



DPS Legal Review

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House Bill 87

In April of 2011, the Georgia legislature enacted House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011 ("H.B. 87"). The legislation was enacted to address concerns about illegal immigration within the state. The Plaintiffs filed a pre-enforcement constitutional challenge seeking to stop enforcement of section 7 and section 8 of the legislation. The Plaintiffs asserted that these sections were preempted by federal law.

Section 7 creates three separate crimes for interactions with an "illegal alien." An "illegal alien" is defined as "a person who is verified by the federal government to be present in the United States in violation of federal immigration law." The first provision of section 7 creates the offense of transporting or moving an illegal alien. The second provision creates the offense of concealing or harboring an illegal alien. The third provision creates the offense of inducing an illegal alien to enter into Georgia.

Section 8 authorizes Georgia law enforcement officers to investigate the immigration status of an individual if the officer has probable cause to believe the individual has committed another crime and the individual cannot provide one of the pieces of identification listed in the statute. The Court considered whether the Plaintiffs were likely to succeed on the merits of their challenge to the constitutionality of sections 7 and 8.

HOLDING: The Eleventh Circuit Court of Appeals held that the Plaintiffs met their burden of showing a likelihood of success on their claim that section 7 is preempted by federal law. Section 7 creates three distinct state criminal violations. Each requires that the accused be engaged in another criminal activity, and each further requires that the accused know of the illegal status of the subject. It is a federal crime for any person to: 1) transport or move an unlawfully present alien within the United states; 2) conceal, harbor or shield an unlawfully present alien from detection; or 3)

encourage or induce an alien to come to, enter, or reside in the United States.

The Court held that federal law allows local law enforcement officers to arrest for these violations of federal law, but the federal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute. The Court also held that, instead of authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for certain crimes subject to federal prosecution in federal court. The Court held that, without a savings clause that permits state regulation, the Court must infer that the role of the states is limited to arrest for violations of federal law. The Court held that section 7 presents an obstacle to the execution of the federal statutory scheme and challenges federal supremacy in the realm of immigration. Further, by confining the prosecution of federal immigration crimes to federal court, Congress limited the power to pursue those cases to the appropriate United States Attorney.

The Court held that interpretation of section 7 crimes by state courts and enforcement by state prosecutors could threaten the uniform application of the Immigration and Nationality Act ("INA"). "The INA comprehensively addresses criminal penalties for these actions undertaken within the borders of the United States, and a state's attempt to intrude into this area is prohibited because Congress has adopted a calibrated framework within the INA to address this issue." The Court held that "(g)iven federal primacy in the field of enforcing prohibitions on the transportation, harboring, and inducement of unlawfully present aliens, the prospect of fifty individual attempts to regulate immigration-related matters cautions against permitting states to intrude into this area of dominant federal concern."

With regard to section 8, the Court held that the Plaintiffs were not likely to succeed with their claim that the provision is preempted by federal law. In *Arizona v. United States*, 567 U.S. ___, 132

S.Ct. 2492 (2012), the United States Supreme Court approved a similar state provision. The Court rejected a pre-enforcement challenge in Arizona in a statute which required officers to make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested where reasonable suspicion exists that the detained individual is an unlawfully present alien. Georgia Latino Alliance for Human Rights v. Governor of Georgia, ___ F.3d ___, 2012 WL 355612 (C.A. 11 (Ga.)).

CRIMINAL ATTEMPT

A civilian code enforcement officer told the Defendant that his property was in violation of the municipal code. The Defendant was given 15 days to correct the violation by cleaning up his property and by bringing his vehicles into compliance with the code. The officer told the Defendant that he would return in 15 days with two trucks. The Defendant told the officer that he was not going to tow the vehicles.

The officer returned to the property and was joined by two officers from the Warner Robins Police Department and three tow truck drivers. The officers discussed the code violations with the Defendant in the Defendant's front yard. The Defendant walked to his front door and retrieved a shotgun. As additional officers arrived on the scene, the Defendant started shooting with a semiautomatic weapon. The code enforcement officer was struck by bullets in the shoulder, arm and face, and the three tow trucks were damaged. None of the officers threatened the Defendant or pointed a gun at him. The code enforcement officer did not carry a weapon. After the Defendant was convicted of criminal attempt to commit murder and aggravated assault, he appealed.

HOLDING: The Defendant's conviction was upheld. The Court held that there was no evidence of any imminent threat of harm that would justify the Defendant's use of force. There was no evidence of an unlawful entry into the Defendant's home or interference with the Defendant's real or personal property that would justify his use of force. The Court held that the Defendant's belief that the officers were stealing his vehicles was unfounded. Adcock v. State, ___ S.E.2d ___, 2012 WL 3601841 (Ga. App.).

EQUAL ACCESS

The Defendant was driving his grandmother's vehicle when he picked up the Co-Defendant in Norcross. When he picked her up, the Co-Defendant asked him if he was "riding dirty" or

driving with narcotics or other contraband in the car. The Defendant was pulled over by an officer for failure to maintain a lane. During the stop, the officer noticed furtive movements inside the vehicle. The officer also detected the strong odor of methamphetamine coming from inside the vehicle. The officer sought and was given consent to search the vehicle. During the search, the officer found a brick of methamphetamine. The Defendant and his Co-Defendant were arrested, charged, and convicted of trafficking in methamphetamine. The Defendant appealed contending, since the vehicle belonged to his grandmother and he was traveling with a passenger, others had equal access to the vehicle.

HOLDING: The Court upheld the Defendant's conviction. Because the Defendant was driving the vehicle where the contraband was found, at the time it was found, a presumption arose that he possessed it. Mercado v. State, ___ S.E.2d ___, 2012 WL 3194331 (Ga. App.).

INQUIRING MINDS

QUERY: Is it permissible for a passenger to consume alcohol in a motor coach?

ANSWER: Yes. O.C.G.A. § 40-6-253(3)(b)(2) creates an exception to the open container law for individuals "in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation or in the living quarters of a motor home or house trailer."

ALS REMINDERS

⊗ Witnesses are **never** subpoenaed by the Court for an ALS hearing. The Court provides notice to the arresting officer. If additional witnesses are needed for an ALS Hearing, the officer must subpoena those witnesses. The witness subpoena can be found on the Court's website at www.osah.ga.gov. Go to forms, and click subpoena. Fill in all of the requested information, and serve it on the necessary witness(es). If you need assistance completing a subpoena, please contact Dee or Beverly in Legal Services at (404) 624-7023.

QUOTABLE WISDOM WORKS

"The world is full of obvious things which nobody by any chance ever observes..."— Arthur Conan Doyle, "The Hound of the Baskervilles"

Published with the approval of Colonel Mark W. McDonough. 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.