Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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JULY 13, 2016

Bailey v. State

The State may not draw blood from an unconscious defendant under the Georgia Implied Consent laws in the absence of actual, voluntary consent, a search warrant, or demonstrated exigent circumstances

In *Bailey v. State*, A16A0200 (July 13, 2016), the defendant, Elmer Bailey, seriously injured himself in a traffic accident after crossing the center line and striking an embankment. Drugs and drug-related paraphernalia were found at the scene. He was unconscious when a trooper arrived at the hospital. The trooper directed that Bailey's blood and urine be drawn. Pursuant to O.C.G.A. § 40-5-55 and O.C.G.A. § 40-5-67.1, an unconscious driver shall not be deemed to have withdrawn the implied consent given by operating a motor vehicle. The blood and urine tests came back positive for amphetamines, methamphetamines, morphine, and hydrocodone. The defendant was charged with DUI Per Se (Driving with methamphetamine present in his blood and urine), and DUI Less Safe combination (less safe due to the presence of all four drugs listed above.) After his motion to suppress was denied, a jury convicted him of both counts, as well as other related charges not appealed.

The full Court of Appeals found that the trooper complied with the Implied Consent statutes given that he had reasonable grounds to believe Bailey had operated a motor vehicle and was involved in a traffic accident with serious injuries. The Court then considered the issue of the defendant's lack of consent, restating the position that mere compliance with the Implied Consent Statute does not necessarily satisfy the Fourth Amendment. The Court expressly held that the Georgia Implied Consent law is insufficient to justify the taking of blood from an unconscious driver under the Fourth Amendment. Therefore, Bailey could not have given consent under the Fourth Amendment to the search and seizure of his blood and urine because he was unconscious. In so holding, the Court specifically disapproved of *Gilliam v. State*, 295 Ga.App. 358 (2008); *Hill v. State*, 208 Ga.App. 714 (1993) and *Rogers v. State*, 163 Ga.App. 641 (1982) to the extent they authorized taking blood from unconscious suspects in conflict with *McNeely v. Missouri*, 133 S.Ct. 1552 (2013 and the Georgia Supreme Court's recent holding in *Williams v. State*, 296 Ga. 817 (2015).

The Court next turned to the issue of whether exigent circumstances could justify the warrantless search and seizure of Bailey's blood and urine. The Court stated that in *McNeely*, the Supreme Court did not foreclose the possibility that exigent circumstance could support a warrant seizure of blood in a DUI case. And, the Court noted, the facts here may have satisfied the requirements in which the *McNeely* Court stated exigent circumstances could be found. But, the State failed to produce such evidence to demonstrate the existence of exigent circumstances.

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Therefore, because the blood and urine were improperly seized, the Court threw out Bailey's conviction for DUI Per Se. The Court also reversed his conviction for DUI Less Safe, finding there was insufficient admissible evidence to establish Bailey's less safe driving while under the influence of the drugs listed in the indictment. Since Bailey was not on notice of being charged with being under the influence of any other combination of drugs, the Court further held that the State could not retry him on any of the DUI charges.

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