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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: J.E. Kemp

*It is a well-known fact that the Uniform Rules of the Road do not apply everywhere in Georgia that an automobile can be driven. But where do the rules apply? How can officers and prosecutors determine whether they are enforceable in a particular location? In this issue, Traffic Safety Resource Coordinator Fay McCormack takes a close look at the Georgia laws governing traffic enforcement on private property, in neighborhoods, and other unconventional locales.*

### *feature articles*



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# Enforcement of Traffic Laws on Private Property

**By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia**

O.C.G.A. § 40-6-3 provides that the Uniform Rules of the Road, as set out in O.C.G.A. Title 40, Chapter 6, relating to the operation of vehicles, refer to the operation of vehicles upon the highway. However, the exceptions in this code section give law enforcement officers the authority to issue citations and make arrests on private property in the same manner they would if the violation occurred on the highway, roadway or street.

Officers can enforce the Uniform Rules of the Road in shopping centers, parking lots or similar areas which, although privately owned, are customarily used by the public as through streets or connector streets. "Similar areas" would include the driveways and parking lots of churches, schools and universities, government and private enterprises, and other places of the same nature. There are a few specific offenses that can be enforced within 200 feet of all such highways, parking areas, and areas customarily open to the public. They are:

- Leaving the Scene of an Accident/Hit and Run (O.C.G.A. § 40-6-270);
- Failure to Notify Owner upon Striking Unattended Vehicle (O.C.G.A. § 40-6-271); and
- Failure to Notify Owner after Striking Fixture (O.C.G.A. § 40-6-272).

In addition, Georgia law specifies that certain offenses apply to vehicles operated on highways *and elsewhere* throughout the State. These offenses are:

- Driving under the Influence (O.C.G.A. § 40-6-391);
- Reckless Driving (O.C.G.A. § 40-6-390); and
- Homicide by Vehicle (O.C.G.A. § 40-6-393).

In *Madden v. State*, 252 Ga. App. 164 (2001), the defendant was arrested and convicted for DUI after a mobile home community resident alleged he was attempting to run over a man with his truck. The Court of Appeals held that the DUI statute draws no distinction between driving on public roads versus private thoroughfares, and the fact that the act was committed on private property did not immunize the defendant from prosecution for this crime. Similarly, in the Peachtree City, Georgia case of *Simmons v. State*, 281 Ga. App. 252 (2006), the Court of Appeals affirmed a DUI conviction where the defendant contended that golf carts driven on a municipal trail system were outside of the provisions of Georgia's DUI laws. The Court held that under O.C.G.A. § 40-6-3(a)(3), the provisions of O.C.G.A. § 40-6-391 apply *anywhere* in Georgia, whether on a street, highway, or private property.

Pursuant to O.C.G.A. § 40-6-3 (5), the Uniform Rules of the Road also apply to vehicles operated on any private property which fronts on coastal marshlands or estuarine areas as defined in O.C.G.A. § 12-5-282, provided that the owner of the private property files with the local law enforcement agency having primary jurisdiction to enforce traffic laws in that area. After the owner has made the required filing, the affected law enforcement agency can then enforce the traffic laws on the affected private property either at no cost to the owner, or it can enter into a contract with the owner of the property whereby the owner consents to pay all or part of the enforcement expenses. At least 30 days' notice must be given to users of these private roads, streets and common areas by publication in the newspapers of general circulation in the area and by posting signs along the private roads and streets specifying that state and local law enforcement agencies will be enforcing the Uniform Rules of the Road on these private roads, streets and common areas.

The Uniform Rules of the Road can also apply to vehicles operated in a privately owned residential area located within the corporate boundaries of a municipality or located within the boundaries of a county under the provisions of O.C.G.A. § 40-6-3 (6). The owner of the privately owned residential area must file with the governing authority of such county or municipality the following documents:

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

(a) a petition signed by 50 percent of the property owners located in said subdivision requesting the law enforcement agency of the county or municipality to enforce the Uniform Rules of the Road within such privately owned residential area; and

(b) a plat delineating the location of roads, streets and common areas within the privately owned residential area. After approval by the governing authority of the county or municipality, and a 30 day notice is published and posted in the area, persons operating vehicles in the area will be subject to traffic laws in the same manner as if they were driving on public streets.

Of major importance is that O.C.G.A. § 40-6-3 (b) mandates that *in all circumstances* officers are authorized to write reports regarding accidents occurring on private property.

Be mindful that the chapters outside of Title 40, Chapter 6 of the traffic code are usually not covered under O.C.G.A. § 40-6-3. For example, in *Barrett v. State*, 172 Ga. App. 485 (1984), an Athens Police officer turned off Atlanta Highway onto Alps Road and observed the defendant leaving a bar located in a shopping center. The officer observed the defendant get into a Mercedes, back out of a parking space, and drive across the parking lot. The officer recognized the defendant and knew that his driver's license had been suspended. The officer pursued the defendant around the bar until the vehicle was returned to a parking space in front of the building. The defendant could not produce a driver's license when the officer requested it, and a records check confirmed the suspension. The defendant was subsequently convicted of Driving with a Suspended License, DUI and Escape. When the defendant appealed, the court reversed the conviction for Driving with a Suspended License because he was not driving on a public highway within the meaning of O.C.G.A. § 40-5-121. The Court stated that "[w]hile O.C.G.A. § 40-6-3 (2) provides that the Uniform Rules of the Road as set forth in Chapter 6 apply to shopping centers or parking lots, *there is no similar provision for Chapter 5*. We cannot, however, agree with the State's interpretation of the charged code section that the term 'public highway' includes a shopping center parking lot. Even if such an area could be considered a 'highway,' there was no proof presented that it was a 'public highway' as provided in *Southern R. Co. v. Combs*, 124 Ga. 1004 (1906)." GTP

# DUI Arrest Procedures

**By Jennifer Ammons, General Counsel, Georgia Department of Driver Services**

The procedure that officers should follow at the time of a DUI arrest are found in O.C.G.A. §§40-5-67 and 40-5-67.1. There are three (3) separate concepts to consider: Seizure of the driver's license of the DUI suspect, issuance of a temporary driving permit, and initiation of an administrative suspension.

## Seizure of the License:

When a driver is arrested for DUI, the officer should always seize his or her driver's license if he or she has it in his or her possession at the time of the arrest. The seized license should be sent to the Department of Driver Services (DDS) with the 1205, if one is issued, or sent to the court with the Uniform Traffic Citation if no 1205 is issued at the time of the arrest.

## Temporary Driving Permit:

The officer should always issue some form of temporary driving permit if the suspect's license is otherwise valid at the time of the DUI arrest. There are two type of temporary driving permits: the 30-day temporary driving permit at the bottom of the 1205 form, and the 180-day temporary driving permit sticker. The temporary driving permit on the 1205 should be issued if the driver refuses testing or if his or her blood alcohol results at the time of the arrest exceed the per se thresholds. The 180-day temporary driving permit sticker should be used in all other cases.

## Administrative Suspensions:

The 1205 form should only be completed and sent to DDS if the DUI involves a refusal or a blood alcohol concentration (BAC) that meets the per se standards. A 1205-S should only be completed and sent to DDS if the officer requested a blood or urine test, and the test results show that the BAC was in excess of the per se standards. The officer should not fill out a 1205 or 1205-S in any of the following situations because there is no administrative suspension in these cases:

1.) If the driver submits to a breath test, but his or her BAC is less than the per se standards;

2.) If the driver submits to a blood or urine test, but his or her BAC is less than the per se standards; or

3.) If the driver's blood or urine test are positive for drugs.

Please feel free to contact the DDS Legal Services Section at (678) 413-8765 if you need any further information. GTP

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

## >>> UPCOMING TRAINING EVENTS

**MARCH 21-23, 2012**
**Protecting Lives, Saving Futures**
Georgia Public Safety Training Center
1000 Indian Springs Drive
Forsyth, GA 31029

**MARCH 30, 2012**
**Joint Prosecutor & Law Enforcement DUI Training**
Roswell City Hall
38 Hill Street
Roswell, GA 30075
9:00 AM - 4:00 PM

**APRIL 19, 2012**
**Joint Prosecutor & Law Enforcement DUI Training**
Lumber City Hall
39 Main Street
Lumber City, GA 31549
8:00 AM - 3:00 PM

**May 4, 2012**
**Joint Prosecutor & Law Enforcement DUI Training**
Stephens County Government Bldg.
Grand Jury Room
70 N. Alexander Street
Toccoa, GA 30577
9:00 AM - 4:00 PM

**June 9-14, 2012**
**Basic Litigation**
Georgia Public Safety Training Center
1000 Indian Springs Drive
Forsyth, GA 31029

**July 22-25, 2012**
**Summer Conference**
Jekyll Island Convention Center
Jekyll Island, GA

**September 11-13, 2012**
**Lethal Weapon**
Georgia Public Safety Training Center
1000 Indian Springs Drive
Forsyth, GA 31029

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# Case Law Update

**Compiled by Fay McCormack, Traffic Safety Resource Coordinator and Todd Hayes, Traffic Safety Resource Prosecutor, Prosecuting Attorneys' Council of Georgia**

## ***Rowell v. State,*** *312 Ga. App. 559, (2011)*

*SFST, Administration of HGN, Inconsistent Testimony, High Heels, Coercion, Miranda, Videotape, Implied Consent, Numerical Alco-Sensor Reading*

The Defendant was stopped after an officer observed her van stop abruptly at a red light, crossing over the stop line and edging slightly into an adjoining lane. When the Trooper approached the Defendant, she could not find her license, but gave him her name and date of birth. The Trooper further noticed an odor of an alcoholic beverage, "somewhat red" eyes, and that the Defendant was a little unsteady while she was standing between her vehicle and the police car. Her speech was "just a little slurred." The Defendant denied drinking. The Trooper observed 6 out of 6 clues on the HGN and on the One-Leg stand; the Defendant swayed and could not hold her foot up for more than about three seconds without having to put it down. Walk and Turn was not administered, but the Defendant did blow positive on the alco-sensor. During the motion to suppress the Trooper testified over objection that the numerical reading on the alco-sensor was .208. The video tape of the stop showed that, on two occasions during the administration of the alco-sensor, the Trooper informed defendant that if she did not blow into the device correctly, he would take her to jail. The Trooper administered several field sobriety tests and concluded that the defendant was intoxicated. A jury convicted the defendant on one count of DUI and one count of Weaving/Failure to Maintain Lane. She appealed on several grounds. The Court of Appeals made the following holdings:

1.) The Defendant argued that there were inconsistencies between the officer's testimony at the trial, the motion hearing, and the videotape of the stop. The Court of Appeals held that it would not reach this issue because the trial court specifically relied on the transcript of the Defendant's administrative license suspension hearing in denying the motion to suppress, and the defendant failed to include this transcript in the record.

2.) The Defendant took issue with the administration of the HGN and One-Leg Stand as shown on the videotape of the stop. She argued that with regard to the HGN, "[t]he distance the stimuli is from the face and height above the eyes, the timing of each pass of each eye by the stimulus, clues of 'equal tracking' being looked for by the Officer, instead of the three recognized clues, all indicate a flawed and butchered performance not worthy of belief." The Defendant also criticized administering the One-Leg Stand when she was in high heels. The Court held that the alleged improper administration of these tests went only to the weight of the evaluations, not to their admissibility.

3.) The Defendant argued that when she repeatedly attempted to blow into the alco-sensor, it amounted to coercion when the officer told her that he would take her to jail if she did not perform the test properly. She also argued that she was improperly coerced into taking the alco-sensor test without the benefit of a *Miranda* warning. The Court of Appeals acknowledged that the Trooper's statements could be interpreted as a threat of criminal sanctions for failing to properly perform the test. However, because his statements left her with a choice "of sorts" between performing the test correctly or with going to jail, the Court found that a reasonable person in the Defendant's circumstances would believe that they would retain their freedom of movement if they performed the test as instructed. Furthermore, the Defendant had already agreed to submit to the test before the statement was made. Therefore, *Miranda* warnings were not required because the Defendant was not "in custody," and the statements were not coercive.

4.) The Defendant argued that the result of her state-administered chemical test should have been suppressed because the videotape did not show the officer reading the implied consent. The Court of Appeals said that she should have raised this argument in the trial court. Since there was no objection from her attorney when the prosecutor asked if the implied consent had been read, this issue was waived for appeal. The Court noted that, even if the issue was properly preserved, they would find no error. Even though the video of the incident did not contain audio of the warning, the Court noted that the quality of the tape (including an audio track that cut in and out) was such that the warning could have been read during a gap in the audio portion. Furthermore, the Trooper testified that he had, in fact, read the warning.

5.) The Defendant argued that the trial court impermissibly admitted the numerical alco-sensor reading at a motion hearing. The Court reiterated the well-established rule that "alco-sensor results are not used as evidence of the amount of alcohol or drugs in a person's blood. Instead, the alco-sensor is used as an initial screening device to aid the police officer in determining probable cause to arrest a motorist suspected of driving under the influence of alcohol." The Court clarified that this information is not even admissible for considering probable cause. However, the Court held, even if the trial court was wrong in admitting this evidence, the defendant failed to show harm.

6.) The Court found that the trial Court did not rely on the alco-sensor reading when determining probable cause and restated the presumption that judges, when sitting as the triers of fact, are able to distinguish between competent and incompetent evidence and consider only that evidence which is admissible. "[A] reversal is not warranted simply because the judge heard… allegedly inadmissible evidence. When the judge sits as the trier of fact, it is presumed that he will consider only legally admissible evidence." "…[I]t is presumed that the judge, as the trier of fact, is able to distinguish between competent and incompetent evidence and consider only that evidence which is admissible." The Court of Appeals found nothing in the record to overcome

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the presumption that the trial judge properly disregarded the numerical alco-sensor evidence. In any event, the Court said it previously found that probable cause existed even without the alco-sensor evidence, and thus this contention affords no basis for reversal.

### ***Buford v. The State,*** *312 Ga. App. 411 (2011)*

***Injuries, Consciousness, Implied Consent, Arrest***

The Defendant lost control of the car he was driving, and it flipped over and hit a tree. Emergency personnel transported the Defendant by helicopter to the hospital and advised the State Trooper at the scene that the Defendant smelled of alcohol. The Trooper, who assumed from the helicopter transport that the Defendant's condition was "pretty serious," drove to the hospital, where hospital personnel told him that the Defendant was conscious. When the trooper entered the room, the Defendant was "taped to the spine board," had "tubes coming from every which direction," and "had a [stabilizing] collar on." His eyes were closed, and he was silent. The Trooper, who could smell alcohol on the Defendant's breath and in the room, told the Defendant who he was and attempted to get him to respond, but concluded from his silence that he was under the influence of alcohol. The Trooper also learned that the Defendant was taking narcotics for back pain. The trooper then told the Defendant that he was "going to charge him with DUI" and read him the implied consent notice. Although the Defendant opened his eyes at one point during these proceedings, he remained silent throughout and appeared to the Trooper to be going in and out of consciousness.

After hospital staff drew a blood sample showing a blood alcohol level of .157, they told the Trooper that the Defendant was going to be admitted and that they did not know how long he would be there. The Trooper responded that he would obtain a warrant for his arrest. The warrant issued the same day, although the Defendant was not arrested until the following November. The Defendant appealed his conviction for DUI and the trial court's denial of his motion to suppress his blood-alcohol results, arguing that the results should have been suppressed because he was neither under arrest nor unconscious when the implied consent warning was read to him.

The Court of Appeals explained that O.C.G.A. § 40-5-55 provides that consent is implied only if a person is placed under a third-tier arrest based on probable cause to believe he has violated O.C.G.A. § 40-6-391. A third-tier arrest is thus a full-blown, custodial arrest as opposed to a temporary, second-tier investigative detention. It follows that the question of whether an implied consent notice was adequate turns on whether the individual was formally arrested or restrained to a degree associated with a formal arrest and not whether the police had probable cause to arrest, *Suluki v. State,* 302 Ga. App. 735 (2010). The test is whether a reasonable person in the suspect's position would have thought the detention would not be temporary. The question of whether someone is under custodial arrest is a mixed question of law and fact, and the appellate court will construe the evidence most favorably to uphold and accept the trial court's rulings unless they are clearly erroneous.

The Court of Appeals pointed out that the Defendant was secured to a board in a hospital room with tubes attached to his body; and, assuming that he was alert rather than coming in and out of consciousness at the time, a reasonable person in his situation could not have thought that he was free to leave when the Trooper announced that he was charging him with DUI. The Court, citing *Hough v. State*, 279 Ga. 711, (2005), stated that a defendant may voluntarily submit to being considered under arrest without any actual touching or show of force. The Court found that the trial court did not clearly err when it found that the Defendant was under arrest when the trooper announced that he was being charged with DUI.

In light of the above, it was not necessary to determine whether the Defendant's injuries were

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IN THEIR OWN WORDS: PROSECUTORS & LAW ENFORCEMENT SHARE STORIES FROM THE FRONT LINES

## MY FIRST TRIAL EXPERIENCE

*As a newly assigned Assistant District Attorney in Chatham County, my first DUI jury trial was in fact my very first jury trial of any kind. Through training and trial and error, I was able to prepare the case and obtain a guilty verdict, gaining valuable experience along the way.*

*The charges were DUI-less safe (alcohol), three counts of endangering a child by DUI, driving the wrong way, and no tag light. On a rainy night, a police officer was in a left turn lane when he performed an evasive maneuver to avoid a head-on collision. The in-car video captured the entire incident. When the officer stopped the driver, he found three children in the vehicle as well. As he spoke with the driver, he realized he needed to conduct a DUI investigation. The only field sobriety test the officer performed was a portable breath test. The defendant was involved in another traffic incident nine months later, which I introduced at the trial. In that case, the defendant had been stopped for speeding. The officer conducted field sobriety tests including the Horizontal Gaze Nystagmus (HGN), but the defendant refused the portable breath test. The defendant was charged with DUI-less safe (alcohol) in that incident.*

*Outside of the courtroom, the best use of my time was attending training and talking with law enforcement officers. Last summer, I attended the Prosecuting Attorneys' Council of Georgia's (PAC) Basic Litigation course. This course is a boot camp for new prosecutors. We learn and practice techniques for opening and closing statements as well as direct and cross examination.*

*Two days prior to the trial, I attended PAC's Joint Law Enforcement & Prosecutor DUI Training. This training explains field sobriety testing and prepares officers and prosecutors for cross examination. The training was invaluable in helping me prepare for the trial. It helped me understand what to look for when I read a police report, so that I could recognize the correct method to perform field sobriety tests. It prepared me for the questions the defense attorney would ask in an attempt to poke holes in the HGN, and allowed me to anticipate how the officer would respond to the inquiry. I understood the foundation I needed to lay during the trial for the jury to appreciate the significance of the field sobriety tests. In short, the words in the police report and the words uttered by the officer on the stand no longer sound like gibberish.*

*Prior to the trial, I spoke with each of the three officers and went through a practice run of my questions with them. They were gracious in acknowledging my lack of experience and willing to help me prepare. During the trial, the arresting officer testified that his emotions affected his immediate response to the defendant – he had nearly collided head-on with the defendant and the three children riding in the vehicle. The officer frankly addressed what the jury might think when they saw the video. He also explained his logic for only requesting a portable breath test and no other field sobriety tests. The officer offered a well-reasoned and thorough explanation of the events before the defense attorney had the opportunity to interpret and spin his own version of events.*

*The ultimate verdict was Guilty… except on the tag light charge. During the trial, I did make several mistakes. I asked some questions poorly, and I stumbled. I needed the officer to explain that the HGN is regarded as a scientific test, but I was tongue-tied every time I tried to ask in a non-leading manner. After the trial, several jurors said they thought the officers appeared disinterested, which I should have addressed by asking the officers if they had worked the previous night. In the end, I learned several lessons during the trial. Training and preparation are extremely important, but there is no greater lesson than that learned from an actual trial.*

***- JENNIFER EASLEY, ASSISTANT DISTRICT ATTORNEY, EASTERN JUDICIAL CIRCUIT***

serious enough to justify the administration of a blood test without the reading of the implied consent notice.

***Greene v. The State,** 312 Ga. App. 666 (2011)*

***Sixth Amendment, Jury List, Challenge to Array, Fair Cross Section***

The Defendant was convicted by a jury for DUI-less safe, in violation of O.C.G.A. § 40-6-391(a) (1), and DUI-per se, in violation of O.C.G.A. § 40-6-391(a) (5). The trial court denied the Defendant's motion for a new trial. On appeal the defendant contended that the trial court erred in denying the Defendant's Sixth Amendment fair cross-section claim, pursuant to O.C.G.A. § 15-12-162, and erred in refusing to give the Defendant's requested charge on circumstantial evidence. Specifically, the defendant contended that the composition of the jury list from which his array was drawn should have reflected the more current population of African-Americans in the county, as found by the U. S. Census Bureau's 2008 American Community Survey, rather than the percentage reflected in the prior 2000 Decennial Census. On appeal, the Court found that the trial court did not err by denying the Defendant's fair cross-section challenge to the jury array because the balancing of cognizable groups to match the then-most recent Decennial Census was justified by a sufficiently significant state interest.

In addition, the Defendant argued that the trial court erred in failing to charge the jury on circumstantial evidence. But, the Court noted that the Defendant's request was predicated upon the DUI-less safe count, which was merged into the DUI-per se conviction. In light of the merger, the DUI-less safe count was void and any error as to that count was harmless. The judgment was affirmed.

***Bennett v. The State,** Court of Appeals Docket No. A11A1678, Decided 12/29/11*

***Roadblock, SFST, Manner of Driving, Unsafe Act, Sufficiency of Evidence, Circumstantial Evidence***

An officer stopped Bennett at a police roadblock. As the officer asked Bennett for his license and insurance, he noticed the odor of alcohol, which he believed to be some type of gin from the distinctive smell, coming from inside Bennett's vehicle. The officer testified that Bennett's speech was slurred; he repeated himself and "his pupils were dilated and his eyes were red, bloodshot." Bennett told the officer that he had had a few drinks earlier that night. The officer had Bennett perform one field sobriety test, the Horizontal Gaze Nystagmus test, which indicated that Bennett was under the influence. Bennett also submitted to an alco-sensor test which registered positive for the presence of alcohol.

Based on his training and experience, his observations, the result of the field sobriety test and alco-sensor test, the officer testified that it was his opinion that Bennett was under the influence of alcohol to the extent that it was less safe for him to drive. Bennett was then placed under arrest. During an inventory of Bennett's vehicle, the officer discovered "a bottle of gin that had been opened" in the back seat. A jury found Bennett guilty of DUI-less safe and open container. On appeal, Bennett challenged only the sufficiency of the evidence to support his DUI-less safe conviction. Bennett argued that his manner of driving indicated that he was safe to drive. He contended that he drove at a safe speed and made no attempt to evade the roadblock.

Affirming the conviction, the Court of Appeals pointed out that a conviction under O.C.G.A. § 40-6-391 (a) (1) does not require proof that a person actually committed an unsafe act while driving; it only requires sufficient evidence to authorize a finding, beyond a reasonable doubt, that the defendant was operating or in actual physical control of a moving vehicle while under the influence of alcohol to the extent that it was less safe for him to drive. In addition, defendant's refusal to submit to sobriety tests was admissible as circumstantial evidence of intoxication.

***Campbell v. The State,** Court of Appeals Docket No. A11A1939, Decided 12/27/11*

***Odor of Marijuana, SFST, Eye Convergence, Probable Cause, Officer's Knowledge, Totality of Circumstances***

Campbell was pulled over after his vehicle was clocked at 63 mph in a 45 mph speed zone. When the officer approached Campbell's vehicle, he smelled, in light of his training and experience, what he believed was the "faint odor of burnt marijuana" coming from inside the vehicle. The officer asked Campbell and the front seat passenger to produce their driver's licenses, and they did. When the officer asked Campbell if the address on his license was correct, he responded that the address was incorrect. Campbell further noted that he had lived at a different address for approximately one year. The officer also asked Campbell if there was anything in the vehicle "that needed to be concerned about" such as "guns, knives, drugs, or bombs." Campbell responded, "Nothing you need to be concerned about." As the officer ran a check on Campbell and his passenger's licenses, he noticed that Campbell appeared to be moving around in his vehicle as if he was "either moving something or try[ing] to conceal something in the back seat." A second officer arrived at the scene as backup, and he likewise observed that Campbell was moving around in his seat in a suspicious manner.

At that point, the first officer returned to the vehicle and directed Campbell to step outside onto the road, where the officer conducted a pat down search for weapons. Campbell's eyes were bloodshot, but he denied having consumed any alcohol. The officer also could smell the odor of marijuana on Campbell's person, and he asked Campbell how much marijuana he had smoked. Campbell admitted that he had smoked part of a "blunt" about an hour ago.

The first officer then administered a series of field sobriety tests, including the Walk and Turn test, the One-Leg Stand test, and the Eye Convergence test. On the Walk and Turn test, Campbell exhibited five clues of impairment. The officer also administered the Horizontal Gaze Nystagmus test and the Romberg test, but Campbell did not exhibit any clues of impairment on those tests. The officer noted that, based upon his training and experience, a person who has smoked marijuana will not exhibit any clues of impairment on the Horizontal Gaze Nystagmus test unless the marijuana is "laced with another substance such as PCP." Campbell exhibited three clues of impairment on the One-Leg Stand test, after which Campbell told the officer, "You got me." During the Eye Convergence test, Campbell's left eye could not maintain focus on the stimulus and drifted away, likewise indicating impairment.

A jury convicted Campbell of DUI-less safe (Drugs), possession of marijuana, speeding, and failure to change the address on his driver's license. The trial court denied his motion for new trial. Proceeding pro se, Campbell argued on appeal that there was no probable cause justifying his arrest and that, as a result, the trial court should have excluded the results of his state-administered blood test and other evidence obtained after his arrest.

Holding that Campbell's argument lacked merit, the Court stated that, in determining whether sufficient probable cause existed, the material inquiry is whether the facts within the officer's knowledge at the time of the arrest constituted reasonably trustworthy information sufficient to authorize a prudent person to believe that the defendant had committed that offense. Probable cause need not be defined in relation to any one particular element, but may exist because of the totality of circumstances surrounding a transaction. Campbell was observed speeding, admitted to smoking marijuana, had the smell of marijuana on his person, had bloodshot eyes, and exhibited multiple clues of impairment during several of the field sobriety tests. In light of these combined circumstances, the Court concluded that the arresting officer clearly had sufficient probable cause to arrest Campbell for DUI-less safe.

***Shelley v. The State,** Court of Appeals Docket No. A11A2172, Decided 11/14/11*

***Roadblock, Supervisor, Roving Patrols, Primary Purpose***

Near midnight on March 27, 2010, the Douglas County Sheriff's Office conducted a roadblock at Douglas Boulevard and Bright Star Road in Douglas County. The roadblock was approved by Chief Deputy Stan Copeland, who is second in command to the Sheriff and whose duties include authorizing such checkpoints. Chief Deputy Copeland approved the roadblock for the primary purpose of checking driver sobriety, and appointed Sergeant Brett Dever to act as the checkpoint supervisor. Sergeant Dever was on the scene supervising the roadblock when Shelley was stopped by Deputy Edward Englett, who smelled alcohol on Shelley's breath and noticed that his eyes were bloodshot and his speech was slurred.

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Shelley admitted that he had consumed about six beers. He also failed a field sobriety test and consented to a breath test, which showed that his blood-alcohol level was above .08.

After a bench trial, Shelley was convicted of driving under the influence of alcohol. On appeal, he argued that the trial court was wrong in denying his motion to suppress because there was no evidence that the police roadblock at which he was stopped had been established by an authorized supervisor for a legitimate primary purpose.

The Court reiterated the five factors that must be considered in determining if a roadblock is lawful: (1) the decision to implement the roadblock was made by supervisory personnel for a proper primary purpose; (2) all vehicles are stopped as opposed to random vehicle stops; (3) the delay to motorists is minimal; (4) the roadblock is well identified as a police checkpoint; and (5) the screening officer's training and experience are sufficient to qualify him to initially determine which motorists should be given field sobriety tests. Shelley conceded that the last four factors had been satisfied, contending only that the first requirement had not been met.

The Court of Appeals clarified that the purpose of this first requirement is to prevent roving patrols in which field officers exercise unfettered discretion to stop drivers in contravention of constitutional protections against unreasonable seizures. The Court found ample evidence that the roadblock in this case was not implemented by a roving patrol of field officers exercising unfettered discretion. Rather, the evidence plainly showed that Chief Deputy Copeland was a supervisor in the sheriff's office, that his duties included authorizing roadblocks, and that he made the decision to implement the roadblock for the primary purpose of checking driver sobriety. Based upon this testimony, the trial court was authorized to find that the roadblock had been authorized by a supervisory officer at the programmatic level and did not err in denying the motion to suppress.

### >>> DID YOU KNOW?

- **In 2010, there were 298 alcohol related fatalities in Georgia—this represents approximately 24% of all roadway fatalities that year. Alcohol related fatalities decreased by 34% from 454 in 2006.**
- **The percentage of drivers with blood alcohol concentration of 0.08 grams per deciliter or higher in fatal crashes was highest for pickup truck drivers (24%).**
- **Of all fatal crashes, alcohol reporting among killed drivers is higher than reporting among injured and non-injured surviving drivers. Approximately 40% of all drivers (killed and surviving) involved in fatal crashes have reported alcohol blood concentrations at the time of the crash.**
- **A person that has been involved in three or more previous alcohol related crashes has a higher risk of being in a fatal crash related to alcohol.**

*- From 2011 Governor's Office of Highway Safety Georgia Crash Analysis Statistics and Information Report, page 6 (Revised February 2012)*

***Martin v. The State,*** *Court of Appeals Docket No. A11A1922, Decided 12/7/11*

***Roadblock, Supervisor, Roving Patrols, Primary Purpose, DUI-Marijuana Cocaine***

At approximately 5:00 a.m. on March 28, 2010, the Defendant was stopped at a roadblock on Thornton Road in Douglas County. At the hearing on the Defendant's motion to suppress, the Chief Deputy of the Sheriff's Office of Douglas County, Stan Copeland, testified that he was authorized to approve roadblocks, although he normally became involved only in large scale operations that required extensive personnel overtime. According to Copeland, the roadblock at issue in this case was part of a large coordinated effort among the Sheriff's Offices of Douglas County and Carroll County and the Governor's Office of Highway Safety. The purpose of the operation was highway safety and driver sobriety. Copeland approved his department's participation in the operation overnight on March 27-28, 2010, and directed that the exact location and hours of operation of the various roadblocks would be determined by unit commanders, who also had authority to implement roadblocks on their own. The officer who initially spoke with the Defendant at the roadblock, and a second officer who completed the DUI investigation, testified that, at the time and place where the Defendant stopped, they were participating in that particular roadblock under the direction and supervision of Sergeant David Martin, who was the commander of the H.E.A.T. (Highway Enforcement of Aggressive Traffic) unit. Based on the testimony of Chief Deputy Copeland and the two field officers, the trial court concluded that the roadblock was implemented in accordance with applicable law. Sgt. Martin did not testify.

After a bench trial, the trial court found the Defendant guilty of driving while under the influence of marijuana and cocaine to the extent it was less safe for her to drive, O.C.G.A. § 40-6-391(a)(2), and possession of marijuana, O.C.G.A. § 16-13-30(j). On appeal, the Defendant argued that the State failed to identify a supervisor who decided to conduct a roadblock at that exact time and place and failed to offer admissible evidence of that unknown officer's primary purpose in implementing the roadblock. As a result, she contended that the State failed to prove that the particular roadblock was implemented at the programmatic level for a legitimate primary purpose.

The Court of Appeals confirmed the well-settled rule that roving patrols in which officers exercise unfettered discretion to stop drivers in the absence of some articulable suspicion are unconstitutional, but standardized highway checkpoints or roadblocks that serve legitimate law enforcement objectives are permissible under certain circumstances. To justify a stop under this exception to the requirement that a law enforcement officer have an individualized suspicion of a crime before stopping a vehicle, the State must prove that a highway roadblock program was implemented at the programmatic level for a legitimate primary purpose, that is, that the roadblock was ordered by a supervisor rather than by officers in the field and was implemented to ensure roadway safety rather than as a constitutionally impermissible pretext aimed at discovering general evidence of ordinary crime. Elevating the roadblock decision from the officers in the field to the supervisory level limits the exercise of discretion by the officers in the field. In addition, the State must prove that all vehicles were stopped as opposed to random vehicle stops; the delay to motorists was minimal; the roadblock operation was well identified as a police checkpoint; and the screening officer's training and experience was sufficient to qualify him or her to make an initial determination as to which motorists should be given field tests for intoxication.

The Court found that the Chief Deputy of the county sheriff's office testified that he was authorized to approve roadblocks and that the purpose of the operation was highway safety and driver sobriety. He approved his department's participation in the operation and directed that the exact location and hours of operation of the various roadblocks would be determined by unit commanders. The two officers who implemented the stop testified that they were under the command of a sergeant, who did not testify. The Court held that the sergeant's testimony was not necessary because his supervisor had testified that the sergeant had authority to conduct the roadblock. The court affirmed the denial of defendant's motion to suppress.

***State v. Sauls,*** *Court of Appeals Docket No. A11A1859, Decided 2/8/12*

***Incomplete Implied Consent, Failure to Inform of Consequence of Refusal***

An officer received a report about a person driving all over the road, located the vehicle

*continued >*

and executed a traffic stop. Following several field sobriety tests, the officer arrested Sauls for driving under the influence to the extent he was a less-safe driver, open container, and driving with a suspended license. After placing Sauls under arrest, the officer began reading him the implied consent notice. While the officer was reading the notice, Saul continually interrupted the officer. A video recording of the stop reveals that the officer omitted the line of the notice informing Sauls that his refusal to submit to testing could be used against him at trial. The officer stated that he was not aware at the time he read the notice that he omitted this line and was only made aware of the omission two days before the hearing on the motion to suppress.

The trial court concluded that the implied consent notice read to Sauls was incomplete and that therefore the substance of the notice was materially altered. The court ruled that because Sauls was not properly informed of his implied consent rights, his failure to submit to testing must be suppressed. The State appealed.

Finding no Georgia precedent or statutory provision explicitly addressing the effect of the failure to inform a DUI arrestee that such a refusal could be used against him at trial, the Court of Appeals turned to the case of *South Dakota v. Neville, 459 U. S. 553, 564-566 (1983)*. In *Neville*, the United States Supreme Court compared the implied consent notice with the right to silence under *Miranda* and concluded that respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota Legislature. The Court further held that the failure to warn that the test results could be used against the defendant was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial, concluding that the use of evidence of refusal after these warnings comported with the fundamental fairness required by due process. The U.S. Supreme Court held that, although it was true that the officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court, it was unrealistic to say that the warnings given here implicitly assured a suspect that no consequences other than those mentioned would occur. Importantly, the warning that he could lose his driver's license made it clear that refusing the test was not a "safe harbor," free of adverse consequences.

The Court of Appeals also pointed to the Georgia Supreme Court's reliance on *Neville* in *Chancellor v. Dozier, 283 Ga. 259, 260-261 (2008)*. There, the defendant complained that he was denied due process because the implied consent notice read to him failed to inform him that his refusal to submit to chemical testing would result in his lifetime disqualification from having a commercial driver's license. The Supreme Court, quoting *Neville*, concluded that due process does not require that the arresting officer inform the driver of all the consequences of refusing to submit to testing because the officer has "made it clear that refusing the test was not a safe harbor, free of adverse consequences."

The Court held that in light of the United States Supreme Court's holding in *Neville*, and the Georgia Supreme Court's holding in *Dozier*, it must conclude that the trial court erred in granting Sauls' motion to suppress evidence of his refusal to submit to chemical testing.

GTP

> ***"One of the jobs that I have to do as a criminal defense attorney is see if the other side knows the law. That's part of what my job is."***
>
> **Bubba Head**
> *Price v. State, 245 Ga. App. 128, 130 (2000).*


# GEORGIA traffic PROSECUTOR

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## >>> GEORGIA TRAFFIC SAFETY RESOURCE PROGRAM


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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 Editors Fay McCormack or Todd Hayes at PAC.***