

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 15, 2013

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THIS WEEK:

- **Search & Seizure**
- **Special Demurrers; Child Molestation**
- **DNA Evidence; Similar Transactions**
- **Search & Seizure**
- **DUI; Double Jeopardy**
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- **Double Jeopardy; DUI**

Search & Seizure

Hernandez-Lopez v. State, A12A1715 (2/11/13)

Appellant was arrested for driving without a license. Upon the denial of appellant's pre-trial motion to suppress the traffic stop, this interlocutory appeal was filed. Appellant argued that the officer lacked reasonable, articulable suspicion to perform the traffic stop. The record showed that an officer was patrolling in a car with a license-plate reader ("LPR") system when he received a "wanted person" alert. An LPR system consists of a mounted camera that reads license plates of passing vehicles to transmit the information to a database of wanted persons. When the LPR recognizes a license plate linked to a wanted person, the system makes an audible alert and provides the officer with the person's name and date of birth, the reason the person is sought, and a photo of the vehicle and its license plate. The alert in question indicated that the wanted person was a male named E. Hernandez-Lopez, being sought for failure to appear in court. Upon identifying the relevant vehicle and seeing that it was driven by an adult male, the officer conducted a traffic stop. When the officer approached the vehicle, he asked

appellant for his driver's license, which appellant did not have and instead gave the officer an identification card. The officer learned that although the driver's last name matched that of the wanted person - Hernandez-Lopez - his first name did not. The officer returned to his patrol car with the I.D. card and ran appellant's full name and date of birth through GCIC, but the system returned that no such driver was found. Appellant was then arrested for driving without a license.

Appellant contended that the officer lacked reasonable, articulable suspicion to perform a traffic stop based on the alert received through the LPR. The Court noted that stopping and detaining a driver to check his license and registration is appropriate when an officer has a reasonable and articulable suspicion that the driver or vehicle is subject to seizure for violation of the law. Articulable suspicion must be an objective manifestation that the person stopped is, or is about to be, engaged in criminal activity, and this determination can only be made after considering the totality of the circumstances. The detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

The Court held that here, based on the alert and information he received from the LPR system, the officer had reason to believe the male driver of the relevant vehicle was wanted for failure to appear in court. This provided reasonable, articulable suspicion to conduct a traffic stop. The information retrieved via the LPR system is not unlike that which an officer retrieves by way of running vehicle-tag numbers through GCIC, which the Court has previously held provides justification for an initial stop. Moreover, the Court noted, in an unpublished opinion, the Eleventh Circuit recently addressed use of the LPR system in the context of a case asserting

an unreasonable search, noting that the United States Supreme Court has concluded in similar contexts that visual surveillance of vehicles in plain view does not constitute an unreasonable search for Fourth Amendment purposes, and that this is true even if the surveillance is aided by the use of technology to augment the officers' sensory faculties. Similarly, the LPR system at issue merely aided the officer by augmenting his sensory faculties, providing an enhanced ability to process tag information through a law-enforcement database rather than requiring the officer to manually conduct random checks. The information retrieved by the system's recognition of the license-plate numbers gave the officer reasonable, articulable suspicion to justify a traffic stop of the vehicle driven by appellant. Thereafter, the officer had probable cause to arrest appellant for driving without a license.

Special Demurrers; Child Molestation

Mosby v. State, A12A1703 (2/11/13)

Appellant was indicted on multiple counts of sexual offenses against four of his children. The record showed that the State alleged that the offenses occurred during a specified date range, rather than on a certain day. Appellant filed a special demurrer, and argued that he expected his defense to include evidence that he did not reside in the family home at the time of several of the alleged offenses and, therefore, that the State should be required to vastly narrow the alleged date ranges so that he may better defend himself against the allegations. After a hearing, the trial court overruled the special demurrer.

Appellant asserted that the trial court erred in overruling his special demurrer because the State failed to present evidence at the hearing on the special demurrer to show that it was unable to identify a single date on which each offense occurred. The Court agreed and reversed. Generally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer. However, where the State can show that the evidence does not permit it to allege a specific date on which the offense occurred, the State is permitted to allege that the crime occurred between two particular dates. The Court explained that even when the State cannot identify a single

date on which the offense occurred, the range of dates alleged in the indictment should not be unreasonably broad. The Court emphasized that the exception to the single-date requirement is not applicable where the State fails to present evidence to the trial court to show the inability to identify a single date on which an offense occurred, as, for example, when the victim is a child who may be incapable of adequately articulating exactly when the offense occurred. However, the State may not rely upon speculation or upon generalities about child victims.

Here, the State failed to present evidence to show that it was unable to specify a single date on which each offense occurred, aside from the speculative argument that children have trouble remembering exact dates. Evidence that the victim is a minor who is incapable of articulating exactly when the offense occurred is a factor the trial court may consider in determining whether the State carried its burden of showing that it cannot establish a specific date or time frame in which the offense or recurring offenses occurred. But, no such evidence appeared in the record and it appeared the trial court did not require the State to make any such showing. Absent the required evidentiary showing, the Court concluded that the counts in the indictment were imperfect and subject to the special demurrer. The Court noted that of course, its holding does not preclude the State from re-indicting appellant upon the return of the case to the trial court.

DNA Evidence; Similar Transactions

Rhodes v. State, A12A2275 (2/12/13)

Appellant was convicted of child molestation and incest. He contended that the trial court erred in failing to suppress DNA evidence. The record showed that appellant married the victim's mother when the victim was 6 years old. The evidence showed that the acts of molestation began when the victim was 8 years old. When she was 13 years old, the victim gave birth to a full term baby. The victim subsequently reported that appellant had been molesting her and that he was the father of her child. Several years later, a county crime scene unit investigator obtained a search warrant for DNA buccal swabs from appellant for the purposes of DNA comparison and paternity

testing. Subsequent DNA testing confirmed that there was a 99.99 percent probability that appellant fathered the victim's child. Appellant was subsequently arrested and indicted for child molestation and incest.

Appellant contended that the trial court erred in denying his motion to suppress the DNA evidence since there was insufficient probable cause to support the warrant to extract buccal swabs from his person for the DNA testing. The Court explained that in determining whether probable cause exists for issuance of a search warrant, the magistrate's task is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place. Appellant argued that the search warrant affidavit was insufficient because it omitted the fact that the victim had previously made inconsistent and contradictory claims regarding who fathered her child, the omitted information was material, and omission of this information was deliberately misleading.

The Court found that assuming the omitted information was material, and considering the affidavit as if the information had been included, the magistrate nevertheless had probable cause for issuing the search warrant. The affidavit in support of the search warrant stated that appellant had possibly fathered the victim's child, appellant began a sexual relationship with the victim when she was 10 years old, the sexual relationship continued until the victim was 15 years old, the victim's son was conceived during that time period, and the son's father had not been scientifically identified. The information contained in the affidavit clearly implied the possibility that appellant was the father of the victim's child. Therefore, the affidavit showed a substantial basis for the magistrate to conclude that a crime had been committed and that evidence of that crime would be found in appellant's blood. Moreover, the information that appellant claimed was improperly omitted did not alter the basis for the issuance of the search warrant.

Search & Seizure

Jones v. State, A12A2139 (2/12/13)

Appellant was convicted of trafficking in cocaine and failure to maintain lane. Appellant asserted that the trial court erred in denying

his motion to suppress the cocaine found during the search of his car, arguing that it was obtained as a result of an unlawful search conducted without probable cause. The evidence showed that a police officer observed the car driven by appellant on an interstate highway failing to maintain its lane and nearly running off the roadway. After observing the traffic violation, the officer stopped appellant's car. Upon approaching appellant's car, the officer smelled the odor of burnt and raw marijuana emitting from the car. The officer testified that he was able to recognize the smell of marijuana based upon his training and experience in law enforcement. The officer asked appellant about the odor that he had detected, and appellant admitted that he had smoked a marijuana blunt earlier that day. Based upon these facts, the officer decided to search appellant's car for marijuana. Although the officer continued to smell the odor of raw marijuana, he was unable to locate any marijuana inside the car. The officer then proceeded to search the car's trunk. During the search of the trunk, the officer found the package containing cocaine.

Appellant argued that the cocaine evidence should have been suppressed because the officer lacked probable cause to conduct the warrantless search of his car. The Court stated that automobile exception to the warrant requirement of the Fourth Amendment applies to the search of a vehicle when probable cause exists to believe it contains contraband. The Court concluded that the officer's detection of the odor of marijuana emitting from appellant's car provided probable cause to believe that the car contained drug contraband, which authorized the search of the car. Appellant nevertheless argued that the officer's uncorroborated claim that he smelled marijuana was merely pretextual, and pointed to inconsistencies in the officer's testimony as to whether the odor detected was of burnt or raw marijuana. The Court found this challenge to the officer's credibility meritless. The alleged inconsistencies in the officer's testimony at the preliminary and motion to suppress hearings presented a matter of the officer's credibility. Notwithstanding the attempted impeachment and the absence of corroboration of the officer's testimony, it was for the trial court, sitting as finder of fact in ruling on the motion to suppress, to determine the credibility of the officer's testimony. Accordingly, the trial court was authorized to find that the officer gave

credible testimony that he smelled both burnt and raw marijuana emitting from the car, which provided probable cause for the search.

DUI; Double Jeopardy

Hassard v. State, A12A2385 (2/13/13)

Appellant was convicted of DUI (less-safe). He contended that the trial court erred in denying his plea in bar on double jeopardy grounds. The record showed that a woman stopped at a red light in Fulton County was hit from behind by another vehicle. As the woman called police, the driver of the other vehicle, whom she identified as appellant, had trouble getting out of his vehicle, and he balanced himself by holding on to the door and the hood of his vehicle as well as her vehicle as he made his way toward her. The woman explained that appellant was slurring his speech and that she smelled alcohol on his person. When she told appellant that the dispatcher advised that they pull off of the road, appellant walked back to his vehicle. The woman pulled her vehicle into a nearby parking lot and got out to wait for appellant, but appellant drove away. The woman gave the police dispatcher appellant's tag number and described his vehicle. Within an hour of the incident, an investigating officer located appellant's residence using information from his vehicle tag number, but had to leave his business card when no one answered the door. Appellant later called the officer and admitted to being involved in the hit-and-run. During further investigation, the officer discovered that appellant had been in a vehicle accident and charged for DUI (less-safe) in Gwinnett County about 54 minutes after the hit-and-run incident in Fulton County. Based upon the statement of the woman in the Fulton County hit-and-run incident, and his belief that there was not enough time for appellant to stop at a location to consume enough beverages to make him intoxicated between the Fulton County incident and the Gwinnett County incident, the officer took out a warrant for appellant's arrest for DUI less-safe. Appellant subsequently pled guilty to DUI (less-safe) to the Gwinnett County charge. After his plea, Fulton County charged appellant by accusation with hit-and-run, following too closely, and three counts of DUI. The trial court denied appellant's plea in bar on double jeopardy grounds seeking to preclude his prosecution for DUI (less-safe) in Fulton County.

Appellant argued that the trial court erred in denying his plea in bar on double jeopardy grounds. The Double Jeopardy Clause of the Fifth Amendment protects criminal defendants from three governmental abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. The Georgia constitutional and statutory protections against double jeopardy also apply to multiple prosecutions or punishments for the same offense or same crime, to offenses arising from the same conduct or same transaction, and to lesser included offenses.

Appellant argued that the Fulton County DUI (less-safe) charge was barred because both the Fulton and Gwinnett County driving under the influence charges arose from the same conduct. The Court explained that it had to consider whether the offenses at issue "arose out of one course of conduct." The Court concluded that here, there were two separate courses of conduct. When appellant collided with the woman's vehicle in Fulton County, he got out of his vehicle, walked to her vehicle, had an extended conversation with her as she spoke with the police dispatcher, got back into his vehicle and began to follow her to a parking lot, but then drove away after driving back by the scene. Appellant collided with another vehicle in Gwinnett County nearly an hour later. This evidence showed that at two different times and in two different locations, appellant drove under the influence of alcohol to the extent he was less safe, albeit on the same day. Thus, appellant's actions in the Fulton County incident and his actions in the Gwinnett County incident were neither the same transaction nor the same conduct as contemplated by O.C.G.A. § 16-1-7(a). Jeopardy therefore did not attach, and the trial court did not err in denying appellant's plea in bar.

Search & Seizure

Pierce v. State, A12A2319 (2/14/13)

Appellant was convicted of DUI (less safe). She contended that the trial court erred in denying her motion to suppress. The record showed that appellant was sitting in the driver's seat of a vehicle parked in front of a gas station with the engine running and the headlights on. As the police officer exited the gas station, he observed appellant in the vehicle and thought

that she was asleep behind the wheel. The officer approached appellant's vehicle, shined his flashlight inside, but received no response from appellant so he knocked on the window. Appellant woke up, looked at the officer standing at her window, and then looked back down and began to scroll through her cell phone. The officer again knocked on the window and asked appellant to roll it down. Appellant rolled down the window, whereupon the officer detected an odor of alcohol and noticed that she had glassy eyes. The officer asked her to step out of the vehicle, and appellant admitted that she had consumed alcohol earlier that day. After appellant failed field sobriety tests, she was arrested for DUI (less safe). Appellant moved to suppress the evidence, contending that the officer seized her without an articulable suspicion of criminal activity when he knocked on the window of her vehicle a second time and asked her to roll it down. The trial court denied the motion.

The Court stated that there are three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention; (2) brief seizures that must be supported by reasonable suspicion; and (3) full-scale arrests that must be supported by probable cause. In the first tier, police officers may approach citizens, ask for identification, and freely ask questions without any basis or belief that the citizen is involved in criminal activity, as long as the officers do not detain the citizen or create the impression that the citizen may not leave. Here, the police officer's testimony showed that appellant was already stopped when the officer approached her vehicle. It is well-established that an officer's approach to a stopped vehicle and inquiry into the situation is not a "stop" or "seizure" but rather clearly falls within the realm of the first tier of police-citizen encounters. Concluding that the situation at hand constituted a first-tier encounter, the Court explained that the officer was permitted to ask appellant to roll down her window or step out of her car, and freely question her without any articulable suspicion, as long as the officer did not detain her or create the impression that she may not leave. There was no evidence that the officer asked appellant to roll down her window in a manner that would have made a reasonable person in her position believe she was not free to leave. Significantly, there was no evidence that the officer engaged his siren or emergency

equipment, drew his firearm, or made any other show of force. Nor was there any evidence that the officer threatened, coerced, or physically restrained appellant.

Appellant next contended that the first-tier encounter escalated into a second-tier encounter when, after she ignored the officer's first knock, the officer again knocked on the window and asked her to roll it down. The Court held that even if the encounter rose to the level of a second-tier encounter, the officer had a reasonable, articulable suspicion to detain appellant. Notably, the officer found appellant asleep behind the wheel of a vehicle with the engine running, and she was unresponsive when he initially shined his flashlight inside her vehicle. Accordingly, the Court affirmed appellant's conviction.

Double Jeopardy; DUI

Johns v. State, A12A1794 (2/14/13)

Appellant was charged with DUI. His motion in *autrefois* convict and plea of former jeopardy was denied by the trial court. The record revealed that appellant got into an argument with his live-in girlfriend and damaged some of her clothes. She called the police and appellant left. The girlfriend informed the responding officer that appellant had driven off and that he had been drinking alcoholic beverages. Another police officer stopped appellant at an intersection near the residence and arrested him for DUI. Appellant made bond and approximately three weeks later he was arrested for criminal trespass (Family Violence Act) for the incident that occurred with his girlfriend. Thereafter, appellant pled guilty to criminal trespass.

Appellant contended that the trial court erred in denying his motion to dismiss his DUI charge based on double jeopardy grounds after he pled guilty to criminal trespass. The Court noted that in addition to constitutional proscriptions of double jeopardy, the extent to which an accused may be prosecuted, convicted, and punished for multiple offenses arising from the same criminal conduct is limited even more strictly by the Georgia Criminal Code. Under O.C.G.A. § 16-1-7(b), if several crimes (1) arising from the same conduct are (2) known to the proper prosecuting officer at the time of commencing the prosecution and are (3) within the jurisdiction of a single court, they must be prosecuted in

a single prosecution. A second prosecution is barred under O.C.G.A. § 16-1-8(b)(1) if it is for crimes which should have been brought in the first prosecution under O.C.G.A. § 16-1-7(b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. In order to determine whether offenses occurred as a result of the same conduct to constitute procedural double jeopardy, the Court explained that the crimes must arise from the same transaction or continuing course of conduct, occur at the same scene, occur on the same date, and occur without a break in the action. Additionally, if it is necessary to present evidence of the one crime in order to prove the other, then the State must prosecute those charges at the same time.

The Court first noted that the record did not contain the transcript of the trial court hearing, thus the Court was required to assume that the trial court's judgment was correct. However, the Court found, based on the recitation of facts in appellant's own motion, the trial court properly denied appellant's motion because the offense of DUI did not arise from the same transaction as the offense of criminal trespass (FVA). The Court explained that appellant was arrested on a warrant for a criminal trespass at the residence of his live-in girlfriend; appellant was not at the scene when officers arrived, and the crime was charged based on the statements given to officers by appellant's girlfriend. According to appellant, another officer stopped his vehicle and charged him for DUI. Although the stop may have occurred near the residence in question, and although the officer who arrested appellant for DUI may have had information that appellant appeared to be intoxicated while he committed the criminal trespass, the two incidents were separate transactions, one of which had been completed prior to the other, and both of which could be presented to a trier of fact without disclosing evidence of the other offense. Accordingly, the trial court did not err by denying appellant's motion to dismiss based on double jeopardy grounds.