

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 18, 2015

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THIS WEEK:

- **Jurors; Use of Sense of Touch**
- **Statements; Miranda**

Jurors; Use of Sense of Touch

Piedmont Newnan Hospital, Inc. v. Barbour, A15A0598 (7/16/15)

In this civil case, the Court stated that it presented the interesting issue of whether it is permissible for a trial court to allow members of a jury to use their sense of touch during a trial to determine a critical issue of fact, just as they might use their senses of sight and hearing. The issue arose when plaintiff's counsel requested and received permission for members of the jury to briefly touch both of the plaintiff's hands to determine if there was a detectable difference in the temperature of each hand, which would be an important factor in determining whether the plaintiff had Complex Regional Pain Syndrome ("CRPS"). The plaintiff claimed that his arm was damaged while undergoing a medical procedure performed at the defendant hospital, causing him to suffer from CRPS, with one consequence being that his damaged arm was much colder than normal. The experts who testified on behalf of the parties disagreed as to whether there was a meaningful difference in temperature of the plaintiff's hands, even though they agreed that a temperature asymmetry would be an important factor in determining whether the plaintiff suffered from CRPS.

The Court noted that no Georgia case was directly on point. However, citing *Union v. State*, 7 Ga.App. 27, 27 (4) (1909) (no error if jurors tasted liquid from jug admitted

into evidence in illegal whiskey trial) and *Morse v. State*, 10 Ga.App. 61, 63 (3) (1911) (jurors may utilize all of their senses, including taste and smell, in determining whether liquid was an intoxicating liquor), the Court found that jurors may utilize all their senses, not just hearing and eyesight, in determining factual disputes put to them. In so holding, the Court rejected the defendant hospital's argument that allowing the jurors to touch the plaintiff's arms was allowing them to make a medical diagnosis. Instead, the Court found, this exercise merely was a tool to aid them, as laymen, in deciding a question of fact that was squarely put to them, that is, whether one arm was colder than the other, and that the information so gleaned was probative to the issues in the case.

Statements; Miranda

Smith v. State, S15A0882 (9/14/15)

Appellant was convicted of felony murder and other related charges in the death of his girlfriend's child. He argued that the trial court erred in admitting his pre-arrest statement into evidence. Specifically, he contended that the investigator's failure to advise him of his *Miranda* rights until the end of the interview rendered his statement inadmissible. The Court disagreed.

Law enforcement officers are required to give *Miranda* warnings prior to questioning only where the subject is in police custody, having either been formally arrested or restrained to an extent associated with such an arrest. Where one has not been arrested, he will be considered to be in custody only under circumstances where a reasonable person in the same situation would perceive that he

was deprived of his freedom of action in a meaningful way. The inquiry focuses not on the interrogating officer's suspicions about the subject of the interview but rather whether the circumstances would lead a reasonable person to believe that he was not at liberty to leave. The trial court must make this determination based on the totality of the circumstances.

Here, the trial court held a Jackson-Denno hearing at which the court heard testimony from the investigator and viewed an excerpt of the video-recorded interview. The investigator testified that he and a fellow officer arrived at the hospital after the victim had been pronounced dead and discovered that appellant and his girlfriend had already left the hospital. The other officer contacted the couple and arranged to meet them at a nearby gas station to obtain the girlfriend's signature on a medical release form. Once at the gas station, the officers asked them to come to the sheriff's office to be interviewed. The couple agreed and followed the officers to the sheriff's office in their own vehicle, arriving a few minutes after the officers. The investigator testified that appellant was not under arrest at the time the interview began; that the limited information the investigator had obtained to that point in the investigation was not sufficient to justify appellant's arrest; and that appellant was free to leave at any point during the interview until the investigator made the decision to arrest and advised appellant of his *Miranda* rights. The video recording of the interview confirmed that appellant was not handcuffed, was given water to drink throughout the interview, and was permitted to keep his cell phone, even at one point interrupting the interview to answer a call from his mother. The investigator also testified that no threats or promises were made to induce appellant to talk and that appellant appeared to suffer from no deficiency and to understand the nature of the questions he was asked. Appellant offered no evidence to the contrary.

Therefore, the Court found, the totality of these circumstances leads inescapably to the conclusion that appellant was not in custody at the time of his interview. Accordingly, the trial court properly admitted appellant's statement at trial.