

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 14, 2012

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## THIS WEEK:

- **Miranda Rights**
- **Recusal; Ex Parte Communication**
- **Statements**
- **Search & Seizure; Forfeiture**
- **Vehicular Homicide; Cross-Examination; Witness Credibility**

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### **Miranda Rights**

*Osei-Owusu v. State, A12A1526 (12/10/2012)*

Appellant was convicted of rape. He contended that the trial court erred by denying his motion to exclude an in-custody statement. The record showed that the victim went with her party-promoter boyfriend to a night club and hung out in the V.I.P. room for several hours, drinking and dancing. The victim, noticeably intoxicated, was approached by a bouncer who told her to leave. After arguing, the bouncer carried the victim outside and left her on a curb. Shortly thereafter, two police officers working security for the club were directed to an area next to the club, where one officer testified that he observed appellant standing in front of a table with his pants below his buttocks. The victim had her buttocks on the table, her head under the table and her legs on top of appellant's shoulders, one leg on each shoulder. The officer testified that appellant was having sexual intercourse with her. The officers got appellant off of the victim and escorted him to the police car. When the officer checked on the victim, she appeared to be unconscious. It took almost an hour for her

to become responsive enough to answer any questions. The victim told the second officer that she did not know appellant and did not know what had happened. When handcuffs were placed on appellant, he repeatedly asked why he was being arrested for having sex with his girlfriend. When the first officer told the victim he had seen appellant "humping her," she began to cry and asked for her boyfriend. The other officer asked appellant if he knew who the victim was and he responded that she was his girlfriend. When asked what her name was, appellant did not respond.

Appellant argued that the trial court erred by denying his motion to exclude his refusal to respond when the officer asked him the victim's name while he was handcuffed in the police car. Appellant contended that the statement was the result of custodial interrogation and that he should have been given the warnings required by *Miranda v. Arizona*, 384 U. S. 436 (1966). The officer admitted that he did not read appellant his *Miranda* rights, but the trial court ruled the statement admissible as part of the on-scene investigation to determine how to charge appellant.

The Court stated that *Miranda* warnings are required to be administered when an individual is interrogated while in custody. The term "interrogation" refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Here, the trial court erred in denying appellant's motion to exclude his statement. The officer should have known that asking appellant his claimed girlfriend's name, after the victim had just stated that she did not know appellant, was reasonably likely to elicit an incriminating response, and the response was given at a

time when appellant should have been given a *Miranda* warning. However, the Court found no basis for reversal because the error was harmless beyond a reasonable doubt in light of the other evidence of appellant's guilt.

## **Recusal; Ex Parte Communication**

*Hargis v. State, A12A1622 (12/11/2012)*

Appellant was convicted of attempt to manufacture methamphetamine. He argued that the trial court erred when it did not recuse itself after receiving an ex parte communication before trial from co-defendant's counsel about appellant's alleged propensity for violence. The record showed that officers executed a search warrant at the shared home of appellant and co-defendant and found a tape recorder and cassette tape. Conversations on the tape included co-defendant's conversations with her counsel and their negotiations with prosecutors. The prosecutor testified that before trial, co-defendant's counsel had entered chambers and, outside the presence of appellant's trial counsel, talked to the judge about the cassette tape discovered in the search. Appellant's trial counsel testified that he knew that co-defendant's counsel had met with the judge on the subject of the tape but did not know that she had expressed "concerns" about appellant until after trial. Appellant's trial counsel did not object or move to recuse the judge on the basis of this meeting. Co-defendant's counsel confirmed that she had spoken to the judge outside the presence of appellant or his trial counsel regarding her concerns about appellant, including personal safety issues. At no point did the trial court dispute any part of co-defendant's counsel's account of the ex parte communication.

Appellant argued that the trial court erred when it failed to recuse itself in the wake of receiving the ex parte communication from co-defendant's counsel. Section (B)(7) of Canon 3 of the Georgia Code of Judicial Conduct forbids a judge from considering an ex parte communication. Once a party has shown that a judge has received an ex parte communication, the resulting presumption of harm can be overcome only by an affirmative showing that the judge did not consider the communication. In determining whether the presumption of harm had been overcome, the Court considered (a) whether appellant's

failure to object or to move for the judge's recusal after learning of the communication amounted to a waiver of his claim of error concerning it, and (b) whether the State can rebut a presumption of harm. Canon 3(E) (1) sets out the general provision that judges should disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including when the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. The waiver provision of Canon 3 is set out in subsection (F), which provides that judges disqualified by the terms of Section 3(E) may disclose on the record the basis of their disqualification and may ask the parties to consider, out of the presence of the judge, whether to waive disqualification. On its face, then, Canon 3(F)'s waiver provision cannot be applied to the ex parte communications covered by the more specific prohibitions of Canon 3(B)(7). In situations involving specific disqualification standards, the Canon is meant to be self-enforcing, and it is the trial court's duty to disqualify itself as soon as it is aware that grounds exist. Thus, no waiver of disqualification under one of the specific disqualifications standards, which includes subsection 3(B)(7) governing ex parte communications, is possible unless authorized by the Canon itself.

The Court held that appellant did not waive his objection to the ex parte communication, as his failure to move to recuse could not amount to a waiver because Canon 3 of the Code of Judicial Conduct does not authorize a waiver when the issue of an ex parte communication is raised in the trial court. Preempting whether trial counsel should have objected sooner, it is undisputed that appellate counsel raised the issue of the ex parte communication before the judge who received the communication, who never affirmatively stated she did not consider it, and who was thus presiding over the issue of her own qualifications to rule on the motion for new trial after the matter had been raised. The Court also held that the State could not show that the trial court's error in receiving the ex parte communication was harmless. When the court considers facts not properly in evidence, the other party has rights that cannot be protected if he is thus denied the privilege of cross-examination. The Court concluded that because so fundamental a right was denied appellant as a result of the ex parte meeting, the trial court erred when it failed

to recuse itself from the case, and, therefore, when it denied appellant's motion for new trial. Accordingly, a new trial was necessary and appellant's conviction was reversed and remanded for further proceedings consistent with the Court's opinion.

## **Statements**

*Tobias v. State, A12A1231 (12/12/2012)*

A jury convicted appellant of homicide by vehicle in the second degree. Appellant contended that the trial court erred in denying her motion to suppress statements. The evidence showed that appellant was driving a truck northbound and as she was attempting to make a left turn, she turned in front of a motorcycle that was traveling southbound. The motorcycle and its driver collided with the truck, and the driver died at the scene. Shortly after the accident, appellant was escorted by emergency medical personnel to a nearby house to be treated for shock. Appellant remained in the residence until law enforcement could speak with her about the details of the accident. About one hour after the accident, an officer with the GSP arrived on the scene as lead investigator, and spent approximately 45 minutes investigating the accident. He then entered the residence where appellant was receiving treatment and began asking her what happened in the crash. He did not physically place her under arrest or tell her that she would be arrested at that time. Appellant told the officer that she was traveling northbound and was turning left when the crash occurred. The officer then advised appellant that there was no insurance on the vehicle and that the tag was expired and asked her if she was aware of those facts. She indicated that she was. The officer then told appellant that she would be charged, advised what the charges would be, placed her under arrest and advised her of her *Miranda* rights.

Appellant maintained that the trial court erred in finding that she was not in custody at the time she made the statements prior to being advised of her *Miranda* rights. Specifically, appellant contended that she had been detained by law enforcement for approximately two hours after the accident and then questioned in an isolated and police-dominated atmosphere. The Court stated that a person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested;

or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that she was in custody, *Miranda* warnings are not necessary. Thus, the proper inquiry focuses upon the objective circumstances attending the particular interrogation at issue, and not upon the subjective views of either the person being interrogated or the interrogating officer.

The Court held that under the totality of the circumstances, the trial court was authorized to conclude that appellant was not in custody when she was questioned because a reasonable person would not have felt that she was under a formal arrest, but would have understood that she could not simply leave the scene of such a serious accident before speaking with the police. It is well-settled that a police officer has the right to detain an individual involved in an auto accident to conduct an investigation into the circumstances surrounding the accident, and such detention does not normally trigger the protections of *Miranda*. It took the officer approximately one hour to arrive at the accident scene, during which time appellant received medical treatment for symptoms of shock. The officer then spent approximately 45 minutes investigating the accident before speaking with appellant. There is no particular length of time in which a temporary detention must be considered "unreasonable," but under the circumstances presented in this case, the Court could not say that the time period between the accident and appellant's questioning was an unreasonable detention. Further, contrary to appellants assertions, she was not isolated in a police-dominated atmosphere while she remained in the residence. She was accompanied by her mother and her aunt, who were also present during her interview with the police.

### **Search & Seizure; Forfeiture** *Mordica v. State, A12A1343 (12/12/2012)*

The trial court granted the State's petition for forfeiture of \$63,339 seized from appellant's vehicle following a traffic stop. Appellant contended that the trial court erred in finding that the funds were subject to forfeiture. The record showed that an officer pulled a vehicle over for its excessively tinted windows. Upon approaching the vehicle, the officer noted that the car emitted an overwhelming odor of an air freshener. The officer asked appellant where

he was going, after noting his Florida license plate. Appellant said he was on his way to buy a restaurant in Atlanta, but that he couldn't remember the name of the restaurant. During this conversation, the officer noticed that appellant demonstrated an unusual level of nervousness and that he could see appellant's carotid artery pounding in his neck. The officer then returned to his patrol car to run appellant's license when he received a call for assistance from another officer located up the road. The officer told appellant that he would be issued a written warning, but asked appellant to drive up about 300 yards so that he could assist the other officer first. Appellant complied, and after assisting the other officer, the officer asked appellant's consent to search the vehicle. Appellant declined, and the officer informed him that he would be using the canine in his patrol car to do a free-air sniff. This resulted in a positive response by the dog. The officer then detained appellant and placed him in handcuffs. The officer searched the car and found \$63,339 in cash, divided into \$1,000 bundles secured with rubber bands. The officer next ran a criminal report and found that appellant had a criminal history with several drug-related convictions. It was undisputed that police found no drugs in the car or on appellant's person and that appellant was not charged with any crime.

Appellant contended that the trial court erred in finding that the funds seized from his vehicle were subject to forfeiture. Specifically, appellant argued that the traffic stop was impermissibly prolonged because although the officer testified that it takes only two or three minutes to write a traffic warning under normal circumstances, appellant's traffic stop was extended to about twenty minutes. The Court stated that it is well-settled that the investigative stop of a vehicle cannot be unreasonably prolonged beyond the time required to fulfill the purpose of the stop. Once the purpose has been fulfilled, the continued detention of the vehicle and its occupants is constitutional only if the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has de-escalated into a consensual encounter.

The Court held that the trial court correctly concluded that the first delay in issuing the warning, when the officer assisted another officer, was caused by exigent circumstances and did not constitute an unlawful detention.

Thus, the trial court did not abuse its discretion in finding that appellant's detention was not impermissibly prolonged by this first delay. The Court also held that the trial court correctly concluded that the second delay in issuing the warning, when the officer sought appellant's consent to search the car and then used his drug dog, was justified by reasonable articulable suspicion. Although extreme nervousness alone does not constitute a valid reason for detention based on suspicion of criminal activity, such behavior combined with the strong scent of air freshener and appellant's strange explanation for his trip constituted evidence on which the trial court could conclude that under the totality of the circumstances, the officer had a reasonable, articulable suspicion of criminal activity justifying a brief detention.

Finally, the Court affirmed the forfeiture of the currency found in the vehicle despite no drugs being found. As the trial court found: 1) a drug dog alert showed drugs recently in the vehicle; 2) expert testimony regarding the packaging of cash and other indicia of the drug trade found was in the vehicle; 3) appellant spent 12 of the last 25 yrs. incarcerated for drug-related offenses; and 4) appellant's explanation as to how he obtained the cash and his intended purpose for the cash was not credible.

### **Vehicular Homicide; Cross-Examination; Witness Credibility**

*Smith v. State, A12A1471 (12/13/2012)*

Appellant was convicted of two counts of first degree homicide by vehicle. She contended that the trial court erred in refusing to allow her to impeach a prosecution witness with evidence of pending charges. The record showed that at approximately 3:00 a.m., appellant was driving an SUV on I-285 at a high rate of speed when she struck the rear of a slower moving sedan. The impact sent the victims' sedan into the median wall, where it rebounded and spun back out into oncoming traffic, where it was then hit by another vehicle, head on, killing both occupants of the sedan. JL, who had been driving alongside the victims' sedan at the time of the accident, testified that when he looked in his rear-view mirror he saw a vehicle approaching at a high rate of speed. He observed the speeding vehicle crash into the rear of the sedan, sending it into the median wall and back out into traffic. JL pulled over and ran

across the interstate to the median wall to give assistance, but another car struck the sedan head-on before he could reach it.

Appellant argued, and the State conceded, that the trial court erred in refusing to allow appellant to cross-examine JL about his pending drug charge. During the trial, appellant was permitted to cross-examine JL outside the presence of the jury regarding his pending charge of possession of cocaine in Indiana. Appellant attempted to elicit testimony that JL may have been testifying favorably towards the State because he hoped that it may have some beneficial effect on the disposition of the pending drug charge. However, JL stated unequivocally that he had no hope of benefiting from providing testimony in the case. The trial court ruled that appellant would not be allowed to cross-examine JL regarding the subject in front of the jury. Appellant contended that this limitation on her cross-examination of JL prevented her from showing that JL had a reason to be biased against her, thereby impeaching his credibility.

The Court stated that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to a harmless-error analysis. At trial, JL's testimony regarding his observation of the speed of appellant's vehicle and its collision with the victims' car was corroborated by the police officers' analysis of the accident scene, the physical evidence on the vehicles involved, the data retrieved from the SDM in appellant's SUV, and investigations of the State's accident reconstruction experts. Thus, there was evidence independent of JL's testimony that was sufficient to support the jury's conviction of appellant on the charges arising out of the collision. Moreover, the trial court allowed appellant's counsel to cross-examine JL for the purposes of impeachment with respect to an unrelated conviction in Indiana for giving false information. Given these facts, any error by the trial court in limiting JL's testimony was harmless. Accordingly, the Court affirmed the conviction.