

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 17, 2017

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THIS WEEK:

- **Motions for New Trial; Abandonment of Issues**
- **Sufficiency of the Evidence; Sexual Offender Registration**
- **Transcripts; Indigency**
- **Demonstrative Evidence; Preservation of Evidence**

Motions for New Trial; Abandonment of Issues

Hornbuckle v. State, S16A1439 (2/27/17)

Appellant was convicted of murder. She contended that the trial court erred in failing to consider the general grounds under O.C.G.A. §§ 5-5-20 and 5-5-21 in her motion for new trial. The record showed that appellant's trial counsel filed a motion for new trial asserting that "the verdict . . . was against the weight and sufficiency of the evidence." New counsel thereafter filed an "Amended Motion for a New Trial" explicitly asserting both that "the verdict and sentence are decidedly and strongly against the weight of the evidence" and that "the verdict and sentence are contrary to law and the principles of justice and equity." Yet another attorney filed a "Second Amended Motion for New Trial," however, which did not amend the first motion or incorporate it by reference, and asserted only the sufficiency of the evidence and ineffective assistance of counsel. In the brief in support of this motion, counsel cited O.C.G.A. §§ 5-5-20 and 5-5-21, but only as an alternative argument not enumerated in his argument on the sufficiency grounds. Moreover, at the hearing, the trial court specifically inquired if counsel was "[w]orking off your second amended motion for new trial," and counsel responded, "That is correct."

The Court found that while appellant's counsel arguably raised the general grounds in his trial court brief, if only as an alternative in his argument on sufficiency, a brief normally does not amend a motion for new trial to add new grounds. Moreover, counsel responded to the trial court's question by affirming that he was proceeding on the second amended motion for new trial, which made no mention of the general grounds. And while he again mentioned the "thirteenth juror" at the hearing, it was in the context of his argument on counsel's ineffectiveness in examining an expert witness, and he conflated the general grounds and sufficiency in his argument. Furthermore, the Court noted, the trial court's order denying appellant's motion for new trial duly addressed the grounds enumerated in the second motion for new trial and elaborated on in the third motion. Thus, the Court concluded, appellant abandoned the general grounds by failing to include them in the motion for new trial which counsel expressly assured the trial court he was relying upon.

Sufficiency of the Evidence; Sexual Offender Registration

Jones v. State, A16A2001 (2/27/17)

Appellant was convicted of a single count of violating the State Sexual Offender Registry statute, O.C.G.A. § 42-1-12(f)(4). He contended that the evidence was insufficient to support his conviction. The Court agreed.

O.C.G.A. § 42-1-12(f)(4) requires that any sexual offender required to register under the statute must "[r]enew the required registration information with the sheriff of the county in which the sexual offender resides or sleeps by reporting in person to the sheriff within 72

hours prior to such offender's birthday each year to be photographed and fingerprinted." The indictment charged that appellant, who previously had been convicted of statutory rape, failed "to report to the appropriate sheriff's office, to wit: the Gwinnett County Sheriff's Office" within 72 hours prior to his birthday on September 26, 2015.

The evidence showed that on Friday, September 25, 2015, appellant reported to the Walton County Sheriff's Department to register on that county's sex offender registry. At the time, appellant told the Walton County deputy who assisted him with the registration that "he had not completely moved in, still had a few things." As a result, the deputy noted on the registration form, "just moving in over weekend." The form listed the Walton County house as appellant's primary address and his Gwinnett County address as his temporary address. However, the Walton County officer primarily responsible for the sex offender registry was on vacation on September 25 and the fingerprinting and photographic equipment was locked in her office, so the registration process could not be completed that day. Appellant returned on September 30, the first day the officer was back at work, for fingerprinting and to have his picture taken in order to complete the process.

Nevertheless, the Court found, it was undisputed that appellant did not report his move to Walton County to the Gwinnett County Sheriff's office, and he did not renew his registration there. Therefore, at the time of appellant's birthday, Gwinnett County records indicated that he continued to reside in Gwinnett County. However, the Gwinnett County officers did not attempt to confirm that appellant was still residing at the Gwinnett County address before seeking an arrest warrant, and all of the Gwinnett County witnesses denied under oath having any personal knowledge as to where appellant was residing at the pertinent time. The Gwinnett County warrant was issued on September 28, 2015, and he was arrested at his Walton County address on October 7, 2015 after the county received notice that he had provided that address at a pawn shop.

The Court stated that premitting whether the evidence demonstrated a violation of some other portion of O.C.G.A. § 42-1-12, appellant was indicted under subsection (f)(4) of that statute, which requires that he renew his registration information "with

the sheriff of the county in which the sexual offender resides or sleeps" within 72 hours prior to his birthday. The Court found that the State presented no evidence that appellant was residing or sleeping in Gwinnett County at that time; in fact, the only evidence was to the contrary. Thus, based on the evidence presented, a rational trier of fact could not have found beyond a reasonable doubt that appellant was guilty of the offense charged in his indictment. Accordingly, the Court reversed his conviction.

Transcripts; Indigency

Roberson v. State, S16G0931 (2/27/17)

Appellant was convicted of family-violence simple battery after a trial in which she was represented by a public defender. She filed a motion seeking a transcript without charge as an indigent defendant under O.C.G.A. § 9-15-2 (the costs statute). After a hearing, the court denied her motion. In its written order, the trial court stated that appellant had failed to provide evidence to support her claims of indigence either at the hearing or thereafter, "despite specific requests by the Court and very specific direction as to what evidence might suffice." The Court of Appeals held that the authority to determine indigence for the purpose of requiring the county to pay for a transcript lies exclusively with the trial court, and thus cannot be considered on appeal. *Roberson v. State*, 335 Ga.App. 606 (1) (2016). The Supreme Court granted certiorari.

The Court noted that O.C.G.A. § 9-15-2(a)(2) specifically provides that "[t]he judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final." Citing *Penland v. State*, 256 Ga. 641 (1987), the Court held that the trial court has the final authority to determine indigence.

Nevertheless, appellant contended, the Indigent Defense Act of 2003 ("IDA"), O.C.G.A. § 17-12-1 et seq., makes a circuit public defender's determination of indigence binding on a trial court faced with determining indigence for the purposes of obtaining a transcript at county expense. The Court disagreed. The IDA and the costs statute each require a determination of indigence, but the two laws are directed at determining indigence for different purposes—representation and costs, respectively. Whether that is the best way

to allocate determinations of indigence is not for the Court to consider or decide. Thus, the IDA cannot disturb the costs statute's exclusive commitment of the determination of indigence to the trial court.

But, the Court stated, even where appellate review of an indigence determination is barred on the merits, procedural review may be permitted. For example, such review could be had where the trial court either failed to hold a hearing to consider the evidence tendered or demonstrated a failure to consider the evidence. But here, the trial court's order indicated that a hearing was held and stated the court's reasons for denying appellant's request. The trial court thus fulfilled its procedural duties to hold a hearing before determining that appellant could pay the transcript costs.

Demonstrative Evidence; Preservation of Evidence

Monroe v. State, A16A1932 (2/23/17)

Appellant was convicted of DUI (less safe), speeding, failure to maintain lane and driving while in possession of an open container of an alcoholic beverage. He argued that the trial court erred by allowing the State to admit video clips showing three types of horizontal gaze nystagmus. The State introduced the video clips to show the jury what nystagmus looks like while the arresting officer was testifying about conducting the horizontal gaze nystagmus evaluation of appellant. The officer testified that appellant demonstrated all three types of nystagmus shown in the video clips.

The Court stated that demonstrative evidence must be relevant, and it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The trial court has wide discretion to admit demonstrative evidence, and the burden is on the party offering demonstrative evidence to lay a proper foundation establishing a similarity of circumstances and conditions. Although the conditions of the demonstration need not be identical to the event at issue, they must be so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the demonstrative evidence

is directed. And here, the Court found, the officer's testimony made clear that the video clips were not of appellant, but that in the "substantial particulars," the conditions of the video clips and his observations of appellant were similar: both showed the same kind of nystagmus. Therefore, appellant failed to show that the trial court abused his discretion in admitting this demonstrative evidence.

Appellant also contended that the trial court erred by admitting the testimony of two officers that they observed in appellant's car an open container that was full of ice cubes and a dark liquid with the distinct odor of alcohol. Citing *State v. Miller*, 287 Ga. 748 (2010), he argued that the testimony was inadmissible because the State did not preserve the actual open container. The Court disagreed.

The Court stated that a claim based on the State's destruction of evidence could be successful only if appellant showed that the evidence was material *and* that the police acted in bad faith in failing to preserve it. Premitting whether the open-container evidence possessed an apparent exculpatory value so as to make it constitutionally material, the Court found that appellant failed to show that the police acted in bad faith in failing to preserve it. Accordingly, he failed to show that the trial court erred by allowing the officers to testify about the evidence.