



# DPS Legal Review

May 2010 Legal Services (404) 624-7423 Volume 9 No. 5

## USE OF FORCE

A fifteen-year-old boy modified a plastic air pistol to look like a weapon and took it to school. His teacher learned that the boy was armed. As students fled the classroom, the boy held at least one classmate hostage. By the time the police arrived, the hostage had escaped. The boy left the classroom and made his way through the campus.

A Seminole County Sheriff's Officer confronted the boy and told him to drop the weapon. The boy held the gun under his chin and said he was going to die one way or another. Then the boy went into a bathroom with a single entrance. A Sheriff's Deputy tried to convince the boy to drop his weapon. While a hostage negotiator tried to talk to the boy, a SWAT team member fired a single shot which struck the boy in the head. The boy did not point his weapon at the negotiator, and the negotiator said that he did not feel threatened. After the shot was fired, the law enforcement officers entered the bathroom and discovered that the gun was not real. The boy died two days later. The boy's parents sued alleging excessive use of force and deprivation of Fourth Amendment rights.

**HOLDING:** The Court held that the Officer was entitled to qualified immunity after balancing three factors: 1.) the severity of the crime, 2.) whether the boy posed an immediate threat to the officers or others, and 3.) whether he actively resisted arrest. The Court held that bringing a firearm to school, threatening the lives of others, and refusing to drop the weapon are serious crimes. The Court held that the Officer's conduct was objectively reasonable and that the Officer had probable cause to believe that the boy posed a threat of great bodily harm to himself and others. Qualified immunity offers complete protection for officers when their conduct does not violate clearly established statutory or

constitutional rights. Penley v. Eslinger, \_\_ F.3d \_\_, 2010 WL 1741557 (C.A. 11( Fla.)).

## UNLAWFUL FRISK

An officer stopped a pick-up truck for a broken tail light. The Defendant was a passenger in the truck. The truck's driver consented to the officer's request to search his truck. A backup officer, who was watching the Defendant, asked him to step out of the truck before the search began. The Defendant did not display any sign of being armed and dangerous. The Defendant did not speak English well. The officer did a pat-down of the Defendant's clothing for weapons and felt a lump.

The officer removed the object, almost a kilo of cocaine. The officer said that the Defendant was breathing heavily and his carotid artery in his neck was pounding more than an average person, before he exited the car. The Defendant moved to suppress the cocaine arguing the pat-down was unlawful absent articulable suspicion that he had a weapon or that the officer might be in danger.

**HOLDING:** The Court suppressed the evidence. The Court held that neither the first officer (who pulled the truck over) nor the backup officer (who searched the Defendant) thought the Defendant posed a threat of any kind. One officer described the Defendant as "pretty normal" other than his heavy breathing and pounding pulse. The Court held the testimony that a passenger was breathing hard with a pounding pulse does not establish a reasonable suspicion that he poses a danger to the officer's safety. The Court held that the law requires that the officer reasonably suspected the Defendant posed a threat to the officer's safety. It is not sufficient to say the situation itself poses a danger to the officer. Molina v. State, \_\_ S.E.2d \_\_, 2010 WL 1931018 (Ga. App.).

## IMPEDING FLOW OF TRAFFIC

An officer from the City of Morrow Police Department was conducting speed enforcement

on I-75 through Clayton County. While the officer was stationary, a vehicle driven by the Defendant passed in the far left of three lanes. Two other vehicles moved into the center lane to pass the Defendant. The officer initially said the cars were traveling at the speed limit, but he subsequently said those two cars may have been exceeding the speed limit. The Defendant was traveling 48 miles per hour in an area where the speed limit changed from 65 to 55 miles per hour (with a posted minimum speed limit of 40 miles per hour).

When the officer initiated the traffic stop, the Defendant apologized for going fast. The officer thought he might be intoxicated because of his unusual response, coupled with his nervous demeanor, and the constricted dilation of his pupils. The officer asked him if he had taken any medication. The Defendant admitted that a few hours earlier he had taken two or three Darvocet pills, a prescription pain medication.

The officer asked the Defendant to exit the vehicle. While the Defendant was at the rear of the vehicle, he looked around in a restless manner and patted his groin area. Because of this behavior, the officer did a pat-down search of the Defendant's outer clothing. The officer noted a "hard cylinder object" in the Defendant's groin area. The Defendant told him it was a pill bottle.

The officer pulled the Defendant's shorts away from his body to confirm it was a pill bottle and asked him to remove it. The Defendant pulled the pill bottle from his shorts, and he opened it to show the officer that it contained Darvocet and another prescription pain medication. The officer asked him whether he had a prescription for the pills. The Defendant said he did not. He was arrested and charged with possession of a controlled substance, possession of a dangerous drug not in its original container, driving under the influence of drugs, and impeding the flow of traffic. He moved to suppress the evidence arguing that the officer lacked articulable suspicion to stop him or conduct a pat-down search.

**HOLDING:** The Court suppressed the evidence. The Court held that the statute prohibiting impeding the flow of traffic does not apply where, as here, the driver is being overtaken by another vehicle that is exceeding the maximum speed limit. In such a context, the other vehicle is not overtaking the driver because the latter is impeding the flow of traffic by traveling unreasonably slow, but rather because the other vehicle is traveling unreasonably fast in violation

of the traffic laws. State v. Parke, \_\_\_ S.E.2d \_\_\_, 2010 WL 1962669 (Ga. App.).

### **INQUIRING MINDS**

**QUERY:** Should individuals charged under O.C.G.A. § 40-5-20 (driving without a valid license) or O.C.G.A. § 40-5-121 (driving while license suspended or revoked) be fingerprinted?

**ANSWER:** Yes. The Attorney General has designated both as misdemeanors for which those charged should be fingerprinted. See 2008 Op. Att'y Gen. 2008-6 and 2009 Op. Att'y Gen. 2009-1.

### **ALS REMINDERS**

☞ If you need a copy of a final decision on an ALS case that occurred after July 1, 2009, you may visit the OSAH website at [www.osah.ga.gov](http://www.osah.ga.gov) to secure the final decision. You will need the docket number, the petitioner's zip code, and you will need to know if the petitioner was represented by an attorney. You may also contact either Dee or Beverly to obtain a final ALS decision.

☞ If you have failed to appear on your ALS case because you did not receive a hearing notice from OSAH, please contact either Dee or Beverly as soon as possible. A motion to vacate the default can be filed within 10 days of the final decision to request that the case be reset on the ALS calendar.

☞ Remember that a defendant must be under arrest for DUI before the implied consent card is read (unless the case involves a wreck with a serious injury or fatality). In a DUI case that involves a wreck with a serious injury or fatality, the defendant does not have to be under arrest before the implied consent card is read. However, there must be probable cause to believe that the defendant was DUI of alcohol or drugs. The serious injury must be one of the following injuries: 1.) one or more persons suffered a fractured bone, 2.) severe burns, 3.) disfigurement, 4.) dismemberment, 5.) partial or total loss of sight or hearing, or 6.) loss of consciousness.

### **QUOTABLE WISDOM WORKS**

**"True heroism is remarkably sober, very undramatic. It is not the urge to surpass all others at whatever cost, but the urge to serve others at whatever cost."**

**-Arthur Ashe**

Published with the approval of Colonel Bill Hitchens. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and Dee Brophy, ALS

Attorney. Send questions/comments to [jbunn@gsp.net](mailto:jbunn@gsp.net).