Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 17, 2017

THIS WEEK:

Mistrials; Commentary on Right to Remain Silent

Issa v. State, A16A1495 (1/31/17)

Appellant was convicted of numerous felonies relating to a home invasion. The evidence showed that during the home invasion, he suffered a gunshot wound. He contended that the trial court erred in denying a mistrial after a State's witness testified that appellant exercised his right to remain silent upon being arrested. The transcript showed that on direct examination of the lead detective, the prosecutor in establishing that the detective determined appellant had sustained a gunshot wound during the home invasion, asked "What was your next step?" The detective responded, "I had previously, before taking photos for [appellant], I had taken warrants out for him for the incident at [the victims' home]. And once he was arrested, he refused to talk to us, but I also had a —" At this point, defense counsel immediately objected and moved for a mistrial. But, the trial court found that the detective's remark was not prompted by the prosecutor's question and, therefore, denied the motion. Once the jury returned, the court gave a curative instruction, directing the jury to ignore the detective's last response. And following a juror's question regarding which remark to ignore, the court clarified and confirmed, via a show of hands and general verbal agreement, that the jury would not construe the comment against the accused.

The Court stated that testimony about the defendant remaining silent is not deemed to be prejudicial if it is made during a narrative on the part of the authorities of a course of events and apparently was not intended to, nor did it have the effect of, being probative on the guilt or innocence of the defendant. Rather, to warrant a reversal of a defendant's conviction, the evidence of the election to remain silent must point directly at the substance of the defendant's defense or otherwise substantially prejudice the defendant in the eyes of the jury. And here, the Court found, the detective's remark was not directed to any particular statement or defense offered by appellant, but was instead made during the detective's explanation of the course of his investigation. Furthermore, there was no indication that the remark had the effect of being probative on the issue of guilt or innocence, and the trial court promptly gave a curative instruction to the jury. Accordingly, the Court held, under these particular circumstances, the court did not abuse its discretion in refusing to grant a mistrial.

Nevertheless, appellant argued, the prejudicial effect of the detective's comment was compounded during the State's closing argument, when the prosecutor was attacking the account appellant provided hospital staff to explain his gunshot wound. Specifically, the prosecutor argued: "If he could tell a story to the doctors to protect his own skin, that's exactly what he's going to do now. He knows the charges that he's facing are really serious, so he's going to come up with a story. Well, actually he didn't even come up with a story, as far as you know. All you know is that the

defense attorney … gave you a theory." Defense counsel objected, claiming that the prosecutor was making an improper comment about appellant's decision not to testify, but the trial court disagreed and overruled the objection.

The Court stated that it is not impermissible for the State to comment on the general failure of the defense to produce any evidence, since counsel for the State may argue that evidence showing guilt has not been rebutted or contradicted. Here, the State prosecutor's comments were not directed at appellant's decision not to testify, but were instead directed at the defense's failure to adequately explain the State's evidence. Accordingly, the trial court did not abuse its discretion in denying a mistrial.

Refreshing Recollection; O.C.G.A. § 24-6-612

Jones v. State, A16A2058, A16A2066, A17A0110 (2/1/17)

Appellants Jones, Johnson and Lemons were convicted of burglary. The evidence showed that appellants were prison inmates and broke into a residence while assigned to a work detail outside the grounds of the prison. They argued that the trial court erred in denying their motions for mistrial after the work-detail guard used notes prepared by the prosecutor to refresh his recollection. The record showed that during the State's direct examination of the work-detail guard (who had suffered three mini-strokes since the date of the incident in question), the witness attempted to reference documents he brought with him to the stand after he was asked to which side of the work detail Lemons had been assigned. Seeing this, the State asked the guard what documents he was holding, and the guard replied, "That was given [to] me by you[,] I think." The State's prosecutor then asked to see the documents and responded that she "didn't realize I had left this with you." The guard responded, "Yeah, you left that with me." The State's prosecutor then replied, "All right. You can have it back then," before moving on to a new line of questioning.

Much later during the same direct examination, the State asked the guard to indicate on a diagram where he saw Jones and standing. At that point, Johnson's counsel observed that the guard appeared to be "using something to refresh his memory" because he "[kept] looking down at the papers." Thus, defense counsel requested to see the writing and to question the guard under O.C.G.A. § 24-6-612(a). When the court asked the guard to what he was referring, the guard responded that it was "a photo that the DA gave me when she came out to my residence." The prosecutor then volunteered that it appeared she had "inadvertently left [her] notes with [the guard]" and that it "was not intentionally done." The court allowed the State to retrieve the document from the guard and ordered that the notes be shown to the defendants for purposes of cross examination. The defendants then unsuccessfully moved for a mistrial due to "prosecutorial misconduct by allowing [the] witness to continue to hold onto these notes, even though [the prosecutor] knew that they were inappropriate for him to have." Then, the court permitted the State to continue questioning the guard after allowing him to refresh his recollection with an incident report that he had prepared the day after the work-detail incident. And when the defendants later cross-examined the guard and asked about the prosecutor's notes, the guard testified that he "wasn't actually using [the notes]" and that he was "going to look down at it to see [if he] could . . . refresh [his] memory of the inmates that were working at the house."

The Court noted that O.C.G.A. § 24-6-612, which permits a witness to "use a writing to refresh his or her memory while testifying," but also provides that "an adverse party [is] entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness." Here, the appellants contended that, notwithstanding their ability to cross-examine the work-detail guard as to the notes that were in his possession during some portion of his direct examination, the guard was improperly permitted to use the notes to refresh his recollection because the document was prepared by the State's prosecutor outside of the guard's presence, citing cases under the old evidence code. But, the Court agreed with the trial court that the guard did not actually use the relevant document to refresh his recollection. Thus, even when a witness reviews a writing before or while testifying, if the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party. Thus, because the witness did not actually use the objected-to document to refresh his recollection, the trial court did not abuse its discretion in denying the appellants' motions for mistrial.

Nevertheless, appellant Jones argued that the motion should have been granted on grounds of prosecutorial misconduct because she allowed the guard to maintain possession of her notes, even after learning that they were inadvertently left with the witness at a prior time. The Court stated that a charge of prosecutorial misconduct is a serious charge and is not to be lightly made. And having raised it, Jones had the duty to prove it by the record and by legal authority.

Here, the Court noted, the trial court denied the motion for mistrial on the grounds of prosecutorial misconduct after deciding, based on its "observations and conclusions," that there was no such misconduct. More specifically, the court determined that the prosecutor "made a mistake and left her notes [with the witness] by accident," and that when she saw that she had done so, she "most likely did what many of us would do, ['W]ell what do I do[?'], and just didn't make the right decision, which would have been to say, ['W]ell let me take those back.[']" The Court determined, given the trial court's benefit of observing demeanor and assessing credibility when making this determination, and given the additional conclusion that the witness did not actually refresh his recollection from the prosecution's notes, that it could not say that the trial court abused its discretion.

DUI; Williams

McKibben v. State, A16A1865 (1/23/17)

Appellant was convicted of DUI (less safe); DUI (per se) and other traffic offenses. He contended that the trial court erred in denying his motion to suppress evidence obtained in a warrantless blood test. Specifically, he argued that he did not freely and voluntarily consent to the blood test under the standard set forth in *Williams v. State*, 296 Ga. 817 (2015). The Court disagreed.

The Court noted that appellant correctly stated that under *Williams*, the results of a warrantless blood test are subject to suppression unless the State establishes that the suspect freely and voluntarily consented to the test. And a suspect's mere acquiescence under the

implied-consent notice is not enough to render the search constitutionally valid. However, *Williams* should not be read as imposing a per se rule that the State must always show more than consent under the implied consent statute. Rather, trial courts must review the totality of the circumstances in determining consent. Accordingly, an affirmative response to the question posed by the implied-consent language may be sufficient for a trial court to find actual consent, absent reason to believe the response was involuntary. In other words, in determining the demarcation line between actual consent and coercion, context is crucial. Thus, in order to ascertain whether a suspect freely and voluntarily consented to the test, the trial court must consider the totality of the circumstances surrounding his consent, including (but not limited to) whether there was any threat or coercion by the officer; whether the suspect was unable to give valid consent due to (for example) his youth or lack of education; and whether a reasonable person would have felt free to decline the officer's request.

Here, the Court found, the evidence did not show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. Nor did appellant argue that youth, lack of education, or low intelligence somehow negated the voluntariness of his consent. Rather, appellant argued that he did not freely and voluntarily consent to the blood test because (1) the language of the implied-consent notice made him feel as though he had no choice but to acquiesce and (2) he was not informed that his blood-test result could be used against him in a criminal prosecution. But, the Court noted, it has already rejected these arguments in other cases. Indeed, while knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.

Thus, the Court determined, the record showed that appellant gave an affirmative answer to the question posed by the implied-consent language, and he never attempted to change that answer during the time that elapsed prior to testing. Appellant also did not appear to be impaired to the extent that he did not understand what was being asked, he did not express any objection to the test, and the officer did not force him to take the test. Thus, upon this particular record, and considering all of the record facts and affording appropriate deference to the trial court that heard the testimony first-hand, the Court affirmed the trial court's denial of appellant's motion to suppress.