

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 6, 2012

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THIS WEEK:

- **Search & Seizure**
- **Double Jeopardy**
- **Double Jeopardy; Jurisdiction**
- **DNA; Right of Direct Appeal**

Search & Seizure

Willoughby v. State, A12A0532 (4/5/2012)

Appellant stood accused of homicide by vehicle, OCGA § 40-6-393, and filed a motion to suppress his medical records that were seized pursuant to a search warrant, arguing that the information in the supporting affidavit failed to show probable cause that a crime had been committed. After a hearing, the trial court denied the motion, and the Court granted appellant's ensuing application for an interlocutory appeal and found that the trial court erred in denying appellant's motion to suppress.

The record showed the following. A magistrate issued a warrant for all medical records concerning appellant who appeared at Grady Memorial Hospital on or about January 1, 2009. The magistrate determined that there was probable cause to believe appellant had committed vehicular homicide, driving under the influence (DUI), and failure to maintain lane, based on the following written statement of the investigating officer: "Affiant was dispatched to automobile collision which occurred at 20:57 PM. It was determined that appellant could possibly be the driver of the vehicle and would be at fault via Failure to Drive Within a Single Lane. Russell Hays, who was possibly the front seat passenger in appellant's vehicle, was killed as a result of the collision.

Appellant admitted to the consumption of an alcoholic beverage at the scene of the collision. Appellant was transported to Grady Memorial Hospital after the collision where he received medical treatment and medical test[s] were performed including toxicology tests. Said test results were documented into appellant's medical records. Said medical records may contain evidence of DUI." The officer who applied for the warrant did not supplement the written application with oral testimony.

Appellant contended that the affidavit contained purely conclusory statements and failed to specify any underlying facts showing that he was under the influence of alcohol at the time of the accident, that his manner of driving caused the accident, or even that he was driving the car at the time. As a result, he contended, the affidavit was insufficient to allow the magistrate to determine whether the investigating officer had a legally sufficient factual basis to justify searching appellant's medical records for evidence of DUI. A search warrant will only issue upon facts sufficient to show probable cause that a crime is being committed or has been committed. OCGA § 17-5-21 (a).

The Court stated that the warrant application suggested that appellant *might* have been driving the vehicle, that he *might* have caused the accident by failing to maintain his lane, and that the amount of alcohol he had consumed *might* have been enough to put him over the legal limit or to make him a less safe driver. The affidavit, however, failed to provide any underlying details that would allow the magistrate to evaluate whether these conclusions were based on specific facts (derived, for example, from physical evidence or eyewitness testimony) rising to the level of probable cause or whether they were instead based on mere speculation or

presumptions. Because the affidavit in this case was insufficient on its face to support a finding of probable cause, the trial court erred in denying appellant's motion to suppress.

Double Jeopardy

State v. Caffee, S11A1529 (4/11/2012.)

Caffee was convicted of malice murder, kidnapping, and other charges. After the trial court granted Caffee's motion for new trial, he filed a plea in bar contending that double jeopardy prohibited a second trial on the same charges. The trial court granted the plea in bar, and the State filed this direct appeal challenging the grant of a new trial and the plea in bar. Because the Court lacked jurisdiction to consider the State's appeal of the new trial order, it dismissed that portion of the appeal. Concerning the plea in bar, the Court concluded that double jeopardy does not bar a second trial since the grant of the new trial was based on the improper admission of evidence. Therefore, the Court reversed the trial court's grant of the plea in bar.

The second of three trial judges who heard this case granted Caffee's motion for new trial on the grounds that the original trial judge erred in rejecting Caffee's offer to stipulate to his prior conviction and in admitting an exhibit that listed, in addition to his conviction on one charge, five felony charges of which he had been found not guilty. The trial court undertook a review of the evidence and determined that the admission of the exhibit was not harmless error. The order stated: "Therefore, this court finds there was not sufficient evidence which would identify the accused as a participant in the criminal act and lead to the guilt of the Defendant independent of the testimony of [the accomplice] Shands." Following the grant of the new trial, Caffee filed a plea in bar contending that double jeopardy prevented a second trial because the new trial was granted on the insufficiency of the evidence. A third trial judge considered the motion and granted the plea in bar "[b]ecause the prior order finds that there was insufficient evidence to convict, and . . . this Court has no power to change or correct that ruling."

The Court stated that whether the State is barred from retrying Caffee depended on whether the second trial judge granted the new trial based on trial error, as the State contended, or the insufficiency of the evidence,

as Caffee asserted. The Court concluded that the order granting the new trial did not find the evidence was legally insufficient to sustain the verdict. The trial court did not grant a judgment of acquittal for lack of evidence, find that the evidence did not authorize the verdict, or undertake to review the sufficiency of the evidence under *Jackson v. Virginia*, 443 U. S. 307 (1979). Instead, the second trial judge granted the new trial based on the original trial court's error in admitting an exhibit to prove Caffee had a prior felony conviction after Caffee had offered to stipulate that he was a convicted felon. Because the retrial was granted due to an erroneous evidentiary ruling, the Court held that double jeopardy does not bar a second trial on the same charges.

Double Jeopardy; Jurisdiction

Palmer v. State, A12A0423 (4/5/2012)

After a jury found appellant not guilty in federal district court of the offenses of armed bank robbery and brandishing a firearm during the commission of a violent crime, the State of Georgia secured an indictment charging appellant with fifteen violations of Georgia law arising out of the same bank robbery. Appellant filed a motion in *autrefois acquit*, arguing that eight of the state counts, those charging him with armed robbery, aggravated assault, and firearms offenses, are barred under OCGA § 16-1-8 (c), which prohibits prosecution when the accused was formerly prosecuted in federal court for the same conduct. Appellant contended that the state armed robbery and aggravated assault charges were for the same conduct as the federal armed bank robbery charge and that the state firearms charges were for the same conduct as the federal firearms charge.

The Court affirmed. The Court stated that it is well settled that when a person in a single act breaks the law of two sovereigns, such as the United States and the State of Georgia, the person has committed two distinct offenses and may be prosecuted and punished by each sovereign for the violation of its law. Under this doctrine of dual sovereignty, successive prosecutions by two separate sovereigns for the same offense do not violate double jeopardy.

Georgia law provides a statutory limitation on the dual sovereignty doctrine. OCGA § 16-1-8 (c) provides that "[a] prosecution is barred if the accused was formerly prosecuted

in a district court of the United States for a crime which is within the concurrent jurisdiction of this state if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not consummated when the former trial began." The "threshold" question is whether the prior federal prosecution was for a crime that was within the concurrent jurisdiction of the State of Georgia. The Supreme Court of Georgia explained that the term "concurrent jurisdiction" as used in OCGA § 16-1-8 (c) unambiguously looks to whether there is an existing Georgia penal provision comparable to the federal crime over which a state court has jurisdiction. Where an accused can be prosecuted in either state court or federal district court indifferently for the same crime, then that crime is within the concurrent jurisdiction of this State. Conversely, no concurrent jurisdiction exists where no Georgia counterpart exists to the federal crime so that the accused could be prosecuted for that crime only in a federal district court. In comparing the violations of federal law for which the appellant was tried with the state's charges, the Court found that the crimes were not counterparts and therefore, the state charges against appellant did not violate double jeopardy because the federal crimes at issue were not within the concurrent jurisdiction of the state.

DNA; Right of Direct Appeal

Bradberry v. State, A12A0607 (4/6/2012)

Appellant was convicted of one count of rape, three counts of child molestation, and two counts of cruelty to children. After his conviction was affirmed on appeal, appellant filed a motion for sentence modification and motion for forensic testing of what he characterized as a "DNA sample." The trial court denied both motions.

Appellant did not challenge the court's ruling with respect to his sentencing; rather, he contended that the court erred in denying his post-conviction motion to have a semen sample tested for the presence of condom lubricants, alleging that a positive test result would have proven that the victim obtained his semen from a condom that he had used with

a different sexual partner and then placed it in her vagina in order to frame him for rape.

The Court's review of the record showed that appellant was not authorized to bring this appeal directly, but was required to file an application for discretionary appeal. The provisions of OCGA § 5-5-41 (c), only apply to those motions seeking "the performance of forensic deoxyribonucleic acid (DNA) testing." OCGA § 5-5-41 (c) (1). Appellant was not seeking a DNA test; he was seeking to have a semen sample tested for the presence of chemicals typically found in condom lubricants, a test which may be accomplished using infrared spectroscopy and other non-DNA testing procedures, as his own expert opined in the affidavit attached to the motion. Thus, the order appealed was not one denying a stand-alone motion for DNA testing under OCGA § 5-5-41 (c); therefore, it was not directly appealable under that Code section and the case law interpreting it. Thus, to maintain the direct appeal, appellant needed another, independent basis for the appeal. Appellant did not show that he had a right to file a post-conviction motion seeking only to retest the semen sample without also demonstrating that the expected test results would constitute newly discovered evidence warranting the grant of a new trial. Indeed, the Court stated, even if it construed appellant's motion as an extraordinary motion for new trial based upon a claim that the test results would constitute newly discovered evidence, the denial of the motion could not serve as a basis for this appeal because a direct appeal does not lie from the denial of an extraordinary motion for new trial separate from the original appeal; an application for discretionary appeal is required. Consequently, the Court dismissed the appeal for lack of jurisdiction.