Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 20, 2012

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THIS WEEK:

Search & Seizure; Miranda

Berry v. State, A11A1502 (1/12/12)

Appellant was convicted of possession of a firearm by a convicted felon. He contended that the trial court erred in denying his motion to suppress. The evidence showed that shortly after appellant arrived at the residence of a longtime friend, five or six law enforcement officers arrived. The officers were looking for a particular individual. The resident allowed the officers to search inside the home. While searching, the officers observed suspected evidence of narcotics distribution. When confronted with this, the resident pointed out where he had cocaine underneath a floorboard. The officers then handcuffed appellant and the other occupants. After ammunition and car keys were found on appellant, the officers asked permission to search his vehicle. Appellant consented and the officers found the weapon.

Appellant contends that his consent was involuntary because no officer advised him of his rights under *Miranda* before he was asked for and thereupon gave his consent. The Court stated that the Fourth Amendment test for a valid consent to search is that the consent is voluntary, and voluntariness is a question of fact to be determined from all the circumstances. Whether the accused was advised of his constitutional rights is a factor to be taken into account in determining voluntariness. However, it is not a prerequisite to establishing a voluntary consent, as no single factor is controlling.

Here, the record showed that the incident occurred while appellant was visiting a longtime friend at his residence. The law enforcement officers entered and searched the house only after asking for and receiving the resident's permission to do so. There was no evidence that, prior to giving his consent to search the vehicle, appellant was subjected to isolation from the others, prolonged questioning, physical punishment, or mental coercion. Rather, an officer testified that when he asked for and obtained permission to search the vehicle, he did not threaten or coerce appellant in any way. Furthermore, there was no showing that the officers misrepresented their authority to enter and search the vehicle against appellant's will, if necessary. Finally, the Court rejected appellant's general assertion that his consent was the product of "an atmosphere of coercive conduct." Therefore, the trial court was authorized to conclude that the search of the vehicle was pursuant to appellant's consent and did not violate his Fourth Amendment rights.

Accusations; Demurrers

Sevostiyanova v. State A11A1864; A11A1865 (1/12/12)

Appellant was involved in two accidents in one week. She went to trial on both and she

was convicted on both. The Court consolidated the appeals. Appellant contended that one of the accusations was fatally defective because it did not use the word "knowingly" in alleging hit-and-run in violation of OCGA § 40-6-270. The Court held that appellant waived any objection to the form of the accusation by signing the charging document and entering a not guilty plea at the beginning of trial. Because appellant failed to challenge the accusation by way of special demurrer or by filing a motion to quash, she waived the right to a perfect accusation. But, the Court stated, even had appellant not waived this alleged error, it was without merit. The accusation charged appellant with a violation of OCGA § 40-6-270, because she "did unlawfully being the driver of a motor vehicle . . . involved in an accident resulting in damage to another vehicle . . . leave the scene of the accident and failed to give the other driver her name, address, and registration number of her vehicle, and failed to exhibit her driver's license to another." The term "unlawfully" in the accusation, with reference to the appropriate Code section, sufficiently included the intent to commit the criminal act and the knowledge necessary to form such intent. Appellant could not admit the allegations and remain innocent of the charge alleged therein. Thus, a general demurrer to the accusation would not lie.

Appellant was also charged in the same accusation with following-too-closely. Appellant contended that the trial court's charge on the following-too-closely count was error because it imposed "strict liability" as to the hit-and-run count. However, the Court found, it is clear from a reading of the entire charge that the trial court distinguished between these two counts. Nevertheless, the Court stated, even assuming that this charge was error, an erroneous charge does not warrant a reversal unless it was harmful and, in determining harm, the entirety of the court's jury instructions must be considered. The charge, when considered in its entirety, fairly instructed the jurors that knowledge is an element of the hit-and-run count.

Mistrial; Commenting on Silence

Maldonado v. State, A11A2219 (1/12/12)

Appellant was convicted of trafficking in cocaine. The evidence showed that appellant was stopped at a roadblock and arrested for driving without a license. An inventory of the truck revealed the cocaine. Prior to the inventory, appellant made a request that the truck be secured because all of his belongings were in the bed of the truck.

Appellant first contended that the trial court erred in refusing to grant a motion for mistrial after a witness commented on his silence. The statement at issue is as follows: "Prosecutor: Did you inform [Maldonado] that he was being arrested for the drugs at that time? Officer: I advised him —after he asked me if there was somebody that could speak Spanish, I advised him that I did want to talk to him about the large amount of cocaine that was found in the back of his vehicle. Prosecutor: Let me move on. What happened to Mr. Maldonado at that time, was he taken into custody and taken for booking at the jail?"

The Court found that the officer's statement that he wanted to talk to appellant about the cocaine was not the equivalent of a statement that appellant had declined to speak with him or had invoked his right to remain silent. Nor is his alleged refusal to speak to the officer a reasonable inference that may be drawn from the officer's statement, especially since appellant was asking for an interpreter, which suggests a desire to speak. Moreover, the prosecutor did not dwell on this line of questioning, but moved on to other topics. Because there was nothing in this line of questioning that improperly touched upon appellant's right to remain silent, the trial court did not err in denying the motion for mistrial.

Appellant also contended that the trial court should have granted his motion for a mistrial, contending that the prosecutor elicited the officer's statement that appellant told him that all of his belongings were in the bed of the truck in violation of a granted motion in limine that prohibited reference to any statements made by appellant after arrest. The Court found that the order granting appellant's motion in limine provided any and all involuntary statements, admissions, and/or confessions were excluded from evidence in the above-styled case. Although appellant's statement that all of his belongings were in the bed of the truck was made after his arrest, the record showed that the statement was not prompted by police questioning, but was a voluntary utterance he made upon learning that his truck was going to be impounded. The trial court found the statement to be a "voluntary outburst" and ruled that the statement was admissible since it was not subject to the terms of the order, was not the result of any police interrogation, and constituted probative evidence. The Court held that since the record supported the trial court's finding that appellant's request was not an involuntary statement, admission, or confession falling within the ambit of the motion in limine, the trial court did not err in denying the motion for mistrial.

Search & Seizure

Sims v. State, A11A2236 (1/12/12)

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in denying his motion to suppress. The evidence showed that after appellant's vehicle was stopped for a traffic violation, appellant twice consented to a search of his vehicle which resulted in the seizure of cocaine. The first consent was when he was being handed the citation and the second was shortly thereafter when the passengers were asked to step out of the vehicle. Appellant conceded that the officer was authorized to stop his car and that he twice gave his consent to the search. But, he argued, his consent was nevertheless invalid because it was obtained during an illegal seizure on the ground that the traffic stop had been unlawfully prolonged.

The Court disagreed. An officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. In determining whether the length of the detention was within the brief investigative period authorized by *Terry*, consideration must be given to whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. Appellant failed to show that the detention became unlawful such that his consent was ineffective. Given the officer's observations of appellant's manner of driving, the officer was authorized to procure his license and use it to check into whether appellant was entitled to continue operating his vehicle. The officer was also authorized to ask appellant to step outside his car. The officer did not impermissibly extend the stop with the brief questioning that occurred

before he began writing the citation, as such inquiry was reasonably tailored to investigate whether appellant's driving maneuvers were the product of driving under the influence. And once the officer then began writing the citation, the additional questioning did not impermissibly prolong the stop.

The Court found that where, as here, a driver is questioned and gives consent while he is being lawfully detained during a traffic stop, there is no Fourth Amendment violation. Once consent is legally obtained, it continues until it is either revoked or withdrawn. The evidence did not show, and appellant did not assert, that he revoked or withdrew his initial consent. And since the second request to search occurred almost contemporaneously with the conclusion of the traffic stop, it did not unreasonably prolong the stop.

Speedy Trial; Barker v. Wingo

Miller v. State, A11A2379 (1/12/12)

Appellant appealed from the denial of his motion to dismiss on constitutional speedy trial grounds. The evidence showed that the crime occurred in April of 2008 and he was tried on April 26, 2010. However, a mistrial was declared. The trial court judge was recused on the motion of appellant in May of 2010. On April 29, 2011, appellant filed a motion to dismiss the indictment due to lack of speedy trial. His motion was denied on June 7, 2011.

The Court found that the relevant time frame for purposes of the motion to dismiss on constitutional speedy trial grounds is from the date of mistrial through the date the motion was denied. Since that delay was a little over one year and one month long, the *Barker v. Wingo* test must be considered.

The Court found that the length of delay was presumptively long. As to the reason for the delay, the Court found that the trial court properly attributed it to governmental negligence which was attributed to the State but only slightly.

The Court also held that the trial court properly weighed the assertion of the right heavily against appellant. Here, appellant never filed a trial demand, his counsel was actively engaged in negotiations with the State about the entry of a plea, and then agreed to the placement of the case on the May 3, 2011, pretrial calendar. Although appellant argued that his demand was implicit from the fact that he announced ready at every calendar call, the Court held that this was not a demand for a speedy trial.

Finally, appellant contended that he was prejudiced because a defense witness who testified at the first trial could no longer be found. The Court stated that the fact that a witness is missing, standing alone, is not sufficient to show prejudice. The Court found that the testimony would have been cumulative and not material. Thus, the trial court did not abuse its discretion in weighing this factor against appellant.

In balancing the four factors, the Court found that the trial court did not abuse its discretion by concluding that the presumptive prejudice arising from any delay in bringing appellant to trial was insufficient for him to prevail on his speedy trial claim, given that there was no demonstrable prejudice to his defense and he was dilatory in asserting his rights.

First Offender Sentencing; Judicial Discretion

Graydon v. State, A12A0061 (1/13/12)

Appellant entered a guilty plea to felony theft by shoplifting. The trial court denied his request for first offender treatment. Appellant contended that the trial court applied a mechanical sentencing formula and, thus, failed to exercise its discretion as required under the First Offender Act, OCGA § 42-8-60 et seq.

The Court stated that a trial court's use of a mechanical sentencing formula or policy as to any portion of a sentence amounts to a refusal to exercise its discretion and therefore is an abdication of judicial responsibility. However, there is a presumption that a trial court regularly and correctly conducted the proceedings. Remand is required only when the record clearly establishes either that the trial court refused to consider first offender treatment on the merits or erroneously believed that the law did not permit such an exercise of discretion.

Here, the trial court stated as follows: "I have no absolute rule in regard to first offender [treatment]. As a practical matter, however, I'm inclined to give it to people who [have a] first drug offense. Those [cases] involving serious dishonesty, like theft, I'm not inclined to give [it]. That doesn't mean I wouldn't in a very unusual case. But[,] the felony theft by shoplifting, the nature of the offense was the primary requisite that went into [denying appellant's request]."

The Court found that the trial court's statements showed neither an outright refusal to consider first offender treatment nor an erroneous belief that the law does not permit first offender treatment in such a case. The record showed, rather, that the trial court was aware that it could treat appellant as a first offender but, after considering his admitted conduct, exercised its discretion not to do so. Thus, the judgment was affirmed.

Severance; Bent of Mind Evidence

Heck v. State, A11A2402 (1/13/12)

Appellant, a registered sex offender, was convicted of three counts of child molestation, and one count of enticing a child for indecent purposes against two victims: An 11 yr. old boy and a three yr. old girl. Appellant contended that the trial court erred in not severing the cases. The Court held that severance is required if offenses are joined solely because they are similar in nature. Severance is not mandated, however, where the similarity of the offenses is coupled with evidence of a pattern which shows a common motive, plan, scheme, or bent of mind. In other words, offenses have not been joined solely because they are of the same or similar character when the evidence of one offense can be admitted as similar transaction evidence during the trial of the other offense.

Here, appellant failed to demonstrate that there was any danger that the jury would be confused or unable to distinguish the evidence and apply the law intelligently as to each offense.

Further, not only did two of the indicted offenses involve the same kind of conduct (the fondling of each victim's genital area), both of the victims were children who were neighbors of appellant, and all of the offenses occurred at the same place (appellant's bedroom) and within months of one another. Thus, even if the trial court had severed the trials, the molestation of each child would have been admissible as a similar transaction —to show appellant's intent and bent of mind to commit an illegal act to satisfy his sexual desires and his pattern of enticing children to come to a private place (his bedroom) to "play" so that he could commit such acts—at the trial on the charges involving the other child. When the evidence of one

offense can be admitted as similar transaction evidence during the trial of the other offense, the decision of whether to sever the offenses for trial is within the discretion of the trial court. Given the circumstances here, the Court concluded that the trial court did not abuse its discretion in denying the motion to sever.

Appellant also contended that the trial court committed harmful error when it admitted "irrelevant, non-sexually explicit exhibits" as evidence to show his course of conduct, intent, motive, and bent of mind to commit child molestation. The challenged evidence included the following: nudist colony videotapes depicting happy naked people of all ages frolicking in a variety of non-sexual activities; a brochure for ordering additional nudist colony videotapes; nine children's live-action or cartoon videotapes; a videotape of a television program involving children; a bag of lollipops; hair barrettes; girls' panties; family-oriented magazines; a comic book; and a child's cookbook. Appellant argued this evidence was irrelevant because there was no evidence that the items were used or otherwise involved in the incidents or that either of the victims had ever been exposed to the items. In addition, he argued that the evidence was unduly prejudicial because it suggested that he may have committed previous acts of child molestation that were not otherwise proved.

The Court disagreed. In a prosecution for a sexual offense, evidence of sexual paraphernalia found in defendant's possession is inadmissible unless it shows defendant's lustful disposition toward the sexual activity with which he is charged or his bent of mind to engage in that activity. Under this rule, sexually explicit material cannot be introduced merely to show a defendant's interest in sexual activity. It can only be admitted if it can be linked to the crime charged. Here, the overwhelming evidence, including appellant's own admissions during his interview with the investigator, showed that he regularly invited children into his bedroom to watch movies and to "play" by wrestling with them, tickling them, and chasing them. In addition, he admitted that the male victim saw appellant's penis —and vice versa —and he admitted that he did not consider it inappropriate to wrestle with the boy while the boy was in his underwear on appellant's bed. Given this evidence, as well as his numerous prior acts of child molestation, the Court concluded that the trial court did not err in finding that the nudist colony videotapes and the brochure were relevant to appellant's bent of mind. Further, even if it was error to admit the videotapes and the brochure because they do not show the adults and/or the children actually engaging in any sexual acts and are, therefore, irrelevant because they are not "sexually explicit," any error was harmless due to the other, overwhelming evidence of appellant's guilt.

As for the other "non-sexual" items, such as the little girls' panties, plastic hair barrettes, lollipops, children's movies, etc., given the fact that appellant lived alone, had no children, regularly invited children into his bedroom to "play" and to watch movies, and had previously committed numerous acts of child molestation, the trial court did not err in concluding that the evidence demonstrated appellant's inclination towards, or preoccupation with, children. Thus, the trial court did not abuse its discretion in admitting the items as evidence of appellant's bent of mind to commit child molestation. And, any error in admitting them was harmless in light of the other, overwhelming evidence of appellant's guilt, especially his admissions and the evidence that conclusively showed that he had, in fact, committed numerous prior acts of child molestation.

Implied Consent; Merger

Luckey v. State, A11A1699 (1/11/12)

Appellant was convicted of DUI, reckless driving and speeding. He contended that the trial court erred in denying his motion in limine to suppress the results of the Intoxilyzer breath test. Specifically, he argued that his request for an independent test was not accommodated. The evidence showed that after arriving at the jail, appellant said that he wanted an independent test. The officer asked him where he wanted to go for the test and appellant did not respond, stating merely that he did not want the arresting officer to be the one to take him. The officer testified: "I explained to him [that] I would be more than happy to take him wherever he wanted to go, however, I was going to be the transporting officer." Appellant never identified any facility for the blood test and when told that the arresting officer was the only person available to take him, responded only that he "did not want [the arresting officer] to take him." According to the testimony at trial, the recording of the encounter shows that the arresting officer tried to find someone else to take him to get the blood test but could not find another officer able to do so.

Appellant argued that the officer was not justified in assuming that his refusal to go with the officer and his demand that someone else take him for the test, relieved the officer of the responsibility of accommodating his request for an independent blood test. But, the Court found, before the duty of the police arises to transport a defendant to the location of the independent test, and before there is a breach of that duty which may give reason to suppress the evidence of the state administered test, the defendant must first show that he had made arrangements with a qualified person of his own choosing, that the test would be made if he came to the hospital, that he so informed the personnel at the jail where he was under arrest, and that those holding him either refused or failed to take him to the hospital for that purpose. Here, contrary to appellant's assertion, the officer never refused to accommodate his request for an independent test. The evidence was undisputed that the officer was willing to take him for an independent blood test at the place of his choosing. Therefore, under the totality of the circumstances, the Court concluded that the trial court did not err in finding that the officer's failure to assist appellant in obtaining a breath test was justified. Thus, the trial court did not err in denying appellant's motion to suppress on this basis.

Appellant also argued that, for purposes of sentencing, the offense of speeding merged into that of reckless driving. He contended that the speeding offense was included in the reckless driving offense as a matter of fact because the jury found him not guilty on the lane change violations; therefore, the only evidence to support the reckless driving charge was the speeding violation. The State conceded that the two offenses should have been merged for sentencing and the Court agreed. Accordingly, appellant's sentence for speeding was vacated and the case remanded to the trial court for re-sentencing.

Recusal Motions; Uniform Superior Court Rule 25

Moore v. State, A11A1537 (1/11/12)

Appellant appealed from the denial of his motion to recuse a superior court judge from

presiding over his motion to suppress. The motion contended that although the judge had been on the bench for almost 30 years, he had never granted a motion to suppress. Without holding a hearing, the judge concluded that the motion to recuse was untimely because while Uniform Superior Court Rule 25.1 requires affidavits accompanying motions to recuse to be filed within five days of the affiant's first learning of the alleged grounds for recusal, defense counsel's affidavit indicated he had known about the judge's alleged policy of not granting motions to suppress since at least 2002. The judge also summarily found that the accompanying affidavit was legally insufficient.

Uniform Superior Court Rule 25.3 provides that: "When a judge is presented with a motion to recuse . . . accompanied by an affidavit, the judge shall temporarily cease to act upon the merits of the matter and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted. If it is found that the motion is timely, the affidavit sufficient and that recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge shall be assigned to hear the motion to recuse."

The Court found that the affidavit was insufficient. First, the affidavit stated that defense counsel made Open Records Act requests to the Superior Court Clerk's Office and the District Attorney's Office for closed cases in which the judge had granted motions to suppress, and that these requests yielded letters indicating that closed files were available for review in general. The affidavit also indicates that defense counsel's query to a listserv for criminal defense lawyers elicited no responses citing any case in which the judge had granted a motion to suppress or found a Fourth Amendment violation. The Court found these communications to be hearsay.

Second, the affidavit failed to present specific and definite information. While a judge must disqualify himself in any proceeding where his impartiality might reasonably be questioned, the lack of specifics here prevented any reasonable questioning of the judge's impartiality. Third, while appellant argued a generalized bias based on the judge's prior rulings, the Court stated that it must distinguish between prior judicial actions and bias. "[W]ithout such a demarcation, no judge might ever rule but once upon a disputed question of law or factual circumstances without forever thereafter being disqualified from hearing similar matters."

Finally, a trial court may deny a motion to recuse, without referring the matter to another judge, if recusal would not be warranted even if the facts alleged in the motion are assumed to be true. The trial judge's denial, absent a hearing, of the motion to recuse was not an abuse of discretion here because even assuming that all the facts alleged are true, the affidavit still was legally insufficient because the kind of bias or prejudice requiring recusal must stem from an extra-judicial source. This was not the type of partiality alleged here.

"The only remedy for the type of bias or prejudice alleged in the affidavit … is an appeal in this case and in each case where the judge has decided facts in a clearly erroneous direction or has decided facts based upon an erroneous understanding of the law. The only other possible remedy is at the ballot box."