Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 8, 2010

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THIS WEEK:

Juveniles; Statements

Emory v. State, A09A2261

Appellant, a juvenile, was convicted of burglary and armed robbery. She contended that the trial court erred in admitting her statement. A juvenile's statement is admissible if, under the totality of the circumstances, the juvenile made a voluntary and knowing waiver of her constitutional rights. The following factors are to be considered: 1) the age of the accused; 2) the education of the accused; 3) the knowledge of the accused as to the substance of the charge and nature of his or her rights to consult with an attorney; 4) whether the accused was held incommunicado or allowed to consult with relatives or an attorney; 5) whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogation; 8) whether the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused repudiated an extrajudicial statement at a later date.

Here, appellant was 16 at the time of questioning and had completed the ninth grade. She was not under arrest when she was questioned, and she had been informed of her right to an attorney. Although contested, the trial court found that her mother was present during the interview with the police. Nevertheless, the Court stated, the absence of a parent during an interview does not necessarily make a juvenile's statement inadmissible. Although there was no direct testimony regarding the interview's length, the written statement was given 20 minutes after appellant signed the *Miranda* rights waiver. Appellant also testified at trial and confirmed the information given in her statement. The Court held that given the totality of the circumstances, the trial court was authorized to find that the statement was admissible.

Speedy Trial; False Statements

Thornton v. State, A09A2046

Appellant was convicted of theft by taking (four counts), entering an automobile, criminal damage to property and false statements. He contended that four counts should have been dismissed because of a violation of his statutory speedy trial demand. The record showed that the superior court had four terms beginning on the first Monday in February, May, August, and November. After a mistrial, the case was re-indicted. Appellant then filed his statutory demand during the August term, and juries qualified to hear his case were impaneled during that term, after he filed his motion. To comply with OCGA § 17-7-170, the State therefore had to try appellant during the November term of court, which ran from November 1, 2004 through February 4, 2005. Appellant's case was scheduled for trial the week of December 13, 2004. At that time, however, Georgia was transitioning from a county-based public defender system to a statewide system. As of January 1, 2005, therefore,

the county public defender's office, which had been handling appellant's case, would no longer exist. The parties met in chambers and it was agreed that rather than try appellant, the public defender, who was leaving for another job, would try to clear up as many cases as she could before the end of the year. The trial court found that appellant's statutory rights were not violated because defense counsel implicitly agreed to a continuance through the November term. The Court disagreed. Citing *Ballew v. State*, 211 Ga. App. 672 (1994), the Court noted that appellant's original defense counsel testified that she had already tried the case once and was prepared to try it again, if necessary. She also discussed his case with both the supervisor of her new office and the supervisor of the office to which appellant's case was being transferred. Both supervisors and the original defense counsel understood that, if necessary, defense counsel could return and defend him when the case was called for trial. Most importantly, the Court found, there was no evidence showing that either the trial court or the prosecutor ever discussed with the newly-appointed defense counsel whether he could be ready for trial within the November term of court, or whether he wanted a continuance.

Therefore, the record was devoid of evidence showing that either appellant or any attorney representing him requested or acquiesced in the continuance of his case beyond the November 2004 term of court. Consequently, the State failed to carry its burden of proof on its claim that appellant waived his speedy trial demand, and appellant was entitled to be discharged and acquitted of the four counts of the indictment.

Appellant also claimed that the evidence was insufficient to support his conviction for making a false statement in his first trial, in violation of OCGA § 16-10-20, which criminalizes the knowing and willful making of "a false, fictitious, or fraudulent statement or representation . . . in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state." The indictment alleged that he made a false statement when, during his testimony at his first trial, he referred to the pick-up truck he was occupying at the time of the incident as "his vehicle when in fact said vehicle was that of Robert McCutcheon. . . ." The Court held that the record contained no evidence showing that appellant ever testified that he owned the vehicle. Rather, it found, the record showed only that appellant referred to the truck as "my" or "mine" when describing it during his testimony at the first trial. "Given that the words 'my' and 'mine' are possessive pronouns they can, by definition, be used to demonstrate *either* possession or ownership." The Court noted that this fact was proved by the testimony of one of the investigating officers, who referred to the city police car he drove to the scene as "my patrol car." Thus, the State failed to prove beyond a reasonable doubt that appellant made a false statement i.e., it failed to prove that he ever affirmatively stated that he owned the pick-up truck. Accordingly, his conviction was reversed.

Search & Seizure

Becoats v. State, A09A1798

Appellant was convicted of trafficking in cocaine, possessing marijuana and failing to maintain his lane. He contended the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped for failing to maintain his lane. The officer noticed that he was nervous and asked for consent to search. Appellant said okay but he was in a hurry. The officer took this response as a refusal. Approximately four minutes after the officer stopped appellant, he went back to his car to check appellant's driver's license. Approximately one minute later, a drug dog arrived and began its open-air search around appellant's vehicle. The Court found that despite appellant's refusal to consent to a search of his car, he was nevertheless validly detained for less than ten minutes while the officer was checking his license. The dog handler was thus free to walk the dog around the car, as use of a trained drug detection dog, in a location where he is entitled to be, to sniff the exterior of a container, is not an unreasonable search. And because a drug dog's sniffing of the exterior of a car does not constitute a search under the Fourth Amendment, a police officer does not need reasonable and articulable suspicion before using a canine trained in drug detection to sniff a vehicle's exterior. Once the drug dog alerted on the exterior of appellant's vehicle, the officer had probable cause to believe that contraband was contained therein and the authority to search its contents. Therefore, trial court did not err in denying the motion to suppress.

DUI; Discovery

State v. Smiley, A09A1827

Smiley was charged with DUI. He moved to suppress the results of his breath test because the State failed to comply with the trial court's discovery order. The record showed that Smiley sought "full information" under OCGA § 40-6-392 (a) (4) from the State. He requested a multitude of documents, including the source codes of the Intox 5000, calibration records, training manuals, maintenance logs, etc. The trial court held a couple of hearings. It first granted the request for information. It then reversed its decision and then re-granted the request after another hearing. The trial court then granted Smiley's motion to suppress when the State failed to comply with the trial court's discovery order. The State appealed, contending that it was not required by law to give Smiley the discovery ordered. However, the State did not provide a transcript of any proceedings before the trial court.

The Court held that OCGA § 40-6-392 (a) (4) expanded previous discovery procedures which allowed discovery only of written scientific reports, and is consistent with the broad right of cross-examination embodied in OCGA § 24-9-64. Thus, as a general rule, a defendant now has the right to subpoena memos, notes, graphs, computer printouts, and other data relied upon by a state crime lab chemist in obtaining gas chromatography test results. A request directed to the State is also sufficient to require production of the information. While a defendant must show that the requested information is relevant, the State is not obligated to produce information that is not within its possession, custody or control. Here, the trial court found that the requested materials were relevant and within the possession, custody or control of the State, and ordered the State to produce them. When the State failed to comply with the trial court's order, the trial court granted Smiley's motion to suppress the results of the breath test. Without a transcript, the Court stated that it "must presume that the trial court found evidence of bad faith on the part of the state in not producing the requested information. Accordingly, we are unable to conclude that the trial court

abused its discretion in suppressing the results of the breath test."

Judge Johnson concurred specially. He first noted that the trial court erred in ruling that *Hills v. State*, 291 Ga. App. 873 (2008) did not apply because Smiley requested the source codes under OCGA § 40-6-392 (a)(4), rather than under OCGA § 17-16-23. Second, the trial court erred in determining that the State must provide such "full information" even if not in the State's custody or possession. Finally, he stated that "[i]t is important to note that the ruling in this case does not affect our decisions in *Hills* and *Mathis* [298 Ga. App. 817, 819 (2) (2009)]. Our hands are simply tied in this case due to the state's failure to provide us with a record sufficient to enable us to review the trial court's decision."

DUI; HGN Tests

Harris v. State, A10A0119

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. Specifically, he argued that because he had cerebral palsy, the results of the HGN test should have been excluded because they were unreliable. The Court stated that evidence of HGN test results are admissible if the party offering the evidence shows that (a) the general scientific principles and techniques involved are valid and capable of producing reliable results and (b) the person performing the test substantially performed the scientific procedure in an acceptable manner. Appellant conceded that the test generally meets the criteria in section (a), but argued that the officer incorrectly performed the HGN test on him given his medical condition. The Court, "[w]hile…sympathetic to [appellant's] condition," found that he failed to meet his burden of showing error in the administration of the HGN test. He presented no scientific evidence or testimony to establish the unreliability and thus the inadmissibility of HGN test results when the HGN test is given to an individual with cerebral palsy. Also, the Court found, in any event, such matters would go to the weight of the evidence and not its admissibility. Moreover, the officer administering the HGN test testified that he had received specialized training in field sobriety tests and that he had even more classes in addition to those mentioned to learn how to properly perform the HGN test. Although appellant argued that the officer did not perform the test according to the standardized techniques, he did not support his arguments with any citation to the record and the officer never admitted he performed the test improperly. The officer merely testified on cross-examination regarding factors other than alcohol that could cause nystagmus and create false results. The officer's performance was also captured on video, and the video was admitted into evidence. Therefore, since appellant failed to show error on the record in the trial court's finding that the test was properly administered, there was no error in denying appellant's motion to suppress his HGN test results.