

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 2, 2016

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General Counsel

Lalaine Briones
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and Crimes Against Children
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Traffic Safety Resource Prosecutor

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State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **DUI; *Williams***
- **Search & Seizure; Cell Phones**
- **Ineffective Assistance of Counsel; Battered Person Syndrome**
- **Traffic Stops; Judicial Interpretation of Law**
- **Attempted Armed Robbery; Sufficiency of the Evidence**
- **Constitutional Speedy Trial; Extradition**
- **Witnesses; Fifth Amendment Protections**
- **Jury Instructions; Excessive Force**
- **Speed Trial Demands; Right to be Present**
- **DUI; HGN Results**
- **Jury Instructions; Plain Error**

DUI; Williams

Bailey v. State, A16A0200 (7/13/16)

Appellant was convicted of DUI (per se), DUI (less safe-combined influence of drugs); possession of methamphetamine; possession of marijuana; and possession of drug-related objects. The evidence showed that appellant was seriously injured in a car wreck. After appellant was taken to the hospital, an investigating officer found a box of drugs next to the vehicle. Appellant was unconscious when an officer located him in the hospital. The officer ordered hospital staff to obtain samples of appellant's blood and urine for drug and alcohol testing.

Appellant argued that the State did not comply with Georgia's Implied Consent statute because he was not advised of his rights and given an opportunity to refuse testing, as required by the implied consent notice. However, the Court found, pursuant to O.C.G.A. § 40-5-55(b) and O.C.G.A. § 40-5-67.1, the officer

was not required to give the implied consent notice to appellant. Although it was clear only that appellant was unconscious at the time the samples were taken and not whether he lost consciousness as a result of the accident, evidence introduced at trial showed that appellant's femur was fractured in the accident. Thus, he was deemed to have given consent to testing under the statute, and he did not withdraw this consent by virtue of being unconscious.

Appellant also contended under *Williams v. State* that given the totality of the circumstances, there was no actual, voluntary consent because he was unconscious at the time his blood and urine were taken. The Court agreed. Appellant's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious. Furthermore, the Court held, to the extent that the Court's decisions in *Gilliam v. State*, 295 Ga.App. 358 (2008), *Hill v. State*, 208 Ga.App. 714, 715 (1993) and *Rogers v. State*, 163 Ga.App. 641, 643 (1) (1982) conflict with the Supreme Court's decision in *Williams* and the United States Supreme Court's decision in *McNeely v. Missouri* on this point, they were disapproved.

In so holding, the Court stated that this may have been a case in which exigent circumstances could have supported the warrantless search of appellant's blood and urine. However, the State produced no evidence of exigent circumstances.

Search & Seizure; Cell Phones

State v. Hill, A16A0501 (7/13/16)

Hill was charged with misdemeanor theft of services in violation of O.C.G.A. § 16-8-5.

The evidence showed that an officer investigated a taxi cab driver's claim that a man had fled without paying his cab fare. The man who fled had left a cellular phone in the backseat of the cab. The officer turned on the phone but a passcode prevented him from accessing any data contained therein. The officer, however, was able to place an emergency call from the phone, and from that call a 911 dispatcher provided him with the number assigned to the phone and with Hill's name and date of birth. The trial court granted Hill's motion to suppress this information and the State appealed.

The Court stated that the application of Fourth Amendment law to this precise set of facts appeared to be an issue of first impression in Georgia. Specifically, Hill's Fourth Amendment argument necessarily rested upon a claim that he had a legitimate expectation of privacy regarding his phone number, name, and birthdate. The Court first noted that although the content of personal communications is private, the information necessary to get those communications from point A to point B is not. Also, a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. This rule applies even where the person revealing information intended its use by the third party to be limited. By using a phone, a person exposes identifying information to third parties, such as telephone companies, and assumes the risk that the telephone company may reveal that information to the government.

In looking at the law in other jurisdictions, the Court found that the majority of courts to consider the question have agreed that a person's name and address is not information about which a person can have a reasonable expectation of privacy. The fact that it was a law enforcement officer, rather than Hill, who placed a call from the phone does not change the conclusion that the information obtained was not subject to Fourth Amendment protection.

In so holding, the Court distinguished *Riley v. California*. Here, in contrast to *Riley*, the officer did not access any files on Hill's phone, which was protected by a passcode, but instead used the phone in a manner that caused it to send Hill's telephone number to a third party, the 911 dispatcher. "We do not construe *Riley* to prohibit an officer in lawful possession of a cellular phone from placing a call on that phone in an attempt to obtain identifying information about its

owner. Moreover, we do not construe *Riley* to recognize a legitimate expectation of privacy in identifying, non-content information such as the person's own phone number, address, or birthdate, simply because that information was associated with a cellular phone account rather than a landline phone account or a piece of physical mail." Accordingly, the Court concluded, because no Fourth Amendment search occurred in this case, the trial court erred in granting Hill's motion to suppress.

Ineffective Assistance of Counsel; Battered Person Syndrome

McLaughlin v. State, A16A0385 (7/12/16)

Appellant was convicted of aggravated assault. The record, briefly stated, showed that appellant and her long-time boyfriend had a long tumultuous history with physical abuse by both parties. The defense attorney filed, pursuant to O.C.G.A. § 16-3-24, a motion to dismiss the indictment based on justification. He also filed a motion for a speedy trial. The trial court heard the motion to dismiss immediately prior to trial. After the court denied the motion, appellant was convicted of aggravated assault on her boyfriend.

Appellant argued that trial counsel performed deficiently when he failed to withdraw the statutory speedy trial demand and seek a continuance so that he could investigate and obtain expert evidence regarding battered person syndrome (BPS). Appellant contended that counsel's conduct in this regard fell below the objective standard of reasonableness because such evidence was crucial to her sole defense of justification. The Court agreed.

The Court stated that battered person syndrome is not a separate defense. Rather, evidence of BPS may be introduced in an appropriate case to support a defendant's claim of justification. To make a prima facie showing of justification based upon battered person syndrome, a defendant should present the opinion testimony of an expert as well as independent testimony regarding the historical facts upon which the expert relies. Specifically, the defendant should present an expert witness to describe the syndrome, apply that model to the facts shown by the evidence, and opine that the defendant falls within the profile. A defendant who meets these evidentiary requirements is entitled to a jury charge on BPS.

Here, counsel testified that appellant's sole defense was justification and that he filed a motion to dismiss based on that defense. After listening to the evidence at the hearing on the motion to dismiss, counsel realized that appellant likely suffered from BPS. Counsel also knew that evidence concerning BPS would provide significant support to the justification defense. Despite this knowledge, however, trial counsel did not request a continuance to investigate whether his client suffered from BPS and/or whether he could obtain expert testimony to support a defense based on BPS.

The Court also noted that counsel's testimony reflected that this decision was not strategic in nature. Rather, it resulted from counsel's mistaken belief that because the hearing on the motion to dismiss occurred immediately before jury selection, it was too late to request a continuance. Counsel further testified that the information he learned at the pretrial hearing on the motion to dismiss caused him to change the theory of defense "midstream," after trial had begun. Thus, the Court determined, based on his understanding of when trial began and the time limits on moving for a continuance, counsel never sought a continuance. Instead, he merely assumed that he could not get one. Thus, the Court found, counsel's assumption in this regard was not reasonable under the circumstances. Despite counsel's belief to the contrary, the law does not specifically limit the time in which a party may move for a continuance. Rather, the law simply provides that "[a]ll applications for continuances are addressed to the sound legal discretion of the court and ... shall be granted or refused as the ends of justice may require." O.C.G.A. § 17-8-22. Therefore, counsel's failure to seek continuance based on his mistaken belief that he was procedurally barred from doing so constituted deficient performance.

Having found that trial counsel rendered deficient performance, then addressed the question of whether appellant suffered prejudice as a result of trial counsel's representation. Appellant's sole defense of justification hinged largely on appellant's own testimony. The State, however, was able to impeach that testimony by playing the jailhouse conversations between appellant and her boyfriend in which appellant apologized to and expressed her love for him and accepted blame for the incident. As the expert testimony at the hearing on appellant's

new trial motion demonstrated, however, evidence of BPS would have explained why appellant accepted blame and why appellant's statements were not inconsistent with her claim of justification. Moreover, evidence of BPS would have entitled appellant to a jury instruction that would have allowed the jury to consider whether, given the nature of her abusive relationship with her boyfriend, appellant reasonably believed that his use of force against her was imminent and that she therefore needed to protect herself.

Thus, the Court found, a reasonable probability existed that had counsel sought a continuance to seek expert testimony on the issue of BPS, that evidence could have influenced the outcome of the trial. Accordingly, because appellant satisfied both prongs of her ineffective assistance claim, the Court concluded that the trial court erred in denying her motion for a new trial.

Traffic Stops; Judicial Interpretation of Law

State v. Mathis, A16A0605 (7/13/16)

Mathis was charged with crimes relating to a traffic stop. The evidence showed that an officer stopped Mathis after noticing that the vehicle had no light illuminating his license plate — a violation of O.C.G.A. § 40-8-23(d). The State introduced the testimony of the officer as well as video from the dashboard camera in the officer's car and the bodycam worn by the officer. Mathis produced a photograph allegedly showing that the tag was illuminated. The trial court granted Mathis's motion to suppress and the State appealed.

The Court first rejected the State's argument that the trial court's order was contrary to the evidence. The Court found that the officer's credibility was an issue and it was clear from the transcript that the trial court did not believe the officer.

The State also argued that the trial court erred in its "interpretation and application of O.C.G.A. § 40-8-23(d)," asserting that the trial judge's personal dislike of the statutory provision — as revealed through certain of the judge's remarks — "cloud[ed]" the ruling. According to the State, a "proper, unbiased interpretation of the statute would have led the trial court to deny [Mathis's] motion to suppress." The transcript showed that the trial court stated, "I have made my opinion

clear about [the statutory provision] and I am going to follow the law but I'm going to be very strict on these cases, as strict as I can be on these cases because this is one area of the law I just think — as I said, I think it wrecks [sic] of pretextuality. ... In this case it hasn't been shown to me that [the tag light] was out because based on the picture that the Defendant entered but at any rate I am ... granting the Motion."

The Court noted that the trial judge readily conceded his personal dislike for O.C.G.A. § 40-8-23(d) and disdain for pretextual stops, but also explicitly acknowledged that where an officer observes a traffic violation, an ensuing stop is lawful. The trial judge repeatedly vowed to follow the law; he reviewed the statutory provision and examined evidence adduced, noting in particular that the officer's credibility was at issue. Although the Court disagreed with the State that the trial court was required to issue a ruling in its favor, the Court agreed that certain of the trial judge's remarks indicated that the grant of the motion may have resulted at least in part from the State's failure to meet the trial judge's own preferred test. Thus, the Court stated, it is not the role of a judge to "interpret" constitutional or statutory provisions through the prism of his or her own personal policy preferences. A judge is charged with interpreting the law in accordance with the original and/or plain meaning of the text at issue (and all that the text fairly implies), as well as with faithfully following the precedents established by higher courts. And in failing to adhere to these constraints, a trial court clearly errs. Therefore, given these circumstances, the Court vacated the trial court's order granting the motion to suppress and remanded the case for the trial court to consider whether the State carried its burden as imposed under Georgia law.

Attempted Armed Robbery; Sufficiency of the Evidence

Rainey v. State, A16A0675 (7/13/16)

Appellant was convicted of criminal attempt to commit armed robbery. He contended that the evidence was insufficient to support his conviction. A divided whole Court agreed and reversed.

The evidence showed that a store employee noticed a vehicle with an obscured license plate parked in an unusual location in the parking lot. The employee observed

appellant inside the vehicle talking on his cell phone and wearing a surgical mask. The employee watched appellant exit his vehicle wearing the mask, a hooded sweatshirt with the hood pulled up, and a hat. He then observed appellant walking a short distance towards a pharmacy, which was also near two banks. A call to 911 was placed by the manager of the witnessing employee.

Appellant walked into the pharmacy, stayed for four or five minutes, asked about the price of cigarettes (although the prices were clearly marked) and left. A sergeant responding to the 911 call saw appellant walking towards his vehicle but did not observe him wearing a mask. The sergeant testified that appellant appeared to throw something inside his vehicle, although he admittedly could not see exactly what appellant was doing.

Upon questioning from the sergeant, appellant stated that he was waiting for his daughter. The sergeant observed that appellant's license plate was obscured by an insurance bill secured by medical tape, which appellant speculated may have been taped onto his car by his daughter to remind him to pay his bill. Appellant's daughter testified that she did not tape the insurance bill on the license plate of the vehicle and that she was not planning on meeting her father.

As the sergeant was questioning him, appellant consented to a search of his vehicle. The sergeant found a surgical mask, medical tape, and a police scanner in the vehicle. He also located a checkbook on the floor of the vehicle, leaning against the driver's seat. After searching inside the checkbook, the officer found a note reading, "I have a gun and there is one outside listening to a police scanner so no alarm put \$2000.00 in the check book and be fast." A second note was found written on the plastic sleeve of the checkbook, which was essentially the same as the first except that it omitted the language referencing the police scanner. A patdown search of appellant was conducted, but no weapons were located on him or in his vehicle.

The Court stated that the evidence presented supported a finding that appellant performed certain acts in preparation for an armed robbery. Arguably, it may even have supported a conviction of criminal attempt to commit robbery. However, the Court stated, that is not the same as supporting a finding that appellant took a substantial step

towards the commission of an *armed* robbery. Specifically, appellant's actions in obscuring his license plate and being in possession of the notes, surgical mask, and police scanner—in the absence of any evidence that he was in possession of a weapon or device having the appearance of a weapon, and in the absence of evidence that he showed anyone the notes—were merely preparatory acts and did not amount to an attempt to commit the crime of armed robbery. Furthermore, the Court stated, while the presence of a weapon is not required in order to sustain a conviction of armed robbery, here, the presence of a weapon could not even be inferred. Thus, there was no evidence that appellant gave the notes to anyone or concealed his hands in any way as if to hide a weapon. Furthermore, the pharmacy employee testified that he was never in fear of appellant or otherwise felt as though he was in danger. Accordingly, the Court concluded that there was insufficient evidence to support the jury's verdict of guilty on the charge of criminal attempt to commit armed robbery.

Constitutional Speedy Trial; Extradition

State v. Wood, A16A0023 (6/30/16)

The State appealed after the trial court granted Wood's motion to dismiss the indictment on constitutional grounds. The record, briefly stated, showed that Wood committed child molestation against the victim in 2006. Wood claimed to have left the country on January 9, 2007 to live with his mother, who was a resident of the Netherlands. Warrants were issued for Wood's arrest on these charges on February 12, 2007, but they were never executed. On January 5, 2009, Wood was indicted on three counts of child molestation and three counts of aggravated sexual battery. His arraignment was set for January 27, 2009. Notice of the arraignment was mailed to his last known address in Georgia. When Wood did not appear for arraignment, a bench warrant was issued. At the request of the State, the case was dead docketed in March 2010 on the basis that Wood was a fugitive.

On September 9, 2013, Wood was re-indicted on the same charges contained in the 2009 indictment. An arrest warrant was subsequently issued based on the re-indictment. Counsel for Woods entered an

appearance on October 28, 2013. A motion to dismiss on constitutional speedy trial grounds was filed on March 23, 2015. In the motion, Woods stated that the U.S. government executed an extradition request to Finland on October 22, 2013. Wood claimed that his arrest and detention in Finland in September 2013 was the first time he became aware of the charges against him. Wood also represented that he was released on bond in April 2014, he fought extradition efforts, and has since been subject to a travel ban, meaning he is generally unable to leave Finland outside of agreeing to extradition to the U.S. The trial court granted the motion and the State appealed.

The State argued that the trial court erred in considering Wood's constitutional speedy trial claims because he had not entered a plea or otherwise subjected himself to the court's jurisdiction. The Court disagreed. Although the State argued that Wood had an obligation to appear in court before the court could consider his motion to dismiss, the Court found that a defendant may waive his appearance at any stage in the trial or counsel may waive this right for the defendant.

Quoting from *In re Kashamu*, 769 F.3d 490, 494 (7th Cir. 2014), the State argued "[o]nce [a defendant is] warned [of criminal charges], it's his choice whether to face the judicial music in the United States or forgo any speedy trial right based on time he spends out of the reach of our court system." But, the Court found, it did not read *Kashamu* as setting forth a new principle under the *Barker* framework that it is required to follow that a defendant always gives up his right to assert a speedy trial claim if he is out of the reach of the country. Instead, the Court found that the quoted language, when read in context of the entire opinion, merely emphasizes the fact that the more the defendant's actions contributes to the pre-trial delay, and thus the more the second *Barker* factor would be weighed against him, the more difficult it will be for him to prove that he was denied his right to a speedy trial. Thus, the Court declined to follow the State's suggestion to conclude that Wood was precluded from even asserting a constitutional right on the basis of being out of the reach of the court system.

The State also argued that the trial court erred in failing to assign any weight to the trial delay caused by Wood's own actions. The Court agreed. The Court noted that through a mistaken

belief by the parties, no evidence existed in the trial court's files regarding the necessary records regarding the pending extradition proceedings. Nevertheless, the trial court erred when it concluded that there was no evidence of efforts to extradite Wood without considering the representations made by Wood, through counsel. In his motion to dismiss on speedy trial grounds, Wood specifically acknowledged that the United States government executed an extradition request to Finland. And, the Court stated, a defendant in a criminal proceeding may make judicial admissions in his pleadings, motions, and briefs, and that such admissions bind the defendant.

Here, the trial court weighed the reason for the delay after the re-indictment, based on the mistakenly believed there was no evidence that any effort had been made to extradite Wood. Had the trial court correctly considered the evidence before it, the trial court could possibly have weighed the second *Barker* factor differently. Accordingly, the Court vacated and remanded for the trial court to reconsider the evidence and conduct a new *Barker* analysis. On remand, the trial court could also consider whether counsel's statements at the hearing are admissible and binding on Wood. Alternatively, it could also permit the parties to supplement the record with other evidence regarding the extradition proceedings that no party actually disputed have occurred, including evidence that both parties had mistakenly assumed was in the clerk's file.

Witnesses; Fifth Amendment Protections

Anderson v. A16A0595 (7/14/16)

Appellant was convicted of trafficking in cocaine. The evidence showed that appellant asked his girlfriend to drive him to another town two hours away to meet his girlfriend's sister, Vicki. They were stopped on the way back and a bag in the car was found to contain the cocaine. At trial, appellant's girlfriend testified against him.

Appellant contended that the trial court erred in quashing his subpoena of Vicki. The record showed that he subpoenaed Vicki to testify on his behalf because, in a statement made to his investigator in 2012, Vicki denied bringing any drugs with her when meeting with appellant that night. Vicki appeared at trial with her attorney, who notified the

trial court that, because his client feared her testimony would place her in jeopardy of incriminating herself, she wished to invoke her Fifth Amendment privilege. The trial court separately asked Vicki if she wished to assert her Fifth Amendment right, and Vicki responded, "Correct." Appellant nonetheless argued that he should be entitled to call her as a witness to suggest that she and her sister "concocted a story to try to protect both of them." The trial court found that in order to answer appellant's questions, Vicki would face the risk of self-incrimination, and thus ruled that he would not be able to call her as a witness.

Appellant argued that the trial court's refusal to allow him to call Vicki as a witness for this reason violated his Sixth Amendment right to call witnesses in his defense. However, the Court stated, a criminal defendant's Sixth Amendment right to present a defense is not absolute. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. And it is well settled that if it appears that a witness intends to claim the privilege against self-incrimination as to essentially all questions, the court may, in its discretion, refuse to allow the witness to take the stand. Neither side has the right to benefit from any inferences the jury may draw simply from the witness's assertion of the privilege either alone or in conjunction with questions that have been put to him. One reason for this rule is that reliable inferences do not ordinarily follow from a witness's invocation of the Fifth Amendment. Therefore, the Court held, the trial court did not abuse its discretion in refusing to allow Vicki to take the stand.

Jury Instructions; Excessive Force

Haygood v. State, A16A0075 (7/15/16)

Appellant was convicted of disorderly conduct and misdemeanor obstruction of a law enforcement officer. The evidence showed that appellant had an argument with his brother and their father and that based on this argument and the conduct of appellant, the brother made two calls to 911 stating that appellant may have a gun and had possession of a knife. When officers confronted appellant in the residence and asked appellant to come outside, appellant resisted and fought the officers.

Appellant requested the pattern charge on a person's right to resist police's excessive

force by the use of proportionate force. The trial court determined that "the requested jury charge on justification was not supported by the evidence at trial because appellant failed to admit to the charged offenses." In its order denying appellant's motion for new trial, the trial court repeated that the charge was not authorized because "appellant failed to admit to" using force against the officers engaged in lawfully arresting him.

A divided whole Court stated that there was no dispute that the arrest at issue here was accompanied by probable cause and was therefore lawful. Appellant, who did not testify, never admitted to using any force against the officers. Appellant's mother testified that she heard him ask them, "What have I done? I'm not doing anything," and appellant's brother testified that because appellant's arms were pinned behind his back, it was "impossible" for appellant to strike or kick any of the officers. In appellant's closing argument, he also denied that he had done violence to any of the officers.

A defendant who does not admit that he resisted an arrest forcibly is not entitled to a charge on his alleged right to do so. Therefore, the Court found, because appellant did not admit to using any force against the officers, he was not entitled to a charge on his allegedly justified use of reasonable force to resist his arrest, and the trial court did not err in refusing his request.

Speed Trial Demands; Right to be Present

Williams v. State, A16A0497, A16A0498 (6/9/16)

Appellant was indicted on two unrelated armed robbery counts which were severed for trial. As to the first count, he pled guilty to a lesser included charge of robbery. As to the second count, he was convicted by a jury. The record showed that following the indictment, his appointed counsel filed a demand for speedy trial. However, counsel later sought to withdraw and asked another attorney (hereinafter "trial counsel") to represent appellant. Trial counsel agreed to do so, but only if the demand for speedy trial was withdrawn. Trial counsel notified appellant that she was going to ask for a continuance and appellant agreed. Thereafter, at a calendar call, trial counsel requested a continuance and agreed with the State's statement that the demand for speedy trial was withdrawn.

Appellant first argued that he was entitled to a discharge and acquittal on Count 2 because the State failed to comply with his statutory speedy trial demand, which he contended was never actually withdrawn. The Court disagreed. The Court noted that after meeting with appellant and getting his approval for a continuance, trial counsel appeared on his behalf at the calendar call and orally informed the trial court that appellant had withdrawn his speedy trial demand. This representation resulted in a waiver of appellant's demand for speedy trial, notwithstanding the fact that appellant was not present at the calendar call. In so holding, the Court rejected appellant's argument that he "did not have valid legal counsel" at the calendar call. The Court noted that appellant's first counsel had filed a motion to withdraw, specifically indicating therein that trial counsel was willing to defend appellant, appellant had met with trial counsel and agreed to a continuance, trial counsel appeared on appellant's behalf at the calendar call, making representations on his behalf, including requesting a continuance, and the trial court specifically stated at the calendar call that he had "[done]" an order appointing trial counsel as appellant's counsel. Under these circumstances, the Court concluded that trial counsel represented appellant at that proceeding despite the fact that the court did not enter the written order appointing her until a week later.

Appellant also argued that his constitutional right to be present at trial was violated when he was not in the courtroom at the calendar call. The Court disagreed. Here, the Court found, trial counsel testified at the hearing on the motion for new trial that she met with appellant before she appeared on his behalf at the calendar call, and he agreed to a continuance. Because appellant failed to prove that his absence from the calendar call, standing alone, substantially affected the outcome of the case such that it could be considered a critical stage of the proceedings or that he ever objected to his absence, the Court found no reversible error.

DUI; HGN Results

Spencer v. State, A16A0118 (6/9/16)

Appellant was convicted of DUI (less safe). He contended that the trial court erred in allowing the arresting officer to testify to a specific numeric value of her blood alcohol content based on the HGN test. The Court affirmed.

The Court stated that it is true that an arresting officer's testimony identifying a specific numeric blood alcohol content based solely on a defendant's HGN results should be excluded. But here, the officer did not identify a specific numeric blood alcohol content level for appellant based solely on her HGN results, and instead merely testified that generally, four out of six clues on the HGN shows that a blood alcohol content exceeds the impairing level of .08. The Court noted that it has previously recognized, under law enforcement guidelines, a score of four out of six clues on an HGN test constitutes evidence of impairment. Moreover, the officer's testimony was similar to the testimony found to be admissible in *Kirkland v. State*, 253 Ga.App. 414 (2002), where an officer testified that "in general, when you see six out of six clues [on the HGN], the blood-alcohol content will be ... 0.10 grams or greater." Thus, the Court found, the trial court did not err in allowing the officer's testimony since he did not identify a specific numeric blood alcohol content based on appellant's HGN results, and instead properly testified that generally an HGN test showing four out of six clues indicates impairment.

Jury Instructions; Plain Error *Bledson v. State*, A16A0281 (6/16/16)

Appellant was convicted of aggravated battery and three counts of aggravated assault. The evidence showed that appellant and at least eight others, at appellant's behest, assaulted a married couple as they were walking home through appellant's neighborhood. The male victim was severely beaten and, during the assault, appellant hit the male victim with a pistol and then later, shot the victim with the pistol.

Appellant argued that the trial court erred in charging the jury as to whether a firearm constitutes a deadly weapon for the purposes of aggravated assault. The Court noted that the trial court correctly instructed the jury that the State had the burden of proving "as a material element of aggravated assault," whether the assault was made with a deadly weapon, and further, that the jury must resolve whether the firearm, as alleged to have been used in the indictment, "in fact, constituted a deadly weapon or in the manner that it was used, [was] likely to cause serious

bodily injury." The trial court also instructed the jury, however, that "a firearm, when used as such, is a deadly weapon as a matter of law." Appellant specifically contended that the latter charge confused the jury on a material issue of the case.

The Court noted that because appellant failed to object to the jury charge at trial, it was subject only to plain error review on appeal. And here, the Court concluded, even assuming that the given charge was erroneous and obviously so, appellant made no showing that it likely affected the outcome of the proceedings or that it seriously affected the fairness, integrity, or public reputation of the trial. The overwhelming evidence showed that appellant struck the male victim on the head with his gun at the beginning of the melee, and the male victim testified that throughout the violent and prolonged assault that followed, he recalled seeing appellant's handgun on more than one occasion, he actually believed that he was going to die, and even before being shot, he had been beaten to the point of "total[] defenseless[ness]." These facts established that appellant's handgun as used in the assault constituted a deadly weapon.

Moreover, the Court found, the jury was charged that the State bore the burden of proving that the assault was inflicted with a deadly weapon, and that it, the jury, must decide from the evidence whether the firearm as used constituted such. Under these circumstances, appellant also failed to show that the erroneous charge likely affected the outcome of his trial. Accordingly, in light of the overwhelming evidence of appellant's guilt, the Court found that the erroneous charge also did not seriously affect the fairness, integrity or public reputation of the proceedings.