

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 21, 2013

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Search & Seizure

Holmes v. State, S13A0369 (6/17/13)

Appellant was convicted of malice murder, possession of a firearm during the commission of a felony, and violating the Georgia Racketeer Influenced and Corrupt Organizations (“RICO”) Act. The evidence showed that the appellant and the victim knew each other for more than seven years. The victim was a prostitute and appellant was her pimp; appellant had other prostitutes working for him as well, all of whom he kept under control by threats and violence.

Appellant argued that the trial court erred in denying his motion to suppress. The evidence showed that while in an area known for prostitute activity, appellant was seated behind the wheel of a Cadillac and was approached by a city police officer to whom he gave consent to search the vehicle. The search yielded the items that were introduced at trial. Appellant contended that the evidence should have been suppressed because he was stopped by the officer on suspicion of violating a city ordinance, and the State did not allege and prove the ordinance at issue. The Court disagreed. Although the officer stated his belief that appellant and two other persons in the vehicle were violating a city ordinance the officer called “loitering for illegal sexual purposes,” the officer’s testimony was clear that he was engaged in an operation designed to suppress prostitution, and had determined that the activity he observed led him to believe the persons were engaged in a “prostitution deal.” Prostitution is a crime in Georgia under O.C.G.A. § 16-6-9. Thus, no local ordinance needed to be proved to establish that the officer had a reasonable suspicion to stop the vehicle appellant was driving.

Rather, the Court found, the question was whether the investigative stop was proper in that it was justified by some objective manifestation that the person stopped is, or was about to be, engaged in criminal activity. Specific, articulable suspicion must be based on the totality of the circumstances. Using this standard, the trial court found that there was articulable suspicion that the occupants of the car were engaged in criminal activity. Moreover, the trial court also noted that the police officer was authorized to approach the parked Cadillac, ask questions of the occupants, and even ask for consent to search the vehicle, without a requirement that the officer have articulable suspicion. The presence of a marked police car at the scene of the questioning, along with an unmarked car driven by the first officer, did not, under the totality of the circumstances, require a finding that the occupants of the Cadillac did not believe that they were free to leave when the officer asked for consent to search the Cadillac. Accordingly, the Court could not conclude that the trial court erred in denying the motion to suppress.

Withdrawal of Plea

Barnes v. State, S13A0860 (6/17/13)

In 1993, appellant was found guilty of malice murder, two counts of felony murder and armed robbery. His convictions were affirmed but his death sentence was vacated based on a finding that the trial court improperly restricted the scope of mitigating evidence presented at the sentencing phase. After the case was remanded for a new sentencing trial on the malice murder conviction, appellant entered into a sentencing agreement in which he agreed to plead guilty and accept a sentence of life without parole in exchange for the State's withdrawal of its notice of intent to seek the death penalty. Pursuant to this agreement, in November 1999, appellant was sentenced to life without parole for malice murder. Later, the trial court's denial of appellant's pro se motion for out-of-time appeal was affirmed in October 2012. In that appeal, the Court specifically rejected appellant's arguments that his sentence for malice murder was illegal because it was contrary to the prior sentencing agreement and Georgia law. In November 2012, appellant filed an unsuccessful motion for appointment of counsel to assist with the

filing and presentation of a motion to withdraw his guilty plea.

Appellant contended that trial court erred by denying his request for appointment of counsel to withdraw his guilty plea. Specifically, he argued that withdrawing a guilty plea was a critical stage of the prosecution and therefore, he was entitled to appointed counsel. The Court disagreed. In Georgia, the Sixth Amendment right to counsel attaches to the preparation and presentation of a motion to withdraw a guilty plea filed within the same term of court in which a criminal conviction is rendered. However, once the term of court in which a defendant is legally sentenced has expired, the only available means for a defendant to withdraw a guilty plea is by filing a petition for habeas corpus. Here, the Court found, appellant's motion was 14 years late. The Court noted that appellant's sentences were imposed in 1993 and 1999 and contrary to his arguments, the validity of the sentencing agreement and his previous sentence for armed robbery had been upheld by the Court. Thus, appellant's motion to withdraw was untimely and the trial court lacked jurisdiction to hear it. Accordingly, there was no error because a court does not abuse its discretion by denying a motion seeking appointed counsel to assist in the filing of an untimely motion to withdraw over which the court lacks jurisdiction.

Collateral Estoppel; Double Jeopardy

Malloy v. State, S13A0188 (6/17/13)

Appellant, a Georgia gynecologist, was indicted along with his office manager on two counts of Medicaid fraud in violation of O.C.G.A. § 49-4-146.1(b)(2). Specifically, appellant was charged with knowingly and willfully accepting medical assistance payments to which he was not entitled and in amounts greater than he was entitled from the State of Georgia Medicaid program because the services charged for were either "associated with the performance of elective abortions," or had not been performed. Prior to the indictment, the Program Integrity Unit of the Georgia Department of Community Health (DCH) had conducted a review of appellant's clinic looking for violations of the "Hyde Amendment" which prohibits the use of federal funds to pay for elective abortions. Based on its findings, DCH referred appellant's case to the

State's Medicaid Fraud Control Unit for a full investigation, while concurrently instituting a "withhold" on reimbursements to appellant's Medicaid provider number.

Appellant requested an administrative review of the withhold decision by DCH and, in response, received a letter informing him the withhold would remain in effect. Appellant then requested and was granted an administrative hearing before an administrative law judge (ALJ) on the issue of the withhold. The ALJ subsequently issued an initial decision in favor of appellant, reversing DCH's decision to maintain the withhold. The ALJ then determined that the record did not support a conclusion that appellant willfully misrepresented a material fact and thus, could not support a finding of fraud or willful misrepresentation under the Medicaid program. As DCH neither filed a motion for reconsideration or rehearing with respect to the ALJ's decision nor sought to reject or modify it pursuant to the provisions of O.C.G.A. § 50-13-41(e)(1), the ALJ's decision was affirmed by operation of law, and effectively became the decision of DCH.

During the period appellant was challenging the withhold, the State's Medicaid Fraud Control Unit continued to conduct its own investigation into the fraud allegations. Despite DCH's affirmance of the ALJ's decision finding no evidence that appellant had committed fraud or willful misrepresentation under the Medicaid program, the State indicted appellant. In response, appellant filed a special demurrer and motion to strike surplusage, a plea in abatement based on collateral estoppel, and a motion to dismiss his indictment claiming the statute under which he was charged was unconstitutionally vague. Following separate hearings, the trial court denied each of appellant's motions via separate orders. After his application for certificate of immediate review was denied by the trial court, appellant filed a notice of appeal seeking review of the trial court's orders.

As an issue of first impression, the Supreme Court addressed whether a determination made in an administrative proceeding has preclusive effect in a subsequent criminal proceeding pursuant to the doctrine of collateral estoppel. Here, the Court ruled that the trial court's determination that the ALJ's civil ruling had no preclusive effect on the State's subsequent criminal prosecution. The United States Supreme Court has held that the

doctrine of collateral estoppel is incorporated in the Fifth Amendment's guarantee against double jeopardy. Thus, collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Collateral estoppel may affect a later criminal prosecution in two ways: (1) it may operate to bar the introduction of certain facts necessarily established in a prior proceeding; or (2) it may completely bar a subsequent prosecution where one of the facts necessarily determined in the former proceeding is an essential element of the conviction sought. In Georgia, the doctrine of collateral estoppel is recognized in criminal, as well as civil cases. The doctrine of collateral estoppel precludes the re-adjudication of an issue of law or fact already adjudicated between the parties or their privies, where that issue is essential to the judgment. Moreover, the doctrine provides that an issue previously litigated and adjudicated on the merits cannot be re-litigated even as part of a different cause of action.

However, administrative decisions are not generally given collateral estoppel effect by Georgia courts in subsequent judicial proceedings unless certain requirements are met. Specifically, administrative decisions may have a collateral estoppel effect in a subsequent judicial proceedings where: (1) both proceedings involve the same parties or their privies; (2) the issue was actually litigated and determined in the first proceeding; (3) the determination was essential to the judgment in the first proceeding; and (4) the party against whom the doctrine is asserted had a full opportunity to litigate the issue in question. Thus, Georgia courts have repeatedly held that questions of fact ruled upon by an administrative body are thereafter precluded from re-litigation in civil suits by the doctrines of *res judicata* and collateral estoppel. Less clear, however, are rulings with respect to the collateral estoppel effect in subsequent criminal proceedings.

Appellant asserted that the requirements for application of the doctrine of collateral estoppel were met in his case because: (1) DCH is considered the State of Georgia pursuant to O.C.G.A. § 50-21-22, thus both this case and the administrative hearing involved the same parties; (2) the same issues were litigated and decided in the administrative hearing wherein the ALJ found that the evidence

did not support a determination of fraud or willful misrepresentation under the Medicaid program; (3) the ALJ's findings that appellant had not engaged in any fraudulent conduct nor willful misrepresentation were essential to the judgment reversing the withhold on appellant's Medicaid provider number; and (4) the State had a full opportunity to litigate the issues before the ALJ and failed to file for reconsideration or rehearing, thus adopting the ALJ's decision. Although appellant's argument was persuasive for the first three requirements, the Court disagreed as to the fourth requirement.

As a general rule, the weight of authority points to a conclusion that administrative decisions should not be the basis for application of collateral estoppel against the government in criminal proceedings. Noting that nearly every state which has considered this question with respect to driver's license suspension hearings has determined such hearings did not provide the government with a full opportunity to litigate the issues, the Georgia Court of Appeals observed that to hold that administrative decisions have preclusive effect in later criminal proceedings would frustrate the purpose of the summary suspension hearing. Here, the Court found the rationale of this weight of authority persuasive. To allow the decision of an administrative law judge to subvert the constitutional authority of the district attorneys and attorney general of the State would be in derogation of Georgia's Constitution. Moreover, the practical effect of holding that a finding in an administrative hearing could have a determinative effect in a subsequent criminal trial would impose upon the State a virtually insurmountable burden of investigating and preparing for administrative matters in the same manner in which it prepares a criminal prosecution. Here, the only purpose of the administrative hearing was to determine whether the DCH withhold decision on appellant's Medicaid reimbursements would continue during the pendency of the State Medicaid Fraud Control Unit's investigation. To require the State to treat the administrative hearing as an integral part of the criminal trial rather than merely as an administrative device allowing the defendant to halt the temporary suspension of reimbursements to his Medicaid provider number during the course of the investigation would frustrate the purpose of the administrative hearing. The dissimilar jurisdictions of the hearing officer

and the criminal court led the Court to conclude that the State's interest in having guilt or innocence determined is not adequately served in an administrative proceeding. Therefore, the Court held, the State did not have a full opportunity to litigate the issue and concluded that preclusive effect should not be given to the administrative determination.

Brady; Perjury

Wimes v. State, S13A0504 (6/17/13)

Appellant was convicted of felony murder and possession of a firearm during the commission of a crime related to the shooting death of a convenience store clerk. The record showed that a friend of appellant testified that appellant had admitted shooting the victim in an attempted robbery. Appellant argued first that reversal of his convictions was required because the State made an undisclosed deal with the friend, or at least made him undisclosed promises, in exchange for his testimony. The Court stated that in criminal proceedings, the State is under a duty to reveal any agreement, even an informal one, with a witness concerning criminal charges pending against that witness, and a failure to disclose such an agreement constitutes a violation of the due process requirements of *Brady v. Maryland*. As the factual premise for this argument, appellant noted that at the time of trial, the friend was facing charges of armed robbery and aggravated assault in a separate case; that when he initially took the witness stand, he refused to testify until he spoke with his attorney; and that six weeks after the trial, he pled guilty to robbery, rather than armed robbery, along with the aggravated assault. Appellant suggested that an undisclosed agreement between the friend and the State should have been inferred from the circumstances. But, the Court noted, during trial, the friend unequivocally denied that any deal or promises existed with regard to his pending charges. Moreover, at the motion for new trial hearing, both the lead prosecutor and the friend's attorney testified that there was no deal between the State and the friend and that the State did not make him any promises for his testimony. Based on this testimony, the trial court found that there was no agreement between the State and the friend in exchange for his testimony. Because appellant failed to show that this factual find-

ing was clearly erroneous, the enumeration of error was without merit.

Next, appellant argued that his convictions should have been reversed because the State failed to correct the friend's testimony that he was charged with robbery, and not armed robbery. The law provides that the conviction of a crime following a trial in which perjured testimony on a material point knowingly used by the prosecution is an infringement on the accused's Fifth and Fourteenth Amendment rights to due process of law. Here, the Court held, such a situation was not present at appellant's trial. Although the length of the prison time that a witness faces if convicted of pending criminal charges may be relevant to impeaching the witness, to the extent that it indicated the strength of his motivation to testify favorably for the State, the trial court retains wide latitude to impose reasonable limits on cross-examination in this area. And in the friend's situation, armed robbery does carry a maximum sentence of life in prison compared to the maximum of 20 years in prison for robbery and for aggravated assault. However, while the friend's testimony that he was charged with robbery, rather than armed robbery was inaccurate, the Court noted that appellant did not show that it was perjured or material. Moreover, the question was not what charges and sentences the friend actually faced, but what he believed about his predicament, because a witness cannot be influenced by matters about which he was unaware. Here, appellant did not elicit at trial, or in the motion for new trial hearing, any evidence that the friend knew he was facing an armed robbery charge, much less that he knew that the maximum sentence for such a charge was higher than the sentence for robbery, so there was no showing that the armed robbery fact was relevant to the friend's credibility. Thus, the record indicated that the friend testified honestly about the charges he believed he was facing, although his belief was inaccurate. Additionally, the State had no obligation to educate the friend about the armed robbery charge, thereby giving him greater reason to potentially shade his testimony to please the prosecution.

Moreover, at trial, appellant was allowed to cross-examine the friend to the facts that he was facing serious criminal charges for robbery and aggravated assault and to the fact he knew that he could be sentenced to up to 20 years

in prison on each charge. Because the friend had no agreement with the State regarding his charges or sentences, appellant could not elicit objective evidence of the disparity between the sentence the friend would have had as a result of his cooperation and the sentence he faced had he not cooperated, as opposed to the friend's mere hope for, or speculation about, the possibility of a lower sentence. Therefore, the Court held, under the circumstances, appellant was not entitled to have the friend's apparently honest but inaccurate testimony that he faced a robbery charge corrected by the State.

Prior Consistent Statements; Character Evidence

Ryans v. State, S13A0572 (6/17/13)

Appellant was convicted malice murder, felony murder and another related offense. He was indicted with four co-defendants, but tried separately. One of his co-defendants testified against him. Appellant contended that the trial court erred in allowing an officer to testify about statements that the co-defendant made to the officer after the crimes, which were consistent with the co-defendant's trial testimony. The record showed that during cross-examination of the co-defendant, appellant implied that the co-defendant's testimony on direct examination was recently fabricated. Because appellant implied that the co-defendant fabricated portions of his testimony at trial, the Court noted that the State was allowed to rehabilitate the co-defendant's testimony by introducing consistent statements that the co-defendant made to the officer prior to the alleged fabrication. Therefore, the Court held, the prior consistent statements were properly admitted.

Next, appellant contended that an officer impermissibly placed his character at issue when he testified that the co-defendant stated to him that appellant "needed money" to pay his probation officer. At trial, the co-defendant testified that on the day of the shooting, he and the other co-defendants wanted to rob someone because appellant and another co-defendant needed some money. The co-defendant did not testify why appellant needed money, but an officer later testified that the co-defendant stated that appellant needed money to pay his probation officer \$5,000. Appellant objected and moved for a

mistrial on the ground that his character had been placed into issue improperly. The trial court sustained the objection, but denied the motion. The Court stated that evidence that is otherwise relevant and admissible to show a defendant's motive for committing a crime is not rendered inadmissible because it incidentally places his character in issue. Here, evidence that appellant needed to pay \$5,000 to his probation officer as opposed to simply wanting some money was thus relevant to establish his strong motive for committing a robbery. Therefore, the Court held, the trial court did not abuse its discretion in denying his motion for mistrial.

Right of Privacy; Search & Seizure

Armstead v. State, S13A0611 (6/17/13)

Appellant was convicted of murder, aggravated assault, possession of a weapon during the commission of a crime, and unlawful eavesdropping and surveillance. At trial, appellant's defense was that he was not guilty by reason of insanity because he was operating under a delusional compulsion. Specifically, appellant's expert psychologist testified appellant suffered from intermittent psychosis and, at the time he killed the victim, was operating under a delusional compulsion that the victim was a bad person who needed to be eliminated.

Appellant contended the trial court erred when it denied his motion in limine and allowed the Director of Mental Health ("DMH") of the County Jail to testify at trial. The evidence showed that appellant was given a mental health evaluation shortly after his booking into the jail. Because he was "behaving bizarrely" and expressed suicidal ideation, he was housed on a psychiatric ward inside the jail to be further evaluated by the DMH and his staff. Appellant was eventually released into the general prison population, but continued to be monitored and evaluated by the DMH and approximately six psychiatrists during his pretrial incarceration spanning from June 2008 to July 2010. On August 4, 2010, appellant filed notice of his intent to plead not guilty by reason of insanity. Two days later, the State obtained appellant's jail mental health records by subpoena. On August 17, 2010, appellant filed an unsuccessful motion in limine seeking to exclude the DMH's testimony and portions of the testimony of a court-appointed

psychologist that were based on his jail mental health records.

Appellant contended that the DMH's testimony should have been excluded because the State improperly obtained his jail mental health records by subpoena and without appellant's consent in violation of his right to privacy under the Georgia Constitution. The Court stated that Georgia citizens enjoy a state constitutional right of privacy to their medical records. In addition, the Georgia legislature has created statutory privileges prohibiting the disclosure of confidential communications between a patient and his psychiatrist, psychologist, or other similar mental healthcare professional. However, the privacy enjoyed by citizens as to their medical records, including mental health records, is not absolute and any statutory privilege or right of privacy in such records may be waived by the accused if he affirmatively places his mental capacity in issue in a civil or criminal proceeding. Here, it was undisputed that appellant placed his mental capacity in issue when he filed a notice of intent to pursue a defense of not guilty by reason of insanity. This constituted a waiver of any state constitutional right of privacy or statutory privilege in his mental health records. The record showed that the State did not subpoena any of appellant's jailhouse mental health records until after appellant filed his notice, or, alternatively stated, until after appellant waived his privacy rights in the records. Accordingly, the Court held that the State was not prohibited from obtaining the records by subpoena and the trial court did not err when it denied appellant's motion in limine and allowed the DMH to testify at trial.

Appellant also contended that the subpoena violated his Fourth Amendment rights. However, the Court found, appellant could not show a violation of the Fourth Amendment's prohibition against unlawful searches and seizures because pretrial detainees have a substantially diminished expectation of privacy for purposes of the Fourth Amendment. Additionally, the maintenance of institutional security and internal order take precedent over any expectation of privacy concerning an incarcerated individual. Here, the facts showed that appellant did not initiate any treatment from the DMH and staff for mental illness. Rather, upon his arrest, appellant was initially subject to a mental health screen in accordance with jail protocol and, soon thereafter

placed on the jail's psychiatric ward and put on a suicide watch because he was "behaving bizarrely." Thus, the primary purpose of the DMH actions, and the actions of his staff, was to control appellant's behavior for the safety of the prison as opposed to caring for appellant's mental health. Therefore, the Court held because appellant had a diminished expectation of privacy with regard to his jailhouse mental health records, his Fourth Amendment rights were not violated when the State subpoenaed his jail mental health records, and the trial court did not err in denying the motion in limine, or in denying the motion for new trial.

Hearsay; Venue Jury Charge

Bullock v. State, S13A0129 (6/17/13)

Appellant was convicted in Harris County of murder. He contended that the trial court committed reversible error in the admission of hearsay testimony at trial and challenged the instruction to the jury regarding venue. The evidence showed that one evening, appellant and co-defendants kidnapped the victim in order to collect from the victim payment for a drug delivery. At a pull-off on the road on Pine Mountain in Harris County, appellant and his co-defendants beat the victim nearly to death. The next morning, the victim was found unconscious off the side of a road in Meriwether County and died from his injuries several days later.

First, appellant asserted the trial court committed reversible error in admitting hearsay testimony from the victim's wife regarding statements the victim made to her prior to the night in question about being in a fight with appellant. At trial, the victim's wife testified on re-direct examination that, on the Friday night before the Tuesday night on which the victim suffered his fatal injuries, he came home with a torn shirt looking like he had been in a scuffle and the victim told her he had been in a fight with appellant. The testimony was admitted over trial counsel's objection that it was hearsay and that the State was required to establish a sufficient indicia of reliability before the statements of the unavailable declarant could be presented into evidence. The trial court overruled the objections because the State represented it would present other evidence to corroborate the statement and because, according to the trial court, the wife was not testifying to the truthfulness of the victim's

statement, but only to what he stated to her.

The Court found that the wife's testimony about her deceased husband's statement was hearsay and was not admissible pursuant to former O.C.G.A. § 24-3-2 as original evidence. This testimony did not involve a communication with respect to which the fact that such communication was made, and not its truth or falsity, was the point in controversy. In fact, the truthfulness of the victim's statement was the only reason it was relevant and was presented, presumably, as evidence the State believed would demonstrate appellant's motive, intent, and bent of mind in committing the crime for which he was tried. By the same token, the wife's conduct upon hearing the victim's out-of-court statement was not an issue in the trial.

Next, the Court questioned whether the statement was alternatively admissible pursuant to the necessity exception of former O.C.G.A. § 24-3-1(b). Appellant asserted that even if the necessity requirement to establish an exception to hearsay was satisfied in the case, insufficient evidence was presented to establish the particularized guaranties of trustworthiness. Appellant asserted that the spousal relationship between the victim and the witness does not, alone, establish sufficient indicia of reliability and he argued that no evidence was presented regarding the quality of the marriage or whether the victim confided in his wife or was truthful with her. Moreover, appellant argued, the courts have previously found sufficient indicia of reliability based on a familial relationship only where there was evidence of a confidential relationship between the parties. However, the Court stated, "we are not prepared to hold that the spousal relationship in this case was insufficient to establish the required indicia of reliability to admit the wife's testimony." And, the Court noted, the wife's testimony was held as cumulative of other evidence presented concerning the previous fight. Thus, the Court found, even if it was error to have admitted the wife's testimony concerning the victim's out-of-court statement, it was highly probable that the error did not contribute to the verdict.

Appellant also argued that the trial court improperly instructed the jury on the issue of venue. Specifically, that the court charged: "[I]f you find beyond a reasonable doubt that a conspiracy existed, venue may lie here if any conspirator committed any overt act here

in furtherance of the conspiracy.” The State acknowledged this charge was improperly requested by the State and that it was erroneously given to the jury since appellant was not charged with conspiracy but with the actual commission of the crimes charged. Accordingly, the State was required to establish beyond a reasonable doubt that the crimes charged were committed in Harris County. However, the Court found, an erroneous charge does not warrant a reversal unless it was harmful and, in determining harm, the entirety of the jury instructions must be considered.

Here, the evidence showed that the victim was found barely alive as a result of head injuries alongside a road in Meriwether County. Sufficient evidence was submitted to support the conclusion that the cause of the victim’s death was a beating involving blows to the head. While no direct evidence was presented establishing where the beating was committed, sufficient indirect or circumstantial evidence was presented from which the jury could conclude the victim was beaten at the pull-off on the road on Pine Mountain in Harris County. Also, the Court noted, the trial court’s charge correctly instructed the jury that venue would be established if they found beyond a reasonable doubt that the murder was committed in Harris County; that the cause of death was inflicted in Harris County; or, if it could not be determined in what county the crime was committed, “it may be considered to have been committed in [Harris County]” if they found beyond a reasonable doubt that it might have been committed in Harris County. Therefore, the evidence was sufficient for the jury to find beyond a reasonable doubt that venue was established in Harris County under any of these theories of venue. In addition, the trial court properly instructed the jury “that each element of a crime must be proved beyond a reasonable doubt; that venue is an element of any crime; that the State has the burden of proof on each element; and that such a burden never shifts to the defendant. Under the circumstances, the Court held, giving the erroneous instruction did not contribute to the verdict and was harmless.

DUI; Implied Consent

Sauls v. State, S12G1292 (6/17/13)

The Supreme Court of Georgia granted certiorari to consider whether the Court of Ap-

peals erred in reversing the grant of defendant’s motion to suppress evidence that he refused to submit to chemical testing where the police officer failed to convey the entire substance of the implied consent notice required by O.C.G.A. § 40-5-67.1(b)(2). The evidence showed that after the officer administered several field sobriety tests to appellant, he was arrested for DUI (less safe). The officer then read to appellant the implied consent notice, but omitting the sentence: “Your refusal to submit to the required testing may be offered into evidence against you at trial.” Appellant refused to submit to State-administered chemical testing. The trial court granted the motion to suppress. The Court of Appeals reversed, finding that there was no Georgia precedent or statutory provision addressing the effect of the failure to inform a DUI arrestee of the possible use of evidence of the refusal against the arrestee at trial, and that the omission did not constitute a violation of due process. *State v. Sauls*, 315 Ga.App. 98 (2012).

The Court, citing *South Dakota v. Neville*, 459 U.S. 553 (1983), and *Chancellor v. Dozier*, 283 Ga. 259 (2008), agreed with the Court of Appeals that the failure to inform the defendant of the use of the refusal may be used against the defendant at trial did not amount to a due process violation. Indeed, the right to refuse to submit to chemical testing is not a right of constitutional magnitude, but one created by legislative enactment, and thus, due process is not implicated when the statutory implied consent notice does not inform the driver that test results could be used against the driver at trial.

However, the Court stated, the proper analysis does not end with inquiry into the issue of due process. At the time of appellant’s arrest and now, O.C.G.A. § 40-5-67.1(b), provides, in relevant part, that the implied consent notice “shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged.” Thus, the determinative issue was whether the implied consent notice that was actually given to the driver was substantively accurate so as to permit the driver to make an informed decision about whether to consent to testing. If a police officer gives a driver implied consent notice which contains misleading information, then the notice as given impairs the driver’s ability to make an informed decision about whether to submit to testing, and consequently, the

driver’s test results or evidence of the driver’s refusal to submit to testing must be suppressed. Moreover, a material omission may be as potentially misleading as an error of commission. The Court cautioned that not every omission or misstatement in the implied consent notice given to a driver is of such potential significance so that the notice cannot be found to be substantively accurate. But here, the General Assembly determined that drivers should be made aware of the potentially most serious consequence of refusal of testing, i.e., that such evidence can be used against the driver at a subsequent criminal prosecution in which the driver’s liberty may be at stake. Therefore, the Court held, the complete omission of the consequence of the refusal of testing rendered the implied consent notice insufficiently accurate so as to permit the involved driver to make an informed decision about whether to submit to testing.

Self Defense; Jury Charges

Brunson v. State, S13A0273 (6/17/13)

Appellant was convicted of felony murder in connection with the shooting death outside of a night club. Appellant contended that the trial court erred in refusing to give the jury a charge on self-defense. The evidence presented at trial showed that appellant attempted to enter with a bottle of gin and the victim, who worked at the nightclub, denied appellant entry because the club did not allow outside liquor. When told to leave, appellant became belligerent, telling the victim, “Okay, I got you. I’ll be back.” Approximately 15 to 30 minutes later, another employee and a patron were inside the club talking when they heard a commotion outside and someone saying, “no, no, no, man, no, no.” Running out the front door, both saw appellant straddled on a bicycle at the street corner and holding a small black revolver in his hand. The victim rushed at appellant and grabbed him by the arm or wrist, and they fell over the bicycle. They got back up and started tussling and when appellant’s arm got free, he stepped back and shot the victim.

Appellant contended that the trial court should have instructed the jury on the affirmative defense of self-defense. To authorize a jury instruction, there need only be slight evidence supporting the theory of the charge at trial. Under O.C.G.A. § 16-3-21(a), a person “is justified in using force which is intended or

likely to cause death or great bodily harm only if he or she reasonably believes that such force is necessary to prevent death or great bodily injury to himself or herself or a third person.” A person is not justified in using force when he is the aggressor or provokes the use of force against himself. Here, appellant did not testify, his custodial statement was not admitted into evidence, and the only evidence of his version of events was his statement that he “didn’t shoot anybody,” which was inconsistent with a justification defense. As evidence that he acted in self-defense, appellant cited testimony that one witness heard three gunshots as she was attempting to leave the nightclub and that the victim often carried a semi-automatic handgun to work, he was wearing an empty holster when he was shot, and he initiated the fight by rushing at appellant. Yet, the evidence showed that the victim moved towards appellant only because appellant had threatened the victim with a revolver. Additionally, eyewitnesses testified that the victim grabbed the arm of the hand holding the gun and pointed it away from anyone. No witness testified that the victim had a gun, and police found no other weapon, shell casings, or bullet holes at the crime scene. The fact that the victim was a large man was insufficient to support a finding that appellant had a reasonable belief that he had to shoot the victim to avoid death or great bodily injury to himself. Therefore, the Court concluded, the trial court did not err in determining that the evidence did not warrant the giving of a self-defense charge.

No Proof of Insurance; Jury Charges

Fouts v. State, A13A0446 (6/14/13)

Appellant was convicted of vehicular homicide in the first degree, possession of methamphetamine, no proof of insurance, and operating a motor vehicle without the immediate possession of a driver’s license. The evidence showed that appellant was driving a truck along a two lane highway. The conditions of the road were excellent, and it was a clear day. As appellant pulled around a curve, she crossed the center line and drove in the opposite lane of travel. The victim’s vehicle attempted to avoid her, but the vehicles collided head-on. Following the accident, the responding officer subsequently took inventory of the truck

that appellant was driving. The officer located appellant’s identification card and discovered that she had a suspended driver’s license. The officer also ran the tag of the truck and determined that it had been issued to another vehicle. Additionally, the officer did not find proof of insurance inside the truck. The officer subsequently discovered that appellant did not own the vehicle, as the title was registered in another individual’s name.

First, appellant contended that the evidence was insufficient to sustain her conviction of operating a motor vehicle without having proof of insurance in her immediate possession. O.C.G.A. § 40-6-10(a)(1) provides that, “[t]he owner or operator of a motor vehicle... shall keep proof or evidence of required minimum insurance coverage in the vehicle at all times during the operation of the vehicle. *The owner of a motor vehicle shall provide to any operator of such vehicle proof or evidence of required minimum insurance coverage for the purposes of compliance with this subsection.* (Emphasis supplied). Additionally, proof of insurance is not required to be inside the vehicle if the Department of Revenue database shows that the required minimum insurance coverage for the vehicle was in effect.

Here, the responding officer testified that he did not find any proof of insurance inside the truck. Although the responding officer indicated that the truck had tags registered to another vehicle, he was still able to run a title check on the vehicle to determine that appellant did not own the vehicle. The officer did not state that he was unable to verify through the Department of Revenue records whether the truck appellant was driving was insured at the time of the accident. Moreover, the evidence presented established that appellant was not the owner of the vehicle. The Court found that the plain language of O.C.G.A. § 40-6-10(a)(1) required that the *owner* of the truck provide appellant with proof of insurance. Indeed, it is the burden of the owner to comply with O.C.G.A. § 40-6-10(a)(1). Therefore, the evidence was insufficient to establish that appellant violated O.C.G.A. § 40-6-10(a)(1), and the Court reversed her conviction on that count.

Next, appellant contended that the trial court erred in failing to give the jury a charge of criminal negligence. Because appellant neither requested the criminal negligence charge nor objected when the trial court failed to give

it, the Court reviewed the failure to give the charge for plain error. To prove that the failure to give a charge was plain error, the Court must determine whether (1) the omission of the charge was erroneous; (2) the error was obvious; (3) the omission of the charge likely affected the outcome of the proceedings; (4) and the error seriously affected the fairness, integrity or public reputation of judicial proceedings. Moreover, the only requirement regarding jury charges is that the charges, as given, were correct statements of the law and, as a whole, would not mislead a jury of ordinary intelligence.

Here, the Court found, the trial court properly charged the jury on first and second degree vehicular homicide, noting that first degree vehicular homicide required reckless driving, while second degree vehicular homicide did not. The trial court also instructed the jury that reckless driving was committed when a person drives any vehicle in reckless disregard for the safety of persons or property. Moreover, during deliberations, the jury asked for a definition of vehicular homicide in the first and second degree, and the trial court recharged the jury on first and second degree vehicular homicide, as well as reckless driving. The trial court asked the jurors if they understood the difference between first and second degree vehicular homicide, and the foreperson assured the trial court that the jury understood the distinction. Considered as a whole, the trial court’s charge made clear to the jury that it could convict appellant of first degree vehicular homicide only if it found that she drove the vehicle in reckless disregard for the safety of persons or property. Moreover, contrary to appellant’s argument, the distinction between first and second degree vehicular homicide is not whether the driver acted with criminal negligence; rather, it is the severity of the underlying traffic offense that distinguishes the two offenses. Therefore, the Court held, there was no likelihood that the omission of a specific charge on criminal negligence affected the outcome of the trial, and, consequently, no plain error.

Search & Seizure

Walker v. State, A13A0387 (6/12/13)

Appellant was convicted of trafficking cocaine, obstruction of a law enforcement officer, and a violation of Georgia’s window tint

statute. The evidence showed that an officer was contacted by a DEA agent who informed him that appellant's vehicle was suspected in a drug purchase and provided him with a complete description of the car, including its license plate number. In response to this information, the officer stationed his patrol car in the median of the road and began a look-out for appellant's car. As appellant's vehicle passed in front of him, the officer could not see the driver through the car's windows, even though the patrol car's headlights shone directly on the vehicle. Based on his training and experience, the officer concluded that the window tint on appellant's car was darker than the legal limit, and he initiated a traffic stop of the vehicle.

The officer directed appellant to exit his car and explained to him the reason for the traffic stop. According to the officer, appellant was "overly nervous," so he began making small talk with appellant in an effort to get him to relax. During the initial conversation, the officer realized that appellant was wearing a portable radio that only worked in Atlanta, where he had been earlier that day. The officer then returned to his patrol car to retrieve a portable radio that worked in his area. The officer testified that he paused his encounter with appellant and changed radios for personal safety reasons because he was the only officer at the scene. After changing radios, the officer returned to where appellant was standing and began to write out a warning ticket for the window tint violation. As he wrote the warning, the officer continued to question appellant about things that were unrelated to the tint of his car windows, and at one point asked if he could search appellant's car. Appellant declined the request and the officer, who had not yet completed writing the warning, returned to his patrol car to retrieve the equipment he used to measure window tint. As the officer walked back towards his vehicle, appellant entered the vehicle through the front passenger door, retrieved a package from underneath the driver's seat, and fled through the driver's door with the package. The package was later determined to contain cocaine. Evidence of the stop showed that a total of ten minutes elapsed from the time the officer initiated the traffic stop to the time he informed dispatch that appellant had been taken into custody. Moreover, a test was performed on the vehicle's windows following appellant's arrest and the test showed that the window tint was illegal.

Appellant argued that the stop of his car was illegal because the officer was using the alleged window tint violation as a pretext for the traffic stop in the hopes of finding drugs. However, the Court stated, when an officer witnesses a traffic offense, the resulting traffic stop does not violate the Fourth Amendment even if the officer has ulterior motives in initiating the stop. Therefore, when a traffic stop is based on a police officer's observation of a minor traffic violation, a suppression motion arguing that the stop was pretextual must fail. Here, the evidence showed that the officer stopped appellant's car because he believed that the car's window tint violated state law. Because the officer had a valid basis for stopping appellant's car, the stop did not violate the Fourth Amendment.

Next, appellant argued that even if the initial stop of his car was legal, by the time police discovered the cocaine, the stop had evolved into an illegal detention. Moreover, appellant contended, the officer illegally prolonged the traffic stop by requiring him to exit the car; asked him a number of questions that were unrelated to the window tint violation; interrupted the writing of the warning to change his portable radio; and delayed the retrieval of his window tint testing equipment until several minutes into the stop.

The Court stated that generally, an officer who has initiated a valid traffic stop may detain the driver only so long as is necessary to accomplish the purpose of the stop. Thus, a seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. A police officer's request that a driver exit his car to speak with the officer represents a legitimate extension of the constitutionally valid detention resulting from a traffic stop. Additionally, so long as the questioning does not unreasonably prolong the detention, an officer may question the vehicle's driver during the course of the stop, and ask questions unrelated to the purpose of a valid traffic stop. To determine whether such questioning impermissibly prolonged a traffic stop, the dispositive factor is not the nature or subject of the officer's questioning, but whether that questioning took place during the driver's otherwise lawful detention for committing the traffic violations in the officer's presence. Similarly, any other incidental conduct of the

officer, such as retrieving necessary items from his patrol car, will not impermissibly prolong the stop and result in an illegal detention as long as the officer is working to accomplish the purpose of the traffic stop. Here, the officer testified that all of the "delaying" conduct to which appellant complained, occurred during the time he was obtaining the information necessary to complete the warning he planned to issue appellant. In its order denying the motion to suppress, the trial court specifically found the officer's testimony on these issues to be credible, and the Court held it was bound by such finding. Thus, the Court determined, the trial court did not err in finding that the traffic stop was not impermissibly prolonged and appellant was not illegally detained.

Inconsistent Verdict; Ineffective Assistance of Counsel

Muldrow v. State, A13A0107 (6/12/13)

Appellant was convicted on two counts of possession of a firearm during the commission of a crime and VGCSEA. The evidence showed that a person was shot and killed on a residential street in Augusta. Appellant lived in a house adjacent to where the victim's body was found, and he and his live-in girlfriend were questioned during law enforcement's investigation. Appellant consented to various searches of his homes and vehicles. He also directed law enforcement as to where they could locate weapons and drugs. Later in the investigation, appellant became a suspect in the murder due to inconsistencies between his statements and those of his girlfriend. Appellant eventually told law enforcement that he killed the victim, but he later denied that this was true. At trial, the jury convicted appellant of possessing a weapon during the commission of a crime and possessing marijuana and cocaine with the intent to distribute, but he was acquitted on the murder charges.

Appellant contended that the evidence against him was insufficient to sustain one of the convictions for possession of a weapon during the commission of a crime. Specifically, he argued that because he was acquitted of murder, there was no basis for the underlying felony of possession of a weapon during the commission of a crime. However, the Court held, the argument was without merit due to Georgia's rejection of the inconsistent verdict rule.

Next, appellant contended that the State failed to establish venue; that his trial counsel was ineffective in failing to move for a directed verdict as to the failure; and that his counsel was ineffective in stipulating to venue. The Georgia Constitution requires that venue in all criminal cases be laid in the county in which the crime was allegedly committed. Moreover, the State must prove venue beyond a reasonable doubt and the failure to prove venue beyond a reasonable doubt renders the verdict contrary to law and warrants reversal. The State maintained that it presented sufficient evidence of venue. However, the Court noted, it is well established that proving a crime happened on a particular street is not sufficient to establish venue. Additionally, it is insufficient to prove that a crime took place within a city without also proving that the city is entirely within a county. Also, the investigating officers' county of employment does not, in and of itself, constitute sufficient proof of venue to meet the beyond a reasonable doubt standard. Moreover, the Court noted that it could not rely upon material not presented to the jury to find that venue was proper or resort to judicial notice to legitimize a judgment. Thus, the evidence produced by the State failed to establish venue.

Nevertheless, the Court held, venue was established when appellant stipulated to it at the State's request. The record reflected that appellant's counsel moved for and was denied a directed verdict as to the issue of murder at the close of the State's evidence, but did not move for a directed verdict on the issue of a failure to establish venue. During the charge conference, the State expressed reservations over not having asked any witness the specific question of whether the crimes occurred in Richmond County and sought leave to reopen the evidence to ask that question of a witness. In response, appellant's counsel had no objection to the State's request. And as a result of defense counsel's willingness to permit the evidence to be reopened for purposes of establishing venue, the State inquired as to whether appellant would stipulate that venue was indeed proven. Appellant's counsel agreed on his client's behalf, and venue in Richmond County was thereafter stipulated to before the jury.

On the issue of ineffective assistance of counsel, premitting whether the decision not to move for a directed verdict or object to the stipulation fell below the objective

standard of reasonableness, the Court found that appellant could not prove there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, had defense counsel either moved for a directed verdict as to the lack of venue or decided against ultimately stipulating to venue, the trial transcript clearly showed that the State was prepared to reopen the evidence to recall a witness for the purposes of asking whether the events transpired in Richmond County, and the trial court had discretion to permit such a procedure. Therefore, the Court held, appellant's contention was without merit.

Search & Seizure

Davis v. State, A13A0491 (6/12/13)

Appellant was convicted of possession of marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was a passenger during a vehicle stop for failure to maintain lane. After initially suspecting that the driver was under the influence, the officer decided only to issue a warning citation for the initial traffic offense. The officer then ran the driver's license information through dispatch to make sure that the license was valid and that the driver did not have any outstanding warrants. While the officer waited to hear back from dispatch, he spoke with the two passengers in the vehicle to obtain their identification information and run a warrant search on each of them. Appellant, the front passenger, gave his name when asked, but the rear passenger proved to be less cooperative. After the rear passenger refused to give his information, the officer walked around the vehicle, opened the car door to make contact with the passenger, and immediately detected the smell of burnt marijuana. At that moment, the return from dispatch came over the radio. Incident to the detection of the odor of marijuana, the officer performed a search of the car and discovered less than one ounce of raw marijuana, which appellant later admitted belonged to him.

Appellant contended that the officer completed the driver's citation before he began to question the passengers and, therefore, that the questioning and resulting search exceeded the scope of the traffic stop. The Court stated that in the course of a traffic stop, both the driver and any passengers are considered "seized"

within the meaning of the Fourth Amendment, and both the driver and his passengers are entitled to the protections of that amendment. In that regard, an officer's actions at a valid traffic stop must be reasonably related in scope to the circumstances which justified the stop in the first place, and limited in duration to the time reasonably necessary to accomplish the purpose of that stop. Specifically, there are two elements in determining whether a stop has been impermissibly extended: (1) the actions taken must be reasonably related in scope to the initial justification for the stop and (2) they must not unreasonably prolong the detention.

Here, the Court held, the officer's actions were reasonably related to the circumstances of the traffic stop. The officer questioned the passengers in order to obtain their information to run a warrant search, which is exactly the type of minimally intrusive measure that is acceptable during a traffic stop. Moreover, a stop is not unreasonably prolonged if it is limited in duration to the time reasonably necessary to accomplish its purpose. Such reasonable time includes the time to verify the driver's license, insurance, registration, and to complete any paperwork connected with the citation or a written warning. It also includes the time necessary to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. Thus, the dispositive issue was whether the officer smelled the marijuana prior to completing the investigation of the traffic violation. The Court found that there was evidence supporting the trial court's finding that the officer questioned the passengers and detected the odor of marijuana before receiving the results of his warrant query. Therefore, the Court held that (1) the officer did not impermissibly extend appellant's detention, and (2) the officer's questioning of appellant and the other passenger neither constituted an extension of the scope of the detention, nor unreasonably prolonged the search because it occurred within the time necessary to complete the warrant check.

Speedy Trial; Inconsistent Verdict

Jackson v. State A13A0124 (6/12/13)

Appellant was convicted, as a party to a crime, of possession of a firearm during the

commission of a crime, but was found not guilty of the remaining offenses, including possession of a firearm by a convicted felon. The record showed that appellant was suspected in the murder of the victim, but was not indicted because the evidence was weak and circumstantial. While serving time in prison for an unrelated offense, appellant's former cell mate came forward and contacted the District Attorney to offer information concerning the murder for which appellant was suspected. From the time of the murder, almost four years had passed till appellant was indicted. Additionally, the indictment came almost two and a half years after the cell mate came forward to offer incriminating information against appellant.

Appellant contended that the trial court erred in denying his motion to dismiss the prosecution for violation of his constitutional right to a speedy trial. Specifically, he argued the State's four-year delay in the investigation prior to his indictment was presumptively prejudicial because it prevented him from interviewing potential witnesses and a possible co-defendant. The Court stated that the right to a speedy trial under the State and Federal Constitution attaches at the time of arrest or when formal charges are brought, whichever is earlier. However, the Court noted, appellant's constitutional right to a speedy trial attached at the time of his indictment, since he was already incarcerated for an unrelated conviction at the time the State brought the charges against him. Thus, the proper focus of the trial court's analysis was on the six-month, twenty-three-day period between the return of appellant's indictment on April 21, 2010, and the filing of the motion to dismiss on November 12, 2010. Under *Barker v. Wingo*, a trial court is not required to engage in the balancing test unless appellant showed that the delay was presumptively prejudicial. Here, appellant failed to make that showing. Therefore, the trial court did not err in denying his motion to dismiss on constitutional speedy trial grounds.

Appellant also contended that that the jury's verdict of guilty to possession of a firearm during the commission of a crime based on party to a crime and not guilty to possession of a firearm by a convicted felon was improper because it was inconsistent. In 1986, the Georgia Supreme Court abolished the rule against inconsistent verdicts. The thrust of the decision held that appellate courts need not

invalidate a conviction on one offense which is logically inconsistent with an acquittal on another offense because the appellate court cannot know and should not speculate as to why a jury acquitted on one offense and convicted on the other offense. A conviction will stand as long as the evidence will support it. The sole exception to the abolition of the inconsistent verdict rule applies when the appellate record demonstrates as to why the jury found the defendant not guilty of one of the charges. Here, the Court noted that the record did not invoke the exception because it contained nothing that made transparent the jury's reasoning for finding appellant not guilty on the possession of a firearm by a convicted felon. Furthermore, the Court held that there was sufficient evidence to support the guilty verdict on the possession of a firearm during the commission of murder based on party to a crime. Therefore, appellant's conviction for possession of a firearm during the commission of a crime was valid.

Child Hearsay; Indicia of Reliability

In the Interest of M. C., A13A0336 (6/13/13)

Appellant was adjudicated delinquent for acts of aggravated sodomy and child molestation. He contended that the trial court erred in admitting the hearsay statements made by the 11 year old victim to the victim's mother and the forensic interviewer because they lacked sufficient indicia of reliability. The Court noted that because the adjudicatory hearing occurred before January 1, 2013, former O.C.G.A. § 24-3-16 governed the issue of child-hearsay statements. Under the former statute, hearsay statements by underage victims of sexual abuse were admissible in evidence by the testimony of the person or persons to whom made if the child was available to testify in the proceedings and the trial court found that the circumstances of the statement provided sufficient indicia of reliability. Additionally, the trial court has broad discretion in determining the admissibility of child hearsay evidence and the Court will reverse a ruling on the admissibility of statements only if the trial court abused its discretion.

Here, the juvenile court found that after the initial outcries to the victim's grandmother and mother, an appropriate forensic interview was conducted, there was nothing unusual in

the victim's demeanor and he did not appear to be either detached or overly emotional, that there was no evidence of threats or promises of benefit, that there was no evidence of coaching the victim, and that any inconsistencies in the victim's statements did not render them unreliable. Therefore, the Court held, the trial court did not abuse its discretion in admitting the child-hearsay statements.

Preservation of Error

Walker v. State A13A0475 (6/11/13)

Appellant was convicted of aggravated sexual battery and child molestation. He contended that the trial court erred in denying his motion in limine to exclude evidence that the victim contracted a sexually transmitted disease. The evidence showed that appellant tried to stick his penis in the victim's anus, thereby hurting her. Five days later, the victim's mother took the victim to the emergency room to have her examined. A hospital screening test conducted on the victim revealed that she tested positive for chlamydia, a sexually transmitted disease. Appellant was indicted for aggravated sodomy, aggravated child molestation, aggravated sexual battery and child molestation. Prior to trial, the State dead docketed the aggravated child molestation charge, which specifically alleged that appellant caused the victim to contract chlamydia. Appellant then moved in limine to exclude any evidence that the victim had chlamydia. The State argued that evidence of chlamydia was relevant to the aggravated sodomy charge to show that sexual contact occurred. The trial court ruled that it would deal with the evidence "as it goes," but noted that it was "dangerous territory."

The Court stated that any evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant. Moreover, the Court will not disturb the trial court's exercise of its discretion absent evidence of abuse. The Court stated that the trial court acted within its discretion by reserving its ruling on appellant's motion to exclude the evidence. The record showed that during opening and closing statements, the State argued that the victim contracted chlamydia directly from appellant. The State also presented evidence that the victim tested positive for chlamydia. Additionally, the State

presented testimony from a communicable disease expert who opined that a person can test positive for chlamydia within two days after they are exposed to the disease, penetration was not necessary in order to transmit the disease, and a chlamydia infection can occur through either vaginal or anal contact.

Appellant argued that the evidence was highly prejudicial and irrelevant. However, the Court noted, he did not object to the State's opening and closing arguments, and he did not renew his objection to admission of the chlamydia evidence when the examining physician and communicable disease expert testified during his trial. Since the trial court reserved its ruling on the admissibility of the chlamydia evidence and appellant failed to renew his objection, the Court held that he waived his claim regarding the admissibility of this evidence.

Miranda; Photograph

Pressley v. State A13A0450 (6/13/13)

Appellant was found guilty of second degree child cruelty. He argued that the trial court erred when it admitted into evidence his videotaped statement and a picture showing the extent of the victim's permanent injuries. The evidence showed that a police investigator interviewed appellant twice: first at his house, where he denied having harmed the child, and then at the sheriff's office, where he appeared to take a polygraph test. In the course of an hour-long unrecorded conversation with the polygraph examiner, who was a retired police officer and did not wear a badge or carry a gun, appellant incriminated himself. The examiner then escorted appellant into an interview room and left him there for an unspecified period of time. In the interview room, a videotape showed appellant sitting in a chair with the door open and texting on his cell phone. The examiner re-entered the room with the investigator, introduced appellant to the investigator, and closed the door. The examiner said that he wanted to be sure that he, the examiner, had told the investigator what appellant had already told the examiner: that appellant had harmed the child. When appellant agreed to the examiner's brief account, the examiner thanked him for "telling the truth" and left the room. The investigator then left the room briefly, returned, and read appel-

lant his *Miranda* warnings from a preprinted form. He then initialed and signed the form. In the interview that followed, appellant again confessed to harming the child on two different occasions. After the investigator again left appellant alone, he called his mother on his cell phone, repeated his confession, and told her that he was "going to plead guilty."

Before trial, appellant moved to suppress his videotaped statement on the ground that it had been coerced. After a *Jackson-Denno* hearing, the trial court found that he had given the statement freely and voluntarily and after a knowing and intelligent waiver of his rights. The videotape was played for the jury. Neither the State nor appellant called the polygraph examiner to testify at trial.

The Court stated that *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Additionally, the determination of whether one is in custody depends upon the objective circumstances attending the particular interrogation at issue, and not upon the subjective views of either the person being interrogated or the interrogating officer. Thus, the relevant inquiry in determining whether one is in custody is how a reasonable person in the suspect's position would perceive his or her situation. Here, it was undisputed that appellant appeared at the sheriff's office for the purpose of taking a polygraph test, that he made incriminating statements to the polygraph examiner, and that he was escorted into an interview room and remained there, unrestrained and with the door open, for some time. Appellant did not argue or show that his original statement to the examiner was coerced, and the videotape showed that appellant agreed without reservation to the examiner's brief account of their previous and unrecorded conversation, at which point the police investigator read him his *Miranda* warnings and obtained his initials and signature on the form bearing the warnings before beginning the interrogation. Thus, the Court held, the evidence supported a conclusion that a reasonable person would not have perceived appellant to be in custody when he made the videotaped statement agreeing to the examiner's summary of his prior, unrecorded confession. Moreover, because appellant confessed to the attacks again while left alone in the interview room after the *Mirandized* portion of his interview, the Court could not say that

the trial court clearly erred when it admitted all of the videotaped statement.

Next, appellant argued that the trial court erred when it admitted into evidence a photograph of the victim that showed her current medical condition at the time of trial and illustrated her need to be strapped into a chair to remain upright. Appellant asserted that because the photograph went only to the issue of the crime's impact on the victim, its introduction should have been reserved for the penalty phase of the trial. The record showed that the State sought to introduce photographs showing the victim both before and after the incidents at issue. After laying a foundation concerning the photographs' accuracy of representation, the State asked that they be admitted into evidence. Appellant objected to the "after" photograph showing the victim strapped into a chair on the ground that it was irrelevant as taken well after the dates alleged in the indictment. The State responded that the photograph went to the State's burden of showing that the physical harm caused to the child was "excessive," under O.C.G.A. 16-5-70(b), and that the State would later link the photograph to an account of the victim's permanent disabilities, which it did. The trial court then admitted the photograph for that purpose.

Under O.C.G.A. § 16-5-70(b), a person commits second-degree cruelty to children only if that person causes the victim "cruel or excessive physical or mental pain." The determination of what is cruel or excessive physical or mental pain is to be made by the jury. Here, the Court noted, appellant's objection at trial went not to the photographs' accuracy, but rather to their capacity to inflame the jury against him. However, photographs showing the extent of injuries suffered by a victim of an alleged criminal act are relevant at the trial of a defendant, and are admissible despite allegations that they may inflame and prejudice the jury. Thus, the Court held, there was no error in the admission of the photographs, which showed the condition of the victim in the wake of appellant's attack.

Lustful Disposition; Curative Instructions

Easter v. State, A13A0024 (6/12/13)

Appellant was convicted of rape, kidnapping, false imprisonment and impersonating a police officer. The evidence at trial showed

that appellant, while impersonating a police officer, lured the victim from a MARTA station. Appellant then took the victim to various locations during the course of a few hours. During this time, he also raped her on two occasions. Eventually, appellant took her into an Office Max. Appellant alerted her distress to an Office Max employee who in turn called the police. Appellant fled out the back door of the store when he saw the police.

Appellant alleged that the trial court erred when it allowed the State to admit into evidence the contents of the bag appellant left behind when he fled the Office Max store. Specifically, he objected to the admission of condoms and “Massage World” flyers found inside the bag because he alleged that the paraphernalia in his possession did not show a lustful disposition toward the sexual activity for which he was charged. The admission of evidence is a matter which rests largely within the sound discretion of the trial judge, and if the evidence has a tendency to establish a fact in issue, that is sufficient to make it relevant and admissible. Here, the Court found appellant’s argument unavailing, as the items from the bag admitted at trial corroborated the victim’s testimony. The victim testified that appellant used a condom both times he raped her; that he had the black bag with him; that on several occasions, he had told her that he was a pimp; and that he had told her that the “Massage World” flyers were for his prostitution business. Further, when appellant was arrested, he had a business card in his pocket for “Massage World.” Therefore, the Court held that the trial court did not err when it allowed the contents of the bag into evidence.

Next, appellant asserted that the trial court erred when it refused to grant a mistrial or give a curative instruction based upon the testimony of the investigating detective. The detective spoke with the victim shortly after she was rescued at the Office Max. He testified that the victim looked “very tired. Her eyes were red as if she had been crying. She had on her clothing some red or orange substance that could have been pepper spray.” Without citing to any legal authority, appellant contended that the detective’s passing reference to the potential for the presence of pepper spray on the victim’s clothing was cause for a mistrial because there had been no evidence presented at trial that the victim had been sprayed with pepper spray.

The Court noted that the decision to grant a motion for mistrial is within the trial court’s sound discretion, and the trial court’s exercise of that discretion will not be disturbed on appeal unless a mistrial is essential to preserve the defendant’s right to a fair trial. Here, the victim testified that appellant told her that he had pepper spray and that he had threatened to spray her with pepper spray if she tried to run or if she looked at anyone else. However, there was no testimony that he actually used pepper spray on her. Further, immediately after making the statement regarding the potential for pepper spray on the victim’s clothing, the State and the trial court further questioned the detective, and he admitted that he “didn’t know” whether the substance was pepper spray. Therefore, the Court held, the trial court did not abuse its discretion in denying the motion.

Search & Seizure; Similar Transactions

Betancourt v. State, A13A0290 (6/12/13)

Appellants, Betancourt and Hernandez, were convicted of trafficking cocaine. The evidence showed that appellants were driving north on I 85 when an officer noticed that the vehicle they were driving had illegal window tint, had a Massachusetts license plate that was partially obscured, and that the driver was following too closely to the car in front of it. As a result of the traffic violations, the officer initiated a stop of the vehicle. Upon approaching the vehicle, the officer requested the license and registration of the driver, Betancourt, and immediately noticed that his license was issued by Rhode Island. Betancourt, who the officer described as “quite nervous,” indicated that he did not understand English. The officer thereafter called for an interpreter from a nearby police department and attempted to verify both appellants’ identities and Betancourt’s license status several times, but experienced a delay due to the verifying computer system—a fact he confirmed by calling the police department’s radio room. While waiting for the license status, the officer asked Hernandez if he had any weapons or drugs in the vehicle, to which Hernandez responded, “no, my friend, you can go ahead and check.” Approximately 20 minutes later, after the translator arrived, the officer gained Betancourt’s consent to search the vehicle contingent upon Hernandez’s consent. The

officer then recovered a package containing 5.085 kilograms of cocaine found in a hidden compartment in the vehicle. The State also presented a similar transaction that on a prior occasion, both appellants were stopped on an interstate heading southbound in North Carolina with approximately \$125,000.00, which was seized and eventually forfeited.

Although both appellants alleged that the search of the vehicle was unlawful, Betancourt specifically argued that the stop was impermissibly prolonged because the officer’s investigation turned into a drug investigation. The Fourth Amendment’s protection of a person’s right to be secure against unreasonable searches and seizures extends to the investigatory stop of a vehicle, which cannot be unreasonably prolonged beyond the time required to fulfill the purpose of the stop. A reasonable stop, however, generally includes the time necessary to verify the driver’s license, insurance, and registration; to complete any paperwork connected with the citation or a written warning; and to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. And while performing these tasks, the officer may question the occupants and request consent to conduct a search of the vehicle, so long as the officer’s questioning does not impermissibly prolong the otherwise lawful detention. Thus, no constitutional violation occurs so long as the purpose for the detention is legitimate, the duration of the detention remains reasonable, and the investigation remains diligent throughout.

Here, the Court found, it was undisputed that the officer was still in the process of conducting the traffic investigation when appellants consented to the search of the vehicle. Specifically, the officer had not yet received the computer information confirming appellants’ identities and the status of Betancourt’s license—which he was actively pursuing, and which he needed in order to issue the traffic citations. And although a delay in the computer response time would not justify appellants’ detention indefinitely, their consent to search the vehicle was obtained approximately 20 minutes after the initial stop, when the translating officer arrived. Under these circumstances, the Court agreed with the trial court that the detention was not unreasonably prolonged beyond the time required to fulfill the purpose of the traffic stop.

Next, Hernandez asserted that similar transaction evidence admitted at trial was inadmissible. The record showed that the State presented testimony from a North Carolina K9 officer who had searched appellants' vehicle and discovered the money in the hidden compartments, but was unable to call the officer who had initiated the stop because he was on vacation on the date of trial. Because the State was unable to prove the reasons for the stop and that it was lawful, Hernandez contended that evidence of the resulting seizure in that case should have been excluded.

The Court stated that the Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. But, this amendment says nothing about suppressing evidence obtained in violation of the amendment. While the exclusionary rule is a judicially created remedy adopted to protect Fourth Amendment rights by deterring illegal searches and seizures, it is not intended to cure the invasion of the defendant's rights which he has already suffered, and it does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons. Rather, the rule applies only when its remedial objectives are thought most efficaciously served. Courts must weigh the likelihood of deterrence against the costs of withholding information in the truth-seeking process.

The Court found that the benefit of, and conversely, the potential cost of withholding, similar transaction evidence was evident in a case such as this, in which appellants' defense was one of unwavering ignorance as to the presence of the hidden compartment and the narcotics contained therein. Thus, the Court said, "Suffice it to say, this excuse is much harder to believe twice."

Moreover, the Court found, it was unlikely that the application of the exclusionary rule here would deter illegal searches and seizures in Georgia to any appreciable degree. Indeed, the notion of there being any meaningful deterrent effect from applying the exclusionary rule in a Georgia criminal proceeding as a result of evidence unlawfully obtained by law enforcement in a foreign jurisdiction is fanciful at best. To be sure, every law enforcement officer in Georgia is armed with the knowledge that the manner in which he or she conducts a search will affect the prosecution's ability to secure a conviction in a criminal trial, and

this knowledge significantly deters the use of unlawful searches and seizures in our state. But, the Court found, there is no reason to assume that applying the exclusionary rule to evidence stemming from the unlawful acts of a law enforcement officer from a foreign state will do anything to advance the rule's remedial objectives here in Georgia. Thus, because the rule's deterrence benefits are so clearly outweighed by the costs of withholding the similar-transaction evidence from the truth-seeking process, the trial court did not err in admitting the subject evidence in this case.

Search & Seizure; Hot Pursuit

Ahmed v. State, A13A0043 (6/10/13)

Appellant was convicted of VGCSA. The evidence showed that police began an investigation stemming from an incident where appellant had been shot. The investigation led officers back to the scene where witnesses identified a co-defendant as a person who fled after the shooting. Upon learning this information, the officers attempted to locate the co-defendant, who was known to be associated with appellant from a prior investigation. The investigation led officers to an apartment complex where they believed appellant and co-defendant lived together. While observing the complex, officers spotted the co-defendant, who noticed that he was being watched. The co-defendant then ran with officers in pursuit. Not finding the co-defendant, officers then went to the apartment which they believed both appellant and the co-defendant shared and knocked on the door. A woman answered and told the officers that the co-defendant was not in the apartment, but gave them permission to enter the apartment. While conducting the sweep, the officers noticed cocaine residue. They secured the apartment to apply for a search warrant and the eventual search resulted in the seizure of cocaine and marijuana.

Appellant contended that the trial court erred in denying his motion to suppress. He argued that the warrantless entry was illegal as not occasioned in hot pursuit of a suspect, thus fatally tainting the search warrant and the admissibility of the evidence seized as a result. The Court disagreed. While an officer must generally have a search warrant or consent to enter a home to make an arrest, under the exigent circumstance exception to the warrant requirement, an officer can enter a home to

arrest a suspect when he or she has followed the suspect there in hot pursuit. A suspect may not defeat an arrest which has been set in motion in a public place by escaping to a private place. Moreover, essential to hot pursuit is that the defendant be aware that he is being pursued by the police, and, that the officer in hot pursuit reasonably fears the imminent destruction of evidence if entry into the residence is not immediately effected, and where an officer reasonably perceives that a suspect within the dwelling poses a risk of danger to the police or others.

Here, the Court noted, the evidence was sufficient to support the trial court's conclusion that the officers had probable cause to arrest the co-defendant; that they were in hot pursuit when he saw the officers; and that the officers reasonably believed that he fled to his apartment to escape them and avoid arrest. Thus, the trial court correctly found that exigent circumstances supported the officers' warrantless entry of the apartment and no taint attached to the search warrant and the seizure of the additional evidence which followed.

Child Hearsay; Witness Bias

Walker v. State, A13A0185 (6/11/13)

Appellant was convicted of multiple counts of rape, aggravated child molestation, and aggravated sodomy. The victims were his eight and nine-year-old daughters. He contended that the introduction of his older daughter's out-of-court statements pursuant to O.C.G.A. 24-3-16 violated his constitutional confrontation rights and that the state improperly impeached his expert witness during cross-examination.

The Court noted that in *Hatley v. State*, 290 Ga. 480, 483-484 (2012), the Georgia Supreme Court overruled a long line of cases that construed the Child Hearsay Statute to require the trial court (1) at the request of either party, to cause a child molestation victim to take the stand before the State rested; and (2) to inform the jury that the trial court called the child as a witness. In so holding, the Court ruled that such a procedure did not pass constitutional muster because it failed to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant. Instead, the *Hatley* Court ruled, to survive constitutional muster, O.C.G.A. § 24-3-16 must be construed to require that a child

whose statements are at issue not merely be available to testify, but actually testify at trial, unless the defendant forfeited or waived such testimony, and required pretrial notice of the State's intent to use child hearsay statements to allow the defendant to exercise that right. Moreover, the *Hatley* Court directed, trial courts must take reasonable steps to ascertain, and put on the record, whether the defendant waived his right to confront the child witness.

Here, the record showed, the older victim did not testify. The State decided not to call her "due to [her] emotional state," but informed the court that she was available, should the court decide to call her. Defense counsel told the court that he did "not require this," was concerned about her emotional state, and did "not request that she be brought in." Regardless, in "an abundance of caution," the trial court excused the jury and said that he would have the child brought into the courtroom so that appellant could question her regarding her emotional state. When he was done questioning the child, defense counsel conferred with appellant and then informed the court that, "[t]he defense does not request the court call her as the court's witness. We do not intend to call her as our witness. I do appreciate the fact that I had a chance to see her and observe this. We are satisfied that she has an enormous reluctance to testify. She has so said. She does appear to be rather tense at the moment."

Thus, the Court found, not only did appellant fail to object on Sixth Amendment grounds at trial, but he affirmatively declined the opportunity to question the victim before the jury. Therefore, he waived his right to confront the child witness. Nevertheless, appellant argued, his waiver was induced by the law prior to *Hatley*, which provided that the admission of child hearsay did not violate his right to confront witnesses, and thus, the reason he did not raise a Confrontation Clause objection. The Court disagreed. Under the circumstances, the Court held, it was clear that appellant waived his right to confront the child witness.

Next, appellant contended that the trial court erred in denying his motion for mistrial because the State improperly impeached his expert witness during cross-examination. The record showed that appellant presented a psychologist as an expert to give an opinion about the efficacy of the procedures used to interview the victims. On cross-examination, the

prosecutor attempted to show that the expert witness was antagonistic to state government and biased against the state's prosecution of cases like appellant's. He asked the witness, "You seem to have a lot of issues with the state, is that right?" and stated, "Let's talk about your bias." He then asked the expert whether he had been charged criminally for failure to report sexual abuse of a child. The witness responded that the charge had been dead-docketed. The prosecutor then asked whether the witness had been required to complete a diversion program, and the witness said he had, and he had not been convicted of anything.

Appellant argued that the questions about the charge for failing to report child sexual abuse amounted to improper impeachment because former O.C.G.A. § 24-9-84.1 only allowed impeachment with a criminal conviction. However, the Court found, the prosecutor's cross-examination of this witness did not constitute impeachment of the witness by proof of a criminal conviction; rather, the prosecutor was cross-examining the witness concerning the criminal charge in order to reveal possible biases, prejudices, or ulterior motives of the witness as they might relate to his testimony on direct examination. Thus, the prosecutor could question the expert about the charge even though it did not result in an adjudication of guilt. Therefore, the Court held, the trial court did not abuse its discretion in allowing this cross-examination or in denying the motion for mistrial.

Rule of Sequestration; Judicial Commentary

Booker v. State, A13A0812 (6/13/13)

Appellant was convicted of burglary, armed robbery, two counts of aggravated assault, kidnapping, and two counts of possession of a firearm during the commission of a crime, all stemming from a home invasion. Appellant contended that the trial court erred by sua sponte instructing the jury on the rule of sequestration. The record showed that after counsel had invoked the rule of sequestration and before the State's first witness was sworn and began to testify, the trial court explained to the jury, "[l]adies and gentlemen, the Rule of Sequestration has been invoked and what that rule requires is that the witnesses remain outside the presence of the courtroom while the testimony is given. It also requires that once

a witness testif[ies] they not go out and tell the other witnesses what was said so there won't be any comparison of the stories. I'm requiring . . . both counsel to make sure your witnesses stay outside the courtroom until they are called."

Under O.C.G.A. § 17-8-57, "[i]t is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused." The Court noted that even if defense counsel failed to raise an objection, if the trial court violates this statutory provision, the court is required to order a new trial, and there can be no finding of harmless error. However, a ruling by the trial court on a point of law is not an expression of opinion, and neither are remarks by the trial court explaining the court's rulings.

Here, the Court held, the trial court's explanation of the rule of sequestration clearly was not a prohibited expression of opinion. Moreover, the explanation was not a comment on the credibility of any of the witnesses and did not suggest that any given witness had violated the rule. Rather, it was a neutral explanation of the rule of sequestration that did not favor either party, and, in this respect, the trial court specifically stated that the court was "requiring . . . both counsel to make sure that your witnesses stay outside the courtroom until they are called." Thus, O.C.G.A. § 17-8-57 was not violated in this case.