

The Local Government LIABILITY BEAT



PRESENTED BY LOCAL GOVERNMENT RISK MANAGEMENT SERVICES INC - A SERVICE ORGANIZATION OF
THE ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AND THE GEORGIA MUNICIPAL ASSOCIATION RISK MANAGEMENT PROGRAMS

LAW ENFORCEMENT POLICIES FOR SEIZING VIDEO RECORDING DEVICES

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There is a current national trend in law enforcement litigation that is and will continue to impact law enforcement agencies as it relates to the seizure of video recording devices and cameras.

Agencies are seeing increased litigation for seizing cameras and cell phones for what they consider “evidence purposes.” Local Government Risk Management Services (LGRMS) – the loss control group of Georgia Municipal Association (GMA) and Association County Commissioners of Georgia (ACCG) – offers a model policy for our member agencies titled “Video Recording and Photographing of Police Officers”. Due to the trends in litigation, we advocate a proactive approach to avoiding litigation. Law enforcement agencies should implement a policy for seizing camera/video recording devices and train all personnel upon implementation of the operational policy.

In the best interest of Georgia law enforcement, policies are available to any police department or sheriff’s department and can be downloaded at www.lgrms.com. Products and Services for Law Enforcement and Model Policies have been vetted for use in Georgia and approved for POST credit.

Individuals have a First Amendment right to record police officers in the public discharge of their duties.

Key Considerations for Seizure of Recording Devices:

- Members of the press and members of the general public enjoy the same rights in any area accessible to the general public.
- In situations where members of the public are photographing or recording a police action, officers must not search or seize a camera or recording device (including cell phones) without a warrant, except under very limited circumstances.

- Officers are prohibited from threatening, intimidating or otherwise discouraging any individual from photographing or recording police activities.
- Officers must not intentionally block or obstruct cameras or recording devices in any manner.
- Officers are prohibited from deleting recordings or photographs, and from damaging or destroying recording devices/cameras under any circumstances.



- A person may record/photograph public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law. Examples of such actions include but are not limited to:
 - Physically interfering with the police officer's official duties. (Interviews with suspects and witnesses; gathering evidence.)
 - Hindering a lawful arrest.
 - Inciting bystanders to hinder or obstruct an officer in the performance of their duties. Conduct taken alone which would be insufficient to meet hindering or obstructing would include, but not be limited to:
 - An individual's recording/photographing of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference.
 - A person's expression of criticism of the police (or the police activity being observed) does not amount to interference. The U.S. Supreme Court has held that "a properly trained officer may reasonably be expected to exercise a higher degree of restraint" than the average citizen when it comes to reacting to insults or "fighting words." Courts have given First Amendment protection to persons who made obscene gestures and yelled profanities at police officers, and they have prohibited the police from interfering with such speech.

The warrantless seizure of material protected by the First Amendment (such as photos and videos) will be strictly scrutinized by a court. In ordinary circumstances, the seizure of cameras or recording devices without a warrant will not be reasonable. Cameras or recording devices will not be seized without a warrant unless:

- Officers have probable cause to believe that critical evidence of a felony crime is contained on/in the camera or recording device; and
- Officers first have explained the circumstances to the person in the possession of the recording device;
- The seizure of the camera/recording device is for no longer than reasonably necessary for the officer, acting with diligence, to obtain a search warrant to seize the evidence (OPTION: and the local prosecutor is notified of the seizure for consultation/direction to secure a search warrant); and
- Supervisory approval has been granted for the seizure.

Seizing or viewing the evidence contained in the device without a warrant is prohibited unless an exigent circumstance exists or until a warrant is obtained for the seizing or viewing.

ACCG and GMA members have access to more than sixty model policies that have been developed in conjunction with LGRMS loss control, GACP, and Jack Ryan of the Legal and Liability Risk Management Services and Training.

GEORGIA COURT HOLDS DRUNK DRIVER TOO INTOXICATED TO CONSENT TO BREATH TEST

by Brian Batterton, Attorney, Legal & Liability Risk Management Institute

On July 7, 2016, the Court of Appeals of Georgia decided the *State v. Jung*,¹ which in which the court of appeals upheld a trial court's grant of a motion to suppress because of a lack of actual consent to the breath test due to level of intoxication of the defendant. The relevant facts of *Jung*, taken directly from the case, are as follows:

[T]he record shows that at approximately 4:30 a.m. on October 2, 2014, the Gwinnett County Police Department responded to a

motor vehicle accident on Dublin Ridge Trail in Duluth. The responding officer observed one vehicle with significant rear-end damage pushed onto a curb. He also observed a white convertible with front-end damage nearby. The driver, identified as Jung, was leaning against the vehicle. When the officer approached Jung, he noticed a strong odor of alcohol and saw that his eyes were bloodshot and watery. Jung explained that he was driving down the street after leaving his girlfriend's house and hit the other car. Jung's speech was slurred and

mumbled, and he had trouble walking or even standing on his own without support.

When the officer asked if he had been drinking, Jung responded, “Yes, but I don’t drinking and driving.” He denied needing medical attention and did not appear to have any injuries. Jung agreed to participate in field sobriety evaluations, but the officer had to assist him in walking to a nearby driveway because he was stumbling and staggering. Once away from the road, the officer performed the horizontal gaze nystagmus (HGN) test and observed six out of six clues, indicating an alcohol concentration of .08 grams or more. The officer then instructed Jung on how to perform the walk and turn evaluation, which indicated eight out of eight clues. Lastly, the officer had Jung perform the one leg stand and observed three of four clues. Based on the results of the field evaluations, the officer asked Jung to blow into a portable breath test. Jung replied, “Yes,” and his breath tested positive for alcohol.

Believing that Jung was driving under the influence of alcohol with an alcohol concentration of .08 grams or more, the officer placed him under arrest. After placing Jung in the back of his patrol vehicle, the officer read him Georgia’s implied-consent notice for drivers over the age of 21. When asked, “Will you submit to the state-administered chemical test of your breath under the implied consent law,” Jung responded, “Yes.” The officer later testified that he read the notice in a “steady and monotone” voice. He further testified that Jung appeared to understand all of his questions and never indicated that he did not understand or that he needed an interpreter. He denied ever yelling at, using force against, or making promises or threats to Jung. In a supplemental police report, the officer indicated that Jung appeared “confused” and failed to follow instructions on the HGN and one-leg stand tests.

At the police station, another officer administered the breath test after instructing Jung in an even tone on how to perform the test. That officer testified that Jung appeared to understand the instructions, did not ask any questions about the test, and never stated that he wished to refuse the test. He also denied ever raising his voice or using force against Jung. Jung was later charged, via accusation, with driving under the influence to the extent it was less safe for him to drive (OCGA § 40-6-391 (a) (1)), driving under the influence per se (OCGA § 40-6-391 (a) (5)), and following too closely.ⁱⁱ

Jung filed a motion to suppress the results of the breath test and argued that he did not voluntarily consent to the breath test. The trial court considered both officer’s testimony as well as the fact that one officer testified that Jung seemed confused during HGN and the walk and turn and seemed to have a difficult time following instructions. The court then held that the state was only able to prove that Jung acquiesced to request for a breath test but was unable to prove actual consent to the breath test, and as such, granted the motion to suppress the breath test.

The State appealed the grant of the motion to suppress to the Court of Appeals of Georgia. The State argued that the trial court focused exclusively on the Jung’s level of intoxication and did not consider the totality of the circumstances regarding actual consent.

The court of appeals first examined recent precedent from the Supreme Court of Georgia, particularly *Williams v. State*.ⁱⁱⁱ The court stated:

Historically, we considered a defendant’s affirmative response to the reading of the implied consent notice as sufficient to allow a search of his or her bodily fluids without further inquiry into the validity of the defendant’s consent.” (Citations omitted.) *Kendrick*, 335 Ga. App. at 769. However, in *Williams*, the Georgia Supreme Court rejected this rule automatically equating an affirmative response with actual consent to search, holding instead that “mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant.” *Williams*, 296 Ga. at 822. Thus, the State is required “to demonstrate

actual
consent
[for



state-administered testing] for the purpose of exception to the warrant requirement.” (Emphasis in original.) Id. And in determining whether the defendant gave actual consent to a state-administered breath test, the trial court is required to address “the voluntariness of the consent under the totality of the circumstances.” Id. at 823. [emphasis added]

Thus, the rule in Georgia is that acquiescence to the Georgia Implied Consent warning and request for a state administered test does not establish “actual consent.” Actual consent to the state administered test must be proven in court and this is based on the “totality of the circumstances.” The court then described various factors to be considered in the totality of the circumstances. The court stated:

Under Georgia law, “voluntariness must reflect an exercise of free will, not merely a submission to or acquiescence in the express or implied assertion of authority.” (Citation and punctuation omitted.) *State v. Bowman*, __ Ga. App. __ (Case No. A16A0555, decided on June 7, 2016). In making this determination, we consider a number of factors, including “prolonged questioning; the use of physical punishment; the accused’s age, level of education, intelligence, length of detention, and advisement of constitutional rights; and the psychological impact of these factors on the accused.” (Citations omitted.) Id. at __. And “no single factor is controlling.” (Citation omitted.) *State v. Tye*, 276 Ga. 559, 560 (1) (580 SE2d 528) (2003). Thus, the trial court must “consider whether a reasonable person would feel free to decline the officers’ request to search or otherwise terminate the encounter.” (Citations and punctuation omitted.) *Kendrick*, 335 Ga. App. at 769. “Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent.” (Citations and punctuation omitted.) Id.^{iv} [emphasis added]

Further, the court of appeals noted that a person’s level of intoxication is a relevant factor to consider in the totality of the circumstances in making a determination of actual consent. The court stated:

[A] defendant’s level of intoxication may be an appropriate factor in determining the voluntariness of consent under the totality of the circumstances. See *Bowman*,

__ Ga. App. at __ (affirming trial court’s grant of motion to suppress blood test results where trial court relied on evidence that defendant was “significantly intoxicated” when he gave consent to the test). Our Supreme Court has also held that a high level of intoxication may be sufficient to support a trial court’s finding that a statement is involuntary. *Clay v. State*, 290 Ga. 822, 826 (1) (B) (725 SE2d 260) (2012).^v [emphasis added]

Thus, the court held that it was proper for the trial court to consider the officer’s testimony that Jung appeared confused and unable to follow instructions during the HGN evaluation and the walk and turn.

Lastly, court of appeals noted that, although the Supreme Court of Georgia, in *Williams*, was deciding the admissibility of a blood test based on actual consent, that case still applies in the case of a breath test, such as the one in Jung’s case.

The court of appeals then noted that the trial court properly considered the totality of the circumstances in determining whether Jung provided actual consent for breath test. Further, the court of appeals observed that there was no evidence that demanded a finding contrary to the trial court’s decision and as such, they will not reverse that court’s decision.

Therefore, the court of appeals affirmed the grant of the motion to suppress.

What should Georgia LEOs take from this case?

- Officers must establish that a DUI suspect provided actual consent to a state administered chemical test, rather than simply acquiescing to the Implied Consent Warning.
- Officers should consider, and document through reports and video/audio, all factors relevant to the totality of the circumstances. Write good reports and use video/audio if you have it.
- If a DUI suspect is severely intoxicated to the point the evidence indicates they are confused and unable to comprehend instructions, an officer may consider obtaining a search warrant to obtain a blood sample for the state administered chemical test of the suspect’s blood to prevent the argument that the suspect did not provide “actual consent.”

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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Endnotes

- i. A16A0527 (Ga. App. Decided July 7, 2016)
- ii. Id.
- iii. 296 Ga. 817 (771 SE2d 373)(2015)
- iv. Id.
- v. A16A0527

LAW ENFORCEMENT AND LEGAL LIABILITY TRAINING ANNOUNCEMENT

GMA and ACCG Loss Control will sponsor an Annual Law Enforcement and Legal Liability update on November 1 in Tifton, November 2 in Macon, and November 3 in Cartersville. This all-day program will satisfy requirements for six Georgia POST Credit hours and six Executive Credit hours for heads of agencies. This program will feature well-known speaker Jack Ryan. This course is targeted toward law enforcement leadership, command staffs, supervisors, and officers in general. It is also appropriate for civilian leadership in cities and counties who deal with the liability issues, litigation, and cost of law enforcement operations.

You can register online by clicking on the training calendar at www.lgrms.com, or by emailing Shamilla Jordan (sjordan@lgrms.com). A continental breakfast and lunch will be provided. This program is at no cost to GMA GIRMA or WC members or for ACCG IRMA or WC Insurance program members. There is a \$100 fee for non-members.

Course Objectives

Over the last two decades law enforcement agencies and individual law enforcement officers in the United States have been the subject of intense public scrutiny. The litigious condition of American society has been a key factor in this scrutiny. The very nature of police work I.e. use of force; high-speed driving and pursuits; and arrest, lends itself to complaints and lawsuits from those that law enforcement officers have contact with.

Law enforcement officers must have a working knowledge of developing laws relating to police liability and discipline. Officers must be aware that

they may be held accountable for decisions made by a court having jurisdiction over them. It is the developing law that guides police training, operations, individual conduct and operations. A failure to recognize the importance of this area of the law can lead to serious monetary consequences for individual police officers, supervisors, police executives and police agencies as a whole. In extreme cases, a failure to follow the rules set forth by the courts can result in criminal sanctions.

This training is structured to assist officers and agencies in assessing their particular level of risk-exposure by examining court decisions that have interpreted acceptable standards of conduct by officers.

Overview of Legal Developments

- Policing after Ferguson, after Baltimore
- Body Cameras – When to Record – Privacy – Policy Development
- Your, Ours, and Theirs
- Social Media – Social Media Developing legal cases and the impact on officers and agencies
- Citizens’ Recording of Law Enforcement Officers on Duty
- Law Enforcement Unmanned Aircraft Systems (Drones)
- Eyewitness Identification and Wrongful Convictions
- Dealing with Mentally Ill and Emotionally Disturbed Persons and Use of Force
- Preventing Friendly Fire Deaths and Injuries





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A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

This Month:

SEIZING VIDEO RECORDING DEVICES
CONSENT FOR DUI BREATH TESTS

