Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 13, 2016

THIS WEEK:

Plain Error; Recorded Conversations

Jones v. State, S16A0498 (5/9/16)

Appellant was convicted of felony murder and other offenses. For the first time on appeal, he argued that the trial court erred in admitting into evidence the testimony of the State's expert witness on geo-cell phone analytics, because the State did not establish that the scientific techniques involved in geo-analytics were valid and capable of producing reliable results. The Court noted that under O.C.G.A. § 24-1-103(d), its review was limited to that of plain error. The Court found that even assuming any clear or obvious error, appellant could not show that the error probably affected the outcome of the trial. Therefore, there was no plain error.

Citing *Davis v. State*, 279 Ga. 786, 788 (5) (2005), appellant also argued that the trial court erred by admitting into evidence a recording of a phone call made from the county jail in which he made incriminating statements. The Court noted that in *Davis*, it provided the proper foundation for the admission into evidence of a recorded phone call from a jailed inmate. However, due to the passage of Georgia's new Evidence Code, the foundational factors from *Davis* regarding the admission into evidence of an automated recording such as the one at issue in this case are no longer applicable. Instead, O.C.G.A. § 24-9-923(c) provides the foundation for the admission of this evidence.

Here, the Court found, the State showed that the jail recording system accurately records phone calls and that the system recorded appellant's phone call at the time that he made it. The State called an investigator who knew appellant's voice and who established that the man in the recording who made the phone call sounded like appellant. Because this competent evidence would tend to show reliably that the automated recording was in fact a recording of the phone call that appellant made from jail, the Court found no error in the trial court's determination that the evidence was admissible.

Search & Seizure; Confidential Informant Reliability

Nichols v. State, A15A2353 (3/17/16)

Appellant was indicted on one count of possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed.

The record showed that an anonymous informant contacted a sheriff's investigator with allegations that two residences were being used to manufacture methamphetamine. The informant had not previously given information to law enforcement, and the informant's background was unknown. Over the course of several weeks, the informant made between 5 and 10 telephone calls to the investigator to provide information concerning the activity at the residences. The informant provided the investigator with the number of

individuals and a description of the vehicles that could be found at the residences, and the informant stated that it had seen blister packs, camp fuel, batteries, empty lye containers, and possible methamphetamine waste containers in the trash can outside one of the residences. The informant also stated that it had observed an area of dead vegetation outside one of the residences, possibly caused by the dumping of methamphetamine waste. The informant did not report seeing any actual methamphetamine, methamphetamine production, or anyone using methamphetamine at the residences.

In response to the informant's tips, the investigator went to the residences on several occasions and confirmed that the vehicles matching the description given by the informant were located there, and the investigator ran the vehicle tags and checked with the local utilities to confirm who lived at the residences. The investigator also confirmed that there was an area of dead vegetation outside one of the residences. However, the investigator did not confirm whether items associated with methamphetamine production were located in the trash can. The investigator ran a criminal history of the individuals associated with the residences, and he discovered that an individual who lived at one of the residences had a prior conviction for unlawful possession of anhydrous ammonia, which is a key component for manufacturing methamphetamine. Based on this information, he obtained a search warrant, which stated as follows: "[A] reliable and confidential informant, who has requested to remain anonymous, and your affiant, have seen on the property . . . areas where chemicals have been dumped causing the death of vegetation on the property. Within the past 24 hours the reliable and confidential informant has seen blister packs, empty lye containers, destroyed batteries, and methamphetamine waste containers on the property, all of which are common with the manufacture of methamphetamine." In addition to the affidavit, the investigator provided sworn testimony to the magistrate to show that the investigator had corroborated some, but not all, of the information provided by the informant. Specifically, the investigator corroborated the information concerning the individuals and vehicles that could be found at the residence and the fact that there was dead vegetation on the premises.

The Court found that the affidavit and application for the warrant were based upon information provided by a confidential informant whose reliability was not sufficiently demonstrated. It was undisputed that, prior to the search warrant at issue, the confidential informant had not assisted law enforcement in any other investigation. But even where a confidential informant is not shown to be inherently credible or reliable, the information that the informant provides may be proved trustworthy if portions of the information are sufficiently corroborated by law enforcement. For the corroboration to be meaningful, however, the information corroborated must include a range of details relating to future actions of third parties not easily predicted. That is, the tip must include inside information not available to the general public; otherwise, the corroboration is not sufficiently meaningful to show reliability.

Here, the Court found, the investigator only corroborated the information concerning the individuals, vehicles, and dead vegetation that could be found at the residence — information that was readily available to the general public. Such details were not sufficient, by themselves, to establish that the informant was a credible source of information about the alleged criminal activity occurring there. Notably, the investigator did nothing to independently confirm the informant's tip that there were items commonly associated with methamphetamine production in the trash can outside the residence. In sum, the independent investigation was insufficient to establish the informant's reliability to any meaningful degree. Accordingly, because the application and affidavit for the search warrant contained insufficient information to allow a finding of probable cause to search the residence, the trial court erred in denying appellant's motion to suppress.

Theft by Receiving; Sufficiency of the Evidence

Lindsay v. State, A15A2104 (3/22/16)

In a case of first impression, appellant was convicted of seven counts of theft by receiving. The evidence showed that appellant's mistress embezzled money from her employer. The mistress purchased items with the embezzled funds and then gave the items to appellant. The State presented evidence that appellant knew the items had been purchased with the employer's funds.

Appellant argued that his conduct in receiving goods purchased with stolen funds cannot satisfy the "receiving stolen property" element of O.C.G.A. § 16-8-7(a). The State argued that that property traceable to stolen funds remains the property of the victim of the theft through equity. But, the Court stated, whether the owner may have had an equitable interest in the goods purchased by the mistress with the embezzled funds begs the question of whether these particular goods satisfy the "stolen property" element of O.C.G.A. § 16-8-7 under a plain reading of the statute. "After carefully considering this issue, we conclude that a common sense reading of the plain language of the statute requires the State to prove that the tangible goods received by the defendant were the same goods that were taken from the owner." Accordingly, the Court reversed appellant's convictions for theft by receiving stolen property.

Open Records; Attorney Work Product

Chua v. Johnson, A15A1728 (3/21/16)

Appellant appealed from an order dismissing his complaint which sought under the Open Records Act (ORA) to require the District Attorney's office to provide him with a copy of a specific document contained in the District Attorney's files related to that office's criminal prosecution of him. The facts showed that in preparation for a habeas petition, appellant filed an ORA request with the District Attorney's office seeking to review its case files in both the criminal and civil forfeiture actions brought against him. Pursuant to this request, the District Attorney agreed to make the files available for personal inspection by appellant's attorney on July 24, 2013. On December 23, 2013, following his July inspection of the files, appellant's lawyer sent a letter to the "Records Custodian" at the District Attorney's office requesting under the ORA a copy of a specific document relating to the relationship of prospective jurors with the local sheriff. The DA's office sent a written response on the 26th, explaining that because of the staff shortage during the holiday season, the records could not be retrieved by December 27. The Records Custodian Officer also informed counsel that the estimated cost

of retrieving the specific document requested was $56.64, and asked the lawyer "to let me know if this charge is acceptable and if you would like me to begin searching for said document." Defense counsel faxed a written response to the District Attorney's office on December 30, 2013, in which he agreed to pay the estimated charge for the document. On January 3, 2014, an ADA telephoned defense counsel and left a voice mail message explaining that the ADA had reviewed the document at issue and determined that it was "a document prepared by an attorney in preparation for trial. So it is work product." He followed that up with a letter dated Jan. 10, 2014 and a fax sent on Jan. 13.

Appellant then filed suit. Without holding an evidentiary hearing as appellant requested, the court found that the document was in fact work product and that the DA's office timely complied with appellant's ORA request.

Appellant first contended that the trial court erred in finding that the January 3 response from the District Attorney's office to his ORA request satisfied the requirements of O.C.G.A. § 50-18-71. Subsection (d) of this Code section provides in relevant part: "In any instance in which an agency is required to or has decided to withhold all or part of a requested record, the agency shall notify the requester of *the specific legal authority* exempting the requested record or records from disclosure by *Code section, subsection, and paragraph* within a reasonable amount of time not to exceed three business days or in the event the search and retrieval of records is delayed pursuant to this subsection or pursuant to subparagraph (b)(1)(A) of this Code section, then no later than three business days after the records have been retrieved." (Emphasis supplied).

The Court found that the Jan. 3 response was timely. The office's initial response to appellant, in which it informed him that the records were offsite and told him the estimated cost of retrieving the document, was made within 3 days after his request. Appellant's attorney did not respond to the District Attorney's office and agree to pay the estimated fee until December 30, 2013. Presumably, therefore, the records were not retrieved before that date. Even assuming that the records were retrieved on December 30, as the trial court correctly noted, January 3, 2014, was within three business days of December 30. Moreover, the Court noted, the voice mail left by the ADA did set forth the legal basis for the District Attorney's decision to withhold the document, as the message informed appellant that the document constituted attorney work product.

However, the Court found, despite the timeliness of its response, the District Attorney's office did not comply with O.C.G.A. § 50-18-71(d), because it failed to cite the "Code section, subsection, and paragraph" pursuant to which it was denying appellant's request. Therefore, the Court concluded, given its history of strictly construing the requirements imposed by the ORA, the District Attorney's office failure to comply with the letter of the law violated the statute.

Appellant contended that a violation of the statute mandated that he was entitled to the document. The Court disagreed. Instead, the Court found, appellant is entitled to the document only if, following an evidentiary hearing on remand, the trial court determines that the requested document is not subject to the attorney work product privilege. Should the court decide that appellant is entitled to the document, it may then determine whether he is entitled to attorney fees under the statute. Appellant would not, however, be entitled to compensatory or punitive damages.

Finally, the Court addressed the issue of the document and attorney work product. Given the lack of information in the record regarding the document's author or authors, its recipients, and the circumstances under which it was written, the Court found that an evidentiary hearing was required so that the information necessary to a determination of the document's status could be obtained. Once the trial court has obtained the relevant information about who created the document, for whom it was created, and why it was created, the trial court should determine whether the evidence shows that the document constitutes attorney work product. If the document does constitute such work product, the trial court should then determine whether it contains "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." O.C.G.A. § 9-11-26(b)(3). If the document does contain such absolutely privileged material, then the court should also determine whether the entire document is privileged or whether the privileged information could be successfully redacted and the redacted document provided to appellant.