

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 2, 2018

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State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Statutory Speedy Trial Demands**
- **DUI; Implied Consent**
- **Sufficiency of the Evidence; OCGA § 40-2-5 (a),**
- **Jury Venires; Postponements**
- **Sentencing; Merger**

Statutory Speedy Trial Demands

Zarouk v. State, A17A1922 (1/12/18)

Appellant was indicted November 4, 2016 in Fulton County on burglary and other charges. Because the terms of court for the Fulton County Superior Court begin the first Monday of January, March, May, July, September and November, and the first Monday in November 2016 was November 7, appellant was indicted in the September 2016 term of court. Appellant was not tried during the November term. On December 15, 2016, he filed a demand for speedy trial. The next term of court for the Fulton County Superior Court began the first Monday in January 2017, and no trial was scheduled for him during that term either. Appellant then moved for discharge and acquittal. The trial court denied the motion. The Court stated that the deciding issue was which term counts as the first term during which appellant was required to be tried. A term or a remainder of a term in which

no juries are impaneled and qualified to try the case is not counted for purposes of OCGA § 17-7-170. Likewise, even if jurors have been impaneled and qualified at some point in the term, if jurors have been dismissed and are not subject to recall when the demand is filed, the term in which the demand is filed does not count for computation of the two-term requirement of OCGA § 17-7-170 (b). For purposes of the statute, “impaneled” means jurors who have been summoned, have appeared for service, and have not yet been discharged. Thus, the Court stated, appellant bore the burden of establishing that there were qualified juries so impaneled at the requisite times. Here, the Court found, the evidence showed that although jurors were impaneled at the beginning of the day on December 15, 2016, they were excused at some point during the morning or afternoon because the cases for which they had been summoned were resolved by plea. No other juries were impaneled for the remainder of the November term. Consequently, because appellant failed to show the jurors had not yet been discharged at the time that he filed his Demand that day, it was not clear error for the trial court to find that appellant failed to prove that a jury was impaneled at the time he filed his Demand. Accordingly, the Court affirmed the denial of his motion.

DUI; Implied Consent

MacMaster v. State, A17A2083 (1/10/18)

Appellant was convicted of DUI (less safe), DUI (per se) and failure to maintain lane. Appellant contended that the trial court erred in denying her motion in limine to exclude the admission of her statements consenting to the State-administered breath test and of the results of that test because the admission of that evidence at trial violated her constitutional right against self-incrimination under the United States and Georgia Constitutions. The Court stated that a defendant's verbal consent to take a breath test and the results obtained from such a test are not evidence of a testimonial or communicative nature and thus do not implicate the right against self-incrimination under the Fifth Amendment. In contrast, our Supreme Court in *Olevik v. State, ___ Ga. ___ (806 SE2d 505) (2017)*, recently held that a defendant's right against self-incrimination afforded by Article I, Section I, Paragraph XVI of the Georgia Constitution protects against compelled breath tests. Nevertheless, the Court found, under the totality of the circumstances, appellant freely and voluntarily consented to the State-administered breath test. Specifically, the Court noted, the evidence, including the dash-cam recording, showed that appellant gave an affirmative response to the question posed by the officer when he recited the implied consent notice, she never changed her mind before the testing occurred, and she did not appear to be impaired to the extent that she was unable to understand what was asked. Furthermore, the evidence did not show that the officer used fear, intimidation, threat of physical punishment, or lengthy detention to obtain appellant's consent to the breath test, and the officer and appellant conducted themselves calmly throughout their encounter. Moreover,

there was no evidence that appellant's age or level of education negated her consent. Appellant also argued that the trial court erred in denying her motion in limine to exclude the admission of her refusal to take the Alco-Sensor test. She contended the test was a warrantless search of a suspect's breath, and she should be able to invoke her Fourth Amendment right to refuse to consent to such a search without having her refusal used against her at trial. The Court noted that the administration of a breath test is a search under the Fourth Amendment, and an individual should be able to invoke her Fourth Amendment rights without having her refusal used against him at trial. However, the case law interpreting implied consent laws demonstrates that the judiciary overwhelmingly sanctions the use of civil penalties and evidentiary consequences against DUI suspects who refuse to comply. Hence, the refusal to take a State-administered chemical test under Georgia's implied consent law is admissible at trial. Thus, the Court stated, it could discern no reason why the same rule in favor of admission should not apply in the context of a defendant's refusal to take an Alco-Sensor preliminary breath test, which it has previously held is admissible as circumstantial evidence tending to show that the defendant was impaired. Furthermore, the Court added, even if the admission was error in this case, it did not rise to the level of reversible error because the evidence against appellant was overwhelming.

Sufficiency of the Evidence; OCGA § 40-2-5 (a),

Kea v. State, A17A1555, A17A1556, A17A1557 (1/12/18)

In these consolidated appeals, appellant was convicted of sexual battery, pandering, and use of a license plate to conceal the identity of a vehicle. He contended that the evidence was

insufficient to convict him for use of a license plate to conceal the identity of a vehicle. The Court agreed. The evidence showed that a police officer responded to a call about a suspicious vehicle, which was parked with its lights turning on and off. The vehicle belonged to appellant, who was sitting inside it. The vehicle bore an expired license plate but a current revalidation decal. The license plate and the revalidation decal were not for the same vehicle. The revalidation decal found on appellant's vehicle had been stolen from another vehicle the prior month. Based on this evidence, the State alleged that appellant violated OCGA § 40-2-5 (a) in that appellant "operat[ed] a motor vehicle bearing a license plate which was improperly removed or transferred from another vehicle, to wit: 2016 decal[.]" However, the Court found, OCGA § 40-2-5 (a) does not address acts related to decals, only acts related to license plates. Although the State treated the terms "license plate" and "decal" as synonymous, it offered no authority for the proposition that the term "license plate" in OCGA § 40-2-5 (a) should be read to refer to a revalidation decal. In fact, the Court noted, other sections within this chapter of the Code refer to license plates and revalidation decals as things distinct from each other. Thus, the Court concluded, there was no evidence that the license plate on appellant's vehicle was removed or transferred from another vehicle, or that appellant committed any other act addressed in OCGA § 40-2-5 (a). Consequently, there was no evidence authorizing appellant's conviction for use of a license plate to conceal the identity of a vehicle, and the Court reversed his conviction for this offense.

Jury Venires; Postponements

Jordan v. State, A17A1580, A17A1581 (1/19/18)

Appellants were convicted of armed robbery. The record showed that at the

beginning of jury selection, appellants were instructed to return to court at 1:30 p.m. after the lunch break. Appellants failed to appear, and the trial court indicated during a bench conference that it would issue a bench warrant and bond forfeiture. After the court attended to some unrelated matters, the court again called for the appellants, and the court issued the bench warrant and bond forfeiture in the presence of the prospective jurors. Appellants then entered the courtroom, and the court admonished them that they were supposed to be there at 1:30 p.m. One defense counsel objected to the issuance of the warrant in the presence of the venire, and the court indicated it would let her put her objection on the record at a later time. The trial court proceeded to propound the statutory questions, but then the other appellant's counsel asked to approach the bench and informed the judge that appellants appeared to be intoxicated. The trial court dismissed the prospective jurors and, after it was determined that appellants were in fact under the influence, ordered them incarcerated and the proceedings continued to another day. The trial court also allowed counsel to perfect her objection about the case going forward before the same potentially prejudiced jurors who had been present when the bench warrant was issued, but refused to continue the proceedings to allow a new venire to be seated. Appellants argued the trial court abused its discretion by refusing to postpone the proceedings until a new jury venire could be convened. The Court disagreed. When prospective jurors who have not been impaneled or sworn are exposed to prejudicial remarks, the prejudiced party has two potential remedies: (1) the more "extreme remedy" of postponement until a new panel of jurors can be impaneled or (2) a challenge to the poll. Here, appellants sought the extreme remedy of postponement, apparently because all of the potential

jurors summoned for the week were in the courtroom. However, the Court found, appellants failed to show that they were prejudiced by the issuance of the bench warrants. Appellants did not request or attempt to question the prospective jurors about the effect of the issuance of the bench warrants. Also, none of the potential jurors responded affirmatively to the statutory voir dire questions concerning whether they had formed any opinion concerning the guilt or innocence of appellants, or were prejudiced for or against appellants, and none of them disputed that they were "perfectly impartial." Furthermore, none of the members of the venire gave any other indication that they were prejudiced by the issuance of the warrants or bond forfeiture against appellants. Finally, appellants did in fact appear in court shortly after the bench warrants were issued, and the prospective jurors knew they had simply been late returning from lunch and had not in fact failed to appear. Under these circumstances, and in the absence of any showing of possible prejudice, the Court concluded that the trial court did not abuse its discretion in the denial of the request for a postponement or continuance.

Sentencing; Merger

Evans v. State, A17A1964 (1/22/18)

Appellant was convicted of one count each of aggravated assault, aggravated battery, possession of a firearm during the commission of a felony, discharge of a firearm on the property of another, and possession of a firearm by a convicted felon. He argued that the trial court erred by failing to merge his aggravated assault and aggravated battery convictions for the purposes of sentencing. The Court agreed. A defendant may not be convicted of more than one crime where one crime is included in another. The test for determining whether one crime is included in another, and therefore

merges as a matter of fact, is the "required evidence" test — whether conviction for one of the offenses is established by proof of the same or less than all the facts required to establish the other crime. Applying this test to the indictments in this case, the Court found that the aggravated assault conviction was a lesser included offense of the aggravated battery conviction. Although aggravated battery required proof that the victim had his body seriously disfigured, which was not a required showing under the applicable aggravated assault provision, the latter provision did not require proof of any fact that was not also required to prove the aggravated battery, as that offense could have been proved under the indictment in this case. Therefore, the Court concluded that appellant's conviction and sentence for aggravated assault had to be vacated and the case remanded to the trial court for re-sentencing.