



# DPS Legal Review

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## **CRIMINAL PROSECUTION IMMUNITY**

A former Atlanta Police Department officer was charged with murder, felony murder and aggravated assault. The Defendant officer's charges arose out of the shooting death of a suspect while the officer was on routine patrol. The officer and his partner spotted an apparent break-in. They moved their vehicle to block one of the exits from the parking lot where the break-in was allegedly taking place. The alleged burglar jumped into a van, and drove towards the officers.

The officers shouted for the driver to stop. As the van's driver continued towards the officers, the Defendant officer shot and killed him. Thereafter, the officer was indicted and charged. The Defendant sought immunity from prosecution on the basis that he reasonably believed his actions necessary to prevent imminent death or great bodily injury to himself or his partner.

**HOLDING:** The Georgia Supreme Court held that the Defendant officer was immune from prosecution because he acted in self-defense in discharging his service weapon. Despite conflicting evidence, the Court held that a preponderance of the evidence supported this conclusion. Preponderance of evidence means that superior weight of evidence upon the issues involved, which is not enough to free the mind wholly from reasonable doubt, is enough to incline a reasonable and impartial mind to one side of the issue rather than to the other. State v. Bunn, \_\_ S.E.2d \_\_, 2010 WL 3619964 (Ga.).

## **SUFFICIENCY OF THE EVIDENCE**

A Douglasville Police Department narcotics detective stopped a car driven by the Defendant. After the Defendant exited, he told the officer that he and his passenger (a nephew who was blind) were returning to their homes in Alabama after visiting the Defendant's sister in Atlanta. He produced his driver's license and said that his automobile registration was in the car's glove

compartment. He gave the officer permission to get the car's registration. When the nephew opened the car door for him, the officer detected the scent of burnt marijuana coming from the car's ashtray and from the nephew's person. The officer retrieved the car's registration and asked the Defendant if he had any marijuana in the car. The Defendant said he did not. The Defendant consented to a search which revealed a brown paper bag with two packages of small, clear plastic bags (commonly used for packaging narcotics for resale). Thereafter, Defendant told the officer his nephew had come to Atlanta to purchase crack cocaine.

The officer disclosed to the nephew what the Defendant had said, and he asked him for any drugs in his possession. During a consensual search of the nephew, the officer removed 6 bags of marijuana and 14 pieces of individually-packaged crack cocaine from his pockets. Both men were arrested. While transporting them to jail, the officer asked them whether they had any other contraband. The Defendant admitted having a bag of marijuana in his pocket, and his nephew admitted having a scale used to weigh drugs in his sock. The Defendant alleged that the evidence was insufficient to sustain his conviction for possession of cocaine.

**HOLDING:** The Court held that the evidence established that the Defendant drove his nephew to Atlanta for the purpose of purchasing drugs. Further, the Defendant helped his nephew negotiate the purchase of both the marijuana and the cocaine. The Court held that the conclusion that the Defendant assisted his nephew in his efforts to possess the cocaine was strengthened by the fact that the nephew was blind. The nephew could not have driven himself to locate the drugs, and he could not have completed the purchase by himself. Thus, the Court held that the evidence was sufficient to support the Defendant's conviction as a party to the crime of possession of cocaine. Wade v.

State, \_\_ S.E.2d \_\_, 2010 WL 3432263 (Ga. App.).

### INVALID SEARCH

A police officer received a dispatch that a male and female had been seen peering into and pulling door handles of vehicles parked in a large shopping center parking lot. As she pulled her patrol vehicle into the shopping center parking lot, she saw the Defendant and a female companion who matched the dispatch description. Both were standing near the Defendant's parked vehicle.

The officer exited her car and asked the Defendant to move away from his vehicle and come toward her. He complied and told her that he had been hired by a local business to place advertisements on cars parked in the lot. While the Defendant was being questioned, another officer arrived. Believing the Defendant was attempting to break into parked vehicles, the second officer arrested him for loitering.

After arresting him, the second officer searched the interior of the Defendant's car and found a small amount of marijuana. The Defendant was charged with possession of one ounce or less of marijuana and one count of loitering. The Defendant moved to suppress, arguing that the search of his vehicle was not a proper search incident to arrest under either Arizona v. Gant, \_\_ U.S. \_\_, 129 S. Ct. 1710 (2009), or the automobile exception.

**HOLDING:** The Court held that the State had the burden of proving that the Defendant was within reaching distance of his vehicle's passenger compartment at the time of the search in order to assert the search as valid incident to arrest. Because the State failed to meet its burden of demonstrating that it was reasonable to believe the Defendant's vehicle contained evidence of the loitering offense, the Court held that the search was not reasonable under Gant. Likewise, the search under the automobile exception was not reasonable. The Court held that, other than the dispatch, there was no evidence that the Defendant was breaking into automobiles, and mere suspicion does not amount to probable cause. Holsey v. State, \_\_ S.E.2d \_\_, 2010 WL 3548464 (Ga. App.).

### LICENSE PLATE OBSTRUCTION

Trooper Ray Malone saw a bracket around the Defendant's out-of-state license plate blocking the view of the registration expiration date. After pulling the Defendant over for this violation, he noticed an overwhelming odor of air

freshener coming from the car. He directed the Defendant to the rear of the car to discuss the tag violation. The Defendant said he was in Atlanta visiting his sister, but he appeared nervous and was unable to identify where his sister lived. His passenger said they were in Atlanta visiting a friend. When the Defendant refused consent to a search, Trooper Malone called for back-up to perform a free air search, which indicated the presence of drugs. Two pounds of marijuana were found in the trunk of the Defendant's vehicle. The Defendant moved to suppress this evidence.

**HOLDING:** The Court held that the legibility and display portions of O.C.G.A. § 40-2-41 apply to any vehicle whether registered in Georgia or out of state. The facts combined with the Defendant and his passenger's conflicting stories were sufficient to support detention for further investigation, such as a free air search. Wilson v. State, \_\_ S.E.2d \_\_, 2010 WL 3516757 (Ga. App.).

### INQUIRING MINDS

**QUERY:** Is it permissible for minors to ride in the bed of a pickup truck?

**ANSWER:** No. Minors are not allowed to ride in the bed of a pickup truck since the bed lacks a restraint system. The Court has held that a driver cannot avoid the mandatory seatbelt requirement for a minor by forcing the minor to ride in the bed of a pickup truck. The legislature intended that minors riding in pickup trucks be required to wear seatbelts. See State v. McDuff, 252 Ga. App. 183, 555 S.E.2d 213 (2001).

### ALS REMINDERS

⦿ If an additional witness is involved in your case, please remember to include on the incident report all of their contact information (name, agency, address, phone number, fax number, etc.).

⦿ When testifying in Court regarding the Standardized Field Sobriety Tests, please remember to explain the meaning or conclusion that was drawn from the number of clues that were observed during the tests.

### QUOTABLE WISDOM WORKS

**"The measure of who we are is what we do with what we have." ~ Vince Lombardi**

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