

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 10, 2010

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THIS WEEK:

- **Search & Seizure**
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Search & Seizure

Miller v. State, S10G0158, (11/22/10)

Appellant appealed the reversal of the trial court's granting of his motion to suppress evidence of cocaine and a firearm found in his possession after he was stopped by an officer. The evidence showed that at the time of the stop the officer observed the appellant and other men standing next to a car in a vacant lot, while one applied tint to his windows. When the police approached, the appellant walked away from the scene. The officer pursued him and wrestled him to the ground, and then observed a gun sticking out of his pocket. Cocaine was found on the appellant after a pat down. The trial court granted the motion to suppress because it found the stop was simply based on a mere hunch. The State appealed and using a de novo standard of review, the Court of Appeals reversed.

There are three fundamental principles that must be followed when conducting an appellate review of a motion to suppress. First, because the trial judge sits as the trier of fact and hears the conflicting evidence, his find-

ings should not be disturbed by a reviewing court if there is any evidence to support it. Second, the trial court's decision with regard to questions of fact and credibility must be accepted unless clearly erroneous. Finally, the reviewing court must construe the evidence in the light most favorable to upholding the trial court's judgment.

Based on the findings of fact and the determinations of credibility described in the record, the trial court found that the officer had no objective and particularized basis to pursue and apprehend the appellant. The record showed the officer did not see appellant do anything illegal before he stopped him, and because of inconsistencies in his testimony, his version of events was explicitly found to be "questionable." Therefore, construing the evidence most favorably to support the trial court's findings, the Court held that the trial court's decision to grant the motion to suppress was not clearly erroneous and must be affirmed.

Herrera v. State, S10A1030, (11/1/10)

Appellant was convicted of malice murder, felony obstruction of a law enforcement officer and fleeing to elude arrest, in connection with a shooting death of another person. He contended that trial court erred in refusing to suppress hospital records showing he used drugs on the day in question. The evidence showed that appellant and the victim lived together in the same house and had quarreled throughout the day in question. The two went to a bar together, but left in a taxi. Later, appellant borrowed a pistol from his father-in-law, and went to the victim's house where the victim was shot. The police arrived and found the victim shot in the back. Appellant fled the victim's house in his vehicle, and the

police gave chase. Appellant's vehicle crashed, and he was admitted to the hospital where he gave a urine sample. The sample tested positive for drugs, and sent to the lab for further tests that revealed the presence of amphetamine, methamphetamine, and cocaine metabolites. A search warrant was issued for appellant's hospital records; the affidavit for the warrant was based primarily on the statements of Appellant's wife who said he used drugs.

Appellant contended that the affidavit failed to establish probable cause to search his medical records because the affidavit did not include facts that would have undercut the reliability of the statements made by his wife. Specifically he noted that the affidavit omitted any mention that he and his wife were estranged, he told her he stopped using drugs, and that his father-in-law said he did not appear to be under the influence on that night. If an affidavit contains omissions, the omitted truthful material must be included, and the affidavit must be reexamined to determine whether probable cause exists to issue the warrant. The Court noted that on its face, the affidavit in question demonstrated a fair probability that evidence of Appellant's drug use would be found in the hospital records. Though the alleged omission had the potential to impeach statements made by the wife, the Court held that they did not eliminate the existence of probable cause; therefore, the trial court did not err in denying appellant's motion to suppress.

Amica v. State, A10A1340, (11/19/10)

Appellant was convicted of possession of marijuana with intent to distribute. He contended that the trial court erred by denying his motion to suppress a search warrant. The evidence showed that in January of 2007, an inmate at the county jail contacted a detective. The inmate stated that appellant and he committed a burglary of a convenience store and an armed robbery of an individual named Patel on two separate days in May of 2006. The detective obtained a search warrant for appellant's home in February of 2007. The affidavit listed the address of appellant's residence and stated that the following articles were likely to be recovered therefrom: a 9-millimeter pistol, receipts or documents linked to the convenience store, "dark colored clothing, blue Dickie pants, low-cut Timberland boots, and cash."

The affidavit indicated the inmate told the detective that appellant "wore the same dark colored sweatshirt [and] blue Dickie pants . . . and had his Luger 9[-millimeter] pistol for both the armed robbery and the burglary." The affidavit also contained the detective's handwritten notes indicating that the clothing and gun were at the residence when the inmate was arrested four weeks earlier.

Appellant contended that the warrant was not supported by probable cause because the nine-month lapse from the crimes' occurrences in May 2006 rendered stale the information contained in the February 2007 affidavit given in support of the warrant. The Court disagreed. The proper procedure for determining if the information relied upon in obtaining a search warrant is stale is to view the totality of the circumstances for indications of the existence of reasonable probability that the conditions referred to in the sworn testimony would continue to exist at the time of the issuance of the search warrant. Here, the clothing and boots sought in the search warrant were non-perishable, non-consumable items which were legally possessed and of continuing utility to defendant. The weapon and receipts from the convenience store were also not perishable. Reviewing the affidavit in its entirety and giving due deference to the magistrate's finding of probable cause, the information in the affidavit was not so remote that it made it unlikely that appellant's clothing and other items sought in the warrant would not be in his home at the time the warrant was issued.

Appellant also contended that the warrant omitted material facts. Specifically, that Patel identified his assailants as white and that appellant is black, and that the detective failed to tell the magistrate that the State agreed not to prosecute the inmate in exchange for his testimony against appellant. The Court held that the record showed no evidence that the affidavit contained deliberate falsehoods, that the detective made it with reckless disregard for the truth, or that he consciously omitted material information, which, if it had been included in the affidavit, would have been indicative of the absence of probable cause. "Nevertheless, [the detective] clearly should have advised the magistrate that Patel believed that one of the men who robbed him was 'possibly white' and that the State declined to prosecute [the inmate] in exchange for his testimony." However, the Court found, even

if the omitted information was included in the presentation to the magistrate, there was still sufficient information to find probable cause for issuance of the search warrant.

Relying on *Battle v. State*, 275 Ga. App. 301 (2005), appellant argued that the search warrant was facially void because the police failed to leave a copy of the warrant and the affidavit at his residence. In *Battle*, the Court held that where a search warrant fails to meet the particularity requirement on its face but instead incorporates a supporting document by reference, failure to leave a copy of that supporting document at the searched premises invalidates the warrant. But where a copy of the affidavit, or other supporting document, is in fact left at the searched premises, the person subject to the search has access to its contents and the purposes of both the warrant itself and the particularity requirement are satisfied. Although appellant argued that the authorities failed to leave a copy of the affidavit at his residence, the detective left a duplicate copy of the search warrant at the premises searched, and the warrant identified the specific location with sufficient particularity. Thus, *Battles* had no application here. According, the trial court did not err in denying appellant's motion to suppress.

Competency to Stand Trial *Ling v. State, S10G0460, (11/22/10)*

Appellant, whose native language was Mandarin Chinese, was convicted of cruelty to children in the first degree. She filed a motion for a new trial, contending that her trial counsel was ineffective in failing to secure an interpreter for trial in the plea agreement. The trial court denied her motion, and the Court of Appeals affirmed. The evidence showed that DFCS came to appellant's home after receiving allegations she was abusing her children. After a visit to the home showed evidence of physical abuse, appellant was arrested and charged. Before trial, counsel, appellant and appellant's husband met with DFCS to discuss a plea offer involving a one-year sentence. Counsel relied on the appellant's husband to explain the offer to his wife in Chinese, and the plea offer was rejected. Appellant was convicted at trial, and sentenced to fifteen years. Appellant contended that because of her inability to speak English, she did not satisfy the competence standard to stand trial, and was denied effective assistance or her sixth Amendment and

due process rights to be present at trial by the lack of an interpreter.

In *Drope v. Missouri*, 420 U.S. 162 (1975), the Supreme Court held that a court must find as a matter of fact that a defendant spoke and understood English well enough to understand the nature and object of the proceedings against [her], to consult with counsel, and to assist in preparing her defense. Here, the trial court did not explain the bases for denying appellant's motion for new trial but did not necessarily find that she was competent. The record showed sufficient evidence to cast doubt on appellant's competency to be tried without an interpreter, including her contention that she thought she had to go to trial and would have accepted the plea offer if she would have understood it. The Court found this also raised questions about whether appellant's counsel was ineffective.

The Court held that one who cannot communicate effectively in English might be effectively incompetent to proceed in a criminal matter if no interpreter is provided. The Court also required that trial courts must state and explain their findings when an issue concerning the need for an interpreter that implicates foundational due process rights is raised and decided at the motion for a new trial. The trial court's decision was vacated, and the case was remanded for the trial court to determine whether appellant was competent under the *Drope* standard and to explain its bases for ruling on the motion for new trial as well as on its resolution of appellant's ineffectiveness claim.

Severance

Allen v. State, S10A1301, (11/22/10)

Appellant was convicted of murder of one victim and the aggravated assaults of three other victims. Appellant contended that the trial court erred in denying his motion to sever his trial from that of his co-defendants because there were antagonistic defenses that requires severance. The evidence showed that appellant and his co-defendants went, uninvited, to a party two houses north of the home of appellant's mother. They were asked to leave after a disagreement arose between appellant and some of the invited guests. Appellant was seen at the party holding a handgun and was overheard making threatening statements, including that he would "shoot this whole [obscenity] party up." Later, as guests were beginning to leave, shots were fired in

their direction from the street in front of the appellant's mother's home where appellant and his co-defendants were seen by witnesses at the time of the shootings. Appellant was arrested and after his arrest, he threatened to kill several witnesses. At trial, appellant introduced the testimony of six witnesses who said that appellant was not standing with his co-defendants but instead arguing with his mother in the front yard when a co-defendant in the street fired shots at the victims.

The question of whether to grant severance in a joint trial for a capital crime is within the discretion of the court, and the defendant has the burden to make a clear showing that the trial was prejudicial and resulted in the denial of due process. In determining whether to sever, the Court must examine whether a joint trial creates confusion of evidence and law, whether there is a danger that evidence implicating one defendant will be improperly considered against another, and whether the defendants are asserting antagonistic defenses. Appellant contended that the trial court improperly denied his motion for severance because there were antagonistic defenses that require it, and that he was prejudiced by the exclusion of the statement one co-defendant made to the police. He claimed that his due process rights were violated by the exclusion because this statement constituted critical exculpatory evidence. The Court found that the co-defendant's statement revealed nothing that contradicted the statements of witnesses at the party concerning the threats they heard the appellant make and that it remained silent as to whether appellant actively promoted the shooting. Because the co-defendant's statement merely duplicated testimony by the State witnesses, the appellant did not succeed in showing prejudice to his case, which would have been avoided by severing the trial. The judgment was affirmed.

Demurrers

State v. Ramirez-Herrera, A10A0982 (11/19/10)

The State appealed from the granting of a general demurrer on five counts of violating the Georgia Street Gang Terrorism and Prevention Act. The evidence showed that the indictment charged appellant with being associated with MS-13, a criminal street gang, and unlawfully participating in the criminal street gang activity through the commission of specific offenses

listed in other counts of the indictment. The trial court's order granting the demurrer stated that based on the evidence proffered by both the State and the defense, there was no established nexus between the alleged offenses in the other counts and criminal street gang activity.

Pursuant to O.C.G.A. § 17-7-54(a), an indictment shall be deemed sufficiently technical and correct if it states the offenses in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury. The Court held that the trial court erred in basing the demurrer on the insufficiency of the proffered evidence. "When considering a general demurrer, the legal sufficiency of the pleading, not the evidence is in issue." Granting a demurrer for a failure to prove facts essential to the charge would be analogous to a motion for summary judgment in a civil case, but there is no basis for that kind of action in Georgia criminal practice. The State was not required to set out its evidence in response to the demurrer; therefore, the judgment was reversed.

Jury Charge; Judicial Comments

Gonzalez v. State, A10A1411, (11/22/10)

Appellant was convicted of armed robbery by use of a device having the appearance of an offensive weapon. He contended that he should have been granted a new trial because the trial court gave a jury charge that was not supported by the evidence. The evidence showed that the victim was walking through a subdivision when he was approached by the assailant. The assailant grabbed the victim by the back of his belt and took him behind a building. He told the victim he had a gun and that he was going to kill him if he did not stop talking. Behind the building, the assailant took what was initially reported as \$300 cash from the victim's wallet. It was undisputed that the assailant kept his right hand behind his back throughout the entire encounter. The victim never saw the assailant's right hand or any weapon. The victim called 911, described the assailant, and the police arrested appellant, though he was not wearing the clothes the victim had described. Appellant later identified the appellant as the man who had robbed him, and during a search incident to arrest, the police found two \$100 bills in his possession. At the end of his trial, the court issued a jury instruction telling the

jury that they could infer the alleged assailant's use of "a device having the appearance of an offensive weapon" from evidence that "there was a hand being held underneath the alleged assailant's shirt."

Appellant contended that he was entitled to a new trial because the trial court erred when it gave a jury charge that suggested facts which were not supported by the evidence, in violation of O.C.G.A. § 17-8-57. Specifically, he contended that because the evidence presented at trial consistently showed that he had his right hand out of sight, behind his back, throughout the assault, there was no evidence to support the court's jury instruction telling the jury they could infer he had an offensive weapon under his shirt.

Under O.C.G.A. § 17-8-57, it is error for any judge in a criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. A court's charge is erroneous when it assumes certain things as facts and intimates to the jury what the judge believes the evidence to be. The Court found that the trial court's jury charge in this case suggested facts that were not supported by any evidence, specifically, that the assailant held his hand underneath his shirt during the robbery. Therefore, the charge was an impermissible comment on the evidence, and constituted plain error. The judgment was reversed.

DUI, HGN Test

Parker v. State, A10A1605, (11/23/10)

Appellant was convicted of DUI per se. The evidence showed that an officer pulled appellant over after she abruptly changed lanes in front of him without signaling. When he made contact with her, he immediately smelled a strong odor of alcohol on her breath and asked her where she had been. Appellant admitted that she was coming from a restaurant where she had "split a pitcher or two" of beer with a friend. The officer asked appellant to perform some field sobriety evaluations, and she agreed. The officer performed an HGN test, a walk-and-turn test, and a one-leg stand test, noting multiple clues of impairment during each test. He also conducted an Alco-sensor test, which registered positive for alcohol. The officer arrested appellant, and after reading her the implied consent warnings, the appellant

elect to take a breath test on an Intoxilyzer 5000 at the sheriff's department. The test was performed within three hours of appellant driving and resulted in two .101 readings for blood alcohol concentration.

Appellant contended that the trial court erred by denying her motion to suppress evidence from the HGN test administered at the scene. Specifically, she argued that the "smooth pursuit" portion of the test was performed improperly because the officer admitted that the performance of that part of the test was "a little quick." In order for a scientific principle or technique like an HGN test to be admitted, the party offering the evidence must show that the principles and techniques are valid and capable of producing reliable results and that the person performing the test substantially performed the scientific procedures in an acceptable manner. The first prong was not at issue because the HGN test is an accepted, common procedure for determining alcohol impairment. As to the second prong, the Court noted that appellant was appropriately qualified as a subject, the other two evaluative components of the test were performed correctly, and she exhibited six of the six clues for impairment. The record also showed that the officer was extensively trained and experienced in administering the HGN test and detecting alcohol impairment. The smooth pursuit component did account for two of the six possible clues of impairment, but a score of four out of six is sufficient to constitute evidence of impairment. Because the Court found that there were no other flaws with respect to the qualification portion or the other four clues of impairment, under these circumstances the entire test was not rendered inadmissible. Absent fundamental error, such as the one affecting the subject's qualification of the HGN test, the evidence of possibility of error goes only to the weight of the test results, not to their admissibility. The judgment was affirmed.

Prosecutorial Misconduct

Hopson v. State, A10A1349, (11/23/10)

Appellant was indicted by a grand jury on charges of rape, kidnapping, aggravated assault, aggravated sexual assault, and aggravated sodomy. The jury convicted him of rape but acquitted him of all other charges. He contended that the trial court erred in deny-

ing his "Extraordinary Motion for New Trial" which alleged that the prosecutor knew the victim and another witness lied during their testimony. The record showed that after the trial the prosecutor went into private practice. The appellant's family consulted the prosecutor about appellant's case and recorded the conversation. The prosecutor stated on the tape that at one point during the trial, he knew the victim and her friend lied on the stand about whether the victim had gone willfully with the appellant or been dragged on the night of the rape. At the motion hearing, the prosecutor stated this only related to the charge of kidnapping, for which the appellant was acquitted. The record showed that the prosecutor offered to help get appellant released, but that his name could not be on any of the pleadings because he had an absolute conflict of interest. The family turned the tape over to appellant's trial attorney, and the extraordinary motion was filed.

A party seeking a new trial based on newly discovered evidence must prove the following: 1) the evidence has come into his knowledge since the trial; 2) it is was not owing to the want of due diligence that he did not get it sooner; 3) it is so material that it would probably produce a different verdict; 4) it is not cumulative only; 5) the affidavit of the witness himself should be procured or its absence accounted for; and 6) a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. The Court found that the evidence came to the appellant's knowledge after the trial, and that it was merely the prosecutor's opinion as to his trial witnesses' credibility. There was no evidence that the witnesses ever recanted their testimony, and in Georgia, a witness must not give an opinion as to whether the victim is telling the truth. The Court held that the only effect of this new evidence would be to impeach the witnesses' credibility. Additionally, the fact that the prosecutor believed one witness over another in the face of conflicting testimony is not sufficient grounds for granting a new trial. The Court affirmed the denial of the extraordinary motion for a new trial.

Similar Transactions; Recusal

Brown v. State, A10A1183, (11/24/10)

Appellant was convicted of trafficking in cocaine and possession of tools (electronic

scales) for the commission of a crime. He contended that the trial court erred by admitting evidence of his 1994 conviction on four counts of selling cocaine because the crime was committed more than ten years prior to the alleged acts without first holding a hearing pursuant to USCR 31.3. Although defense counsel did not object to the admission of the evidence at trial, the Court held that the burden of conducting the requisite hearing before similar transaction evidence can be admitted at trial is placed squarely with the State and the trial court; the defendant bears no burden to initiate this procedure. Since appellant raised the issue in a motion for new trial, he did not waive his right to the procedure dictated by Rule 31.3 despite his failure to object at trial. Since the record was unclear as to whether a hearing was in fact held, the Court remanded this issue to the trial court to conduct a post-trial Rule 31.3 (B) hearing or determine whether such hearing was actually held, as the State argued, in appellant's probation revocation hearing.

Appellant also contended that the trial judge erred by not sua sponte recusing from presiding over the trial and motion for new trial hearing because he was the district attorney when appellant was convicted in 1994 of drug charges and because the judge had recently presided over appellant's probation revocation hearing. The Court held that there is no duty for a trial judge to sua sponte recuse himself absent a violation of a specific standard of OCGA § 15-10-8 or Canon 3 (E) (1) (a) through (c) of the Code of Judicial Conduct, which is not waived by a party after disclosure. Although appellant argued that under the Code of Judicial Conduct, the trial judge's impartiality fell into the category of that which "might reasonably be questioned" based on his prior experience with him, the Court disagreed. A trial judge's failure to sua sponte recuse himself will warrant reversal only where the conduct or remark of the judge constitutes an egregious violation of a specific ethical standard, and it must support the inescapable conclusion that a reasonable person would consider the judge to harbor a bias that affects his ability to be impartial. The Court determined that the trial judge's involvement in appellant's probation revocation hearing and prior conviction does not constitute reason, standing alone, for sua sponte recusal by the trial judge. The Court also rejected appellant's

contention that the trial judge should have recused based on the cumulative effect of his prior experience with him. Appellant failed to present any citations to the record showing specific conduct or remarks by the trial judge that would support his claim that the judge harbored a bias toward him to the extent that sua sponte recusal was necessary. Moreover, a judge is not automatically disqualified from sitting or acting in criminal cases merely on the ground that the judge, in prior employment, has previously prosecuted the defendant in unrelated criminal proceedings.