

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 24, 2013

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

Al Martinez
State Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Lalaine Briones
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

THIS WEEK:

- **Out-of-time Appeals; Collateral Estoppel**
- **Speedy Trial; Barker v. Wingo**
- **Jury Instructions; Plain Error**
- **Nolle Prosequi; State's Right to Appeal**
- **Hearsay; Self-serving Statements**
- **Aggravated Stalking; O.C.G.A. §16-5-91**
- **Attempt to Elude; Sentencing**
- **DUI; Waiver of Jury Trial**
- **Constitutional Questions; Waiver**
- **Search & Seizure; Motions for Continuance**
- **Prosecutorial Misconduct; Closing Arguments**

Out-of-time Appeals; Collateral Estoppel

Sessions v. State, S13A0041 (5/20/13)

Appellant challenged the trial court's denial of his motion for an out-of-time appeal. The record showed that on December 10, 1997, a jury found appellant guilty of several counts each of murder, felony murder, aggravated assault, and possession of a firearm, as well as armed robbery and obstruction of an officer. On December 12, 1997, he was sentenced to life without parole, two life sentences with parole, and a term of years for his other felonies. Appellant did not file a motion for new trial or a notice of appeal. On June 23, 1998, appellant filed a pro se pleading entitled "Application for Out of Time Motion for New Trial." The trial court treated the pleading as an extraordinary

motion for a new trial and denied it without a hearing on February 10, 1999. Meanwhile, on November 10, 1998, appellant, through counsel, filed a petition for habeas corpus relief in which he alleged he was denied his right to appeal in violation of the Fifth, Sixth, and Fourteenth Amendments allegedly due to his court-appointed trial attorneys' failure to file an appeal. The habeas court denied habeas relief on July 31, 2000, concluding that appellant was informed of his right to an appeal and was aware of that right. The habeas court also noted that appellant was aware he needed to contact the indigent defense coordinator in order to appoint appellate counsel, and refused to do so. Thus, appellant's inaction forfeited his statutory right to an appeal. In 2010, appellant filed the instant motion to file an appeal out-of-time and a hearing was held on same. Upon considering the evidence presented at the hearing, the underlying trial record, and the habeas corpus record, the trial court denied the motion finding that after his conviction, appellant told his trial counsel that he and his family would seek representation from other counsel. As such, the trial court concluded appellant had waived his right to appeal through his own conduct.

Appellant contended that his trial attorneys' inaction caused him to be denied a direct appeal. The Court declined to sustain such a contention, noting that an out-of-time appeal is a judicially-created remedy for a frustrated right of appeal and is granted if the defendant shows he lost his right to a direct appeal through the error of counsel. If there is sufficient evidence to support a finding that the movant's conduct caused the loss of his direct appeal, then the movant is not entitled to an out-of-time appeal. Since the habeas court found that appellant had forfeited his right

to appeal through his own inaction and the habeas court decided the issue of ineffective assistance of counsel adversely to appellant, he was now precluded under the doctrine of collateral estoppel from re-litigating the merits of the issue.

Speedy Trial; *Barker v. Wingo* *Brock v. State, S13A0443 (5/20/13)*

Appellant was convicted of murder. He argued that his Sixth Amendment right to a speedy trial was violated by the delay between his arrest in 2003, his indictment in 2009, and trial in 2011. Appellant, who was released on bond shortly after his arrest, first raised the speedy trial claim in his July 2012 amended motion for a new trial.

To decide a constitutional speedy trial claim, courts engage in a balancing test that considers the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The initial inquiry is whether the interval from the accused's arrest, indictment, or other formal accusation to the trial is sufficiently long to be considered presumptively prejudicial. If it is, the court considers whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.

The Court first noted that the eight-year delay in this case between appellant's arrest and trial triggered a presumption of prejudice, since in Georgia one year marks the point where deliberateness in prosecuting a crime turns generally into presumptively prejudicial delay. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of the delay.

The Court found that the pre-trial delay was uncommonly long and weighed against the State, because an eight-and-a-half year lag between indictment and arrest has been described as extraordinary. To the extent the trial court overlooked this factor in its balancing process, it erred.

The record did not show the specific reason for the six-year delay prior to indictment

or the two-year delay between appellant's indictment and trial. There was no evidence that the State intentionally caused the delay or attempted to undermine appellant's defense. The Court explained that when the reason for the delay is not apparent, it is treated as caused by the negligence of the State and weighed lightly against the State.

Appellant never filed a speedy trial demand in any form prior to trial, first asserting the claim 17 months after the jury had convicted him of murder. The Court noted that barring extraordinary circumstances, it would be reluctant to rule that a defendant was denied this constitutional right on a record that strongly indicated that a defendant did not want a speedy trial. Here, the trial court found that trial counsel did not file a speedy trial demand after he was hired in 2009 for strategic reasons: he believed the passage of time would benefit the defense and his client was out on bond. In addition, the trial court found unpersuasive appellant's testimony that he disagreed with his attorney and had expressed a desire for a speedy trial. Thus, the trial court did not abuse its discretion in weighing this factor heavily against appellant.

The Court identified three interests which the speedy trial right was designed to protect, the last being the most important: (a) to prevent oppressive pre-trial incarceration; (b) to minimize anxiety and concern of the accused; and (c) to limit the possibility that the defense will be impaired. In this case, appellant was released on a signature bond shortly after his arrest and, thus, was not incarcerated for most of the time prior to trial. Because appellant was out on bond, he was able to assist in his alibi defense by locating an alibi witness, and the trial was delayed a day to enable the witness to testify. While appellant testified at the motion for new trial that he experienced stress and anxiety due to the pending murder charge and was unable to leave the state to attend his daughter's college graduation, he also admitted that some of this stress was caused by the financial burden of his defense.

Regarding the effect of the delay on his ability to present his defense, appellant argued that he was significantly impaired because one of his alibi witnesses died prior to trial and the passage of time impaired the ability of his other witnesses to recall events. The witness, however, died 18 months after the murder, and appellant was able to read the witness's testi-

mony from the May 2003 pretrial hearing into evidence at trial. Moreover, the Court stated, the dimming of memories and loss of evidence that inevitably accompany the passage of time tends to help rather than hinder the accused since the government has the burden of proving each element of its case beyond a reasonable doubt. Given appellant's failure to assert his right to a speedy trial prior to trial and his failure to present persuasive evidence of prejudice, the trial court did not abuse its discretion in determining that the presumptive prejudice arising from the delay in bringing appellant to trial was insufficient to establish a violation of appellant's constitutional right to a speedy trial.

Jury Instructions; Plain Error *Lake v. State, S13A0487 (5/20/13)*

Appellant was found guilty of felony murder and aggravated assault. He first contended that the trial court erred by providing the jury with instructions prior to closing arguments taking place. The Court noted that under O.C.G.A. § 5-5-24(b), the court should inform counsel of its proposed action upon the requests to charge prior to their arguments to the jury but should instruct the jury after the arguments are completed. However, the record revealed that the trial court held a charge conference and informed counsel on multiple occasions that it intended to provide the jury with its substantive instructions prior to closing arguments. Appellant's trial counsel was involved in the discussion, and he acquiesced to this proposed procedure. Accordingly, appellant provided no basis for review because under Georgia law, a party may not complain on appeal of a ruling that he contributed to, or acquiesced in, by his own action, trial strategy, or conduct.

Next, appellant argued that the trial court erred by informing the jury that it could consider any involuntary statements made by him for purposes of impeachment. The Court noted that because appellant's counsel never objected to the jury instruction, appellant's claim could only succeed if the instruction constituted "plain error" that affected substantial rights of the parties under O.C.G.A. § 17-7-58(b). Under the "plain error" test, reversal is authorized only if the instruction was erroneous, the error was obvious, the instruction likely affected the

outcome of the proceedings, and the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

Here, the Court found, even assuming the first and second prongs of the test were met, there was no plain error because the third prong had not been met, i.e., the omission did not affect the outcome of the proceedings. More specifically, there was no evidence that appellant made any involuntary statements to police. Indeed, appellant never challenged the voluntariness of his statements to police; there was no *Jackson-Denno* hearing; and appellant never argued before or during trial that his statements were involuntary. Accordingly, the Court concluded that the jury instruction given regarding the use of involuntary statements did not affect the outcome of the proceedings.

Nolle Prosequi; State's Right to Appeal

State v. Hill, A13A0799 (5/14/13)

The State appealed the trial court's order vacating Hill's plea of guilty to one count of misdemeanor battery and one count of simple battery and entering a plea of no contest in its stead. The record showed that Hill originally pled guilty to these counts on October 18, 2012, as part of a negotiated plea. In exchange, the State requested, and the trial court entered, an order to nolle prosequi four additional counts of simple battery and one count of simple assault against her. The record further showed that the State and Hill initially negotiated the plea to include first offender status with 24 months of probation and 48 hours to serve, among other conditions. But after hearing the factual basis from the State and Hill and holding an unrecorded bench conference with counsel, the trial court sentenced Hill to serve 13 hours, with credit for time served, and closed the case. The State raised no objection at that time. Approximately one week later, on October 26, 2012, the trial court held another hearing in which it invited Hill to change her plea from guilty to no contest. The trial judge, acknowledging that she failed to provide Hill first offender treatment in the original sentence, said that she regularly allowed defendants in similar circumstances to enter a no contest plea. The trial judge recognized that Hill was concerned about her record and stated

that a no contest plea did not "look quite as bad" and could not "be used for certain other purposes." The prosecution objected to the trial court's initiating such a procedure, noting that Hill had made no request to withdraw her plea and had been willing to enter a guilty plea after the trial court rejected the parties' negotiated plea. The trial court, however, did not expressly address the issue of the State's nolle prosequi, and the State did not pursue the issue further.

The State's sole argument on appeal was that the trial court erred by dismissing five counts of Hill's accusation without legal authority. The State argued that the trial court could not substitute a no contest plea for Hill without re-opening her entire case. The State asserted that it withdrew its motion for nolle prosequi when the trial court changed the plea, and thus, the trial court erred when it did not address those counts of the accusation.

The Court explained that the order from which the State appealed did not dismiss any counts of the accusation. Rather, those counts had already been dismissed pursuant to the State's request at the original guilty plea hearing on October 18, 2012, because "[n]olle prosequi is the State's formal action on its decision not to further prosecute." When the trial court entered an order granting the nolle prosequi that day, the prosecution for those counts of the accusation came to an end. The State did not have the right to appeal from the order at issue, which merely vacated Hill's guilty plea and substituted a no contest plea in its place. The General Assembly has set forth only a limited right of appeal for the State in criminal cases under O.C.G.A. §5-7-1(a). If the State attempts an appeal outside the ambit of O.C.G.A. § 5-7-1(a), the appellate courts do not have jurisdiction to entertain it. Nothing in the statute allows the State to appeal directly from an order entering, vacating or substituting a plea. Accordingly, the Court had no jurisdiction to consider the State's appeal.

Nevertheless, the State further argued that the trial court's failure to reinstate the previously dismissed counts at the time it accepted Hill's no contest plea constituted a dismissal of those counts, thus allowing the State to appeal. The Court disagreed, noting that the record contained nothing for review in that regard. The State made only a conditional motion to withdraw its prior nolle prosequi at the October 26 hearing, stating that it would withdraw the motion if the trial court

re-opened the case. Even if the prosecutor's statement could be interpreted as a motion to withdraw, the State failed to obtain any ruling on such a motion. Thus, the State's failure to obtain a ruling on its motion left nothing for the Court to review.

Hearsay; Self-serving Statements

Martin v. State, A13A0804 (5/16/13)

Appellant was convicted of criminal trespass, theft by taking motor vehicle, and felony theft by taking. He argued that the trial court erred in granting the State's motion in limine to exclude an audio recording of his post-detention statements to an investigator as self-serving hearsay. The evidence showed that appellant was a passenger in a truck pulled over for slow, suspicious driving, and which was later revealed to have been stolen from a company warehouse. The deputy noticed that the truck bed was "overflowing" with metal tools, including several three-foot augers sitting on the top of the pile. Both the driver and appellant failed to provide any credible answers as to how they came to possess the truck and its contents, or where they were going. The deputy detained and handcuffed the men. An investigator questioned both men at the time of their roadside detention. Appellant gave a recorded statement to the investigator, and prior to trial, the State filed a motion *in limine* to exclude this post-detention statement as self-serving hearsay unless appellant testified in his own defense. The trial court listened to the audio recording of this statement in a pretrial hearing and granted the State's motion.

The Court explained that self-serving declarations are inadmissible hearsay unless the declarant testifies and is subject to cross-examination. Appellant argued that the statement was not self-serving because in the statement "he admitted that he was going to help [the driver] unload the stolen truck." However, the Court noted, although the trial court listened to the recorded statement prior to trial, neither the recording nor a transcript of the statement was admitted into the record as evidence. It is well-settled that it is the appellant who bears the burden of showing any alleged error affirmatively by the record, and a brief cannot serve in the place of the record or the transcript for the purpose of demonstrating

error or for supporting a claim of error. Accordingly, in the absence of the audio recording of the statement in the record or a transcript of such, the Court had to presume as a matter of law that the trial court's evidentiary findings were correct.

Aggravated Stalking; O.C.G.A. §16-5-91

Crumity v. State, A13A0388 (5/16/13)

Appellant was convicted of aggravated assault with a deadly weapon under O.C.G.A. § 16-5-21(a)(1) and (2), aggravated stalking under O.C.G.A. § 16-5-91, and possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106. He contended that the evidence was insufficient to sustain his conviction for aggravated stalking. The evidence showed that appellant was married to the victim. The relationship was tumultuous and violent, and involved numerous calls for police assistance. The victim obtained a temporary restraining order ("TRO") against appellant in 2007 requiring him to stay at least 200 yards away from her. After the entry of the TRO, appellant told the victim that he would be back and that she was not getting rid of him. In contravention of the TRO's terms, appellant on various occasions drove past the victim's house, followed her to work in his car, watched her go into her workplace from a parking lot that was only 30 to 50 feet from her workplace, and even went to the store where she worked. On these occasions, the victim was frightened and called police. On December 23, 2007, appellant called the victim on the phone and told her he was going to kill her. The next morning, as the victim was leaving her house with her son to go to work, she saw appellant approaching while pointing a shotgun at her. The son, who was armed, shot appellant and then ran to the house to get another gun and to call 911. Appellant then shot the victim twice.

O.C.G.A. § 16-5-91(a) provides in pertinent part that: "A person commits the offense of aggravated stalking when such person, in violation of a temporary restraining order, follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." O.C.G.A. § 16-5-90(a)(1) defines harassing and intimidating behavior

by a four-factor test: (1) a knowing and willful course of conduct directed at the victim (2) which causes emotional distress by placing her in reasonable fear for her safety or the safety of someone in her immediate family (3) by establishing a pattern of harassing and intimidating behavior (4) which serves no legitimate purpose. Appellant acknowledged that the State proved his violation of the protective order, that he engaged in prohibited contact, and that he did so without the victim's consent. He argued, however, that the State failed to prove that he acted for the purpose of harassing and intimidating the victim. Specifically, he contended that O.C.G.A. § 16-5-90(a)(1)'s knowing and willful course of conduct and pattern of behavior requirements necessarily involve a "series of successive actions." Appellant pointed to his own testimony as evidence that his proximity to the victim near her home and workplace did not involve the purpose of harassment or intimidation, because he was visiting friends near her home, meeting a contractor near her workplace, or purchasing items from the store where she worked. The Court disagreed.

By its plain terms, O.C.G.A. § 16-5-91 prohibits even a single violation of a protective order, if that violation is part of a pattern of harassing and intimidating behavior. In determining whether a defendant has exhibited such a pattern of behavior, the jury can consider a number of factors, including the prior history between the parties, a defendant's surreptitious conduct, as well as his overtly confrontational acts, and any attempts by a defendant to contact, communicate with, or control the victim indirectly, as through third parties. The Court concluded that from the facts, including the parties' prior history and the more recent contacts, threats, and telephone calls appellant made to the victim, a rational jury was authorized to find a pattern of harassing and intimidating behavior sufficient to sustain the conviction.

Attempt to Elude; Sentencing

Hicks v. State, A13A0514 (5/16/13)

Appellant was convicted of felony fleeing and attempting to elude a police officer under O.C.G.A. § 40-6-395. The evidence showed that in the early morning hours an officer responding to a missing vehicle call, spotted the

vehicle, and saw it collide with a steam roller parked beside the road. After the collision, the officer activated his lights and began pursuit of the vehicle. The officer testified, and the video from the camera mounted on his police car showed, that after he activated his lights, the vehicle accelerated, drove through a stop sign without stopping, crossed over the white fog line on the edge of the roadway several times, and turned into two residential driveways before the driver, appellant, abandoned the vehicle and fled on foot.

Appellant argued that the evidence was insufficient to convict him of felony, rather than misdemeanor, fleeing and eluding. The Court agreed. Under O.C.G.A. § 40-6-395(a), "[i]t shall be unlawful for any driver of a vehicle willfully to fail or refuse to bring his or her vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle . . . when given a visual or an audible signal to bring the vehicle to a stop." O.C.G.A. § 40-6-395(b)(1) provides that any person violating subsection (a) is guilty of a "high and aggravated misdemeanor," while O.C.G.A. § 40-6-395(b)(5)(A) (i)-(v) provides that any person who violates subsection (a) while fleeing or attempting to elude a pursuing police vehicle is guilty of a felony if he operates his vehicle in excess of 20 miles over the speed limit, strikes or collides with another vehicle or pedestrian, flees in traffic conditions that place the general public at risk of receiving serious injuries, has an alcohol concentration of 0.08 grams or more within three hours of driving, or leaves the state.

The indictment charged appellant with willfully fleeing from a pursuing police vehicle in an attempt to escape arrest in traffic conditions which placed the general public at risk of receiving serious injuries, after having been given a visual signal to bring his vehicle to a stop by an officer. Under O.C.G.A. § 40-6-395(a), the signal to stop may be "by hand, voice, emergency light or siren." The only evidence of a signal to stop in the instant case was the officer's activation of his lights *after* appellant collided with the steam roller. As an initial matter, the Court noted that the State presented no evidence of the speed limit in the area or the speed at which appellant was driving, presented no evidence of a collision with a pedestrian or other vehicle in the time period after the officer activated his lights, and presented no evidence that appellant left the state. Further, the officer testified that

although he smelled alcohol on appellant's breath, he did not perform any tests to check appellant's intoxication level.

The Court further added that the State presented no evidence of traffic conditions that placed the general public at risk of serious injury. The transcript contained no testimony related to risk to the general public, and the video of the chase showed empty roadways containing no other vehicles or pedestrians during the pendency of the pursuit. The prosecution argued that so long as the jury viewed a police video of the chase, jurors determined "first hand" whether the evidence supported a finding that appellant fled in traffic conditions which placed the general public at risk of receiving serious injuries, and thus the verdict could not be overturned. The Court disagreed, noting that it was well settled that for the jury's verdict to be upheld, there must be some competent evidence, even if contradicted, to support each fact necessary to make out the State's case. Here, the State presented no such competent evidence and thus proved none of the elements required under O.C.G.A. § 40-6-395(b)(5)(A). Thus, the Court vacated appellant's felony sentence. Because the evidence did support a misdemeanor conviction, the Court remanded the case with direction that a conviction and sentence be entered for a misdemeanor offense.

DUI; Waiver of Jury Trial

Simmons v. State, A13A0083 (5/13/13)

Appellant was convicted of DUI (less safe), failure to report an accident resulting in injury or property damage of \$500 or more, aggressive driving, possessing an open container of an alcoholic beverage in the passenger area of a vehicle, and operating a motor vehicle without registration or a valid license plate. The evidence showed that appellant struck a truck in a stop-and-go line of traffic four times in rapid succession. When the other driver approached, he noticed that appellant's speech was slurred and he reeked of alcohol. When the other driver then called 911, appellant drove off, and got into another accident nearby. The officer dispatched to the accident arrested appellant for DUI.

Appellant argued that he did not intelligently waive his right to a jury trial, because the trial court did not advise him of the specific

consequences that the waiver would have with regard to the trial court's factual findings. The Court stated that a defendant's right to trial by jury is one of those fundamental constitutional rights that the defendant must personally, knowingly, voluntarily, and intelligently choose to waive. A trial court should ask the defendant sufficient questions, on the record, so that the court can ensure the defendant's waiver is knowing, voluntary, and intelligent. The waiver, however, need not follow any particular form. The only real issue is whether the defendant intelligently agreed to a trial without jury. When a defendant questions the validity of such a waiver, the State bears the burden of showing the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made.

Here, immediately before the trial began, the trial court asked appellant if he understood that he had a right to a jury trial and asked whether appellant was "voluntarily and knowingly waiving" his right to a trial by jury, and appellant responded affirmatively to both questions. Only after receiving appellant's oral assurance that he wished to waive trial by jury and proceed with a bench trial did the trial court accept appellant's waiver. Under these circumstances, the Court found, the record showed that appellant knowingly and intelligently waived his constitutional right to a trial by jury.

Appellant also contended that the trial court erred by admitting a particular witness statement. Specifically, appellant argued that the trial court erred by admitting the first driver's testimony regarding appellant's statement that someone had put something into his drink because the State failed to provide the statement to the defense before trial. The Court disagreed. O.C.G.A. § 17-16-7 provides, in relevant part, that no later than ten days prior to trial or at such time as the court permits, the prosecution shall produce for the opposing party any statement of any witness that is in the possession, custody, or control of the state or prosecution that relates to the subject matter concerning the testimony of the witness that it intends to call as a witness at trial. But, the statutory obligation of O.C.G.A. § 17-16-7 is

not triggered when a witness merely makes an oral statement. There can be no possession, custody, or control of a witness's statement which has neither been recorded nor committed to writing. Moreover, even assuming that admission of the statement was erroneous, it was harmless in light of the other evidence in the case, including witnesses' observations of appellant's slurred speech, bloodshot eyes, lack of balance, odor of alcohol, and repeated collisions with the other driver's truck.

Constitutional Questions; Waiver

Pierce v. State, A13A0440 (5/13/13)

Appellant was convicted for improperly passing an emergency vehicle in violation of O.C.G.A. § 40-6-16 (a) & (b), known as the Spencer Pass Law. Appellant contended that the law was unconstitutionally vague. The record showed that appellant initially appealed to the Supreme Court of Georgia, invoking its exclusive appellate jurisdiction over novel constitutional questions. But the Supreme Court transferred the case to the Court of Appeals because appellant failed to raise her constitutional challenge in the trial court at her first opportunity, and the issue was therefore not properly before the Court on appeal. Appellant made her challenge in her motion for new trial, but, the Court of Appeals noted, it is well-established that a criminal defendant may not initiate a constitutional attack against a statute in either a motion for a new trial or a motion to arrest the judgment. A constitutional attack on a statute must be made at the first opportunity, and it is too late to raise such a question after a guilty verdict has been returned by the factfinder. Because appellant waited until filing her motion for new trial, her challenge was deemed waived on appeal.

Appellant also generally challenged the sufficiency of the evidence for her conviction under the Spencer Pass Law. The evidence showed that appellant passed the officer in a lane adjacent to the officer while he concluded a traffic stop and had his blue emergency lights activated. The officer testified that appellant had room to move out of the adjacent lane and into a farther lane.

O.C.G.A. § 40-6-16(b), provides as follows: "The operator of a motor vehicle approaching a stationary authorized emergency

vehicle that is displaying flashing blue lights shall approach the authorized emergency vehicle with due caution and shall, absent any other direction by a peace officer, proceed as follows: (1) Make a lane change into a lane not adjacent to the authorized emergency vehicle if possible in the existing safety and traffic conditions; or (2) If a lane change under paragraph (1) of this subsection would be impossible, prohibited by law, or unsafe, reduce the speed of the motor vehicle to a reasonable and proper speed for the existing road and traffic conditions, which speed shall be less than the posted speed limit, and be prepared to stop.” Viewed in favor of the verdict, the Court found that the officer’s testimony supported a finding that it was possible for appellant to safely make a lane change into a lane not adjacent to the officer before she passed him. Accordingly, the Court affirmed the conviction.

Search & Seizure; Motions for Continuance

Daniels v. State, A13A0241 (5/14/13)

Appellant was found guilty of DUI (per se) and driving with a suspended license. The evidence showed that officers conducting a roadblock at 10:30 p.m. observed appellant’s car approach within 75 yards of the roadblock before suddenly turning off of the road and into the parking lot of a closed motel. Believing the driver’s sudden turn into the parking lot to be suspicious, an officer drove to the parking lot to investigate. As he entered the parking lot, the officer observed appellant get out of the vehicle from the driver’s side door and walk toward the door of the motel. The officer approached appellant and asked what he was doing. Appellant responded that “he had come to get a room.” The officer told appellant that the motel had been shut down for some time. He noticed that appellant appeared nervous, had glassy, bloodshot eyes, and had a very strong odor of alcohol about him. A second officer arrived on the scene, made the same observations of appellant as the first officer, and had appellant perform a breath test which registered positive for the presence of alcohol. Appellant was arrested for DUI and for driving with a suspended license. He consented to a state-administered breath test which revealed a blood-alcohol level of 0.196. During his encounter with the officers, appellant did not deny that he was driving the vehicle and at

no time claimed that his former girlfriend, who was riding in the front passenger seat, was driving.

Appellant challenged what he claimed was an “illegal search and seizure.” Appellant filed a motion to suppress but failed to appear for the hearing on the matter, and the trial court deemed the motion abandoned. During trial, however, the court nonetheless allowed appellant to make his objection that the officers did not have probable cause to stop him. Following the arguments by both counsel, the trial court denied the motion. Appellant argued that because the officer pulled into the hotel parking lot behind him, allowing no way for him to leave, he was not free to go and the officer’s questioning therefore was unlawful. But the officer testified that he pulled into the parking lot behind appellant after appellant had stopped, and that he approached appellant at the door of the motel.

The Court stated 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 type of police-citizen encounter. Here, the officer’s approach to appellant was nothing more than a first-tier encounter, and once the officer observed that appellant smelled strongly of alcohol, had bloodshot eyes, and had just exited the driver’s side of the vehicle, after observing appellant pulling into the parking lot of a closed motel within 75 yards of the roadblock, the officer had sufficient articulable suspicion to continue investigating. Thus, the Court found this claim of error to be without merit.

Appellant also argued that the trial court erred in denying his motion for a continuance. At the start of trial, appellant announced that he was not ready to begin trial because of the absence of a witness critical to his defense. Appellant explained that testimony from his mother was needed to establish the bias of his former girlfriend, who had testified that he had been drinking and driving. He argued that the two women had had an altercation the day before trial which caused his mother to have a stroke. Appellant asserted that his mother was in intensive care and could not appear for trial. The State stated in rebuttal that the day before trial, appellant and his mother attempted to dissuade the former girlfriend from testifying that appellant was driving.

O.C.G.A. § 17-8-25 provides that in all applications for continuances upon the ground

of the absence of a witness, it must be shown to the court that the witness is absent; that the witness has been subpoenaed; that the witness does not reside more than 100 miles from the place of trial by the nearest practical route; that the testimony is material; that the witness is not absent by the permission, directly or indirectly, of the applicant; that the applicant expects he will be able to procure the testimony of the witness at the next term of the court; that the application is not made for the purpose of delay but rather, to enable the applicant to procure the testimony of the absent witness; and the application must state the facts expected to be proved by the absent witness. Furthermore, the trial court has discretion in determining whether to grant a continuance for absence of a witness, and that discretion is not abused unless all of the requisites of O.C.G.A. § 17-8-25 are shown and the trial court still denied a continuance.

The Court found that appellant admittedly did not meet the requirements of O.C.G.A. § 17-8-25 because he did not subpoena his mother. And he presented nothing to show that she was in fact hospitalized and unable to appear in court. He argued that he was unable to comply with the requirements of the statute because the alleged bias did not arise until the day before trial. Nevertheless, although the trial court denied appellant’s motion for a continuance, it allowed appellant’s counsel to question the former girlfriend regarding the altercation.

It is axiomatic that harm must be shown from the denial of a motion for a continuance to secure a witness. The Court found, under the circumstances, that appellant failed to show any harm from the absence of his mother’s testimony. He was allowed to question the former girlfriend regarding whether the altercation involving appellant’s mother affected her testimony. Moreover, while appellant argued that the trial court erred in denying his motion for a continuance at the hearing on the motion for new trial, held nearly three years after trial, appellant failed to present his mother as a witness or proffer her testimony to show how it would have aided his defense. Thus, in the absence of any ensuing harm from the denial of his motion for a continuance, appellant failed to meet his burden of presenting the Court with grounds for reversal.

Prosecutorial Misconduct; Closing Arguments

Thompson v. State, A13A0756 (5/14/13)

Appellant was found guilty of aggravated child molestation and two counts of child molestation. He contended that the trial court erred in overruling his objection to improper bolstering by the prosecutor during closing argument. Specifically, appellant alleged that comments made by the prosecutor during closing argument improperly bolstered testimony from the psychologist who conducted the forensic examination of the witness. He asserted that the prosecutor's comment impermissibly inferred that the psychologist believed the victim, and that the trial court should have instructed the jury pursuant to O.C.G.A. § 17-8-75. The Court did not agree.

The record showed that during closing arguments, the prosecutor made the following remarks: "What about the psychologist? You suppose she lied? Because, again, [appellant] is saying either she lied or she is a fool. Did she lie? Would it make sense for the psychologist, who left the Georgia Center when that got shut down and now has a pretty good practice going in Cobb County, who has made a career out of helping children who have been victims of sexual and physical abuse, does it make sense she's going to come in here and lie? She doesn't get money for a conviction. She doesn't get money for referrals. . . . Why would she lie? Maybe she's just a fool then, because that's the only other alternative is this 12-year-old girl. . . maybe she's such a clever, such a smart, such a shifty, maybe she's got such an encyclopedic knowledge from watching *Law and Order*, maybe she's seen so much *Law and Order* that she can fool a Ph.D. After those 600 evaluations, the psychologist just blew it on this one."

Appellant objected, arguing that the psychologist "never gave an opinion as to the truth of the testimony." The State responded that it had not asked the psychologist whether or not she was going to pass on the truthfulness of the victim. However, she did testify to a number of specific things she found—that she would find to be reasonable or that she would expect to see, and, incidentally, those were the things seen in the victim.

The Court stated that as a general rule, prosecutors are granted wide latitude in conducting closing argument, and defining

the bounds of such argument is within the trial court's discretion. This wide latitude encompasses the prosecutor's ability to argue reasonable inferences raised by the evidence. Accordingly, it is proper for a prosecutor to urge the jury to draw inferences from the evidence regarding the credibility of witnesses. As the State noted, the psychologist had testified about certain reactions that were common in sexually abused children, including the reluctance to verbalize about the sexual abuse, that it was common for victims to tell a friend, and also common for them to not make an outcry at the time of the abuse. The State's references in closing argument were to the psychologist's forensic findings and the inferences thereto, not to any opinion as to the veracity of the victim.

Moreover, the Court noted, appellant argued in his closing argument that the victim's reactions—including that she had not made an outcry for two years—did not "make sense." Thus, despite appellant's contention, there was absolutely nothing wrong with expert opinion testimony that bolsters the credibility of the indicted allegations of sexual abuse, e.g., "the victim's physical examination showed injury consistent with sexual abuse," or "the victim's psychological evaluation was consistent with sexual abuse." Establishing the credibility of the indicted acts of sexual abuse is what the State's case is all about and is the purpose for such expert testimony in the first place; the fact that such testimony may also indirectly, though necessarily, involve the child's credibility does not render it inadmissible. Accordingly, as the State's remarks did not improperly bolster the psychologist's testimony but instead reinforced the inferences that could be made from the forensic findings, the trial court did not err in overruling appellant's objection.