

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 27, 2013

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THIS WEEK:

- **Voir Dire; Excusal For Cause**
- **Misnomers; Accusations**
- **DUI; Source Code**

Voir Dire; Excusal For Cause

Clarke v. State, A13A1783 (12/13/13)

Appellant was convicted of two counts of financial transaction card fraud. He contended that the trial court erred in denying his motions to strike two jurors who expressed bias and partiality. The Court disagreed. Whether to strike a juror for cause is within the sound discretion of the trial court. Jurors are presumed to be impartial, and the challenger bears the burden of proving the juror's partiality. Before a potential juror can be disqualified for cause on the ground that his or her ability to be fair and impartial is substantially impaired, the challenger must show that a potential juror's opinion is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence. A juror's opinion of his qualification to serve is not determinative of the issue of his ability to be fair and impartial. Where there is some hint that a juror's ability to be fair and impartial is impaired, the trial court abuses its discretion by limiting inquiry into any potential bias. The parties and the trial court are permitted to ask questions that might rehabilitate a juror, but it is improper to browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions.

The first juror stated that he owned three retail stores and had experienced credit card fraud and other theft, and that his personal credit card and his wife's financial information had also been compromised. When the prosecutor asked the juror whether he could be impartial and fair based on those experiences, the juror responded, "Do you think so?," and then, "No." The prosecutor then asked the following two questions which showed that the juror believed he could be fair and impartial. The Court found that although the juror initially expressed doubt about his ability to be fair and impartial, he ultimately confirmed that he could be fair and impartial in reaching a verdict and that he would not let his past experiences affect his ability to reach a verdict. Additionally, while the juror was a business owner and the victim of credit card fraud, there is no per se rule excluding the victims of crime, even if the crime charged in the indictment is similar to the crime of which the potential juror was a victim. Moreover, the Court found, contrary to appellant's arguments, the prosecutor did not incessantly interrogate the juror in an attempt to rehabilitate him. The prosecutor asked only two follow-up questions, which were similar to the questions asked by appellant. There was no evidence that the trial court limited inquiry or allowed the prosecutor to "browbeat" the juror. Additionally, the juror's answers to the prosecutor and to appellant showed that his opinion was not so fixed and definite that it could not be set aside to decide the case upon the evidence and the law. Under these facts, there was no manifest abuse of the trial court's discretion in not excusing this juror.

Appellant also challenged the denial of his motion to strike a second juror, who stated that she was the victim of identity theft. This

juror stated that, as a result of the identify theft, she almost lost her house and had to go through “a lot of rigmarole.” The juror then expressed reservations about her impartiality, stating she hoped she would be alright. Although indicating doubts about her ability to remain impartial, the juror further stated that she was not leaning towards the defense or the State and that she believed she could limit her consideration to the law and the trial evidence.

The Court found that notwithstanding this juror’s professed doubts about her ability to be impartial, her doubt did not demand as a matter of law that she be excused for cause. Where, as here, the juror states that she will try to decide the case based on the evidence and law, excusing the juror for cause is not mandated. Furthermore, the voir dire transcript did not reveal this juror was coercively rehabilitated or that she professed to have a fixed and definite opinion as to appellant’s guilt. Accordingly, the trial court did not abuse its discretion in denying appellant’s motion to strike this second juror.

Misnomers; Accusations

Thornton v. State, A13A1867 (12/13/13)

Appellant, Latoya Thornton, was charged by accusation with the offense of simple battery. Appellant filed a general demurrer and motion to quash the accusation on the ground that the indictment was fatally defective since it charged “Latoia Jordan,” a person not known to appellant. The trial court denied her motion, concluding the accusation was not rendered defective due to a fatal variance because it charged her as the perpetrator by use of an alias, which constituted a permissible misnomer. The Court granted her an interlocutory appeal.

The Court stated that although styled as a general demurrer and motion to quash accusation, appellant’s motion in substance was a plea of misnomer. In a plea of misnomer, the defendant generally claims that she is not the person named in the indictment or accusation, and that she is not known or called by the name of the accused. However, a defendant may be indicted or charged by accusation properly under a name by which she is generally known and called, whether this be her true name or not. Consequently, to sustain a plea of misnomer, the accused must

show that she was never known under the name used in the accusation.

Here, the Court found, the record supported the trial court’s decision that the accusation properly charged appellant. Notably, appellant admitted that she had been previously arrested and booked into jail under the name Latoia Jordan, and Jordan’s listed date of birth matched that of appellant. Additionally, appellant signed a waiver of formal arraignment in this case, which specifically listed her name as Jordan a/k/a “Thornton.” Consequently, contrary to appellant’s claims, the evidence clearly showed that Jordan was another name by which appellant was known.

In support of her argument, appellant cited to *Culpepper v. State*, 173 Ga. 799 (1931) and *Noeske v. State*, 181 Ga.App. (1987). But, the Court found, these cases were inapposite. The reason the accusations in *Culpepper* and *Noeske* were fatal was that they designated a distinct and separate person as the perpetrator of the offense. In this case, however, appellant did not make a claim that she was not the person charged with simple battery for the underlying incident. Indeed, she admitted to having been arrested for the offense and that she would be able to defend herself against the pending charges. Rather, her claim was that she was accused under the wrong name, but, the Court held, this was insufficient to carry her burden to sustain a plea of misnomer because the evidence showed that she was known by Latoia Jordan. Moreover, notice provided by use of an alias or other name by which a defendant is known is constitutionally sufficient. Accordingly, the Court affirmed the denial of appellant’s general demurrer and motion to quash the accusation.

DUI; Source Code

Smith v. State, A13A1282 (11/15/13)

Appellant was convicted of DUI (per se). He contended that the breath test results were inadmissible under O.C.G.A. § 40-6-392(a)(1)(B) because the State could not show that two samples were taken and did not differ by greater than .020 grams alcohol concentration. The evidence showed that appellant’s first sample was adequate, and the Intoxilyzer registered a 0.126 blood alcohol concentration. Appellant blew a second time but did not provide a sufficient sample, and

the machine “timed out” before appellant provided an adequate sample. No further breath test was administered.

Here, the Court found, the officer administering the test stated that appellant “blew the first time with no problem[,] and I’m not sure if he saw the results and decided not to, but he tried it the second time. For whatever reason the machine expired.” It was for the trial court to evaluate the credibility of the witness, resolve disputed facts, and determine the reason for the failed second sample. The Court, citing *Thrasher v. State*, 292 Ga.App. 566 (2008), concluded that based on the record, it could discern no clear error in the trial court’s finding that the first sample was admissible.

Appellant also argued that the State has constructive possession of the computer source code for the Intoxilyzer 5000, and the trial court erred by admitting the test results despite the State’s failure to disclose it under O.C.G.A. § 40-6-392(a)(4), which provides that “[u]pon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney.” The Court disagreed.

The record showed that leading up to trial, appellant sought disclosure of the computer source code by seeking witnesses from CMI, Inc., which manufactures the Intoxilyzer 5000 and which is located in Kentucky. Appellant obtained a certificate of materiality in the trial court and sought a ruling in a Kentucky court allowing him to compel out-of-state witnesses to testify about the source code during his Georgia DUI prosecution. The Kentucky court issued an order denying the request.

Appellant argued that the State nevertheless should have disclosed it to him because “[t]he State of Georgia has always had the power to negotiate a contract with CMI that would give it access to the source code . . . [or] to switch to a different machine for which the source code is available.” But, the Court stated, neither of these arguments addressed the issue here, which is that the State, so far, has not and it was undisputed that the State lacks actual access to the source code.

Nevertheless, appellant argued, CMI is essentially a state actor because it is the exclusive provider of the Intoxilyzer 5000 used for breath testing in Georgia, citing

federal law applicable to civil claims under 42 USC § 1983. The Court found this argument to be misplaced because the issue is the admissibility of a breath test under O.C.G.A. § 40-6-392, which outlines in detail the criteria for admissibility and disclosure of scientific testing in DUI cases. Appellant cited no Georgia precedent requiring disclosure of the source code, and, the Court stated, in light of this clear legislative directive on the issue, it declined to depart from the legislative scheme in this case.

NOTE: Judge McFadden did not concur in the above findings regarding the source code. Specifically, he stated that “[Appellant] has not supported his factual assertions of collusion between the state and CMI with citations to evidence in the record. But should a defendant show by the admission of evidence that CMI is a state actor, whether the state can be compelled to disclose the source code under O.C.G.A. § 40-6-392(a)(4) is an issue for another day. Because I do not agree with all that is said [regarding the source code, that part of the opinion] is physical precedent only.”