1996)*. In ***Manos*** they found a roadblock constitutionally impermissible in view of unfettered discretion of field officers to allow some vehicles to pass based on vague and undocumented articulation of public safety. ***Ledford*** did not find it fatal to a roadblock's reasonableness that officers did not stop 18-wheel commercial vehicles and non-commercial vehicles which had been stopped previously. The difference between ***Manos*** and ***Ledford*** is that the procedure in the former case but not the latter enabled officers in the field to exercise unregulated discretion in deciding which vehicles to stop. Here, supervisory officers decided to stop all vehicles traveling north on Peachtree Road, Officer Fox testified that all such vehicles were in fact stopped, and the trial court did not find otherwise. This case is more akin to Ledford than to Manos. The failure to stop vehicles going southward was not fatal to the roadblock's reasonableness. There was no evidence the roadblock was initiated as a pretext or subterfuge to catch Stearns.

Roadblock in High Crime Areas

A roadblock is not unreasonable simply because it is set up in areas and at times that are likely to result in the detection of crimes. ***State v. Ruiz,*** *supra.*

Wrigley v. State, *248 Ga. App. 387 (2001***:** Wrigley argues that because the roadblock in this case was part of Operation Street Sweep, it was aimed at general crime control and not intended for any permissible purpose under Edmond. Operation Street Sweep was a department-wide operation aimed at cleaning the streets of crime. Officer Johnson testified that in addition to the roadblock, Operation Street Sweep involved "different operations" by the Red Dog Units and the vice and narcotic units, all occurring at the same time. Although it was part of a larger effort, however, the roadblock itself was conducted only by the motorcycle squad, backed up by the DUI countermeasures team. There is no evidence that any other unit participated. And Officer Johnson testified that the primary purpose of the roadblock was checking for driver's licenses and insurance cards. The presence of the DUI countermeasures team also suggests at least a secondary purpose of detecting drunk drivers.

Held: The use of a checkpoint for these purposes has been approved by the U.S. Supreme Court, which has acknowledged that these measures serve the states' interest in roadway safety. ***Edmond,*** *121 S. Ct. at 453;* ***Sitz,*** *496 U.S. at 455;* ***Prouse,*** *440 U.S. at 658, 663.* Thus, standing alone, the roadblock in this case was proper. And the legitimate purposes of the roadblock were not undercut by the fact that other police units were simultaneously conducting different operations as part of a larger, organized effort. Therefore, that the roadblock in this case met the requirements of the Fourth Amendment.

Evading Roadblocks

Terry v. State, *283 Ga. App. 158 (2007)*: On December 31, 2004, officers of the Carroll County Sheriff's Office conducted a well-marked road check on the campus of the University of West Georgia. At about 11:45 p.m., Officer Stephan Stollar observed a vehicle, subsequently determined to have been operated by Terry, turning into an entranceway leading to buildings that were closed at that time of night. He then backed his vehicle into the roadway and drove away from the roadblock in a direction opposite from the one in which he had been traveling. Stollar testified that he then got into his patrol car, pursued Terry, and stopped his vehicle for two reasons: first, his suspicions were aroused because he believed Terry had taken evasive actions to avoid the roadblock; second, Terry's backing of his vehicle into the roadway had been improper because, in doing so, he had blocked both lanes of travel. According to Stollar, any approaching vehicle would have had to stop

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

to avoid hitting Terry's vehicle. After Stollar approached Terry's vehicle and began to talk to him, he detected a strong odor of alcoholic beverage emanating from his breath and person. As a result of Terry's performance of field sobriety tests, Stollar arrested him for DUI. A chemical test of Terry's breath showed an unlawful blood alcohol concentration.

Terry moved to suppress all evidence gathered after the traffic stop on various grounds, including that Stollar lacked reasonable suspicion of criminal activity to justify initiating the traffic stop in that he had not observed Terry drive erratically or commit any traffic violation. After the trial court denied the motion to suppress, Terry appealed.

Although an officer may conduct a brief investigative stop of a vehicle, such a stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. Investigative stops of vehicles are analogous to Terry-stops, and are invalid if based upon only unparticularized suspicion or hunch. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. This suspicion need not meet the standard of probable

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cause, but must be more than mere caprice or a hunch or an inclination. Abnormal or unusual actions taken to avoid a roadblock may give an officer a reasonable suspicion of criminal activity even when the evasive action is not illegal. Further, an officer's honest belief that a traffic violation has been committed in his presence, even if ultimately proven incorrect, may nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for the stop.

Contrast this case with ***Jorgensen v. State,*** *207 Ga. App. 545 (1993),* where the police set up a roadblock about 200 feet from the entrance to an apartment complex. The officer observed the defendant turn his car into the complex. Although the defendant did so in normal fashion, the officer stopped him based solely on the officer's intuition. The Court of Appeals found the stop illegal, because the record was devoid of any articulable fact which would support the officer's intuition that the defendant was avoiding the roadblock. The Court found no indication in the record of any sharp driving maneuver, sudden turn or reduction in speed or other facts which might tend to show that the appellant's actions were evasive. The rule thus established in ***Jorgensen*** is that completely normal driving, even if it incidentally evades a roadblock, does not justify a Terry-type stop.

In ***Jones v. State****, 259 Ga. App 506 (2003),* the defendant observed a roadblock after traversing the crest of a hill. He then brought his vehicle to an abrupt stop and backed uphill into an intersecting street. The Court held that regardless of whether defendant's abrupt backing maneuver near the crest of a hill turned out to be a traffic violation, it was nevertheless a sufficiently suspicious and deliberately furtive response to the road check so as to give the officer at least a reasonable suspicion of defendant's criminal activity and to warrant further investigation.

The Court of Appeals reached a similar conclusion in ***Castillo v. State****, 232 Ga. App. 354 (1998),* where the defendant who was approaching a road check suddenly decelerated and abruptly turned onto a side street, stopped, backed up onto the main road, and proceeded in the opposite direction from the road check. In ***Taylor v. State****, 249 Ga. App. 733 (2001)* the Court found the defendant's actions sufficiently abnormal or unusual to justify a Terry-type stop where he turned abruptly and drove over a curb into a closed shopping center as he was approaching a roadblock. GTP

····> upcoming training

Joint Prosecutor/L.E. DUI Training
November 5, 2010
Athens-Clarke County Police Department
3035 Lexington Road
Athens, Georgia 30605
8:00 AM - 12:00 PM

Joint Prosecutor/L.E. DUI Training
November 8, 2010
Tybee Island Police Department
78 Van Horne Avenue
Tybee Island, Georgia 31328
8:00 AM - 12:00 PM

Joint Prosecutor/L.E. DUI Training
November 30, 2010
Ware County Sheriff's Office
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Questioning and Interrogations for Criminal Traffic Offenses

By C. Eric Restuccia, Solicitor General for the Attorney General's Office in the State of Michigan

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One of the primary tools of the police in investigating criminal traffic offenses is the ability to question a suspect on the scene at a traffic stop. At these stops, the police may ask questions without providing the suspect his *Miranda* warnings. "So, where are you going?" "Why are in you in such a hurry?" Or for more serious traffic offenses, "how many drinks did you have at the bar before leaving?" "Did you even see the red light before you entered the intersection and struck the other vehicle?" On-the-scene questions are a vital part of police investigation.

Questioning the Suspect on the Scene

The United States Supreme Court has recognized that traffic stops based on reasonable suspicion that there was a traffic violation do not require the provision of *Miranda* warnings because the suspect is "not 'in custody' for the purposes of *Miranda*."[1] The obligation to provide the *Miranda* warnings only attaches once the suspect's freedom is "curtailed to a 'degree association with formal arrest.'"[2] In *Berkemer v McCarty*, the police took two statements from a suspect after stopping him based on his erratic driving. The police initially asked the suspect whether he had been using intoxicants, and he admitted that he had had "two beers and had smoked several joints of marijuana a short time before." After the suspect's arrest and without providing the suspect his rights under *Miranda*, the police asked whether he had been under the influence while driving, the suspect admitted that he had ("I guess, barely")[3]. In concluding that the first statement was admissible (but not the second), the Court determined that it was admissible because the questions asked were not "in-custody" interrogation[4]. Even if not free to leave, a motorist who is not under arrest is not surprised by questions from the police that relate to the stop.

Questioning the Suspect After Arrest

Now, the U.S. Supreme Court has strengthened the ability of the police to ask questions even where the police arrest that suspect. In *Berghuis v. Thompkins*, the U.S. Supreme Court clarified that the police may ask questions of a suspect once that suspect has been arrested in the absence of a waiver of the *Miranda* rights as long as the suspect has acknowledged these rights[5]. The provision of the *Miranda* rights is the key.

In this way, if the police arrest a suspect on the scene and wish to continue questioning, the police must ensure that the suspect acknowledges his rights. As the Supreme Court has recognized, when the police provide a suspect these rights and they are fully comprehended, the inherently coercive setting of custodial interrogation is dispelled[6]. But any voluntary statement given by a suspect after knowingly acknowledging his rights is admissible because it would constitute an implied waiver. This is because a suspect "waive[s] his right to remain silent by making a voluntary statement" where he understands that he need not make a statement[7]. Significantly, the Court also clarified that a suspect must "unambiguously" invoke his right to remain silent[8]. This is bright-line rule for police. Where a suspect only equivocally acts regarding his right to remain silent, there is no obligation to stop questioning. Rather, the suspect must make clear his intention that the questioning stop or that he does not want to talk to the police.[9] This rule is now the same for the right to counsel from *Davis v. United States*[10]. The suspect must act unambiguously in invoking his rights.

For the police, this is clear guidance. The police should inform the suspect of his four rights under *Miranda* prior to any questioning: "(1) that he has the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney; and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[11] Regarding the third right, the Court in *Miranda* was clear that an individual held for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation."[12]

At the same time, however, there is no requirement to include an express waiver of these rights. As *Thompkins* makes clear, the police need not obtain such an express waiver before questioning a suspect. The warnings themselves ensure that a suspect understands that he need not answer questions and may ask for an attorney at any time.

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The facts of *Thompkins* are instructive. In *Thompkins,* the suspect was arrested and was provided his rights under *Miranda* but he refused to sign the notification form. Thompkins "understood his *Miranda* rights" and the police began to question him[13]. Thompkins then remained "largely silent" for then next two hours and 45 minutes but did provide "sporadic answers."[14] At this point, the police asked Thompkins whether he "believed in God," whether he "pray[ed] to God," and whether he asked for forgiveness "for shooting that boy down."[15] Thompkins said "yes" to all three questions. By acting in a manner "inconsistent" with the exercise of his rights—when he knew he did not have to answer the questions—his conduct demonstrated that he was relinquishing his rights.[16] The touchstone of admissibility once the rights are knowingly received by a suspect is voluntariness. This is the focal point of the Fifth Amendment. Consequently, for a suspect arrested on a scene by the police, the police may begin questioning once they have provided a suspect his rights under *Miranda*.

Invocation of Right to Remain Silent

Where a suspect invokes his right to remain silent, the police must scrupulously honor this invocation and stop questioning.[17] A statement may be admissible where the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."[18] The courts have disagreed about whether the police may then re-interview a suspect on the same subject after a significant period of time has passed, i.e., two-to-three hour interval.[19]

Questioning a Suspect on the Scene – Questions Unrelated to the Stop

Of course, even before the police arrest a suspect at the scene of a traffic offense, the police may ask questions of a suspect even if they do not relate directly to the basis for the stop as long as the questions are reasonable under the circumstances.[20] In *Ohio v Robinette*, the U.S. Supreme Court examined a traffic stop conducted by a police officer in which he stopped the defendant for speeding. Based on the stop, the officer obtained the defendant's license and ran a computer check on it, which indicated that the defendant had no prior violations. The officer then asked the defendant to step out of the car, turned on his mounted video camera, gave him a verbal warning, and returned him his license. At this point, the officer asked the defendant "[o]ne question before you get gone: Are you carrying any illegal contraband in your car?" The defendant answered no and then the officer asked for consent to search to the car and obtained it. Consistent with the consent, the officer found a small amount of marijuana in the car.[21]

In finding that the consent search was illegal, the Ohio Supreme Court determined that continued detention was illegal because the motivation underlying the questions was "not related to the purpose of the original, constitutional stop."[22] The U.S. Supreme Court reversed, noting that the subjective intentions of the officer were irrelevant because the test for a seizure's constitutionality was whether the circumstances, viewed objectively, justified the action.[23] The Court also stated that pursuant to the probable cause to stop the defendant for speeding, the officer was justified in asking the defendant to step from the vehicle.[24] The question whether the consent was properly obtained turned on whether the consent was voluntarily given under the circumstances.[25]

Conclusion

Thus, consistent with common sense, the police may ask questions of a person at a traffic stop and even obtain consent for a search as long as the questions are reasonable and the circumstances justify the action taken by the police. GTP

ENDNOTES

1 Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
2 Id. at 440, quoting *California v. Beheler,* 463 U.S. 1121, 1125 (1983)(per curiam).
3 Id. at 423 - 424.
4 Id. at 441-442 ("we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody.").
5 Thompkins, 560 U.S. ___; 130 S. Ct. 2250, 2264 ("Thus, after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights.").
6 Moran v. Burbine, 475 U.S. 412, 427 (1986).
7 Thompkins, 130 S. Ct. at 2264.
8 Thompkins, 130 S. Ct. at 2260.
9 Id. ("Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police.").
10 512 U.S. 452, 459 (1994).
11 Miranda v Arizona, 384 U.S. 436, 479 (1966).
12 Miranda, 384 U.S. at 471.
13 Thompkins, 130 S. Ct. at 2256, 2262.
14 Id. at 2256, 2262.
15 Id. at 2257.
16 See id. at 2261, 2262 ("[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.").
17 Michigan v. Mosley, 423 U.S. 96, 103 (1975).
18 Id. at 105.
19 Compare *Brown v. Caspari,* 186 F.3d 1011, 1015 (8th Cir. 1999)("the fact that the second interrogation involved the same subject matter as the first interrogation did not mean that the second interrogation was unconstitutional") with *Commonwealth v. Walker,* 470 Pa. 534, 545 (1977)("The crucial distinction between the facts of this case and those of *Mosley* is that in *Mosley*, once the accused exercised his "right to cut off questioning," he was never further questioned *about the same crime*. For this reason, the *Mosley* court concluded that the accused's rights had been "scrupulously honored" by the police. I n the instant appeal, however, the subsequent interrogation by the police concerned *the same crime* about which Walker had previously refused to talk. . . . the police here failed to 'scrupulously honor' appellant's right to remain silent about the crime for which he had been arrested and was now being questioned") (emphasis in original).
20 See Ohio v. Robinette, 519 U.S. 33 (1996).
21 Id. at 36.
22 Id. at 37-38.
23 See *Robinette,* 519 U.S. at 38, citing *Whren v. United States,* 517 U.S. 806, 813 (1996).
24 Robinette, 519 U.S. at 38-39, citing *Pennsylvania v. Mimms,* 434 U.S. 106, 111 n. 6 (1977).
25 Robinette, 519 U.S. at 40.

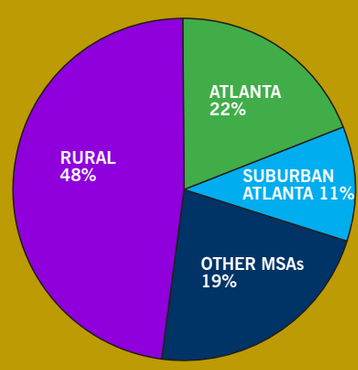
····> georgia motor vehicle fatality report 2009

EXCERPT

In 2009, there were 612 motor vehicle fatalities in 117 rural Georgia counties, accounting for 48% of all motor vehicle fatalities. Traffic fatalities have increased in rural counties since 2000 (GDOT, 2008). Rural counties have more state and county two-way roads, which have historically been the highest risk roads in Georgia (GDOT, 2008). These roads often have no safety barriers; therefore, there is no shoulder or clear zone with trees and posts close to the side. These roads also have frequent entering and exiting vehicle traffic and limited access control. The striping can be worn and difficult to see, increasing the risk for a crash when visibility may be an issue (GDOT, 2008).

Twenty-two percent (22%) of fatalities occurred in the five (5) metropolitan counties surrounding Atlanta. Two hundred seventy-nine (279) deaths occurred in Clayton, Cobb, DeKalb, Fulton, and Gwinnett counties. Outside of Atlanta, the other 22 metropolitan statistical area counties accounted for 19% (242) of motor vehicle fatalities. Suburban Atlanta counties had the fewest motor vehicle fatalities in 2009 with 11% of motor vehicle fatalities.

FATALITIES BY TYPE OF COUNTY



**Pre-2003 census definition was used.*

Five Atlanta Metropolitan Counties: *Clayton, Cobb, DeKalb, Fulton, Gwinnett;* ***Atlanta Suburban Counties:*** *Barrow, Bartow, Carroll, Cherokee, Coweta, Douglas, Fayette, Forsyth, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, Walton;* ***Other Metropolitan Statistical Area (MSA) Counties:*** *Bibb, Bryan, Catoosa, Chatham, Chattahoochee, Clarke, Columbia, Dade, Dougherty, Effingham, Harris, Houston, Jones, Lee, Madison, McDuffie, Muscogee, Oconee, Peach, Richmond, Twiggs, Walker;* ***Rural Counties:*** *All other counties.*

(Courtesy College of Public Health, University of Georgia)

DUI Case Law Update

Compiled By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council

HGN; Number of Passes; Refusal

Duncan v. State, A10A0651, June 28, 2010

Appellant was convicted of driving under the influence of alcohol and drugs, and other traffic offenses. The evidence showed that an officer, upon noting that appellant's truck had no headlights and was crossing the center line, stopped the truck and asked the driver for his license, which was expired. The officer detected a slight odor of alcohol, and asked the appellant to step out of the truck. The officer administered the Horizontal Gaze Nystagmus ("HGN") test, and though he only performed two passes in each eye instead of the seven he was trained to do, he still observed six out of a possible six "clues" for nystagmus. When asked, appellant initially denied having any alcohol, but subsequently admitted he had consumed a beer and had taken Lorcet for his back pain. The officer arrested the appellant for driving under the influence.

Appellant contended that the trial court erred in denying his motion to exclude the HGN evidence because the officer failed to perform the test properly. The Court disagreed. Evidence based on a scientific principle or technique is admissible upon a showing that the general scientific principles and techniques are valid and capable of producing reliable results, and the person performing the test substantially performed the scientific procedures in an acceptable manner. Georgia has already recognized the HGN test as a procedure that meets verifiable certainty in the scientific community, and the trial court was authorized to conclude that because the officer observed six of the six possible indicators of impairment, he did substantially perform the test in accordance with his training. Any testimony about how the test was administered goes to the weight of the evidence, not the admissibility.

Crash with Injuries; Search Warrant; Medical Records; Private Paper

Brogdon v. State, 287 Ga. 528 (2010)

Appellant was convicted of DUI. He contended that the trial court erred in not suppressing the medical records obtained by the State through the use of a search warrant. Specifically, he contended that the medical records were exempt from seizure because the records were "private papers" under OCGA § 17-5-21(a) (5). OCGA § 17-5-21(a)(5) authorizes a judicial officer to issue a search warrant for the seizure of tangible evidence of the offense for which probable cause has been shown, excepting private papers; subsection (a) (1) authorizes the issuance of a search warrant for instrumentalities, including private papers, of the offense in connection with which the warrant was issued; and subsection (b) authorizes the seizure during a lawful search of tangible evidence of the commission of a crime, excepting private papers, and the seizure of any item, including private papers, that is an instrumentality of a crime regardless of whether it is named in the search warrant. Thus, the statute authorizes seizure pursuant to a warrant or during the execution of a lawful search, of private papers that are instrumentalities of the crime in connection with which the search warrant was issued, but the statute does not permit the seizure pursuant to a warrant or during the execution of a lawful search of private papers that are merely tangible evidence of the commission of the crime in connection with which the search warrant was issued.

The Court held that the "private papers" that were subject to OCGA § 17-5-21 (a) (5)'s exemption from a search warrant's coverage were those papers that belonged to the accused or were, at the least, in his possession. Since the medical records that were the subject of the search warrant were neither the personal property of appellant nor were they seized from his possession, they did not constitute the "private papers" that are exempt from coverage of a search warrant in Georgia under OCGA § 17-5-21 (a) (5). In so holding, the Court reviewed its holding in *Sears v. State*, 262 Ga. 805 (1993), determined that it had "deficiencies" in its approach and "disavow[ed] its result."

Directed Verdict; Motion to Suppress

Van Auken v. State, A10A0462, July 6, 2010

Appellant was convicted of DUI and violating OCGA § 40-6-16 (a), Georgia's "move over" statute. Appellant contended that because the trial court found, in denying his motion to suppress, that he did not violate the "move over" statute, the trial court subsequently erred when, at the close of evidence in his jury trial, it failed to direct a verdict on the count alleging this traffic violation. The Court disagreed. A motion to suppress and a motion for a direct verdict of acquittal involve different evidentiary frameworks. In ruling on a motion to suppress, the trial court sits as the trier of fact and thus is charged with resolving any conflicts in the evidence and assessing the credibility of the witnesses. In contrast, in ruling on a motion for a directed verdict of acquittal, the trial court does not assume the role of factfinder. Rather, the trial court must view the evidence in the light most favorable to the State, and the court can grant the motion only where there is no conflict in the evidence and no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Thus, the Court held, given these different modes of analysis, the trial court's finding regarding the "move-over" violation made in the context of the suppression order cannot be treated as the equivalent of a finding that the evidence demanded a verdict of acquittal on that count as a matter of law.

DUI; Discovery, Intox Printout

State v. Tan, A10A0687, July 8, 2010

Tan was charged with DUI. The State appealed from an order suppressing the breath test slip from the Intoxilyzer 5000 and all testimony regarding the intoxilyzer. The evidence showed that Tan initially agreed to a breath test, but then kept spitting out the mouthpiece and eventually, the Intox 5000 timed-out, producing a breath test slip showing an insufficient breath sample. Tan moved to suppress the evidence regarding the slip and the breath test because the slip was not produced in discovery under OCGA § 17-16-23 as a scientific report within 10 days of trial. The trial court agreed and suppressed the evidence.

The Court reversed. The breath test slip in this case does not constitute a written scientific report within the meaning of OCGA § 17-16-23. Under OCGA § 17-16-23 (a), a written scientific report subject to discovery "includes, but is not limited to, . . . blood alcohol test results done by a law enforcement agency or a private physician; and similar types of reports that would be used as scientific evidence by the prosecution in its case-in-chief or in rebuttal against the defendant." An intoxilyzer measures a person's blood alcohol concentration from a breath sample given by blowing into the machine, which then produces a printout of the test results. Thus, an intoxilyzer printout showing the results of the instrument's analysis of the blood alcohol concentration in a defendant's breath would be subject to discovery under OCGA § 17-16-23. Here, however, no test or analysis was performed because the sample was insufficient, and the breath test slip does not show any test results. It reflected only a measurement of breath volume. There was no analysis by the instrument of that breath volume. Accordingly, the Court concluded, a printout reflecting an "insufficient sample," and thus no analysis and no result, is not subject to discovery under OCGA § 17-16-23.

DUI; Cerebral Palsy; HGN Tests

Harris v. State, 301 Ga. App. 775 (2009)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. Specifically, he argued that because he had cerebral palsy, the results of the HGN test should have been excluded because they were unreliable. The Court stated that evidence of HGN test results are admissible if the party offering the evidence shows that (a) the general scientific principles and techniques involved are valid and capable of producing reliable results and (b) the person performing the test substantially performed the scientific procedure in an acceptable manner. Appellant conceded that the test generally meets the criteria in section (a), but argued that the officer incor-

rectly performed the HGN test on him given his medical condition. The Court, "[w]hile… sympathetic to [appellant's] condition," found that he failed to meet his burden of showing error in the administration of the HGN test. He presented no scientific evidence or testimony to establish the unreliability and thus the inadmissibility of HGN test results when the HGN test is given to an individual with cerebral palsy. Also, the Court found, in any event, such matters would go to the weight of the evidence and not its admissibility. Moreover, the officer administering the HGN test testified that he had received specialized training in field sobriety tests and that he had even more classes in addition to those mentioned to learn how to properly perform the HGN test. Although appellant argued that the officer did not perform the test according to the standardized techniques, he did not support his arguments with any citation to the record and the officer never admitted he performed the test improperly. The officer merely testified on cross-examination regarding factors other than alcohol that could cause nystagmus and create false results. The officer's performance was also captured on video, and the video was admitted into evidence. Therefore, since appellant failed to show error on the record in the trial court's finding that the test was properly administered, there was no error in denying appellant's motion to suppress his HGN test results.

Weaving; Braking; Reasonable Articulable Suspicion

Ivey v. State, 301 Ga. App. 796 (2009)

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. Specifically, he contended that the officer did not have reasonable, articulable grounds for stopping his vehicle. The officer testified that he observed appellant driving erratically by braking for no reason, abruptly turning back into a shopping center parking lot that he had just exited, and drifting from the left side of his lane to the right side to the extent that his rear-view mirror crossed into the fog line. The Court held the officer had sufficient reason for the stop because weaving, both out of one's lane and within one's own lane, particularly when combined with other factors, may give rise to reasonable articulable suspicion on the part of a trained law enforcement officer that the driver is violating the DUI laws. The Court also rejected appellant's argument that his acquittal of the charge of failure to maintain lane supported his contention that the officer had no reasonable articulable suspicion justifying the traffic stop. In fact, the Court stated, conduct forming the basis for reasonable suspicion need not even be a violation of the law.

DUI; Probable Cause to Arrest

State v. Damato, 302 Ga. App. 181 (2010)

Damato was charged with DUI. The trial court granted her motion to suppress finding that the officer lacked probable cause to arrest. The evidence showed that Damato was involved in a one-car accident at 4:00 a. m. The officer on the scene smelled a strong odor of alcohol on her breath and noticed that Damato's eyes were bloodshot and her skin was "slightly paled." She admitted having a couple of drinks "earlier in the evening." The officer did not administer field sobriety evaluations and an alco-sensor test registered positive.

The Court stated, "[W]e have repeatedly held that the odor of alcohol on a driver's breath or a positive result on an alco-sensor test shows only the presence of alcohol and does not support an inference that the driver is intoxicated and it is less safe for her to drive." Here, the odor of alcohol on Damato's breath, her admission that she had a few drinks earlier in the evening, and a positive result on an alco-sensor test did not provide probable cause to arrest her for DUI several hours after the consumption of alcohol. Similarly, bloodshot eyes and slightly paled skin may support a finding of impairment, but such evidence does not require a finding of impairment. The Court noted that while the officer testified that he believed Damato was a less safe driver, the trial court obviously chose not to believe the officer's opinion, and it could not second-guess the trial court or use the officer's opinion in its analysis of whether probable cause existed to arrest Damato. Therefore, the Court upheld the trial court's finding that the evidence was insufficient to support Damato's arrest for DUI (less safe).

The Court also upheld the trial court's finding that the evidence was insufficient to support Demato's arrest for DUI (per se). No evidence was presented that her blood alcohol concentration exceeded .08 grams.

DUI; Loud Music Probable Cause to Arrest

Brown v. State, 302 Ga. App. 272 (2010)

Appellant was convicted of DUI (less safe); Dui (per se); possession of marijuana (misdemeanor); and violating the sound volume limits for devices within motor vehicles. He contended that the trial court erred in denying his motion to suppress because the officer lacked probable cause for arrest. Specifically, he argued that the officer observed no moving violations, failed to conduct field sobriety tests, and failed to ask whether he had been drinking that night. The Court disagreed. The evidence showed that the officer heard the music emanating from appellant's car before he saw the vehicle and initiated a traffic stop. The officer observed that appellant had trouble getting out of his car, that he was unsteady on his feet and almost fell, that his eyes were glassy and blood-shot, that his body and breath smelled of an alcoholic beverage, that he had marijuana (an illegal intoxicant) in his possession, and that he was driving at night while playing his music loud enough to be heard three quarters of a mile away. This was sufficient probable cause to arrest appellant for DUI.

DUI; Probable Cause to Arrest, Refusal

State v. Encinas, 302 Ga. App. 334 (2010)

The State appealed from the trial court's order suppressing evidence of Encinas' refusal to take the state administered test. The trial court found that the arresting officer lacked probable cause to arrest. The evidence showed that appellant was stopped for doing 70 in a 55 mph zone. The officer testified that Encinas had bloodshot eyes, an odor of alcohol and failed the HGN test. Encinas refused to comply with any other field sobriety tests. The trial court found this insufficient to arrest for DUI. The Court noted that except for the bloodshot eyes and the smell of alcohol, the officer acknowledged that Encinas did not exhibit other signs of being impaired; he was not unsteady on his feet, nor was his speech slurred. Further, the officer acknowledged that the HGN test was not performed by the officer according to proper procedure.

The State argued that the Court should review the facts de novo and that probable cause to arrest can be supported merely by an experienced officer's observation that a defendant exuded the odor of alcohol and had bloodshot watery eyes. The Court held that de novo review is only appropriate where the facts are stipulated or uncontested. Here, the testimony was conflicting and therefore, the facts as found by the trial court must be judged under a clearly erroneous standard of review. Here, there was no evidence that alcohol affected Encinas' ability to drive and upheld the trial court's determination that there was not probable cause to arrest even though the officer testified that the defendant exuded an odor of alcohol, had bloodshot watery eyes, and refused to take any field sobriety tests. Moreover, there was also the videotape of the stop showing no evidence or erratic driving and Encinas showing no evidence of being impaired.

Hospital Records; Search Warrant; Diabetic

Stubblefield v. State, 302 Ga. App. 499 (2010)

Appellant, a diabetic, was convicted of DUI (less safe). The evidence showed that he refused to take the state-administered test. He was taken to a hospital for his diabetic condition. The police then obtained a search warrant for his hospital records and the results of his blood test taken at the hospital were admitted at trial over his objection. Appellant contended that the trial court erred in admitting these results. First, he argued, the search warrant was overly broad. The Court disagreed, finding that the warrant was sufficiently particularized because it was drafted to seek only the hospital's medical records related to his treatment immediately after the traffic stop. Next, he argued, the return on the warrant was untimely. But, the Court held, the fact that a written return of the warrant was not made in a timely fashion, as provided in OCGA § 17-5-29, did not render the warrant invalid. Here, appellant did not contend that he did not receive a copy of the inventory of

the medical records seized prior to trial, and he made no showing of prejudice as a result of the delayed filing. Under these circumstances, the delay was a technical irregularity not affecting substantial rights, and the trial court properly refused to suppress the records.

Appellant also argued that the physician who administered the blood test to him in the hospital emergency room testified that the test result showed that he had an alcohol level of 287 milligrams per deciliter, and that this equaled .287 grams per deciliter. He contended that the trial court erroneously overruled his objection that the physician had not been qualified as an expert capable of calculating that .287 grams equals 287 milligrams. The Court found that although the State did not formally tender the physician as an expert, the trial court tacitly or impliedly accepted her as an expert after her medical qualifications were presented and the State proceeded, without objection, to ask her for expert opinion evidence. Having testified that the test result showed an alcohol level of 287 milligrams per deciliter, the physician did not have to demonstrate additional expert qualifications to make the simple mathematical calculation that 287 milligrams equals .287 grams. The Court then stated it would take judicial notice that a milligram is a unit of mass equal to one thousandth of a gram.

Self-Incrimination, Field Sobriety Tests

Bramlett v. State, 302 Ga. App. 527 (2010)

Appellant was convicted of DUI. He argued that the trial court erred in denying his motion to suppress the results of his field sobriety tests. The evidence showed that appellant was stopped for speeding. The officer observed manifestations of intoxication. The appellant refused a preliminary breath test, but agreed to take a couple of field sobriety tests. Appellant contended that these tests violated his constitutional right against self-incrimination under our State Constitution. The Court disagreed. Ga. Const. of 1983, Art. I, Sec. I, Par. XVI provides that "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating." The term "testimony" in this constitutional provision includes all types of evidence. Thus, it protects against oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature. Citing *Montgomery v. State*, 174 Ga. App. 95 (1985), and *Clark v. State*, 289 Ga. App. 884, 885 (1) (2008), the Court found that appellant was neither threatened with criminal sanctions for his failure to perform the tests nor was he physically forced to do the tests. There was no show of force tantamount to an actual use of force and he did not refuse to perform the tests. Moreover, under Georgia law, an investigating officer is not required to advise a suspect that his performance of field sobriety tests is voluntary. Therefore, the evidence authorized the trial court to find that appellant voluntarily performed the field sobriety tests after being asked by the officer to do so.

Alcohol, Xanax, Ambien; Intent

Myers v. State, 302 Ga. App. 753 (2010)

Appellant was convicted of DUI. She contended that the trial court erred by failing to charge the jury on her sole defense that she lacked the intent to drive under the influence. The evidence showed that appellant drove while under the influence of alcohol, Xanax an Ambien. She testified that she had no recollection of the events that occurred between her taking a second Ambien and waking up in jail.

Citing *Crossley v. State*, 261 Ga. App. 250 (2003), the Court held that driving under the influence and reckless driving are crimes malum prohibitum, the criminal intent element of which is simply the intent to do the act which results in the violation of the law, not the intent to commit the crime itself. The State is not required to prove that the defendant intended to drive under the influence. Rather, it is required to show only that while intoxicated, the defendant drove. The trial court's charge regarding intent was aligned with the holding in *Crossley*. Therefore, the trial court did not commit reversible error.

DUI Drugs & Less Safe; Cocaine Metabolites; Constitutional Challenge

Head v. State, 303 Ga. App. 475 (2010)

Appellant was convicted of DUI-less safe, in violation of OCGA § 40-6-391 (a) (2). He was also convicted of driving with a controlled substance in his blood (alprazolam and cocaine), in violation of OCGA § 40-6-391 (a) (6). He contended that the evidence was insufficient to support his less safe conviction. The Court agreed. The evidence showed that appellant's vehicle collided with a bus, but only the bus driver was cited. During the investigation, the officer determined that appellant had a clear line of sight and what appeared to be time to avoid the accident, yet he saw no evidence that appellant attempted to stop prior to the collision and had made only a last moment attempt to swerve. The officer smelled alcohol on appellant and cited him for DUI-less safe.

The Court held that to sustain a conviction on DUI-less safe, it is not sufficient to show merely that appellant was driving after having ingested, at some point in time, alprazolam and cocaine. Rather, the State must prove that appellant was a less safe driver as a result of being under the influence of these drugs. Here, the State presented evidence that appellant had alprazolam and a cocaine metabolite in his blood, and further presented the officer's opinion testimony that appellant should have been able to avoid the collision. But, the Court found, the record contained no evidence tending to explain the significance of the alprazolam and cocaine metabolite present in appellant's blood, i.e., whether the quantity of the drugs was considered sizeable; whether the quantities indicated recent or merely past usage of the drugs; or what effect the level of drugs found in his blood would have on the average person, specifically whether those drugs would cause any physical and/or mental impairment. Appellant also elicited expert testimony that the presence of benzoylecgonine in one's blood is not indicative of any impairment because it is the after-effect of cocaine. The Court concluded that the record was completely devoid of any evidence tending to show that appellant was a less safe driver as a result of being under the influence of alprozalam and cocaine, and therefore reversed his conviction on this count.

Implied Consent; Intox Room; Coercion

State v. Rowell, 299 Ga. App. 238 (2009)

The State appealed from an order suppressing the results of Rowell's breath test. The evidence showed that Rowell was stopped after being observed driving in an unsafe manner. The officer smelled alcohol emanating from her and asked her to complete some field sobriety tests. Rowell's performance indicated to the officer that she was intoxicated, so he asked her to undergo an Alco-Sensor test. Rowell declined. The officer then placed her under arrest and read her the implied consent warnings. Rowell refused to submit to a state-administered chemical test. The officer then transported her to jail. Later, he again asked her whether she would submit to a breath test. Rowell asked what would happen if she was under the legal limit and the officer told her she could go home to her son.

The Court emphasized that it does not second guess the credibility determinations of the trial court. A law enforcement officer may attempt to persuade an accused to rescind her refusal to submit to chemical testing, as long as the procedure utilized by the officer in attempting to persuade a defendant to rescind her refusal is fair and reasonable. Here, the trial court concluded that the procedure utilized by the officer to persuade Rowell to rescind her refusal — telling her that she could go home to her son if she blew under the legal limit — was not fair or reasonable. As the ruling in this case depended on the credibility of the witnesses and the trial court correctly applied the law, the Court affirmed the grant of Rowell's motion to suppress. GTP

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····> fact:

Every day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes. The annual cost of alcohol-related crashes totals more than $51 billion.

-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.