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GEORGIA traffic PROSECUTOR

A PUBLICATION OF THE PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA TRAFFIC SAFETY PROGRAM

>>> OUR MISSION

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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Photo courtesy of Middle Georgia Traffic Enforcement Network, © 2014 Lou Crouch..

In two recent cases, the Georgia Supreme Court clarified the constitutional analysis of police roadblocks, both individually and at the programmatic level. These decisions have both altered the way law enforcement agencies approach roadblock implementation and changed the way prosecutors demonstrate the constitutional validity of particular checkpoints.

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ROADBLOCKS AFTER *BROWN* and *WILLIAMS*: COMPLETELY THE SAME . . . EXCEPT FOR THE PARTS THAT ARE DIFFERENT

By Todd Hayes, Traffic Safety Resource Prosecutor
Prosecuting Attorneys' Council of Georgia

In *Brown v. State*, 293 Ga. 787 (October 21, 2013) and *Williams v. State*, 293 Ga. 883 (October 21, 2013), the Supreme Court of Georgia overturned two convictions of defendants stopped at separate unconstitutional police roadblocks. According to the Court, the long-standing analytical framework used by Georgia courts to determine the constitutional validity of roadblocks (first framed by the Court of Appeals in *Baker v. State*, 252 Ga.App. 695 (2001)) improperly merged two distinct constitutional requirements relating to the authorization of roadblocks by supervisory personnel pursuant to a roadblock program established for "an appropriate primary purpose other than general crime control[.]" *Brown*, slip op. at 25.

In *Brown*, the Court traced the history of the roadblock exception to the Fourth Amendment's requirement that traffic stops be justified by individualized suspicion. Writing for a unanimous court, Justice Nahmias noted that the Supreme Court of the United States recognized a narrow exception to that general requirement which authorized roadblocks implemented pursuant to a "plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (99 S.Ct. 2637, 61 L.E.2d 357) (1979). Such limitations strike a constitutionally acceptable balance between the public interests served by checkpoints and the right of individuals to be free from arbitrary and oppressive government interference. *Id.* at 50. Responding to the U.S. Supreme Court's concerns, the Georgia Supreme Court, in *LaFontaine v. State*, 269 Ga. 251, 253 (1998), articulated five minimum requirements that a *particular checkpoint* must satisfy in order to be found constitutional, rather than arbitrary or oppressive. Those requirements are that (1) the decision to implement the roadblock be made by supervisory personnel rather than by officers in the field; (2) all vehicles be stopped, rather than random vehicle stops; (3) the delay to motorists be minimal; (4) the roadblock be well identified as a police checkpoint; and (5) screening officers possess sufficient training and experience to qualify him or her to make an initial determination as to which motorists should be subjected to field sobriety testing. *Id.* at 253.

Two years after *LaFontaine*, the U.S. Supreme Court revisited the constitutional validity of roadblocks in *City of Indianapolis v. Edmond*, 531 U.S. 32 (121 S.Ct. 447, 148 L.E.2d 333) (2000). There, the Court held that in order to comply with the Fourth Amendment, a *checkpoint program* must have (in addition to the sort of safeguards on the implementation and operation of checkpoints embodied in *LaFontaine*) a primary purpose other than a general interest in crime control. *Edmond* at 40, 48. Following the *Edmond* decision, the Georgia Court of Appeals considered what impact that decision had upon Georgia's *LaFontaine* requirements. See *Baker v. State*, 252 Ga.App. 695, 697-709 (2001) (whole-court decision). Unfortunately, instead of recognizing that *Edmond added* to the *LaFontaine* analysis, the Court of Appeals erroneously held that *Edmond* simply *modified* the first *LaFontaine* factor, such that the State was required toprove both "that the decision to implement the checkpoint in question was made by supervisory officers in the field *and* that the supervisors had a legitimate primary purpose." *Baker* at 702 (emphasis in original).

Put another way, the *Baker* court merged the *Edmond* requirement that a roadblock program have a primary purpose other than general crime into the first *LaFontaine* factor that the roadblock be implemented by a supervisor and not a field officer. Properly understood, the two criteria "involve different factual inquiries, and they serve different objectives in the Fourth Amendment scheme."

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Brown, slip op. at 19. The focus of the *Edmond* "primary purpose" requirement is on *why a law enforcement agency uses checkpoints*; in contrast, the *LaFontaine* factors focus on *when, where, how, and by whom specific checkpoints are implemented and operated*. Therefore, the Court disapproved of *Baker* and its progeny to the extent that they merged these two separate inquiries.

Having corrected the constitutional analysis applicable to roadblocks generally, the Court applied it to the facts of both *Brown* and *Williams*. In *Brown*, the defense challenged the roadblock based upon two alleged shortcomings in the evidence offered by the State regarding the sergeant that authorized it. First, the defense argued that the sergeant did not qualify as a "supervisor" within the meaning of *LaFontaine* because the State failed to prove that he was an "executive" or "programmatic level" supervisor. Second, the defendant asserted that the sergeant had authorized the roadblock while in the field rather than in advance, while acting in his supervisory capacity. At the motion hearing, the defense presented some evidence supporting the theory that the sergeant had authorized the roadblock from the field, and based on that evidence, the trial court granted the motion to suppress.

According to the Supreme Court, the facts in *Brown* did not present a problem in regard to the *Edmond* "primary purpose" requirement because the police department policy governing roadblock implementation (which was introduced by the State and which provided that roadblocks were to be used "to monitor and check driver's licenses, driver condition, vehicle registrations, vehicle equipment, and various other requirements of the Georgia State Motor Vehicle and Traffic Code") sufficiently demonstrated that the purpose of the roadblock program was not general crime detection. In addition, the Court rejected the argument that the sergeant who authorized the roadblock in his case failed to qualify as "supervisory personnel" within the meaning of *LaFontaine* because he was not an "executive" or "programmatic level" supervisor. Instead, the Court held that a "supervising officer" under *LaFontaine* was simply one to whom the authority to implement roadblocks was delegated, and that the authorizing sergeant in *Brown* qualified. However, the Court found that because there was evidence in the record to support the trial court's determination that the sergeant made the decision to implement the roadblock while in the field rather than in advance of the roadblock, that determination was not clearly erroneous. Therefore, the Court held that the Court of Appeals erred in reversing the trial court's grant of the motion to suppress.

In *Williams*, the defense challenged the constitutionality of the roadblock on the ground that the State failed to establish the first of the *LaFontaine* factors. Referencing *Brown*, the Court interpreted this as a challenge to whether the roadblock was established in advance by a supervising officer and to whether the law enforcement agency's roadblock program had a primary purpose other than general crime detection. After analyzing the facts adduced by the State at the motions hearing, the Court concluded that the record supported the trial court's determination that the officer who authorized the roadblock was a supervisor, and that he decided to implement the roadblock in advance and while acting in his supervisory capacity. In that regard, the Court noted that the assistance the authorizing officer provided while at the scene of the roadblock did not deprive him of supervisory status for purposes of the first *LaFontaine* requirement. However, the Court held that the State failed to prove that the roadblock program in this case was properly limited as required by *Edmonds*. Specifically, the Court noted that the short written law enforcement policy governing the agency's utilization of roadblocks did not contain sufficient limitations preventing roadblock usage for general crime detection purposes. The Court stated that while nothing in the Constitution requires law enforcement agencies to have written policies governing the use of roadblocks, the existence of such policies and the use of written forms documenting the implementation of roadblocks make it easier to establish the purposes of a roadblock program. Here, the Court found, the record contained no testimony or other evidence beyond the written policy regarding the law enforcement agency's purposes for roadblock implementation. Furthermore, the trial court's finding that the supervisor in this case had been given the authority to implement roadblocks for legitimate law enforcement purposes did not establish that the agency's checkpoint program *as a whole* had a primary purpose other than general criminal deterrence. Therefore, because the State failed to make an adequate showing in regard to *Edmond*, the Court of Appeals erred in upholding the trial court's denial of the motion to suppress.

The decisions in *Brown* and *Williams* clarify the factors our courts must use to determine the constitutionality of a police roadblock under the Fourth Amendment. In summary, the State must show the following:

1. The roadblock was implemented pursuant to a checkpoint program that has, when viewed at the programmatic level, an appropriate primary purpose other than general crime control;
2. The decision to implement the specific roadblock in question was made by a supervisor in advance, and not by an officer in the field;
3. All vehicles that passed through the roadblock were stopped, rather than random vehicle stops;
4. The delay to motorists was minimal;
5. The roadblock was well-identified as a police checkpoint;
6. The screening officers staffing the roadblock possessed sufficient training and experience to qualify them to make an initial determination as to which motorists should be subjected to field sobriety testing; and
7. Under the totality of the circumstances, the stop of the defendant was reasonable under the Fourth Amendment. GTP

>>> **UPCOMING TRAINING EVENTS**

JUNE 30, 2014

Joint Prosecutor & Law Enforcement DUI Training

Bulloch County Courthouse
2 North Main Street
Statesboro, GA 30459
8:00 AM - 3:00 PM

JULY 20-23, 2014

2014 Summer Conference

Jekyll Island Convention Center
75 Beachview Drive
Jekyll Island, GA 31527

AUGUST 15, 2014

Joint Prosecutor & Law Enforcement DUI Training

Bacon County Agriculture Building
203 S. Dixon Street
Alma, GA 31510

SEPTEMBER 3-5, 2014

2014 Prosecuting the Drugged Driver

Hilton Savannah DeSoto
15 East Liberty Street
Savannah, GA 31401

SEPTEMBER 19, 2014

Joint Prosecutor & Law Enforcement DUI Training

Golden Isles Career Academy
4404 Glynco Parkway
Brunswick, GA 31525

SEPTEMBER 22, 2014

Joint Prosecutor & Law Enforcement DUI Training

Varnell City Hall
1025 Tunnel Hill Varnell Road
Dalton, GA 30720

JANUARY 21-23, 2015

2015 Winter Conference

Brasstown Valley Lodge
6321 Highway 76
Young Harris, GA 30582

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PROSECUTORIAL OPTIONS WHEN K-9 OFFICERS ARE ASSAULTED

By Pete Lamb, Assistant District Attorney
Augusta Judicial Circuit

Photo courtesy of Nathan Todd/City of Douglasville. http://www.ci.douglasville.ga.us/index.aspx?NID=284.

A suspect hides in the crawlspace beneath a house. As *human* police officers surround the residence, a K-9 officer arrives. The suspect is told that if he does not come out, the dog will be sent in to retrieve him. The suspect ignores the warning and the K-9 is dispatched. Looking underneath the house, officers discover that the suspect is fighting with the K-9, hitting the animal with his fists and attempting to choke the dog. The human officers then intervene and take the suspect into custody. Can the offender be charged under Georgia law with any crime relating to the injuries to the police dog?

Several Georgia statutes protect K-9 law enforcement officers from harm and abuse directed at them as they carry out their assigned tasks. Interestingly, however, law enforcement K-9s are not covered by the misdemeanor and felony obstruction statutes codified at O.C.G.A. § 16-10-24. The obstruction statute only applies when the resistance offered by an offender is directed against a *human* police officer. However, despite the fact that the General Assembly has never decreed that police K-9s are entitled to the same protection against obstruction as human officers, there are both felony and misdemeanor options available to prosecutors in cases where defendants assault police dogs when the animals are acting within the scope of their official duties.

O.C.G.A. § 4-8-5 (which is in the general provisions portion of Article 8 of Title 4 relating to animals) provides that it is unlawful to "perform a cruel act on any dog" or to "harm, maim, or kill any dog, or attempt to do so." Although subsection (a)(1) of the statute carves out an exception for harm done to a dog by a person defending themselves, their property, or the person or property of another person, subsection (c) makes clear that it is not intended to limit "in any way the authority or duty of any law enforcement . . . dog." Therefore, it seems clear that the statue would apply in cases where K-9s are harmed in the line of duty. According to the penalty provision in O.C.G.A. § 4-8-7, violation of this statute is punished as a misdemeanor *unless* the provisions of O.C.G.A. § 16-12-4 (Cruelty to Animals) apply.[1]

O.C.G.A. § 16-12-4(b) provides that a "person commits the offense of cruelty to animals when he or she causes death or unjustifiable physical pain or suffering to any animal by an act, an omission, or willful neglect." Generally, the crime is punished as a misdemeanor, much like O.C.G.A. § 4-8-5. However, this statute provides for aggravated punishment under certain circumstances not covered in Title 4. Specifically, according to subsection (b)(1), the maximum fine for persons convicted of this offense for a second or subsequent time increases from $1,000 to $5,000. Additionally, if the second or subsequent offense results in the death of an animal, then subsection (b)(2) provides that the crime is a high and aggravated misdemeanor punishable "by imprisonment for not less than three months nor more than 12 months, a fine not to exceed $10,000.00, or both, which punishment shall not be suspended, probated, or withheld."

The Cruelty to Animals statute also provides for felony punishment under the circumstances outlined in O.C.G.A. § 16-12-4(c). That subsection provides that when an offender "knowingly and maliciously causes death or physical harm to an animal by rendering a part of such animal's body useless or by seriously disfiguring such animal," they have committed the offense of Aggravated Cruelty to Animals. Persons convicted of this felony offense for the first time are subject to imprisonment for one to five years and a fine not to exceed $15,000. For second or subsequent offenses, the fine increases as provided in O.C.G.A. § 17-10-8.

Two other statutes apply in cases where police dogs are injured. According to O.C.G.A. § 16-5-23(e), the offense of Simple Battery against a Law Enforcement Dog is treated like Simple Battery committed against a human officer, corrections officer, or detention officer, and is punished as a high and aggravated misdemeanor. To secure a conviction under this statute, prosecutors must show that the dog was "engaged in carrying out his official duties." Further, O.C.G.A. § 16-11-107 defines the crime of "Destroying or Injuring Police Dog." Subsection (b) of the statute provides that, "[a]ny person who knowingly and intentionally destroys or causes serious or debilitating physical injury to a police dog . . . knowing said dog to be a police dog . . . shall be guilty of a felony." Unlike the other statutes discussed above, this crime requires proof that the offender knew that the dog was a police K-9, and that he or she acted intentionally to kill or cause serious or debilitating injury to the dog. Defendants convicted of this offense can be punished by imprisonment for not less than one nor more than five years, or a fine not to exceed $10,000, or both.

In summary, where an assault is committed on a police dog, several options are available to prosecutors:

- O.C.G.A. § 4-8-5 provides misdemeanor punishment for performing "a cruel act on any dog" or "harm[ing], maim[ing], or kill[ing] any dog, or attempt[ing] to do so;"
- An act that "causes death or unjustifiable physical pain" to a K-9 can be charged as misdemeanor Cruelty to Animals under O.C.G.A. § 16-12-4;
- O.C.G.A. § 16-12-4(b)(1) and (2) provide enhanced penalties for Cruelty to Animals for second and subsequent convictions;
- Felony punishment for Aggravated Cruelty to Animals under O.C.G.A. § 16-12-4(c) is authorized when an offender knowingly and maliciously kills, seriously disfigures, or renders useless a body part of a police dog;
- Simple Battery on a K-9 officer can be prosecuted under § 16-5-23(e) as a high and aggravated misdemeanor; and
- Where an offender kills or inflicts serious or debilitating injury upon the K-9 knowing the animal to be a police officer, he or she should be charged with the felony offense of Injuring a Police Dog pursuant to O.C.G.A. § 16-11-107. GTP

Endnote

1. O.C.G.A § 4-8-7 also provides that if the Dogfighting provisions of O.C.G.A. § 16-12-37 apply, the crime is to be punished in accordance with that statute, but those provisions will almost never apply to K-9 officers.

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Case Law Update

Compiled by Todd Hayes, Traffic Safety Resource Prosecutor
Prosecuting Attorneys' Council of Georgia

Prior Bad Acts Evidence in DUI Cases Under O.C.G.A. § 24-4-404(b)

Jones v. State, A13A1940, 2014 Ga.App. LEXIS 263 (3/28/14)

Admission of prior bad act evidence (formerly known as "similar transactions") pursuant to O.C.G.A. § 24-4-404(b) is now governed by the Federal 11th Circuit Court of Appeals three-part analysis explained in *United States v. Delgado*, 56 F.3d 1357 (11th Cir. 1995). Under this analysis, prior bad act evidence is admissible when: (1) it is relevant to an issue other than the defendant's character; (2) there is sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act in question; and (3) the probative value of the evidence is not substantially outweighed by the danger of undue prejudice in accordance with O.C.G.A. § 24-4-403. A trial court's admission of prior bad act evidence is reviewed for abuse of discretion.

In DUI cases, O.C.G.A. § 24-4-404(b) cannot be used to admit evidence of other DUI violations for the purpose of proving the "intent" or "knowledge" of a defendant. Because DUI is a general intent crime that does not require proof of a culpable mental state, prior bad act evidence showing that the defendant had formed the general intent to drive while less safe on a prior occasion does not logically tend to prove that the defendant formed the general intent to do so a second time because no culpable mental state is required to commit the crime. Similarly, evidence of "knowledge" gained by a defendant during a separate DUI incident concerning how drinking affects his or her driving only tends to prove a culpable mental state. Because such a showing is unnecessary to prove DUI, the evidence is not admissible to show "knowledge."

NOTE: The Solicitor-General of Cherokee County has petitioned for a writ of *certiorari* to the Georgia Supreme Court.

Closing Argument

State v. Mitchell, A13A1829, 2014 Ga.App. LEXIS 188 (3/20/14)

At the close of a DUI trial, the prosecutor characterized the defendant's refusal of chemical testing as the defendant's failure to "prove his innocence," and defense counsel objected. After the defendant was convicted, the trial court granted a motion for new trial based upon the improper comment, which the state appealed. The Court of Appeals held that when an improper argument is made, opposing counsel may obtain appellate review of the trial court's ruling simply by objecting. The objecting party is not required to renew his objection or move for a mistrial after the trial court overrules the objection. Here, the prosecutor's comments were improper and explicit: the state told the jury that the defendant could have proven his innocence by taking a breath test, but chose not to do so. Therefore, the trial court correctly granted defendant's motion for new trial.

Source Code; Admissibility of Evidence in Uniform Act Hearing

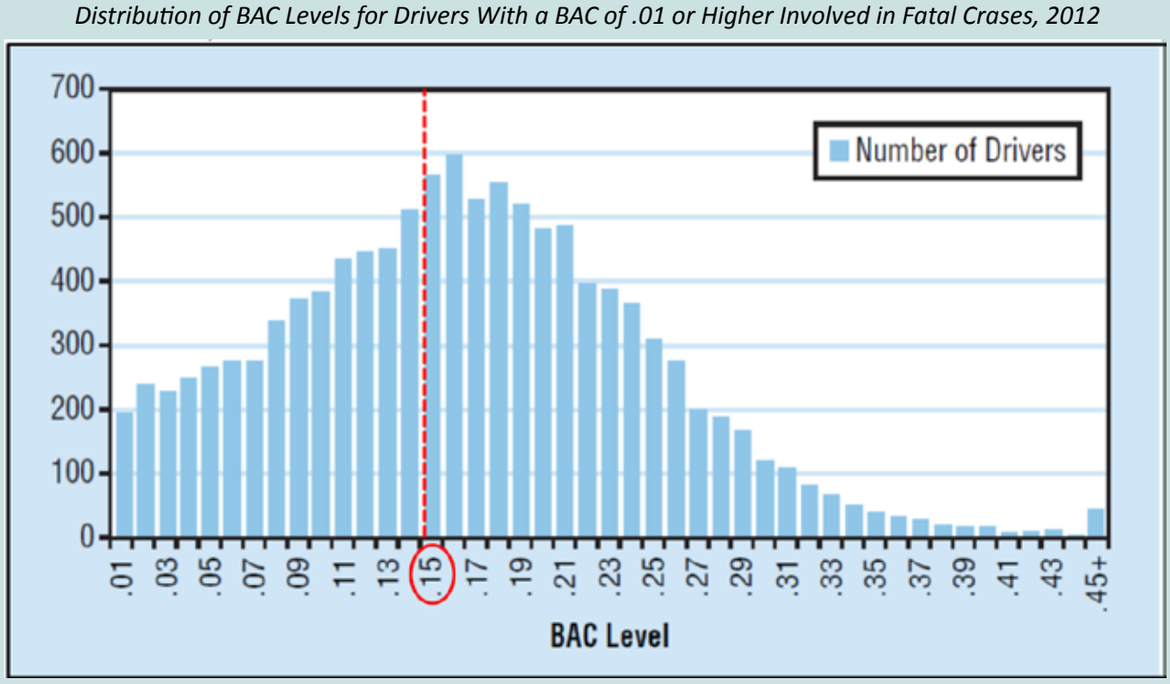
Parker v State, A13A2100, 2014 Ga.App. LEXIS 145 (3/13/14)

To obtain a certificate of materiality under the Uniform Act, a defendant must show that the evidence sought regarding the source code bears a logical connection to facts supporting the existence of an error in the defendant's breath test results. Here, the defendant proffered a transcript of his expert witness's testimony from another proceeding, as well as two affidavits by that expert and three scholarly articles in support of his petition of a certificate. The State objected, arguing that under O.C.G.A. § 24-1-2(b), the rules of evidence applied to a materiality hearing, and that therefore the entire proffer was inadmissible hearsay. The trial court agreed and declined to issue the certificate. The Court of Appeals affirmed

>>> DID YOU KNOW?

In 2012, 59% (6,730 out of 11,415) of U.S. drivers involved in fatal crashes who had been drinking (that is, who had BACs at or above 0.01) had a BAC of 0.15 or greater.

Distribution of BAC Levels for Drivers With a BAC of .01 or Higher Involved in Fatal Crases, 2012



Source: National Highway Traffic Safety Administration, "Traffic Safety Facts 2012 Data: Alcohol-Impaired Driving," December 2013, available at http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf.

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the trial court's ruling, finding that no admissible evidence regarding the materiality of the named out-of-state witnesses was presented. Furthermore, the Court of Appeals declined to address the defendant's argument that CMI's actions should be imputed to the state under the "Public Functions Test" because the defendant cited nothing in the record as factual support for his contention that CMI acted as an arm of law-enforcement.

NOTE: The defendant has been granted a writ of *certiorari* by the Georgia Supreme Court.

Search Warrants for Blood Sample After Refusal

McAllister v. State, 325 Ga.App. 583 (1/22/14)

O.C.G.A. § 40-5-67.1(d.1), added by the General Assembly in 2006 in response to *State v. Collier*, 279 Ga. 316 (2005) (*prohibiting officers from obtaining warrants for blood following an Implied Consent refusal*), does not render the language of O.C.G.A. § 40-5-67.1 (d) meaningless. Subsection (d) provides that if a defendant "refuses, upon the request of a law enforcement officer, to submit to a chemical test . . . no test shall be given." However, the plain meaning of subsection (d.1) and its addition on the heels of *Collier* clearly demonstrate that search warrants obtained after refusal are permissible. The addition of subsection (d.1) clarified that subsection (d) applies only to *warrantless* chemical tests obtained by the State after a driver refuses such testing following the reading of the implied consent warning. Because it is not *required* that an officer seek a warrant, and because sufficient evidence must exist to support the issuance of any warrant for blood, the language of subsection (d) still has meaning as written, and when read in conjunction with subsection (d.1).

Circumstantial Evidence of Driving

Pough v State, 325 Ga.App. 547 (1/15/14)

Driving of an automobile while intoxicated may be shown by circumstantial evidence, and such evidence need exclude only *reasonable* alternate inferences and hypotheses, so as to justify the inference of guilt beyond a reasonable doubt. Juries (or factfinders) are entitled to reject defense evidence disputing the driver's identity in favor of admissions and/or other circumstantial evidence showing the defendant to be the driver. Other circumstances juries (or factfinders) are authorized to consider include, but are not limited to, the defendant's proximity to the vehicle, the absence of other persons in the vicinity, and the credibility of the evidence presented disputing the identity of the driver.

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Impermissible Extension of Traffic Stop

Heard v. State, 325 Ga.App. 135 (11/22/13)

When determining if an officer impermissibly prolonged a traffic stop, trial courts must examine whether police diligently pursued a means of investigation likely to confirm or dispel their suspicions of criminal activity quickly, during which time it is necessary to detain the defendant. A reasonable time to conduct a traffic stop includes the time needed to verify the driver's license, insurance, and registration; to complete any paperwork connected with a citation or written warning; and to run a computer check for outstanding arrest warrants on the driver or passengers. Once those tasks are complete, an officer cannot continue to detain a motorist without additional articulable suspicion of additional violations. A defendant's nervousness alone does not provide such articulable suspicion.

Source Code; Logical Connection to Specific Facts of Case

Young v. State, 324 Ga.App. 127 (10/4/13)

After *Cronkite v. State*, 293 Ga. 476 (2013), a defendant seeking a certificate of materiality for an out-of-state witness to produce the source code of the Intoxilyzer 5000 must show that the witness' testimony regarding the source code bears a logical connection to facts supporting the existence of an error in the defendant's breath test results. When defendants fail to produce any evidence of specific facts supporting the existence of an error in their test, or when evidence they do produce is not credible, the required logical connection between their case and the source code has not been established. Proffers, affidavits, and statements of counsel are not evidence of facts unless agreed to by both sides. Therefore, unless both parties agree, such evidence cannot establish specific facts as required by *Cronkite*.

Implied Consent; Deceptively Misleading Information

Wallace v. State, 325 Ga.App. 142 (11/22/13)

The central issue regarding reading Georgia's Implied Consent warning to DUI suspects is whether the notice as given was substantively accurate so as to permit a suspect to make an informed decision about whether to consent to testing. Even when an officer reads the correct notice, if additional, deceptively misleading information is provided that impairs a defendant's ability to make an informed decision about whether to submit to testing, the test must be suppressed. Specifically informing a defendant that refusal could not be used against him constitutes such additional, deceptively misleading information that alters substance of the warning because, in fact, refusal to submit to testing under the Implied Consent statute can be used against a DUI defendant.

Jury Charges; Search Warrants for Blood Sample after Refusal

Johnson v. State, 323 Ga.App. 65 (7/3/13)

It is not error for a trial court to decline to charge a jury that the state "can obtain a search warrant to test a suspect's blood for the presence of alcohol in the event that the suspect refuses a State-administered test under the implied consent law." As long as the trial court properly charges the jury regarding the implied consent law, that a refusal could be admitted into evidence against the defendant, and that the refusal is not sufficient alone to prove that the defendant is guilty of DUI—Less Safe, there is no error in refusing to charge on the potential for the state to seek a search warrant.

Source Code; Request for Continuance; Brady Material; Confrontation Clause

Phillips v. State, 324 Ga.App. 728 (11/15/13)

It is not an abuse of discretion for a Georgia trial court to refuse to grant a defendant's motion for continuance after a Kentucky trial court declines to enforce a Georgia certificate of materiality for the Intoxilyzer 5000 source code. Once a Georgia trial court issues a certificate of materiality for the source code under the Uniform Act, it is for the Kentucky trial court to decide whether the witnesses and evidence sought are sufficiently material and necessary to warrant compelling attendance in Georgia. A Georgia trial court has no authority to compel the attendance of the requested witness(es)itself, however, and when a Kentucky trial court finds that the witness and/or evidence is ***not*** necessary and material, its order is entitled to full faith and credit. Furthermore, the source code cannot be considered *Brady* material unless a defendant shows that (a) the state possesses it and that it is favorable to the defense; (b) the defense does not possess it and cannot obtain it with reasonable diligence; (c) the state is suppressing it; and (d) disclosure would create a reasonable probability that the outcome of the proceedings would be different. Finally, failure to grant a continuance does not violate a defendant's Sixth Amendment right to confront the witnesses against him or her. The Sixth Amendment only prohibits the introduction of "testimonial" statements of witnesses absent from trial, and under *Rackoff v. State*, 281 Ga. 306, 309 (2006)), the source code (i.e., the "testimony" of the Intoxilyzer 5000) is not testimonial hearsay. For each of these reasons, a trial court does not err when it insists that a case proceed to trial after a Kentucky trial court has refused enforcement of a Georgia certificate of materiality for the Inoxilyzer 5000 source code.

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Motions Practice; Probable Cause; Standard of Review

State v. Hughes, 325 Ga.App. 429 (11/21/13)

The defendant ran a red-light, struck another vehicle killing the driver, and came to rest after hitting a utility pole. Officers did not immediately form probable cause to arrest for DUI, arrested the defendant for the red-light violation and second degree vehicular homicide. A search incident to arrest revealed suspected Ecstasy on the defendant's person, at which time officers concluded that earlier observations regarding the defendant's behavior and demeanor resulted from him being under the influence of the drug. Therefore, the defendant was read the Implied Consent warning and submitted to a blood-test. The trial court suppressed the test results based upon its finding that officers lacked probable cause to read the Implied Consent warning to the defendant. The court rejected the officers' testimony regarding the cause of the defendant's post-crash behavior (i.e., Ecstasy) in favor of its own conclusion that the defendant's behavior was consistent with the after-effects of an automobile collision. The State appealed.

According to the defense, the trial court's order was subject to review for abuse of discretion. However, according to the Court of Appeals, where—as in this case—the evidence is *uncontroverted* and *no question regarding the credibility of witnesses is presented*, the trial court's application of the law to undisputed facts is subject to *de novo* review. Here, the Court of Appeals held that the issue was whether the investigating officers, in light of all facts and circumstances at the scene, had a reasonable and objective basis for suspecting that the defendant was under the influence of a drug that contributed to the collision. The fact that other explanations might exist for his behavior did not establish that the officers' beliefs were unreasonable or lacking in credibility. The trial court "finding" that that the defendant's physical manifestations were consistent with after-effects of an accident simply represented its own conclusion as to whether the state cold prove that the defendant was impaired. Such a determination is for a jury, and the trial court in this case should have limited its inquiry to whether officers had reasonable grounds to believe that drugs were likely involved. As a result, the grant of the motion to suppress was reversed.

NOTE: The Georgia Supreme Court has granted the defendant's petition for *certiorari* in this case.

Implied Consent; Using Refusal Against a Defendant

Sauls v. State, 293 Ga. 165 (6/17/13)

The right to refuse chemical testing under the implied consent statute is a statutory right created by the General Assembly, not a constitutional right. Therefore, the constitutional right to due process is not violated when a defendant is not informed that test results can be used him or her at trial. However, the implied consent itself statute (O.C.G.A. § 40-5-67.1(b)) requires that the Implied Consent warning "shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged." Thus, appellate courts must also consider whether the notice as read was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing *as required by the statute*. If an officer—even inadvertently—reads the Implied Consent warning in a way that provides misleading information, then the driver's ability to make an informed decision about whether to submit to testing is compromised. In such cases, any test results or evidence of the driver's refusal to submit must be suppressed. Although not every omission or misstatement in the implied consent notice is of such significance that the notice cannot be found to be substantively accurate, failing to make a driver aware that such evidence can be used against him or her at a subsequent criminal prosecution *is* of such significance that its omission makes the warning substantively inaccurate.

Roadblocks; "Well-Identified" Requirement

State v. Conner, 322 Ga.App. 636 (7/3/13)

Whether a roadblock is "well-identified" is a legal question subject to *de novo* review. The *subjective* perceptions of motorists approaching a roadblock do not determine whether it is "well-identified" within the meaning of the Fourth Amendment. Instead, trial courts must evaluate the totality of circumstances (i.e., objective observations) surrounding the roadblock in question to make that determination. The presence or absence of particular items, such as cones or signs, does not, standing alone, determine whether a particular roadblock is well-marked. This is because the overarching purpose of the "well-identified" requirement is simply to lessen drivers' fright or concern and to permit drivers to see visible signs of the officers' authority. The purpose is *NOT* to "advertise the checkpoint as if it were the 'coming attractions' on a movie theater's marquee." Georgia case law requires that a roadblock be well-identified as a police checkpoint, not that it be *explicitly* identified as such. GTP

TYPICAL EFFECTS AND PREDICTABLE EFFECTS OF BAC ON DRIVING

The ABC's of BAC: A Guide to Understanding Blood Alcohol Concentration and Alcohol Impairment

Blood Alcohol Concentration	Typical Effects	Predictable Effects on Driving
.02%	• Some loss of judgment. • Relaxation. • Slight body warmth. • Altered mood.	• Decline in visual functions (rapid tracking of a moving target). • Decline in ability to perform two tasks at the same time (divided attention).
.05%	• Exaggerated behavior. • May have loss of small-muscle control (focusing your eyes). • Impaired judgment. • Usually good feeling. • Lowered alertness. • Release of inhibition.	• Reduced coordination. • Reduced ability to track moving objects. • Difficulty steering. • Reduced response to emergency driving situations.
.08%	• Muscle coordination becomes poor (balance, speech, vision, reaction time, and hearing). • Harder to detect danger. • Judgment, self-control, reasoning, and memory are impaired.	• Reduced concentration. • Short-term memory loss. • Speed control. • Reduced information processing capability (signal detection, visual search). • Impaired perception.
.10%	• Clear deterioration of reaction time and control. • Slurred speech, poor coordination, and slowed thinking.	• Reduced ability to maintain lane position, and brake appropriately.
.15%	• Far less muscle control than normal. • Vomiting may occur. • Major loss of balance.	• Substantial impairment in vehicle control, attention to driving task, and in necessary visual and auditory information processing.

www.nhtsa.gov/links/sid/ABCsBACWeb/index.htm

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>>> GEORGIA TRAFFIC SAFETY RESOURCE PROGRAM

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>>> fact:

Every day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes.The annual cost of alcohol-related crashes totals more than $51 billion.

-Statistics courtesy NHTSA (www.nhtsa.gov)

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Todd Hayes at PAC.