

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 6, 2013

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THIS WEEK:

- **Child Hearsay; Hatley**
- **Discovery; Protective Orders**
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Child Hearsay; Hatley

State v. Dague, A13A0910 (11/18/13)

Dague was convicted of two counts of child molestation against a 5-year-old victim. The trial court granted appellant's motion for new trial, finding that because the victim did not testify, the admission of her hearsay statements violated appellant's Sixth Amendment right of confrontation under *Hatley v. State*, 290 Ga. 480 (2012). The State appealed and the Court reversed.

The Court found that Dague waived his right to confront the victim. Prior to trial, Dague filed a motion in limine, stating that he believed that the State was planning, pursuant to O.C.G.A. § 24-3-16, to introduce evidence of the victim's out-of-court statements. Dague noted that the trial court had not yet made a determination, as statutorily required, that "the child is available to testify in the proceedings and . . . that

the circumstances of the statement provide sufficient indicia of reliability." Additionally, in a separate paragraph within that motion, Dague made the claim: "O.C.G.A. § 24-3-16 is unconstitutional and infringes upon Defendant's Sixth Amendment right to confront witnesses." Thereafter, in another motion, Dague requested a pretrial hearing to determine whether there was sufficient indicia of reliability to render any such statements admissible under O.C.G.A. § 24-3-16. At a pretrial hearing, Dague argued only that the circumstances of the victim's out-of-court statements failed to provide sufficient indicia of reliability under *Gregg v. State*, 201 Ga.App. 238, 240-241(3)(b) (1991). At the end of that hearing, the trial court ruled from the bench that the victim's statements to her mother and to the forensic interviewer were admissible.

Thus, the Court found, Dague pursued an unsuccessful pretrial argument that the victim's out-of-court statements failed to satisfy the reliability requirement of the Child Hearsay Statute. Although Dague included in his motion in limine a conclusory claim that the Child Hearsay Statute was unconstitutional as violative of his right to confront witnesses, he thereafter neither advanced any argument in support of it nor did he elicit any distinct ruling from the trial court on whether the Child Hearsay Statute was unconstitutional. And by further failing to lodge at trial any Confrontation Clause objection, Dague waived the issue.

Rather, the Court found, the defense had chosen, as a matter of trial strategy, not to confront the victim in front of the jury. Thus, the Court noted, Dague's trial lawyer recounted at the motion for new trial hearing that he had been concerned about the reliability of the victim's out-of-court

statements, and consequently, had sought before trial to exclude the child's outcry to her mother and the child's disclosures to the forensic interviewer. But when that effort failed, the lawyer testified, "as a matter of trial strategy our focus was more on the mother and the circumstances surrounding the child's outcry than upon placing the child on the stand."

Accordingly, the Court held, the record showed that any pretrial objection Dague may have had that the Child Hearsay Statute itself was unconstitutional as violative of his right of confrontation was abandoned. Furthermore, not only did Dague fail to raise a Confrontation Clause objection at trial, he deliberately declined the opportunity to question the victim before the jury, thereby waiving his right to confront the child witness. Contrary to Dague's claim on motion for new trial, *Hatley* does not apply retroactively such that admission of the victim's out-of-court statements was improper. The trial court therefore erred in granting Dague a new trial, based on its determination that child hearsay was admitted in evidence in violation of Dague's Sixth Amendment right to confront the child.

Discovery; Protective Orders

Morris v. State, A13A1461 (11/15/13)

Appellant was indicted for 45 counts of sexual exploitation of children for the knowing possession of movies and images of minors engaged in sexually explicit conduct on his home computer. He filed a motion for a protective order in which he requested copies of all the alleged contraband materials, including his computer's hard drive, for forensic analysis by his computer expert. He maintained that his expert needed a copy of the hard drive delivered to his expert's private laboratory because the state facilities were inadequate. He further argued that O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional as its prohibition of his right to copy evidence, in conjunction with 18 USC §3509(m)(1) (the "Adam Walsh Act"), deprived him of his due process right to an adequate defense. This federal provision provides as follows: "[i]n any criminal proceeding, any property or material that constitutes child pornography . . . shall remain in the care, custody, and control of either the Government or the court."

After two hearings, the trial court agreed that a forensic examination at the DA's Office would be unworkable and found that the prohibition in O.C.G.A. § 17-16-4(a)(3)(B) was unconstitutional as applied to appellant because it deprived him of his due process rights to have an expert examine the evidence against him and prepare a defense. Thereafter, the parties agreed to a proposed protective order detailing the furnishing of a copy of the hard drives to appellant's expert for the "sole and limited purpose" of testing the hard drives in anticipation of trial. However, the order also provided that: "The parties acknowledge that this Order will not be deemed to be in effect until Defense Counsel and Expert obtain all reasonable assurances in writing from The United States that their conduct in compliance with this order is not a violation of any federal statute, civil or criminal, including those statutes regulating child pornography. A copy of such assurance received from the United States shall be provided to the State and submitted to this Court to become part of the court record." When appellant was unable to obtain such written assurance from any of the state's three United States Attorneys, he moved to dismiss his indictment on due process grounds. The trial court denied the motion, but granted him a certificate of immediate review and the Court granted the appeal.

The Court stated that due process allows a criminal defendant to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion. Here, the Court found, appellant was not denied access to the materials he requested by an expert of his choosing. The trial court ordered that appellant's expert be provided with a copy of his computer's hard drive and that the parties devise a protective order detailing the conveyance of the materials. The provision requiring written assurances from a United States Attorney of non-prosecution for any potential violations of federal child pornography statutes before it took effect exceeded the authority granted to trial judges in the control of judicial proceedings. A trial court has no authority over the United States Attorneys regarding their prosecutorial discretion. Thus, the provision of the protective order requiring that federal prosecutors essentially provide blanket

immunity to defense counsel and appellant's expert was a nullity.

Moreover, the Court determined, appellant did not show that the failure to obtain federal assurances prevented him from having meaningful access to the hard drive. The State was prepared to give him and his expert access to the hard drive, and nothing prevented the trial court from vacating the existing protective order to remove the references to federal assurances and adopting a new protective order. Nor was there any evidence to suggest that appellant's expert would be prosecuted under the federal statute when he was acting within the confines of a court order authorizing examination of the hard drive for a judicial proceeding. Appellant also failed to show that without the federal immunity he would be unable to obtain the services of any expert forensic examiner. Under these circumstances, and at this stage of proceedings, appellant's due process and fair trial claims were simply too speculative to justify the drastic remedy of dismissal of the indictment. The Court concluded that because the evidence failed to demonstrate that appellant was denied meaningful access to the materials at issue, the trial court did not err in finding that his due process rights had not been violated and in denying his motion to dismiss.

Search & Seizure; Attenuation

Ansley v. State, A13A1078; A13A1079; A13A1303 (11/18/13)

Ansley, Hannah, and Johnson were tried together and convicted of armed robbery. The evidence showed that the three conspired to rob a finance store. A fourth accomplice, Cameron, who worked at the finance store at the time of the robbery, confessed when questioned, plead guilty and testified at trial. Ansley was the cousin of Cameron's live-in boyfriend and the robbery was planned by Ansley and Hannah in her apartment.

Ansley contended that the trial court erred in denying his motion to suppress, for two reasons. First, he contended that the traffic stop of the vehicle he was driving was improper, and second, that Cameron's statement to police should have been suppressed as "fruit of the poisonous tree" because she knew that he had been arrested and this knowledge caused her to reveal his

involvement in the robbery. The Court stated that a particularized description of a suspect vehicle may provide a reasonable suspicion sufficient to warrant a *Terry* stop. Here, police had a detailed description of the car including its make, color, approximate age, and features such as tinted windows and rims. A deputy was able to locate the car within 45 minutes after a BOLO was put out, at a location within two miles of the robbery that could be easily reached on main roads in the direction the vehicle was last seen traveling. Given the vehicle's description and proximity to the crime, the officer had a well-founded, objective basis for suspecting the occupant of the vehicle was the subject of the lookout. Additionally, officers knew that the vehicle belonged to Ansley, went to the area where it was last seen, and had Ansley and his companion under observation when they switched cars; conduct that suggested an effort to throw off pursuit. Accordingly the Court found, the trial court did not err in holding that the officers had sufficient specific and articulable suspicion to support a *Terry* stop.

Nevertheless, Ansley further contended that Cameron's statement to police should have been suppressed as "fruit of the poisonous tree," because Cameron knew that Ansley had been arrested and this caused her to reveal his involvement in the crime. But, the Court found, even assuming that this conjecture regarding Cameron's motivation was correct, the "fruit of the poisonous tree" doctrine fails where intervening circumstances attenuate the link between the illegality and the evidence obtained. When examining the admissibility of evidence that is "fruit of the poisonous tree," the appropriate question is whether the evidence at issue has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Thus, the Court noted that two functionally similar exceptions to the exclusionary rule, the independent source doctrine and the ultimate or inevitable discovery doctrine, have developed because the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred. The independent source doctrine allows admission of evidence

that was discovered by means wholly independent of any constitutional violation, while the ultimate or inevitable discovery doctrine allows admission of evidence that was discovered as a result of police error or misconduct if the State establishes by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, without reference to the police error or misconduct.

Here, the Court found, the police had a specific and articulable suspicion to support the stop of the vehicle driven by Ansley, and, his identification as a suspect was independent of his illegal arrest. Even had Ansley not been arrested after the legal traffic stop, he was identified as a suspect within an hour of the robbery, and the police would have continued their investigation of him regardless of whether he was in custody. Thus, it was at least as likely that Cameron could have been motivated to confess by the detective's informing her that the robbery involved inside information. But even assuming that Cameron was motivated by news of Ansley's arrest rather than the police investigation, there was no evidence that Cameron's actions would have been different had she learned instead that Ansley had been stopped and questioned, or that he had been identified as a suspect. And the store manager's report to police of Ansley's relationship with Cameron would not have changed, regardless of how she learned that Ansley was a person of interest to the police. Moreover, given the substantial facts suggesting that the robbery was an "inside job," there was a reasonable probability that the police in the ordinary course of their investigation would have uncovered the connection between Ansley and Cameron regardless of his arrest.

Accordingly, the trial court did not err in concluding that Cameron's statement was untainted by any illegality associated with the arrest of the defendant and was therefore admissible.

Indictments; General Demurrers

Crooks v. State, A13A1385 (11/18/13)

Appellant was convicted of robbery. He contended that the trial court erred in overruling his general demurrer to the robbery indictment. Specifically, that the indictment was defective in that it did not allege the

essential element that appellant took the "property of another," and thus, he could admit all the allegations in the indictment and not be guilty of a crime. The Court agreed and reversed his conviction.

A general demurrer challenges the sufficiency of the substance of an indictment. The true test for the sufficiency of an indictment to withstand a general demurrer is found in the answer to the question: Can the defendant admit the charge as made and still be innocent? If he can, the indictment is fatally defective. A criminal indictment which does not recite language from the Code must allege every essential element of the crime charged. Furthermore, each count set forth in an indictment must be wholly complete within itself, and plainly, fully, and distinctly set out the crime charged in that count. Unless every essential element of a crime is stated in an indictment, it is impossible to ensure that the grand jury found probable cause to indict. Consequently, there can be no conviction for the commission of a crime an essential element of which is not charged in the indictment.

O.C.G.A. § 16-8-40(a)(1) provides that "[a] person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another . . . [b]y use of force[.]" The term "property of another" is defined as "property in which any person other than the accused has an interest but does not include the property belonging to the spouse of an accused or to them jointly." O.C.G.A. § 16-8-1(3). Consequently, in a robbery by force case, the State must allege and prove that the defendant took property of a person or persons other than the accused. Here, however, the one-count indictment charged appellant with robbery in that he "did, with the intent to commit theft, take lawful U. S. Currency, from the immediate presence of [the victim], by use of force, contrary to the laws of [this] State, the good order, peace and dignity thereof." The Court found that the indictment contained no language constituting an allegation that the property in question was that of another, i.e., that it was property in which some person other than appellant had an interest. Accordingly, appellant could admit all the allegations of the indictment and still not be guilty of the robbery charged since there would be no admission that he took the property of another. Likewise, he would not

be guilty of a lesser crime of theft by taking, which also includes the essential element that the accused has taken the “property of another.” O.C.G.A. § 16-8-2. And despite the allegation of use of force, appellant could admit to the allegations in the indictment and still not be guilty of simple battery or assault as those crimes require various essential elements that clearly were not included in the indictment here.

Accordingly, the Court stated, because the indictment failed to allege the necessary element that appellant took the property of another, and he could thus admit the facts alleged and not be guilty of a crime, it was constrained to find that the indictment was void, that the trial court erred in overruling the general demurrer and that such ruling must be reversed. In so holding, the Court stated as follows: “we strongly encourage the State to make every reasonable effort to avoid the problems at issue here by ensuring that each count of every indictment meets some or, preferably, all of the following criteria: includes all of the essential elements of the crime sought to be charged, especially the applicable mens rea; cites to a specific criminal statute and, when appropriate, the relevant subsection; tracks the language of a specific criminal statute; avoids surplus language; and accurately provides names, dates, and other facts, especially when they are material to the charged crime.”

Search & Seizure; Computers

Mastrogiovanni v. State, A13A1179 (11/15/13)

Appellant was convicted of eleven counts of sexual exploitation of children. The evidence showed that law enforcement executed a search warrant at appellant’s home and seized his computer which was then sent to a GBI facility. At this facility, the computer was examined and multiple images depicting child pornography were discovered. Appellant contended that his trial counsel was ineffective for failing to challenge the use of the search warrant as the basis for the full forensic search of his hard drive. He conceded that the search warrant was executed at his house within 10 days after it was issued, as required by O.C.G.A. § 17-5-25, but argued that the subsequent forensic analysis of the seized computer took place more than 10 days after the warrant was issued. In other words,

the computer that was seized during the search could not itself be “searched” without a warrant, and the 10-day period window defined by O.C.G.A. § 17-5-25 had expired before the forensic analysis took place. Thus, he argued, had his trial counsel made the proper motion to suppress, the results of the analysis should have been suppressed because they were obtained in a warrantless search.

The Court disagreed. First, the Court noted, appellant failed to cite any authority for the proposition that the analysis of items seized during the execution of a valid search warrant requires a second search warrant. Second, the Court stated, it was aware of no authority for the proposition that items seized from the lawful execution of a search warrant must then be analyzed, tested, or examined within the ten-day period provided for in O.C.G.A. § 17-5-25. Rather, as the State argued, the forensic analysis of appellant’s computer is analogous to the chemical analysis of substances that field-tested positive for illegal drugs when seized pursuant to a search warrant. The State is not required to obtain a second warrant to analyze the substance or, for example, conduct ballistic tests on seized firearms. Similarly, the Court held, the State was not required to obtain a second warrant to analyze the computer here. Accordingly, because appellant failed to establish that a motion to suppress would have been granted on this ground, the trial court did not err in finding that trial counsel was not ineffective for failing to file a motion to suppress.

Commenting On Right To Remain Silent; Ineffective Assistance of Counsel

Shaburov v. State, A13A1187 (11/15/13)

Appellant was convicted of attempted murder, aggravated assault, arson and other related offenses. He argued that he received ineffective assistance of counsel when his attorney failed to object and/or move for a mistrial when both the prosecuting attorney and a witness for the State improperly commented on his failure to come forward to law enforcement. The record showed that in opening statement, the prosecutor told the jury that “[t]he investigators that you will hear from in this case immediately obtained the name of Sergey Shaburov, and they went looking for him, and they went to the house

of his fiancée and left a message for him to contact them. He never did[.]” During the trial, an investigator testified on direct that he went looking for appellant and left a message with a third party at a location which he believed was appellant’s address, but appellant never contacted him.

The Court stated that under the *Strickland v. Washington* test, appellant must show both deficient performance on the part of his counsel and that such performance prejudiced his case. Upon reviewing the evidence, the Court found that appellant could not show any deficiency on the part of his trial attorney in failing to object. Specifically, the prosecutor neither contended nor presented evidence that appellant ever received the message the investigator left asking appellant to contact police. Moreover, immediately after the complained-of portion of the opening statement, the prosecutor told the jury that approximately two weeks later, after appellant was arrested, the police were able to interview him and “he gave his side of the story, and that side of the story you will have the opportunity to listen to.” Similarly, after the quoted portion of the investigator’s testimony, the investigator testified that he, in fact, interviewed appellant, after reading him his rights, and appellant gave a statement, a portion of which was then played for the jury. Accordingly, as the trial court found, no evidence exists that appellant ever exercised his right to remain silent; instead, he chose to talk to the police. Under these circumstances, appellant failed to carry his burden as to the first prong of the *Strickland* test because the prosecutor’s line of questioning and opening statement did not constitute impermissible commentary on appellant’s right to remain silent.

But the Court added, even if the trial counsel’s failure to object somehow could be considered deficient performance, appellant failed to carry his burden of showing that but for the opening comments or the investigator’s testimony, a substantial likelihood existed that the outcome of the trial would have been different. Courts must consider a number of factors when determining whether the State’s unchallenged comments or questions about a defendant’s right to remain silent have prejudiced that defendant. These include whether the error was an isolated incident, or instead consisted of several questions

or comments, and whether the error was inadvertent, rather than a deliberate attempt by the State to use the defendant's silence against him. A court must also examine the "trial context" of the error, and should "take a particularly dim view of the State's conduct in arguing during closing that evidence of the defendant's silence should be viewed as evidence of his guilt." Finally, a court must analyze whether, in light of the evidence presented, there was a possibility that the State's improper comments contributed to the guilty verdict. In other words, whether the evidence of the defendant's guilt was overwhelming or whether the evidence was conflicting.

Here, the Court found, although the argument and testimony cannot be considered inadvertent, no deliberate attempt was made to use appellant's failure to respond to the investigator's message against him, because it appeared that these statements, when considered in context, were made during a narrative on the part of the authorities of a course of events and apparently were not intended to, nor did they have the effect of, being probative on the guilt or innocence of the defendant. In each instance, the jury immediately was informed that appellant, in fact, did speak with police, and the jurors were able to hear his statement. Because these incidents occurred as part of a narrative of events and were not directed to a particular statement or defense offered by appellant, they were not prejudicial. Moreover, the evidence of appellant's guilt was overwhelming. Therefore, appellant also failed to meet the second prong of the *Strickland* test.

Double Jeopardy

State v. Pruiett, A13A1293 (11/18/13)

The State appealed from the grant of a plea in bar on double jeopardy grounds. The record showed that the police stopped Pruiett and found an unspecified amount of Xanax in her vehicle. Based on statements she made at the time of her arrest, a search warrant was obtained for her home that she shared with Day. The search of the home resulted in the discovery of alprazolam; methamphetamine; clonazepam and marijuana. On October 26, 2010, Pruiett was formally accused of possessing an unspecified amount of alprazolam "on the 30th day of July, 2010," an accusation to

which she pled guilty on February 14, 2011. On March 1, 2011, approximately two weeks after Pruiett's plea, Pruiett and Day were both formally accused of possessing unspecified amounts of methamphetamine, alprazolam, and clonazepam, as well as less than one ounce of marijuana, "on the 30th day of July, 2010." The second accusation against Pruiett did not distinguish the alprazolam discovered in her home from that found in her car and at issue in the first accusation (to which she had already pled guilty). Pruiett filed a double jeopardy plea in bar under O.C.G.A. §§ 16-1-7 and 16-1-8, seeking to dismiss all four counts of the second accusation, which the trial court granted.

The Court stated that O.C.G.A. §§ 16-1-7(a) and 16-1-8(a) codify the principle of "substantive double jeopardy" in that they preclude multiple convictions or prosecutions for crimes arising from the same criminal conduct. By contrast, O.C.G.A. § 16-1-8(b) embraces the concept of *res judicata* and is not constitutional double jeopardy, but is protection against subsequent prosecution where the defendant could have been, and under O.C.G.A. § 16-1-7(b), should have been, prosecuted on a former prosecution. A plea of guilty to an indictment or complaint with its entry on the record and acceptance by the trial judge constitutes jeopardy for purposes of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b).

First, the Court determined, Pruiett's prosecution for possession of the Xanax found at her house was not barred under the substantive double jeopardy provisions of O.C.G.A. §§ 16-1-7(a) and 16-1-8(a) because it did not arise out of the "same conduct" as the possession of the drug in her car on the same day that formed the basis of her guilty plea. The phrase "the same conduct" in O.C.G.A. § 16-1-7 has been used interchangeably with the phrase "the same transaction." In determining whether two offenses arise from the same conduct or transaction, Georgia courts have considered whether the two crimes involve the same parties, circumstances, locations, and times. The courts also consider whether evidence of the other offenses could be presented without permitting evidence of the first offense or vice versa. Here, the two accusations against Pruiett arose from the discovery of one-milligram pills of Xanax in her car by city police

officers on July 30, 2010, and the discovery of two-milligram pills of the same drug, as well as methamphetamine, clonazepam, and marijuana, by a county investigator at Pruiett's home later on the same day. Although these discoveries were made on the same day, and although Pruiett was the common possessor in both cases, they occurred under different circumstances: Pruiett possessed the one-milligram doses in her car while traveling to an appointed drug deal, but shared possession of the two-milligram doses found later on July 30 at the home she shared with Day before beginning the trip culminating in her arrest. Thus, the incidents forming the basis of the two charges occurred on the same date, but at different times and locations, such that each offense required proof of different facts and the offenses were not the same in law or fact.

However, the Court determined, Pruiett's prosecution under the second accusation for possession of the Xanax found at her house was barred by the procedural double jeopardy provisions of O.C.G.A. § 16-1-8(b), which bars prosecution if an accused has been formerly prosecuted for a different crime or for the same crime based upon different facts, if the former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution 1) is for a crime of which the accused could have been convicted on the former prosecution; 2) is for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge); or 3) is for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution or the crime was not consummated when the former trial began. Here, the State charged Pruiett with the identical crime of possession of an unspecified amount of Xanax on July 30, 2010, in two accusations, the second of which was brought after Pruiett had pled guilty to the first. The Court noted that the record did not include a transcript of the hearing at which Pruiett pled guilty to the first accusation, with the result that the Court could not determine whether the factual bases for that plea included possession of the drug in both her car and her home. A plea of guilty admits the facts set forth in an accusation or indictment. Under these circumstances, which included the State's charging Pruiett in the second accusation with a crime identical

to that to which she had already pled guilty, the State failed to show that Pruiett was not convicted of possessing both the Xanax found in her car and that found in her home when she entered her guilty plea to the first accusation. Accordingly, the first of the three grounds for the procedural double jeopardy bar of O.C.G.A. § 16-1-8(b)(1) was established, and the trial court did not err when it barred the State from bringing the second charge for possession of Xanax against Pruiett.

Finally, the Court held, Pruiett's possession of the three drugs other than Xanax found at her home did not involve the "same conduct" as that at issue in the first accusation (which involved only Xanax), with the result that her prosecution for them did not violate the substantive double jeopardy provisions of O.C.G.A. §§ 16-1-7(a) and 16-1-8(a); and her prosecution for the three drugs other than Xanax found at her home did not violate the procedural double jeopardy bar because the second prosecution on those charges met none of the scenarios laid out in O.C.G.A. §§ 16-1-7(b) and 16-1-8(b)(1). Specifically, 1) Pruiett could not have been convicted of possession of these drugs on the former prosecution, which involved only Xanax; 2) these three crimes did not arise from the "same conduct" as the charge concerning possession of Xanax in Pruiett's car, such that she could not show that she "should have been charged" with possession of the three drugs found in her house in the first prosecution concerning the Xanax found in her car; and 3) facts showing that this district attorney had actual knowledge of both prosecutions are irrelevant where the two prosecutions arose from different conduct. Accordingly, the trial court did not err when it granted Pruiett's plea in bar as to the second accusation for possession of Xanax, but erred when it granted the plea in bar as to the second accusation's charges for possession of methamphetamine, clonazepam, and marijuana.

Source Code; Brady Material

Phillips v. State, A13A0991 (11/15/13)

Appellant was convicted of DUI (per se). The record showed that he was charged in 2006. In 2008, the trial court granted him a certificate of materiality under the Uniform Act to Secure the Attendance of Witnesses from Without the State ("the Act") so that he

could attempt to obtain source code evidence from CMI, Inc., the Kentucky manufacturer of the Intoxilyzer 5000. In July 2012, a Kentucky court denied the motion, finding the certificate of materiality to be defective. Appellant appealed that order in Kentucky. However, while that appeal was pending, and over appellant's objection, the Georgia trial court proceeded to trial on appellant's charges.

Appellant argued that the trial court violated his right to compulsory process by requiring him to proceed to trial without the witnesses and documents he sought from CMI. The Court disagreed. Citing *Davenport v. State*, 289 Ga. 399 (2011), the Court noted that here, the trial court considered the motion, and issued the certificate, which was then presented to the Kentucky court. It was then for the Kentucky court to decide whether the witnesses and evidence were material and necessary and should have been compelled. Thus, the Georgia trial court had no authority to compel the witness and absent a finding that the Kentucky court lacked jurisdiction (there was no such allegation here), the Kentucky order was entitled to full faith and credit pursuant to Article 4, Section 1 of the U. S. Constitution. Although appellant argued that the trial court should have waited until his appeal had been resolved, the Court found that there was nothing in the record to indicate that the Kentucky appellate court issued a supersedeas of the order, and therefore, the Kentucky trial court's order was enforceable.

Appellant also argued that the materials he sought from CMI constituted *Brady* material and that his failure to obtain them violated his due process rights. To establish a *Brady* violation, the defense must show (1) that the State possessed evidence favorable to the defense; (2) that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. The Court found that because appellant did not meet his burden of establishing the first, third, or fourth factors, his argument failed.

Finally, appellant argued that the trial court's failure to continue the trial violated his Sixth Amendment right to

confront the witnesses against him, i.e., the Intoxilyzer itself. The Court again disagreed. The Confrontation Clause prohibits the introduction of only testimonial statements of witnesses absent from trial. An inspection certificate of the instrument used to conduct a breath test prepared under O.C.G.A. § 40-6-392(f) is not testimonial and was admissible. An inspection certificate is a record made and promulgated in the regular course of business. It is not made in an investigatory or adversarial setting; nor is it generated in anticipation of the prosecution of a particular defendant. The Court held that this rationale applies to the "testimony" of the Intoxilyzer 5000, as well as the employee witnesses and documentation appellant sought from CMI.

Thus, the Court concluded, the trial court granted a certificate pursuant to former O.C.G.A. § 24-10-94 to permit the defense an opportunity to obtain the information and witnesses sought from CMI, specially set the case with enough time for the defense to do so, and after the Kentucky court issued an order denying appellant's request for the information, which order was entitled to full faith and credit, required appellant to proceed to trial. Under these circumstances, the trial court did not abuse its discretion in proceeding to trial over appellant's objection.

Cross-Examination; Ineffective Assistance of Counsel

Deleon-Alvarez v. State, A13A1000, A13A1001, A13A1002 (11/14/13)

Appellants Deleon-Alvarez, Palacios-Baras, and Hernandez were tried jointly and convicted of kidnapping for ransom. The evidence showed that the victim was a store owner in Gwinnett County. He set up a sale of three kilograms of cocaine between two of his store patrons, for which he received \$500. However, the drug deal went bad and the drugs were stolen. Appellants believed that the victim was responsible so they kidnapped him in Gwinnett and took him to Floyd County where they forced him to make arrangements to pay back the \$84K lost from the sale of the cocaine. But, unbeknownst to appellants, Palacios-Baras was the subject of an on-going drug investigation and Gwinnett law enforcement officers had a wiretap on his phone. After learning through the wiretap that a person had been kidnapped, the officers

freed the victim, who agreed to testify against appellants after being given testimonial immunity.

Palacios-Baras contended that his Sixth Amendment right to confrontation was violated when the trial court sustained objections to his cross-examination of the victim about the immunity deal the victim made with the State. The record showed that twice defense counsel asked the victim about his immunity deal with the State and on both occasions, implied through his questioning that the victim would not have to serve any time in jail as a result of the deal. The prosecutor successfully objected on both occasions and prompted the trial court to instruct the jury as follows: “Testimonial immunity means you cannot be prosecuted for what you say in court. In other words, the evidence that you give in court cannot turn around and then be admitted against you and used against you, should you be charged with a crime, based upon the things that you admit in court. It differs from transactional immunity, which means you cannot be prosecuted for the transaction at all, any time.”

The Court found no error. The trial court was authorized to determine that, as phrased, the questions that drew objections tended to confuse issues relating to the specific type of immunity extended to the victim. In sustaining those objections, the trial court articulated that concern, issued curative instructions to the jury, and admonished defense counsel not to ask questions that misrepresented applicable law and circumstances. These actions taken by the court did not impose unreasonable limits on Palacios-Baras’s cross-examination of the victim, nor did the actions cut off all inquiry into the subject of the victim’s testimonial immunity. Instead, the Court noted, Palacios-Baras’s counsel thereafter chose not to ask the victim any additional questions that might have exposed to the jury the victim’s belief concerning whether the deal he struck with the State was sufficiently lucrative to render his testimony less creditworthy. Accordingly, the trial court did not abuse its discretion in limiting defense counsel’s cross-examination.

Palacios-Baras also contended that the trial court erred by rejecting his claim of ineffective assistance of counsel. Specifically, that his trial lawyer did not file a motion to suppress evidence derived from the wiretapping, asserting that such evidence

was plainly illegal pursuant to our Supreme Court’s holding in *Luangkehot v. State*, 292 Ga. 423 (2013). In *Luangkehot*, the Supreme Court interpreted the Georgia wiretap statute and held that “superior courts do not currently possess the authority to issue wiretap warrants for interceptions conducted outside the boundaries of their respective judicial circuits.” Palacios-Baras contended that, under that holding, the Gwinnett County Superior Court lacked the authority to issue the wiretap warrant for the interceptions at issue here, which, according to the evidence presented, took place exclusively in a “wiretap facility” located in Atlanta. The State conceded that “the wiretap facility where the calls were intercepted was not in Gwinnett County.”

The Court found that Palacios-Baras’s contention demonstrated no error in the trial court’s rejection of his ineffectiveness claim. Even had Palacios-Baras’s counsel filed a motion to suppress evidence on the ground of an unauthorized warrant, the trial court would have been bound to reject it under the Court of Appeals 2012 decision in *Luangkehot v. State*, 313 Ga.App. 599 (2012). Although that decision was overturned in 2013 by the Georgia Supreme Court, at the 2011 joint trial, Palacios-Baras’s trial counsel was not ineffective for failing to predict the 2013 decision. Indeed, the Court noted, Palacios-Baras’s claim that “[certain] evidence was plainly illegal pursuant to our Supreme Court’s holding in *Luangkehot*” was, on its face, the product of hindsight and hindsight, whether by a court, the defendant, or defendant’s counsel, is a legally insufficient basis for concluding that counsel’s performance at trial was deficient. Instead, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.

Finally, Deleon-Alvarez and Hernandez also made similar arguments regarding the failure to file motions to suppress and the *Luangkehot* decision. But, the Court noted, since neither of them were subscribers to the phones that were tapped and there was no evidence that their voices were heard on any recorded phone calls, they lacked standing to challenge the admission of any wiretap evidence and thus, their respective counsel

were not ineffective for failing to file a futile motion to suppress.

NGRI; Release From Verdict *Coogler v. State*, A13A1410, (11/18/13)

In 2006, appellant was found not guilty by reason of insanity (“NGRI”) of criminal damage to property, criminal trespass, and criminal damage to property in the second degree. Thereafter, he was civilly committed to the Department of Behavioral Health and Developmental Disabilities for involuntary treatment pursuant to O.C.G.A. §§ 17-7-131 and 37-3-1. In April 2011, pursuant to O.C.G.A. § 17-7-131(e)(5)(B), appellant filed a petition for full release from the verdict of NGRI, which the trial court denied. Appellant argued that the trial court erred by denying his petition. The Court agreed and reversed.

The Court noted that it must review the trial court’s order to determine whether a rational trier of fact could have found that appellant failed to establish by a preponderance of the evidence that he was sane, and more specifically to the issue of moving from an involuntary outpatient to full release from the NGRI verdict, that (1) he did not require outpatient treatment to avoid predictably and imminently becoming an inpatient; (2) he could voluntarily seek and comply with outpatient treatment; and (3) he does not need involuntary treatment. After reviewing the evidence, the Court found that while it was clear that appellant has a serious mental illness that led to his criminal actions, the evidence, viewed in the light most favorable to the State, showed that no rational trier of fact could conclude that appellant failed to overcome the presumption of insanity and the continued need for involuntary outpatient treatment. Appellant had shown that he was able to voluntarily comply and seek out individual treatment for his condition, which he had done for the last two years, and based on the testimony by experts about appellant’s insight into his diagnosis, there was no evidence to support a finding that without involuntary treatment that he would be in danger of imminently becoming an inpatient again. Thus, he did not fit the definition of a mentally ill outpatient under O.C.G.A. § 37-3-1 (12.1). Moreover, the Court found, the only evidence that appellant continued

to meet the criteria for involuntary treatment was the presumption of insanity, and that, alone, was not sufficient evidence when faced with the evidence of sanity presented at the hearings. The trial court may not disregard expert medical evidence and rely solely on the presumption of insanity. In fact, the Court stated, "If no amount of evidence offered at a release hearing by an insanity acquittee could rebut the presumption of insanity, the processes of proof in the due process hearing would be an empty ritual. The sole basis for argument would be an appeal to judicial discretion or mercy rather than to a process of proof." Here, there was no evidence to support the trial court's finding that appellant failed to rebut the presumption of insanity, and the trial court therefore erred by denying his petition for full release from the NGRI verdict.