

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 16, 2017

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Robert W. Smith, Jr.
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Jason Samuels
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Search & Seizure; Ineffective Assistance of Counsel**
- **Search & Seizure; Prolonged Traffic Stops**
- **Competency to Stand Trial; Sell v. US**
- **Judicial Commentary; OCGA § 17-8-57**
- **Motions for New Trial; General Grounds**

Search & Seizure; Ineffective Assistance of Counsel

Darden v. State, A17A1059 (5/10/17)

Appellant was convicted of VGCSA. He contended that his trial counsel rendered ineffective assistance by failing to move to suppress the drugs found in his vehicle. The Court disagreed.

The evidence showed that officers in an unmarked vehicle observed what they believed to be a drug deal in appellant's vehicle, which was sitting in a parking lot. The officers approached in their vehicle and pulled up "at an angle to the rear of [appellant]'s vehicle." The officers approached the vehicle and inquired whether the person with appellant had just purchased drugs. That person indicated yes and handed one of the officers a piece of cocaine.

Appellant contended that a motion to suppress would have been successful because the officers' initial approach of his vehicle was a second tier encounter requiring reasonable suspicion of criminal activity. Specifically, appellant argued that the officers parked their unmarked vehicle "[d]irectly behind" his car, blocking him in and preventing him from leaving the parking lot. However, the Court found, the evidence showed that the officers'

vehicle was not sitting directly behind appellant's vehicle. And when the officers pulled into the parking lot, appellant was sitting in his parked vehicle; there was no evidence that the vehicle was running or that he was attempting to leave the area. Thus, the Court found, no stop occurred within the meaning of the Fourth Amendment when the officers initially approached appellant's car. Therefore, the approach was a first tier police-citizen encounter that did not require reasonable suspicion. And once the passenger stated that he had purchased cocaine from appellant, the officers were authorized to detain the two men for further investigation. Accordingly, there was no deficient performance in failing to file a motion to suppress.

Search & Seizure; Prolonged Traffic Stops

Caffee v. State, A17A0087 (5/10/17)

Appellant was charged with possession of less than one ounce of marijuana and driving with an expired tag after a police officer found a small baggie of marijuana in his shirt pocket during a traffic stop. The trial court denied appellant's motion to suppress, but granted a certificate of immediate review, and the Court granted interlocutory review.

Appellant argued that the trial court erred by denying his motion to suppress because the officer was not authorized to search his shirt pocket without a warrant. The Court disagreed. Here, the Court found the officer stopped appellant for an expired tag. There was evidence that the officer, who had training and experience in detecting the odor of raw marijuana and physical manifestations of recent marijuana use, (1) noticed that appellant's eyes

were bloodshot and glassy, and his taste buds were “white and risen”; (2) smelled raw marijuana when he approached appellant’s truck; (3) noticed that the odor dissipated during the search of the truck while the doors were open and while appellant was not in the vehicle; (4) did not find marijuana in the truck; and (5) smelled marijuana “pretty strongly” again when he approached appellant after the vehicle search. Given this evidence, the officer had sufficient probable cause to search appellant a second time (the officer conducted a brief pat-down prior to the search of appellant’s truck) to seek the raw marijuana he smelled coming from appellant’s person.

Nevertheless, appellant argued, the officer exceeded the scope of the initial traffic stop and unnecessarily prolonged it to conduct the search of appellant’s shirt pocket. However, the Court found, the officer detected the odor of green marijuana immediately upon approaching appellant’s vehicle. After speaking to appellant briefly and observing physical symptoms consistent with recent marijuana use, the officer decided to search the truck, and he patted appellant down for weapons while they waited for back-up, which arrived ten minutes after the traffic stop. The search of appellant’s truck took approximately 10 to 15 minutes. Once the officer returned to appellant after the search, he again recognized the strong smell of marijuana emanating from appellant and immediately searched his clothing. Approximately 30 minutes elapsed from the time of the initial traffic stop until appellant’s arrest. Under these circumstances, the Court concluded, the officer’s investigation did not exceed the permissible scope of the stop or unnecessarily prolong it.

Competency to Stand Trial; *Sell v. US*

Johnson v. State, A17A0611, A17A0783 (5/15/17)

Appellant was indicted for armed robbery, aggravated assault, and obstruction. The trial court ordered a psychological evaluation, held a hearing as required by *Sell v. United States*, 539 U. S. 166 (123 SCt 2174, 156 LE2d 197) (2003), and ordered appellant be involuntarily medicated in order to make him competent to stand trial.

The Court noted that in *Sell*, the Supreme Court of the United States established a four-part test for determining the rare instances

when it is constitutionally permissible to involuntarily medicate a mentally ill criminal defendant for the sole purpose of making him competent to stand trial. Specifically, the State must demonstrate the following: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those governmental interests; (3) involuntary medication is necessary to further those governmental interests; and (4) the administration of the drugs to be used is medically appropriate for the defendant.

Appellant contended that the court failed to follow the four-part *Sell* test when it ordered that he be forcibly medicated. The Court agreed because the court’s order was insufficient to justify appellant’s involuntary medication for the sole purpose of making him mentally competent to stand trial. Thus, the Court found, the record merely showed that appellant is schizophrenic, and he had reportedly taken the anti-psychotic medications Haldol and Risperdal in the past. The record contained no evidence regarding the proposed medications and dosages recommended to restore appellant’s competency, other than the unsigned and unauthenticated appendix to the order, which was apparently prepared by a non-testifying witness at the *Sell* hearing. Moreover, the Proposed Treatment Plan did not set forth the duration for which the specified medications would be tried, except to state that the proposed protocol will be enforced involuntarily at 90 day intervals. Finally, there was no evidence or testimony in the record that the administration of specific medications is medically appropriate for appellant or linking specific possible side effects to specific medications. According, the Court concluded, the trial court’s order was legally insufficient to justify appellant’s involuntary medication for the sole purpose of making him mentally competent to stand trial. Consequently, the Court vacated the trial court’s order and remanded the case for further proceedings, including a new *Sell* hearing if the State elects on remand to pursue its motion for involuntary medication.

Judicial Commentary; OCGA § 17-8-57

Crenshaw v. State, A17A0717 (5/16/17)

Appellant was convicted of rape, aggravated sodomy, burglary and other offenses. He

contended that the trial judge commented on the evidence in violation of OCGA § 17-8-57 by directing that the record reflect that the victim and a witness had identified him. The Court noted that because appellant did not object at trial, the Court’s review was limited to whether it amounted to plain error.

The Court noted that in *Anderson v. State*, 249 Ga. 132, 136 (6) (1982), the Supreme Court held that a judge’s statement “[l]et the record reflect that the man that the witness pointed out in court today is the defendant” does not constitute an improper comment on the evidence. The Court found that this customary language allows the record (i.e. the transcript) to accurately reflect aspects of the evidence that are available to the jurors’ sensory perception, such as a witness’s gestures, but will not be available to future readers of the transcript. Here, the jurors were present in the courtroom and able to determine for themselves whether someone in the courtroom matched the man identified by the victim and by the witness by describing his clothing and his location in the courtroom and by gesturing toward him. In context, the trial judge’s “the record will so reflect” served to clarify the victim’s and witness’s words, as they would later be transcribed, not to indicate to the jury whether the State had proved that appellant was the man who visited the victim’s home and, months later, broke in and attacked her. The trial judge did not comment on the evidence in violation of OCGA § 17-8-57.

Motions for New Trial; General Grounds

State v. Byrd, A17A0207 (5/18/17)

Byrd was convicted of aggravated child molestation, child molestation, and statutory rape. The trial court granted Bryd’s motion for new trial on the general grounds. The State appealed.

The State contended that Byrd waived his right to a new trial based on the general grounds. Specifically, the State argued that because Byrd failed to address the general grounds during the hearing on his motion for new trial or in his brief to the trial court following the hearing, he waived them. The Court disagreed because in the context of a motion for new trial, grounds for relief must be raised in *either* the motion for new trial *or* at the hearing on the motion for new trial. Here, the

Court found, Byrd expressly raised the general grounds in his first motion for new trial and referred to the original motion in his amended motion for new trial. The Court further found that Byrd's failure to brief the issue also did not amount to an express waiver.

The State also argued that the trial court abused its discretion in granting the motion for new trial because the evidence of Byrd's guilt was overwhelming and demanded the jury's verdict. But, the Court stated, even if, as here, the evidence was legally sufficient to sustain Byrd's convictions, a trial court is not prohibited from exercising its discretion to grant a new trial under the general grounds. And here, the Court noted, the trial court stated in its new trial order that "[u]pon the review of the record, arguments of counsel, and considering the credibility of witnesses, conflicts in the evidence and the weight of the evidence, the [trial court] finds the verdict in this case contrary to the evidence and contrary to the principles of justice and equity." Thus, the Court held, since the case rested entirely upon the credibility of Byrd, the victim, and witnesses, it was "constrained" to conclude that the trial court, who observed the trial and who had the duty to examine the conflicts in the evidence and the credibility of the witnesses in ruling on the general grounds, did not abuse its broad discretion in granting the motion. Nevertheless, because the evidence was legally sufficient to convict, the State may retry Byrd.