

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 30, 2012

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THIS WEEK:

- **Search & Seizure; Cellphones**
- **Attempt to Elude; Multiple Counts**
- **Grand Jury; Indictments**
- **Similar Transaction**
- **Similar Transaction; Rule 31. 3 Hearing**
- **Juvenile, *Miranda* Rights**
- **Double Jeopardy**
- **Return of Indictment; "Open Court"**

Search & Seizure; Cellphones

Hawkins v. State, S11G0644 (3/23/2012)

The Court granted certiorari to consider whether a police officer's search of a cell phone incident to arrest was lawful. The facts of the case briefly stated are as follows: Appellant was arrested for various crimes, including an attempted violation of the Georgia Controlled Substances Act following an exchange of telephone text messages between herself and an officer who posed as another individual. After agreeing by text to meet the officer, ostensibly to purchase illegal drugs, appellant arrived in her car at the appointed place; there, the officer observed her entering data into her cell phone, and he contemporaneously received a text message stating that she had arrived. The officer approached appellant's vehicle and placed her under arrest; her vehicle was searched and her

cell phone was found inside her purse. The arresting officer searched the cell phone for the text messages he had exchanged with appellant, and then downloaded and printed them. Appellant moved the trial court to suppress evidence of these text messages as the product of an unreasonable search and seizure because it was accomplished without the authority of a warrant.

Appellant argued that the cell phone at issue could not be treated as a container because it does not ordinarily contain another physical object. The Court found that although an electronic device, a cell phone is "roughly analogous" to a container that properly can be opened and searched for electronic data, similar to a traditional container that can be opened to search for tangible objects of evidence. The similarity of a cell phone to a traditional container in which there might be found physical entities of evidence is clear; it is reasonable to believe that the object of the search will be found inside the cell phone.

The Court stated that it did not believe that the potential volume of information contained in a cell phone changed its character; it is an object that can store considerable evidence of the crime for which the suspect has been arrested, and that evidence may be transitory in nature. The mere fact that there is a potentially high volume of information stored in the cell phone should not control the question of whether that electronic container may be searched. The Court noted that the search should be reasonable and limited such that when "the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored [in] the phone."

Attempt to Elude; Multiple Counts

Smith v. State, S11A1903 (3/23/2012)

Appellant was convicted of, among other things, malice murder and attempting to elude a police officer in connection with a failed drug deal and a subsequent high-speed chase involving five police officers. He contended that the trial court erred by sentencing him on five separate counts of attempting to elude a police officer. Based on the plain language of the statute, the act or conduct that is prohibited by OCGA § 40-6-395 is the "willful[] . . . fail[ure] or refus[al] to bring [one's] vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer when given a visual or an audible signal to bring the vehicle to a stop." Thus, it is the act of fleeing from an individual police vehicle or police officer after being given a proper visual or audible signal to stop from that individual police vehicle or officer, and not just the act of fleeing itself, that forms the proper "unit of prosecution" under OCGA § 40-6-395. Accordingly, where, as here, the evidence supported the jury's conclusion that appellant willfully led police on a dangerous high speed chase after being given clear signals by five separate police vehicles to stop, the trial court properly sentenced appellant on five separate counts of attempting to elude a police officer.

Grand Jury; Indictments

State v. Dempsey, S11A1875; S11X1876 (3/23/2012)

In case number S11A1875, the State appealed the trial court's order granting Lewis Dempsey's motion to quash indictment number 10-CR-003-DB. In case number S11X1876, Dempsey cross-appealed the trial court's earlier denial of his motion to quash indictment number 09-CR-325-MM. For the reasons that follow, the Court affirmed S11A1875, and reversed S11X1876.

On November 10, 2009, during the August 2009 term of the Lumpkin County grand jury, indictment number 09-CR-325-MM ("first indictment") was returned, charging Dempsey with malice murder, felony murder, two counts of aggravated assault, and possession of a firearm during the commission of a felony. On December 17, 2009, Dempsey moved to quash this indictment because those persons who had been summoned for the

August 2009 term of the Lumpkin County grand jury included an elected member of the City Council of Dahlonega, who not only sat on the grand jury, but served as its foreman. In an order of January 4, 2010, the trial court denied Dempsey's motion to quash, but nonetheless ordered the official removed from future service on the grand jury.

The next day, the State sought to indict Dempsey for the same crimes; the grand jury, composed as before, but without the local official, returned indictment number 10-CR-003-DB ("second indictment"). The State also moved for an order of nolle prosequi as to the first indictment, which was granted on January 14, 2010. Dempsey then moved to quash the second indictment, which was granted. In the cross-appeal, Dempsey contended that the trial court should have granted his motion to quash the first indictment.

The Court agreed with Dempsey as to the first indictment because the elected local government officeholder was ineligible to serve on a grand jury under OCGA § 15-12-60 (b) (1). And, it was uncontroverted that he nonetheless served on the grand jury that issued the first indictment against him. Further, the Court stated, the trial court erred in denying Dempsey's motion to quash because according to OCGA § 17-7-110, "[a]ll pretrial motions, including demurrers and special pleas, shall be filed within ten days after the date of arraignment, unless the time for filing is extended by the court." It was uncontroverted that no arraignment had occurred when Dempsey filed his motion, and thus it was filed before the statutory deadline.

In regards to the second indictment, the State contended that the trial court erred in quashing it. However, the Court found that it was properly quashed as it was uncontroverted that on January 5, 2010, the grand jury returned a true bill of indictment without hearing evidence. But, a "grand jury has no right to find any bill or to make any special presentment except upon the testimony of a witness sworn in a particular case in which the party is charged with a specified offense, and in which the oath administered to the witness is substantially the one prescribed by the statute." *State v. Williams*, 181 Ga. App. 204, (1986).

Similar Transaction

Wheeler v. State, S11A1838 (3/23/2012)

Appellant contended that the trial court

erred in admitting similar transaction evidence from his ex-wife and his ex-girlfriends. He did not contend that the evidence was admitted for an improper purpose, but only that, because the incidents involving his ex-wife and his ex-girlfriends had occurred between eighteen and thirty years prior to the murder, too much time had passed for the evidence to be admissible at trial. However, the Court stated, lapse of time does not render the similar transaction evidence automatically inadmissible, but it is a factor to be taken into consideration when balancing the probative value of the evidence against its potentially prejudicial impact. The Court found that both of the prior transactions in this case involved violent assaults by the appellant against women with whom he was intimately involved. The evidence established appellant's pattern of choking his lovers, beating them, and threatening them with a knife. Given that the similar transaction evidence reflected appellant's behavior towards his prior spouse and ex-girlfriends, the Court concluded that any prejudice from the age of these prior incidents was outweighed by the probative value of the evidence under the particular facts of this case and the purpose for which the similar transactions were offered.

Similar Transaction; Rule 31.3 Hearing

Moore v. State, S11A1503 (3/23/2012)

In a 5-2 decision, the Court vacated the appellant's malice murder conviction, even though evidence supported it, holding that the trial court erred in allowing the State to introduce similar transaction evidence without conducting a hearing pursuant to U.S.C.R. 31.3 (B) and making the necessary findings on the record pursuant to *Williams v. State*, 261 Ga. 640 (1991). The Court rejected the State's contention that an in-chambers discussion of appellant's motion in limine to prevent the admission of or reference to this evidence constituted a proper Rule 31.3 hearing, as it was off the record, without appellant present, and not open to the public. The Court held that the trial court's errors in this regard were not harmless, given the circumstantial nature of the State's case and the power of the similar transaction evidence. Thus, the Court remanded the case to the trial court to conduct a proper Rule 31.3 hearing; if the trial court determines that the similar transaction evidence is admissible, it

should enter the required *Williams* findings, and if not, a new trial is required.

Juvenile, Miranda Rights

Boyd v. State, A11A2381 (3/28/2012)

A divided Court of Appeals reversed appellant's convictions and 20-year sentence for armed robbery and two firearms offenses. Applying the nine *Riley v. State* factors for evaluating juvenile confessions and adopting a de novo standard of review in light of the videotaped interview, the Court held that the trial court erred in admitting appellant's in-custody incriminating statement, as the State failed to meet its heavy burden of establishing that 15-year-old appellant knowingly and voluntarily waived his privilege against self-incrimination.

The question of waiver must be analyzed by a consideration of several factors. *Riley v. State*, 237 Ga. 124 (1976). Those factors include (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether or not the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date.

Placing these facts in context, the Court noted first that appellant was only 15 years old and in the ninth grade and, for whatever reason, could not provide the officer with certain details such as his street address. The interview did not start until almost 2:30 a.m., and the officer acknowledged that appellant appeared tired but said appellant was not so tired that he lost track of what was going on during the interview. The recording revealed that appellant gave the officer the necessary contact information for his parents and the officer stated that he thought one of the other officer's may have tried to contact appellant's father, but the officer did not mention that fact to appellant or ask him if he wanted to wait until his father had been reached before proceeding with the interview. Further, although the officer informed appellant of his rights, including his right to have a parent or attorney present, these rights were

unnecessarily read in a way that might have confused an adult, much less a 15-year-old being interviewed at 2:30 a.m. And although appellant acknowledged understanding his rights, he did so using minimal head gestures, even though up to that point he had been verbalizing his responses to the officer.

The Court further noted that at this juncture of the interview, appellant had been arrested but not charged, and more importantly, the officer had not revealed to appellant that he might be charged with serious felony offenses, such as armed robbery and various weapons violations, before the officer entreated him to "straighten out what in the hell happened this evening." When appellant did not immediately respond, the officer pressed appellant to go ahead and "get it straightened out now." The officer's statement, while not an outright promise, could have caused a juvenile offender, uninformed about what serious charges he might be facing, and knowing that the shotgun was not loaded, to believe that the situation could be "straightened out" if he talked to the officer. The Court stated it was apparent the officer knew prior to starting the interview that appellant was going to be charged whether he talked to him or not since the victim had already identified appellant as the person who brandished the shotgun during the robbery. The Court found that these methods may be ill-advised when interviewing a juvenile, and particularly true where the juvenile was interrogated without the aid of an attorney or a parent, and without being advised of the very serious charges he could be facing. Thus, considering the totality of the circumstances, the Court held that the appellant did not knowingly and voluntarily waive his privilege against self-incrimination.

Double Jeopardy

Herrington v. State, A11A1860 (3/23/2012)

The Court reversed the denial of appellant's plea in bar based on procedural double jeopardy with regard to charges of methamphetamine trafficking and attempted methamphetamine trafficking. The record revealed that a victim testified that, after she gave appellant a ride to his house, he dragged her inside and sexually assaulted her. Appellant maintained that he and the victim used methamphetamine together, after which she robbed him, they fought, and the victim stabbed him. Police ob-

tained a search warrant for appellant's house to look for weapons, evidence of recent occupants, and "any items used to store, manufacture or use methamphetamine," and, upon executing the search, discovered methamphetamine and items used to manufacture methamphetamine, as listed in the warrant return. Appellant was indicted for kidnapping, three counts of aggravated assault, three counts of possession of a knife during the commission of certain crimes, and possession of methamphetamine, all allegedly occurring on April 20, 2009. He was also indicted the same day for attempting to manufacture methamphetamine and possession of ephedrine with the intent to distribute, allegedly occurring between February 22, 2009 and July 1, 2009. During trial on the eight counts in the first indictment, the court granted appellant's motion for mistrial, agreeing that a police officer's comment that he knew appellant from an unrelated pseudoephedrine investigation had improperly placed appellant's character directly into issue. The State re-indicted appellant on the previous eight charges and added two more, for trafficking in methamphetamine and for criminal attempt to commit trafficking in methamphetamine, both allegedly having occurred on April 20, 2009.

The Court found that double jeopardy had attached and that the State was prohibited by OCGA § 16-1-7 (b) from adding new charges to the indictment. The Court noted that Georgia by statute extended the prohibition of double jeopardy beyond those substantive constitutional limits by placing procedural bars on multiple prosecutions arising out of the same criminal conduct. Thus, appellant was placed in jeopardy when his jury was sworn in the first trial and the trial court erred in holding that jeopardy had not attached on the previous charges because of the mistrial. The Court also held that the prosecuting officer may not avoid jeopardy from attaching as to less than all charges arising out of defendant's "same conduct" where, at the time he commences the prosecution by filing an accusation or achieving return of an indictment, he actually knows of the other charges

Return of Indictment; "Open Court"

State v. Brown, A11A2121 (3/29/2012)

The State appealed the grant of Brown's motion in abatement which quashed the

indictment against him because it was not returned in "open court." However, the Court found no error and affirmed. A grand jury returned an indictment against Brown in a courtroom in the recently constructed Cobb County Courthouse (the "Courthouse"). At the time the indictment was returned, the Courthouse had limited accessibility to the public while court employees were moving into it. As a result of this limited access, Brown filed a motion in abatement contending that the indictment was defective because it was not returned in open court. Following an evidentiary hearing, the trial court granted Brown's motion and quashed the indictment.

The evidence showed that at the time the indictment was returned, every exterior doorway was locked and the only entrance available to the public was a walkway, guarded by deputies, connecting the old and the new courthouses. The deputies were stationed there to ensure the integrity of the clerk's office files being transferred to the new building and as a security measure because some construction workers in the Courthouse were using knives and hammers to install carpeting. An attorney at the firm representing Brown went to the Courthouse to observe the return of the indictment against Brown. The attorney found the doors to the courthouse either locked or guarded by sheriff's deputies. To gain entry to the Courthouse, he was instructed to call the court administrator and obtain a personal escort across the walkway to the courtroom. He did so, and it took several minutes for the court administrator to meet him so that he might be escorted into the Courthouse. By the time the attorney was finally able to enter the courtroom, he had missed the return of Brown's indictment. The presiding judge testified that he did not intend to exclude anyone from the courtroom and that the media and sheriff's department personnel were present in the courtroom. Brown's attorney was delayed approximately ten to fifteen minutes because he could not enter the front entrance of the Courthouse.

The State argued that there is no law requiring an indictment to be returned in open court because neither the United States Constitution nor the Constitution of the State of Georgia addresses this issue. However, Georgia case law has long held that an indictment must be returned in open court to be valid. This requirement "must be complied with in every case," and failure to comply strictly with this

rule may nullify an otherwise valid indictment. The Court held that to satisfy the 'in open court' requirement, the "place of the reception of the indictment must be one where the court is being held open to the public." In this case, the Courthouse had limited accessibility at the time the indictment was returned against Brown: the exterior doors were locked, the only entrance to the courthouse —the catwalk — was guarded by deputies, and Brown's attorney was required to call the court administrator in order to be escorted to the courtroom. His attorney was thereby delayed by approximately ten to fifteen minutes in reaching the courtroom, and, as a result, was not present when the indictment was returned. Because of these factors, the Court found that the courtroom was not open to the public at that time and the Georgia Supreme Court has held that any failure to return the indictment in open court "is per se injurious to the defendant." Thus, the trial court did not err in granting the motion in abatement and quashing the indictment.