

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 15, 2011

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THIS WEEK:

- **Statements; *Miranda***
- **Mistake of Fact; Jury Charges**
- **Hearsay; Prior Consistent Statements**
- **Conflict of Interest; Ineffective Assistance of Counsel**
- **Mistrial; Identification**
- **Search & Seizure**
- **Speedy Trial; *Barker v. Wingo***
- **Jury Charges; Voir Dire**
- **Lesser Included Offenses; Jury Charges**
- **Polygraph; Statements**
- **DUI; *Miranda***
- **Judicial Misconduct**

Statements; Miranda

Almodovar v. State, S11A0153 (7/5/2011)

Appellant challenged his convictions for murder and other crimes in connection with two shooting deaths. Appellant first argued that the trial court erred in admitting his statements to the arresting officer because the State failed to show that they were freely and voluntarily made. However, the Court found that appellant explicitly told the officer several times that he wanted to clear his name, and the officer had read appellant his *Miranda* rights. Further, appellant did not appear to be under the influence of drugs or alcohol and the officers did not make any threats, promises, or offers of benefit to him. Appellant never asked to speak with counsel or expressed a desire to

stop talking. The Court held that under these circumstances, the trial court did not err in concluding that appellant's statements were made freely and voluntarily.

Appellant also argued that his statements to the officers should have been excluded because they derived from an illegal arrest. However, premitting whether appellant waived this claim by not raising it in the trial court, the Court found that appellant was lawfully arrested pursuant to a warrant. Accordingly, the Court affirmed appellant's convictions.

Mistake of Fact; Jury Charges

Price v. State, S10G1354 (7/5/2011)

In *Price v. State*, 303 Ga. App. 589 (2010), the Court of Appeals upheld appellant's convictions for burglary and criminal trespass, and further held that the trial court did not err in failing to charge the jury on appellant's sole defense, mistake of fact, with respect to the crime of burglary. The Supreme Court granted review.

The Court first noted that the trial court must charge the jury on the defendant's sole defense, even without a written request, if there is some evidence to support the charge. In this case, appellant repeatedly and consistently testified that he saw "for sale" and "open house" signs that led him to believe that he was authorized to enter the house. He also testified that he entered the house through an open door and spoke with his mother on the phone about buying the house while he was examining the inside of the house. Two other witnesses testified about the "for sale" and "open house" signs as well. The Court stated that because appellant presented evidence that he acted under a misapprehension of fact

which, if true, would have justified his entry into the house and would have authorized the jury to acquit him of burglary, the trial court was obligated to charge the jury on mistake of fact unless the charge given otherwise fairly presented this issue to the jury.

The Court also held that the Court of Appeals had erred in finding that appellant could not present a mistake of fact defense because he could not deny committing the act while at the same time arguing that he committed the act by mistake. The Court explained that because appellant's defense was based on the idea that he was authorized to enter the house as an interested buyer, and because this authorization alone would have eliminated one of the essential elements of burglary that the State was required to prove, the only "act" that was relevant to appellant's mistake of fact defense was the act of entering the victim's home. The Court found that because appellant admitted to the relevant act that was directly connected to his mistake of fact defense, the Court of Appeals was incorrect in concluding that appellant could not avail himself of that defense.

Lastly, the Court held that the trial court's error may not have been harmless because the charge that was given "failed to fairly present [appellant's mistake of fact] defense to the jury." Accordingly, the Court reversed the judgment of the Court of Appeals.

Hearsay; Prior Consistent Statements

Johnson v. State, S11A0303 (7/5/2011)

Appellant argued that the trial court erred in overruling his hearsay objection. At trial, the State had asked the police officer who responded to the crime scene what the victim's neighbor had said to the officer. Appellant interrupted with a hearsay objection. The State argued that the objection should be overruled because the neighbor was "here and available to testify, and he's available for cross-examination." The court overruled the objection. The officer then continued his testimony.

The State defended the court's ruling on the grounds that: (1) the neighbor later testified at trial and was subject to cross-examination; (2) the Court held in *Cuzzort v. State, 254 Ga. 745 (1985)*, that a witness's prior consistent statements made out of court are admissible as substantive evidence where the witness's verac-

ity is at issue; and (3) the neighbor's veracity was at issue in this case because the substance of what he told the officer was "part of the determination that the fact finder had to make."

However, the Court explained that unless a witness's veracity has *affirmatively* been placed in issue, the witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury. The Court further explained that a witness's veracity is placed in issue only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross examination. The Court emphasized that *Woodard v. State, 269 Ga. 317, 320 (1998)* squarely rejected the State's logic, holding that "*Cuzzort* has been improperly construed to permit the admission *per se* of a witness's prior consistent statement—regardless of whether the witness's veracity actually has been called into question during cross-examination."

The Court found that in this case, neither party had called the witness's veracity into question. Therefore, the officer's testimony about what the witness said to him was not a prior consistent statement but plain hearsay. Accordingly, the Court found that the trial court erred in overruling appellant's objection. However, the Court also found that in this case the witness's hearsay testimony had no real effect on appellant's convictions, so the error was harmless.

Conflict of Interest; Ineffective Assistance of Counsel

State v. Abernathy, S11A0314; S11X0315 (7/5/2011)

Abernathy was convicted of murder and sentenced to life imprisonment. The trial court granted Abernathy's motion for new trial on the sole ground that Abernathy's public defender had rendered ineffective assistance due to a conflict of interest. The State obtained a certificate of immediate review and filed an application for interlocutory appeal challenging the award of a new trial, which the Court granted. Abernathy then filed a cross-appeal, contesting the trial court's rejection of his other alleged grounds for reversal.

The trial court had analogized public defenders within a single circuit office to lawyers

within a single law firm, and found that Abernathy's public defender was laboring under an actual conflict of interest from which prejudice must be presumed, and that Abernathy had thus received ineffective assistance of counsel. But based on its review of the record, the Court found that the alleged conflict of interest consisted of the fact that Abernathy's public defender worked in the same circuit as the public defender who represented Abernathy's romantic partner in the same matter. However, the record showed that the two defenders only worked in the same circuit for a few weeks and did not represent their clients at the same time. Moreover, they never discussed the case and Abernathy's defender was unaware that his office had represented Abernathy's partner.

Under these circumstances, the Court rejected the trial court's determination that Abernathy need not show actual harm to establish a violation of his Sixth Amendment rights. Rather, "a defendant . . . asserting ineffective assistance of counsel based on an actual conflict of interest [must] demonstrate that the conflict of interest existed and that it 'significantly affected counsel's performance.'" *Edwards v. Lewis, 283 Ga. 345, 349 (2008)*. Therefore, the Court held that the trial court erred in granting a new trial.

The Court did not find any merit to the arguments Abernathy made in his cross-appeal. Accordingly, the Court reversed the trial court's grant of a new trial, affirmed its denial of Abernathy's motion on the other grounds, and remanded for further proceedings.

Mistrial; Identification

Gonzalez v. State, A11A0246 (6/30/2011)

Appellant was convicted of rape, aggravated child molestation, aggravated sexual battery, and child molestation involving his stepdaughter. He argued that the trial court erred by failing to grant a mistrial sua sponte in response to an incident involving a juror. The jury was shown a video recording of appellant's police interrogation, which was translated from Spanish to English. The juror, who was fluent in Spanish, approached the bailiff during a break and stated that the translation differed from her understanding of the Spanish. The trial court then instructed her to disregard her own interpretation and to rely only on the official English translation provided to the jury, which the juror agreed to do.

Appellant argued that the juror's conversation with the bailiff was in front of the other jurors, and she might have discussed the translation with them. However, the Court held that the trial court was required to act sua sponte only if there was a manifest necessity for a mistrial. In this case, the Court found nothing in the record that supported appellant's assertion; nor was there any evidence that the jury was in any way tainted by the juror's independent interpretation of the interview.

Appellant also argued that the trial court erred in denying his motion for directed verdict at the close of the State's case on the ground that no witness had pointed to him in the courtroom as being the perpetrator of the crimes and that the trial court erred by allowing the State to then reopen its case. The Court noted that although no one had pointed to the defendant and identified him as the perpetrator, the record showed that the victim's mother testified on direct that she recognized the defendant and that she had been married to him. She also testified about the night she found the victim in bed on top of her "husband," which led to the charges in this case. The State argued that this was sufficient identification of the defendant as the perpetrator, but nevertheless moved to reopen the evidence to present additional evidence on identity. The trial court allowed the State to reopen the evidence for the limited purpose of identification, noting that all the witnesses were present and there would be no delay. The State recalled the victim, her sister and her mother, who each identified appellant as the man involved in the incidents to which they had previously testified. Considering the totality of the circumstances, the Court found that the trial court acted well within its discretion in allowing the State to reopen its case. Accordingly, the Court affirmed appellant's convictions.

Search & Seizure

Dominguez v. State, A11A0328 (6/30/2011)

Appellant was convicted of possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress. The evidence showed that two county deputies stopped a car driven by appellant after they observed appellant fail to properly signal a turn. The deputies were following appellant because they had received a tip that a Hispanic man who drove the same kind of car

was a drug dealer. At the end of the traffic stop, the deputies asked appellant for permission to search his car. When he refused, the deputies called for a canine unit to come to the scene and detained appellant until the canine unit arrived approximately ten minutes later. At that time, the drug dog sniffed the exterior of the car and alerted the officers to the presence of drugs. The deputies then searched the car and found approximately 3 grams of methamphetamine in the steering column.

The Court first noted that when an officer stops a driver to investigate a traffic violation, the officer cannot continue to detain the driver after the investigation of the traffic violation is complete unless the officer has a particularized reason to suspect that the person is engaged in some other criminal activity. The State contends that the deputies had reasonable cause to suspect that appellant was engaged in drug activity based on what the tipster had told the deputies and the fact that appellant appeared to be nervous at the beginning of the traffic stop. However, the Court found that the deputies could not verify the identity or the credibility of the tipster, and appellant's nervousness was insufficient by itself to give the deputies a reasonable suspicion to perform an investigative stop. Moreover, the deputies did not request the canine unit until after the traffic stop was complete and their search of appellant's person yielded nothing of interest. Therefore, the Court held that the deputies' detention of appellant was unlawful and the trial court erred by refusing to suppress the drug evidence found during the search of the car. Accordingly, the Court reversed the judgment.

Speedy Trial; Barker v. Wingo

State v. Shirley, A11A0500 (6/30/2011)

Finding a violation of his constitutional right to a speedy trial, the trial court granted Shirley's motion to dismiss the indictment. The State argued on appeal that the trial court abused its discretion in applying the balancing test formulated by the U.S. Supreme Court in *Barker v. Wingo*.

The State did not challenge the trial court's finding that the length of the delay was uncommonly long and should be weighed heavily against it. Rather, the State argued that there was no evidence that it had purposefully delayed the prosecution to gain a tactical

advantage over the defense, as the trial court had found.

The Court noted that the State had finished its investigation by the time Shirley was indicted in October 2006, and that the State had intentionally delayed the prosecution for two years after that by refusing to comply with the trial judge's order to reveal information about the confidential informant who helped build the case against Shirley. The State maintained that it was not attempting to gain a tactical advantage over the defense, but was merely concerned for the CI's safety, and also pointed out that the judge did not impose a deadline on his order. However, the Court emphasized that because there was evidence in the record to support the trial court's finding that the State had intentionally delayed the prosecution, it could not find that the trial court had abused its discretion even if it would not have made the same ruling.

The Court also found that the trial court was correct in finding that Shirley was not required to show actual prejudice because he had demonstrated a presumption of prejudice that the State failed to rebut. Because the record supported the trial court's findings that the length of the delay was uncommonly long, that the State was to blame for the delay, that Shirley had timely asserted his right to a speedy trial, and that Shirley had established a presumption of prejudice, the Court affirmed the trial court's dismissal of the indictment.

Jury Charges; Voir Dire

White v. State, A11A0690 (6/30/2011)

Appellant was convicted of possession of cocaine with intent to distribute and felony obstruction of a law enforcement officer. He argued, among other things, that the trial court erred when it denied his request to charge the jury on a lesser included offense and that it erred in refusing to strike a juror for cause. The Court first looked to the contention that the trial court erred when it denied a request to charge the jury on misdemeanor obstruction as a lesser included offense. It concluded that such a charge was not warranted by the evidence. While misdemeanor obstruction is a lesser included offense of felony obstruction, where the evidence shows completion of the greater offense, it is not necessary for the court to charge on a lesser included offense. The Court found that the evidence plainly

showed the completion of the greater offense, obstruction that involves “offering or doing violence” to an officer. Therefore, it could not accept the contention that “there is a question of fact as to whether kicking and biting constituted violence for the purposes of felony obstruction.” The Court noted that it had said before that kicking at an officer amounts to felony obstruction.

Next the Court examined appellant’s assertion that the trial court erred when it refused to strike a juror for cause because the daughter-in-law of this juror served on the grand jury that indicted appellant. Appellant, without citing any authority, claimed the juror was ineligible to serve on the jury due to her relationship to the grand juror. The Court disagreed. It found that there is no rule that a trial juror cannot be related to a grand juror in the same case. The Court said that while appellant had the opportunity to explore whether the juror had discussed the case with her daughter-in-law and thereby had formed any opinions about the case, he pointed it to no evidence in the record showing any bias on the part of the juror. In fact, the juror testified that she was not even aware of the fact that her daughter-in-law had been on a grand jury until she saw something with her name on it —presumably the indictment itself—in the jury room. Because the juror had further testified that she could be fair and impartial in this case, the Court held that the trial court did not abuse its discretion in refusing to strike the juror for cause. The trial court’s judgment was affirmed.

Lesser Included Offenses; Jury Charges

Smith v. State, A11A1082 (6/30/2011)

A jury found appellant guilty of aggravated sexual battery, criminal attempt to commit child molestation, and two counts of child molestation. Appellant argued, among other things, that the trial court erred in failing to charge the jury on sexual battery as a lesser included offense of aggravated sexual battery and child molestation. The Court first examined appellant’s argument that the trial court should have charged on sexual battery as a lesser included offense of aggravated sexual battery. The Court noted that a conviction for aggravated sexual battery requires proof of penetration, while a sexual battery conviction

does not, comparing OCGA § 16-6-22.2 (defining aggravated sexual battery) with OCGA § 16-6-22.1 (defining sexual battery). The State alleged that appellant committed aggravated sexual battery by digitally penetrating the victim. According to appellant, however, at least some evidence showed that he touched the victim’s vagina without penetration, entitling him to a jury instruction on sexual battery.

The Court found that a trial court must charge a jury on a lesser included offense if any evidence (even slight evidence) supports the charge. However, it noted that a charge request, under the definition in *Anderson v. State*, 264 Ga. App. 362, 365 (3) (2003), “must be apt, a correct statement of law, and precisely adjusted to some theory in the case.” If the evidence shows either the completed offense as indicted or no offense at all, the trial court should not instruct the jury on a lesser grade of the crime. The Court found that the trial evidence did not conflict with the victim’s detailed, recorded statement regarding penetration. Under these circumstances, the evidence showed either the completed offense as charged or no offense. The Court held that the trial court, therefore, properly refused to give the requested charge.

Next the Court examined appellant’s other claim, that the trial court should have also instructed the jury on sexual battery as a lesser included offense of child molestation. The indictment charged appellant with two counts of molestation based on his fondling of the victim’s breasts. According to appellant, the State failed to present direct evidence of the intent to arouse or satisfy sexual desires necessary to support a molestation conviction under OCGA § 16-6-4 (a) (1). He argued, therefore, that the jury could have found him guilty of the lesser included offense of sexual battery, a crime that does not have the same intent requirement. The Court found that appellant was correct that if the evidence showed a touching without the intent necessary for child molestation, he would have been entitled to a jury instruction on sexual battery as a lesser included offense. However, the Court held that the evidence supported a finding of the requisite intent here. It noted that appellant had pointed to no evidence demonstrating that a touch occurred without the necessary intent, and he did not defend the case on the ground that he touched the victim without intent. He

pursued the “all or nothing” defense that the victim made up her entire story, and since the circumstances demonstrated either the indicted crime or no crime at all, it found no support for a charge of sexual battery as a lesser included offense of child molestation.

Polygraph; Statements

Beaudoin v. State, A11A0976 (6/29/2011)

Appellant was convicted of statutory rape as a lesser included offense of rape, aggravated sexual battery, aggravated child molestation, and two counts of child molestation. Two of his contentions were that the court erred in the admission of his statements to police and erred in the admission of testimony from a polygraph examiner.

The Court first disagreed with appellant’s contention that his statements were inadmissible. The record showed that appellant voluntarily went to the police station for an interview, that appellant was not in custody during the interview and was free to leave at any time, that he was not threatened or promised anything, that he was allowed to leave the station after the interview, and he was informed of his rights under *Miranda*. The Court held that under such circumstances, the evidence showed that the statement was made freely and therefore the trial court did not err in admitting it.

In response to appellant’s argument that the trial court erred in allowing the polygraph examiner’s testimony that appellant was deceptive in his answer as to whether he had sex with the victim, the Court quoted *Lockett v. State*, 258 Ga. App. 178 (2002) which said that “... upon an express stipulation of the parties that they shall be admissible, the results of a polygraph test shall be admissible as evidence for the jury to attach to them whatever probative value they may find them to have. And, such stipulation is binding on both parties.” The Court held that because appellant requested the polygraph examination and expressly stipulated to the admissibility of its results, the trial court did not err in allowing the examiner’s testimony as to those results. The Court also found that appellant’s further challenge to the validity of the stipulation on the ground that he did not have an attorney with him was without merit because it is not required that the accused have counsel present or act only upon the advice of counsel in order to render a stipulation to the admissibility of

the results of a polygraph examination valid and binding upon the accused. The Court further found that the evidence showed that appellant knew and understood his rights before he waived counsel and stipulated to the admissibility of the polygraph results, and therefore the trial court's determination that the stipulation was valid was not clearly erroneous and was affirmed.

DUI; Miranda

Hale v. State, A11A0327 (6/30/2011)

Appellant was convicted by a jury on one count of passing in a no-passing zone and one count of driving under the influence (less safe). He argued that the trial court erred by denying his motion to suppress the results of an alco-sensor test and informing the jury as to the existence of excluded evidence during preliminary instructions. The evidence showed that following the administration of the three field sobriety tests when an officer stopped appellant, the officer inquired as to whether anyone was available to retrieve appellant's motorcycle. In response, appellant asked if he was going to jail. When the officer replied in the affirmative, appellant immediately said, "Give me a blood test. Give me a breath test." The officer then explained that while he could administer the portable roadside alco-sensor test, it was not considered a state-administered test. The alco-sensor test was administered and returned a positive result.

Appellant first contended that the trial court erred in denying his motion to suppress the results of the portable alco-sensor test conducted prior to receiving his *Miranda* warnings. The trial court denied appellant's motion to suppress, concluding that he was not in custody at the time the test was given. The Court disagreed with the trial court's reasoning for denying appellant's motion to suppress, but it nevertheless concluded that the court did not err in admitting the results of the test. The Court found that appellant was in custody for purposes of *Miranda*, but the portable alco-sensor test results were admissible because the portable test was administered in response to a demand from appellant, *not* the officer, thus making the situation clearly distinguishable from other custodial settings triggering the protections of *Miranda*.

Appellant also contended that the trial court erred in mentioning the excluded results

of the Intoxilyzer 5000 breath test administered pursuant to the Georgia Implied Consent Statute when it instructed the jury on the differences between Georgia's two types of DUI. The record showed that after appellant was formally arrested, the officer read appellant his rights under the Georgia Implied Consent Statute, and appellant ultimately consented to the use of the Intoxilyzer 5000 breath test, which was administered upon his arrival at the police station. But both before and after this test was administered, appellant requested an independent blood test, which the State never allowed appellant to obtain. And based on this violation of appellant's right to seek an independent test, the trial court ordered that the results of the Intoxilyzer 5000 breath test be excluded. In the trial court's preliminary instruction to the jury regarding Georgia's two forms of DUI and the differences between DUI per se and DUI less-safe, it mentioned the excluded breath test. The Court found that this preliminary instruction was both unnecessary and improper, but that the trial court's error was harmless. Therefore, the Court affirmed the trial court's judgment.

Judicial Misconduct

In the Interest of D. D., A11A0646 (6/29/2011)

Appellant was adjudicated delinquent in juvenile court for committing sexual battery against a classmate at his middle school. He appealed his adjudication, claiming that the juvenile court improperly engaged in ex parte communications with a State witness prior to his adjudicatory hearing, requiring reversal. The communication in question was an e-mail sent to the juvenile court judge by the middle school resource officer, who testified at a detention hearing the day before appellant's adjudicatory hearing. In the e-mail, the officer thanked the judge for his ruling and referenced an unspecified communication between the judge and the school board.

The Court held that this communication merited further investigation because the school resource officer was the complainant in both charges filed against appellant, the evidence against appellant was entirely based on a credibility determination by the judge, and the e-mail suggested that the judge both directly and indirectly communicated with representatives from the school that appellant was ultimately ordered to leave. The Court

also noted that ex parte communications are presumptively harmful error.

Therefore, the Court remanded the case to the juvenile court for a determination of when appellant first learned of this e-mail communication and whether a waiver had occurred; and whether the State could rebut the presumption of error through affidavits, sworn testimony, or other evidence. The Court held that if on remand the juvenile court concluded that appellant had not waived this issue, and the State failed to rebut the presumption of harm, appellant's adjudication of delinquency would have to be vacated and appellant readjudicated before a different judge. Accordingly, the Court affirmed appellant's adjudication on condition and remanded the case to the juvenile court.