Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 27, 2017

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THIS WEEK:

• **Appellate Jurisdiction; HGN Testing**

• **Contributing to the Deprivation of a Minor**

• **Demand for Speedy Trial; Statutory Requirements**

Appellate Jurisdiction; HGN Testing

State v. Walsh, A16A1618 (12/19/16)

Walsh was accused of DUI (less safe). The trial court granted his motion to exclude the results of a Horizontal Gaze Nystagmus (HGN) test because Walsh was not told to take off his glasses during the test. The State appealed and the Court reversed.

Walsh initially contended the appeal should be dismissed because the State violated O.C.G.A. § 5-7-1(a)(5). Specifically, the State failed to file a valid certification to the trial court pursuant to O.C.G.A. § 5-7-1(a)(5)(B), because it included its certification in the body of its notice of appeal. However, the Court stated, although the notice of appeal was filed in the trial court, it is the appellate court who alone has the authority to determine whether such filing is sufficient to invoke its jurisdiction. And here, the Court found, nothing in O.C.G.A. § 5-7-1(a)(5) prohibits the State from filing a certification pursuant to O.C.G.A. § 5-7-1(a)(5)(B) in the same document as its notice of appeal. Thus, the Court concluded, the State's notice of appeal was effective, and jurisdiction was properly before the Court.

Turning to the merits of the appeal, the Court stated that in evaluating the admissibility of an HGN test, two findings are necessary: (1) the general scientific principles and techniques involved are valid and capable of producing reliable results, and (2) the person performing the test substantially performed the scientific procedures in an acceptable manner. With regard to the first determination, the Court noted that the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol. With regard to the second determination, HGN tests should be administered under law enforcement guidelines. To make such a showing the State may have the arresting officer testify both as a fact witness, regarding how he or she administered and interpreted the test, and as an expert witness, giving an opinion that he or she administered and interpreted the test properly under law enforcement guidelines.

Here, the officer testified that although it would have been better practice for him to ask Walsh to take off his glasses, the glasses would have no effect on his interpretation of the test. Thus, the Court found, the officer functioned as both a fact witness and an expert witness with respect to whether the HGN test was administered under law enforcement guidelines. Absent a fundamental error, such as one affecting the subject's qualification for the HGN test, evidence of the possibility of error goes only to the weight of the test results, not to their admissibility. Furthermore, the officer testified that Walsh exhibited all six validated clues for which the HGN tests. Under law enforcement guidelines, a score of four out of six clues on an HGN test constitutes evidence of impairment, and Walsh failed to present any evidence as to how having his glasses

remain on his face during the HGN would have made the test invalid.

Nevertheless, Walsh argued, "[s]imple logic would demand that an eye following a stimulus would have to adjust or jerk as it passed thick black eye glass frames." However, the Court found, he presented no evidence whatsoever that he could not overcome the officer's testimony that the officer was still able to make a fair observation of the six validated clues. Accordingly, the record did not support a finding that the officer did not substantially comply with applicable law enforcement guidelines with respect to administering the HGN test. Thus, the Court found, the evidence that Walsh's glasses remained on while the HGN was administered goes to the weight of the test results, not their admissibility. Therefore, the ruling of the trial court excluding the results of the HGN test was reversed.

Contributing to the Deprivation of a Minor

Adams v. State, A16A1583 (12/20/16)

Appellant was convicted of aggravated child molestation, child molestation, and two counts of contributing to the delinquency of a minor for having sex with a 13-year-old boy. She was additionally convicted of two counts of contributing to the deprivation of a minor. The evidence showed as to these two counts that appellant left her two young children asleep at home alone for less than an hour when she went out to buy marijuana for herself, the 13-year-old victim and other teenagers. Appellant contended that the evidence was insufficient to sustain her convictions for contributing to the deprivation of a minor. The Court agreed.

The Court noted that under the version of O.C.G.A. § 16-12-1(b)(3) in effect at the time of the actions giving rise to this prosecution, a person committed the offense of contributing to the deprivation of a minor when he or she "willfully commits an act or acts or willfully fails to act when such act or omission would cause a minor to be found to be a deprived child as such is defined in Code Section 15-11-2[.]" The version of O.C.G.A. § 15-11-2 then in effect provided that a child may be "deprived" in several ways; the State relied on the provision that defined as deprived a child who "[i]s without *proper parental care or control*, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals[.]" O.C.G.A. § 15-11-2(8)(A) (2012) (emphasis supplied). The Court also noted that "proper parental care or control" is not a term defined by statute.

Relying on *Bagby v. State*, 274 Ga. 222 (2001), the Court found that O.C.G.A. § 16-12-1(b)(3) has been narrowly construed to prohibit a person from willfully committing an act or omission that deprives a child of the physical, mental, emotional or moral needs essential to the child's well-being. In reviewing the statutory text and limited relevant case law, the Court stated that it could not "conclude with confidence that [appellant]'s act of leaving her sleeping children for less than an hour was an act that persons of ordinary understanding would conclude deprived those children of needs essential to their well-being." Although the Court found that appellant's reason for leaving her children home alone to commit VGCA was far from compelling, the evidence of leaving young children home alone asleep in bed for a few minutes – without more – was insufficient to prove beyond a reasonable doubt a crime under the applicable version of O.C.G.A. § 16-12-1(b)(3). Accordingly, the Court reversed appellant's two convictions for contributing to the deprivation of a minor.

Demand for Speedy Trial; Statutory Requirements

Rogers v. State, A16A2143 (12/20/16)

Appellant was charged with two counts of DUI, reckless driving and other traffic offenses. On the day of her trial, she moved to dismiss based on the State's failure to try the case within two terms of court following the filing of her speedy trial demand. The court denied the motion, finding that her statutory speedy trial demand was invalid under O.C.G.A. § 17-7-170. The Court reversed.

The Court noted that O.C.G.A. § 17-7-170(a) sets forth the required form of a statutory speedy trial demand. The demand must be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. The demand must also clearly be titled "Demand for Speedy Trial"; reference O.C.G.A. § 17-7-170 within the pleading; and identify the indictment number or accusation number for which such demand is being made. Here, the Court found, appellant filed multiple documents on the same day, including her statutory speedy trial demand. Each document had a separate certificate of service, and each document was clearly and distinctly titled, including appellant's speedy trial demand. Moreover, appellant's speedy trial demand referenced O.C.G.A. § 17-7-170, it was not stapled or otherwise bound to any other document filed that day, and it specifically identified the accusation number for appellant's case. Consequently, the Court concluded, appellant's speedy trial demand complied with the pleading requirements set forth in O.C.G.A. § 17-7-170, and the trial court erred in denying her motion to dismiss.

Accordingly, the Court reversed and remanded for further proceedings to determine whether appellant's speedy trial demand satisfied the remaining requirements of O.C.G.A. § 17-7-170, including the requirement of showing that there were jurors empaneled and qualified to try appellant within the term of court in which she filed her speedy trial demand, or the following term of court.