

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 16, 2010

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THIS WEEK:

- **DUI; HGN Evidence**
- **Right to Counsel**
- **Due Process; OCGA § 24-9-84**
- **Law of the Case Rule**
- **Severance; Sentencing**
- **Guilty Plea**
- **Confrontation**
- **Disqualification**
- **Sentencing; DUI**
- **Defense of Habitation; Automobiles**

DUI; HGN Evidence

Duncan v. State, A10A0651

Appellant was convicted of driving under the influence of alcohol and drugs, and other traffic offenses. The evidence showed that an officer, upon noting that appellant's truck had no headlights and was crossing the center line, stopped the truck and asked the driver for his license, which was expired. The officer detected a slight odor of alcohol, and asked the appellant to step out of the truck. The officer administered the Horizontal Gaze Nystagmus ("HGN") test, and though he only performed two passes in each eye instead of the seven he was trained to do, he still observed six out of a possible six "clues" for nystagmus. When asked, appellant initially denied having any alcohol, but subsequently admitted he had consumed a beer and had taken Lorcet for his back pain. The officer arrested the appellant for driving under the influence.

Appellant contended that the trial court erred in denying his motion to exclude the

HGN evidence because the officer failed to perform the test properly. The Court disagreed. Evidence based on a scientific principle or technique is admissible upon a showing that the general scientific principles and techniques are valid and capable of producing reliable results, and the person performing the test substantially performed the scientific procedures in an acceptable manner. Georgia has already recognized the HGN test as a procedure that meets verifiable certainty in the scientific community, and the trial court was authorized to conclude that because the officer observed six of the six possible indicators of impairment, he did substantially perform the test in accordance with his training. Any testimony about how the test was administered goes to the weight of the evidence, not the admissibility.

Right to Counsel

State v Brown, S10A0220

Appellant was indicted for murder and other crimes. The evidence showed that appellant was detained and questioned at police headquarters regarding the death and assault of the victims. Before and during the time the officer was going over the advice of rights form, appellant interrupted several times with statements claiming he had acted in self defense. Without encouraging appellant to provide more information on these claims, the officer reminded appellant of his rights to remain silent and to have counsel present. Appellant then clearly invoked his right to counsel by stating, "I want a lawyer," but then continued to volunteer information on the crimes and to ask about the condition of the victims. The officer stayed in the interrogation room with appellant and reminded him of his right to remain silent until counsel was present,

though the attorney was not contacted until after appellant was moved to a holding cell. Appellant contended that the detectives violated his constitutional rights by keeping him in the interrogation room after his invocation to counsel instead of ending the interview and contacting his attorney. The Court disagreed.

In determining whether to exclude statements following an invocation of the right to counsel, the issue is whether the police subjected the defendant to further interrogation after a request for counsel, and if so, whether the additional questioning was initiated by the defendant rather than the police. Whether it is an “interrogation” depends on whether there is express questioning by the officers or whether the officer’s words or actions are ones that the police should know are reasonably likely to elicit an incriminating response from the suspect.

The Court found that appellant’s statements were not elicited by interrogation, or coerced, and therefore admissible at trial. The officers had an obligation to advise appellant of his rights and to stop interrogating him after he unequivocally invoked his right to counsel, both of which they did. They did not, however, have any obligation to stop listening to anything appellant had to say or to immediately leave the room.

Due Process; OCGA § 24-9-84

Childs v State, S10A0497

Appellant was convicted for one count of the sale of cocaine. The evidence showed that investigators watched as their informant attempted to purchase drugs from appellant. Appellant sold the informant a small piece of crack cocaine, informant then turned the drugs over to the investigator, and appellant was charged. At his trial, appellant did not testify because his counsel argued that OCGA §24-9-84.1 (a) (2) would allow the State to impeach him with evidence of his prior convictions. Appellant contended that this statute violated his due process rights because it unduly burdens his right to testify. The Court disagreed.

Subsection (a) (2) of OCGA §24-9-84 provides that if the defendant testifies, “evidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more...if the court determines the

probative value...substantially outweighs its prejudicial effect to the defendant.” Relying on *Ohler v United States*, 529 U.S. 753, the Court found that the statute, which resembles Federal Rule of Evidence 609 (a), does not violate a defendant’s due process rights. The statute does not prohibit the defendant from testifying, but simply requires him to weigh the pros and cons of any matters which may then be brought out on cross-examination. Additionally, the Court also noted that defendants in Georgia are actually subject to more limited impeachment than other witnesses who have prior felony convictions. The conviction was upheld.

Law of the Case Rule

State v Stone, A10A0267

Appellant was convicted of several offenses, which he appealed, contending that the trial court erred by admitting his custodial statement, which was obtained in violation to his right to counsel. The Court agreed based on the United States’ decision in *Michigan v Jackson*, 475 U.S. 625 (1986). The conviction was reversed, and the Supreme Court of Georgia denied the state’s petition for certiorari. One week later, the United States Supreme Court overruled *Jackson* in *Montejo v Louisiana*, 129 S. Ct. 2079 (2009). During the retrial the State petitioned the court to revisit the ruling on the admissibility of defendant’s custodial statement, and the trial court ruled that the statement could not be used because the “law of the case” rule applies. The Court affirmed.

OCGA §9-11-60 (h) sets forth that “any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court.” If the law changes, the decision of an appellate court may not be binding in other situations, but remains binding between the parties of the original decision. Because the instant case had already received interim appellate review, the trial court correctly determined that the issue was governed by the law of the case rule.

Severance; Sentencing

Dickerson v State, A10A0674, A10A0675

Appellant was convicted for child molestation, aggravated sexual battery and sexual exploitation of a minor. The evidence showed that appellant’s wife found a box containing

child pornography in her home and contacted the police. The police executed a search warrant during which they seized a laptop and CDs that had hundreds of images of children involved in sexual activities. Appellant was indicted for molestation and sexual battery, and for sexual exploitation of children. The two indictments were joined for trial, appellant was convicted, and he was sentenced to life for the sexual battery, plus an additional five years for the sexual molestation. Appellant contended that the trial court erred denying his motion to sever and failing to merge his convictions for sexual battery and child molestation for sentencing.

In deciding the issue of severance, the law mandates that the court must consider the “complexity of the evidence to be offered” and if “the trier of fact will be able to distinguish the evidence.” In the instant case, the evidence was not so complex that the jury was not able to distinguish it in order to apply the law intelligently as to each offense. Thus, the Court upheld the conviction. However, the sentence was vacated because the Court ruled that the two counts at issue in sentencing did not allege specific averments separate and distinct from any other counts in the indictment. Because “the touching of the child’s genital area for the purposes of the child molestation conviction was in connection with the penetration required for the aggravated sexual battery conviction,” the counts should have been merged for sentencing. The case was remanded for re-sentencing.

Guilty Plea

Belcher v State, A10A0453

Appellant negotiated a plea of guilty on two counts of armed robbery and one count of kidnapping. The evidence showed that appellant victimized two women in the course of one armed robbery and held a five year old at knifepoint, cutting his mother’s neck when she tried to help, in another robbery. Appellant negotiated a plea of 20 years imprisonment in return for the State dropping the other charges. The trial court accepted the plea, finding that it was voluntarily and intelligently entered. Appellant contended that his plea was not entered knowingly and intelligently because he was not told the mandatory minimum sentences for his crimes and the prosecutor incorrectly advised him he could apply for sentence review by a three-judge panel. The Court disagreed.

Relying on *Adams v State*, 285 Ga. 744, the Court ruled that a guilty plea is not invalidated simply because defendant was not told the range of punishment on the plea, unless he makes a claim that he was disadvantaged by the lack of information. Here, appellant received the sentence he bargained for, so he did not establish any adverse consequence from not being told the mandatory minimums for the crime. Additionally, the Court found no evidence that the prosecutor or trial court assured appellant that his plea was subject to a panel sentence review pursuant to OCGA § 17-10-6 (a). Because he pled guilty to two serious violent felonies, appellant was ineligible for sentence review. The prosecutor had no requirement to provide appellant definitive guidance about whether he could seek sentence review, because this is a collateral consequence of entering a guilty plea. A defendant's "lack of knowledge of such collateral consequences cannot affect the voluntariness of the plea." *Williams v Duffy*, 270 Ga. 580, (1999).

Confrontation

Boggs v State, A10A0269

Appellant was convicted of robbery. The evidence showed that officers observed two young males, one identified as the appellant, running away from an injured man. The officers pursued them and saw that appellant dropped a backpack as he continued running. Appellant was arrested, made a statement to the police waiving his right to an attorney, and was indicted for robbery. At trial, the State did not call the victim as a witness. Appellant contended that this violated his constitutional right to confrontation. The Court disagreed.

A defendant's right to confrontation is not implicated unless the jury hears an out of court testimonial statement of an unavailable declarant, introduced to prove the truth of the matter. Here, the jury never heard any out-of-court statements from the victim, thus, there was no error.

Disqualification

Schaff v State, A10A0290

Appellant was charged with various crimes related to his alleged molestation of his minor daughter. The evidence showed that victim and her mother proffered testimony regarding incidents of sexual abuse of the victim.

The victim testified that she visited defense counsel's office and gave a videotaped interview recanting her allegations of abuse. The State moved to disqualify defense counsel on the ground that he was a necessary witness. The trial court ruled that because defense counsel's role became that of a forensic interviewer, he would need to be available for the State to cross-examine. The Court reversed.

In determining whether to disqualify counsel, the trial court should consider the particular facts of a case, balancing the litigant's right to freely choose counsel with the need to ensure ethical conduct of the attorneys. The State claimed that the child hearsay statute, which allows videotape to be introduced at trial if sufficient indicia of reliability exist, would require the attorney's testimony to impeach the mother's testimony about the circumstances surrounding the recantation. Relying on *Clough v Richelo*, 274 Ga. App 129 (2005), the Court explained that this speculation as to the content of the opposing counsel's testimony was not sufficient to support a disqualification order because it could open the door to "a blatant misuse of a rule that already has great potential for abuse." Additionally, the evidence showed that the victim's mother was present at the interview and counsel's assistant prepared the equipment and sat outside the office during the interview, so those witnesses could testify as to the circumstances surrounding the child's statement. Thus defense counsel was not a necessary witness.

Sentencing; DUI

Wright v State, A10A0459

Appellant was convicted on two counts of vehicular homicide predicated on DUI and reckless driving, as well as two counts of serious injury by vehicle and one count of DUI. The evidence showed that appellant was driving his truck, after consuming a combination of drugs, when he crossed over the center line of the road and collided with another vehicle. The driver was killed and another passenger was injured. Appellant admitted use of the drugs to an investigator and blood was drawn, confirming the presence of the drugs. Appellant contended that his sentences on three counts should have been merged. The Court agreed.

A vehicular homicide defendant can only be convicted once for the death of each victim. Appellant was found guilty of vehicular homi-

cide based on both a reckless driving theory and a DUI theory, but the two counts should have been merged for sentencing. The same is true for the serious injury by vehicle counts. Additionally, because the DUI was a predicate of both previous counts, and a defendant cannot be convicted of both a greater offense and the lesser included predicate offense, it should have been merged as well. The Court remanded the case for resentencing.

Defense of Habitation; Automobiles

Kendrick v State, S10A0092

Appellant was convicted for malice murder and possession of a firearm by a convicted felon during commission of a felony. The evidence showed that the victim entered defendant's Oldsmobile Cutlass with the intention of stealing it, broke open the ignition and drove away. Soon after, a light colored Acura, later identified as belonging to a woman living with defendant, pulled up beside the Cutlass and several shots were fired towards the victim. The Cutlass was later found crashed against a utility pole and the victim was dead from two gunshot wounds to the head. Upon searching defendant's home and automobiles, officers found spent bullets and bullet casings consistent with those found in the Cutlass, and defendant was arrested. At trial defendant testified that when he heard his car being stolen he entered the Acura to give chase and defend his property, when victim pulled out a pistol and the two fired at each other. There was no evidence of bullet holes on the Acura or of any weapon found with the victim. Defendant contended that the trial court erred in not instructing the jury on the law of defense of habitation, in the context of an automobile, as specified in OCGA §16-3-24.1. The Court disagreed.

The suggested Pattern Jury Instructions authorize use of deadly force in an attempt to terminate another's unlawful entry into a motor vehicle when there is a person present in the automobile to be protected from assault or personal violence. Additionally, the instructions indicate that the moment in time at which the defendant resorts to deadly force and the act being performed by the victim at that moment is critical to the application of defense of habitation. The Court found that neither of these sections of the pattern instruc-

tions applied in the instant case. First, there was no other person present in the Cutlass who was in need of protection from violence. Second, because defendant did not use deadly force until after the victim was driving away on the road, when the theft was already complete, there was no reasonable belief that it was necessary to fire the pistol at him at that time in order to prevent the unlawful entry into his motor vehicle. Thus, the denial of the request was proper.