Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 29, 2016

THIS WEEK:

Tattoos; Demonstrative Evidence

Smith v. State, S16A0398 (7/5/16)

Appellant was convicted of felony murder in connection with the death of his two-month-old daughter. He first contended that the trial court erred by allowing the State to cross-examine him about tattoos on his arm. The record showed that in an effort to dispute that he had the right-hand strength needed to inflict the injuries the victim suffered in the way the medical examiner said the injuries had occurred, appellant testified on direct examination that he is naturally right-handed but that his dominant hand is now his left hand because he broke his right wrist previously. Defense counsel then received the trial court's permission to have appellant show his right hand, showing the scars from that injury, to the jury. On cross-examination, the prosecutor said, "You showed the Jury your arm. Show me," and appellant complied. The prosecutor then asked appellant, "What are those tattoos on your arm?" Over objection, appellant pointed out one tattoo that he said was the victim's mother's nickname and another that he said was the letter "C," for "Christian." The prosecutor then inquired about tattoos on appellant's hand, and he testified that they said "Jim"(a homonym for "GEM") and "Hood." The prosecutor asked what "Jim Hood" means, and appellant said, "Gentlemen everywhere are maintained." The prosecutor asked, "Maintaining what?" and appellant answered, "You're maintaining self-control, all that."

The Court stated that whether appellant was physically able to inflict the victim's injuries was certainly a relevant issue in this case. Thus, it was appropriate for defense counsel to explore that issue on direct examination of appellant, and to have him show the jury any physical manifestations, such as scars, supporting his testimony. Likewise, it would have been proper for the prosecutor to ask about this topic on cross-examination, even if it had not already been broached on direct. The relevance of appellant's tattoos was far less evident. The State conceded that the tattoos were not relevant to the determination of the perpetrator's identity, as tattoos are in some cases, but argued that appellant "opened the door" to cross-examination about his tattoos by showing the jury his right hand and arm up close, which allowed the jury to see the tattoos.

The Court noted that the prosecutor may have had concerns that the jury had seen tattoos on appellant's hand and arm and that

the tattoos could depict words or images — say, a tattoo of the victim's name inside a heart — that might influence the jury even though the tattoos were not at that point reflected in the record or admitted as evidence. Any such concerns would have been more properly addressed by the prosecutor asking to examine appellant's hand and arm before they were displayed to the jury, and raising any objections at that point. Moreover, any such concerns were reduced when, before asking appellant any questions about the tattoos, the prosecutor demanded that appellant show the prosecutor his arm, which appellant did. Only then did the prosecutor ask about the tattoos, drawing defense counsel's relevance objection; without the prosecutor at that point articulating any potential relevance to the tattoos, it would have been appropriate for the trial court to sustain the objection. But, the Court stated, tattoos are often difficult to see clearly and to comprehend, and especially on cross-examination, it may have been within the trial court's broad discretion to allow the prosecutor to ask a few questions to try to establish the relevance of the tattoos, although this also risked eliciting improper evidence and the overruling of the objection should then have been made conditional. The prosecutor started down this path, simply asking appellant to explain what was symbolized by the tattoos the jury may have seen. These questions elicited evidence that benefitted appellant, which he otherwise might not have been able to introduce — that he had the victim's mother's nickname tattooed on his harm (indicating a close bond with the victim's mother); that he was a Christian; and that he was focused on maintaining self-control. Thus, the Court concluded, any error was harmless given the overwhelming evidence of appellant's guilt.

Similar Transactions

State v. Ashley, S15G1207 (7/8/16)

Ashley was convicted of kidnapping a seven-year-old girl, attempting to kidnap her three-year-old sister, and criminal trespass at the trailer park where his father lived. The evidence showed that on September 4, 2011, a woman was preparing to take her four daughters, ages seven and under, in her minivan. The woman was on her front porch, locking the door, and seven-year-old K.L. was sitting on the floor of the minivan with the sliding door on the driver's side open after helping her three-year-old sister B.L. and the other children into their seats. Ashley walked up to the minivan, reached inside, grabbed K.L. by the wrist, pulled her out of the minivan, and began dragging her up the street as she screamed and tried to get away. K.L. managed to break free from Ashley and ran to her mother, shaking and crying. The woman yelled at Ashley and saw him "touching himself" as he reached into her minivan a second time and tried to grab B.L., who scrambled away from him. Ashley ran off.

At trial, the State presented similar transaction testimony regarding three incidents involving Ashley at the trailer park pool during the summer of 2011: (1) an occasion when the assistant property manager and another woman saw Ashley staring inappropriately at young girls ranging in age from five to ten years old; (2) Ashley's repeated touching of a ten-year-old girl on her torso just below her breasts when the girl's mother went inside for a few minutes to use the restroom; and (3) an incident when the police were called after the assistant property manager and other adults saw Ashley repeatedly squirting a five-year-old boy with a powerful water gun so hard at close range that the boy was crying and had red marks on his skin. These three incidents led the trailer park to seek the trespass notice against Ashley.

A divided Court of Appeals reversed his conviction, finding that under the old Evidence Code, the trial court abused its discretion in admitting the similar transaction evidence. *Ashley v. State*, 331 Ga.App. 794 (2015). The Supreme Court granted the State's petition for writ of certiorari.

The Court concluded that under the old Evidence Code and the cases interpreting it, the trial court acted within its discretion in admitting the evidence of Ashley's conduct at the pool involving the ten-year-old girl and the five-year-old boy as proof of his intent when he grabbed K.L. and tried to grab B.L. — particularly in view of Ashley's protestations, both before and at trial, that he acted with innocent or even helpful intent. The Court also concluded that even if the evidence of Ashley's leering at young girls at the pool was not properly admitted on the issue of intent, the trial court could have properly admitted it for other purposes and the other evidence of Ashley's guilt was strong, so any error was harmless.

In so holding, the Court noted that rather than engaging in a straightforward analysis of similar transaction evidence under the old Evidence Code and the copious case law interpreting it, the Court of Appeals majority looked for "persuasive" guidance to the new Evidence Code and cases interpreting the new Code and the Federal Rules of Evidence, which may have accounted in part for how the majority went astray. At the least, the Court stated, the majority opinion's reliance on those sources unnecessarily complicated its analysis. "In many a case, the result may be the same whether an issue is analyzed under our old or new Evidence Code, but as we have recently emphasized to lawyers, if that is so, it is 'happenstance, at least without careful comparison of the old and new law.'[cite] Where there is ample authority available on an issue under the applicable Evidence Code, there is no need to look elsewhere. And so it should be clear that we render no opinion on how this case would be decided under the new Evidence Code."

Statements; Coercion

Blackwell v. State, A16A0172 (5/20/16)

Appellant was convicted of manufacturing methamphetamine in the presence of a child. The evidence showed that based on a tip, an investigator and his partner knocked on the front door of a home, which was answered by a resident, and asked for appellant. The resident led them to the garage, where they found appellant, his wife, their three-month-old daughter, and another man. As he entered the garage, the investigator detected a strong chemical odor and saw "an active meth lab cooking" a few feet from where appellant and the other occupants were sitting.

Appellant contended that the trial court erred in admitting his statement to the investigator that he knew methamphetamine was being manufactured in the garage a few feet from his three-month-old child. Specifically, he argued that the statement was made in response to threats, undermining its voluntariness and admissibility. The evidence showed that the investigator obtained the statement after appellant agreed to waive his *Miranda* rights at the scene. The investigator testified that he did not threaten appellant or promise him anything to obtain the statement. He did, however, ask whether

appellant wanted to claim ownership of the drugs, and he possibly stated that appellant's child might be taken into state custody. The investigator also told appellant that "there[ ] [was] a good chance" appellant's wife would be going to jail, given her presence with the child in front of an active methamphetamine lab. Appellant produced the testimony of a person who was present during the interview. She testified that the investigator informed appellant that "it was time to man up and that if [appellant] didn't tell [the investigator] everything that [the investigator] found in that house belonged to him that [the investigator] was going to take his wife to jail and his child to [the Georgia Division of Family and Children Services]." She also testified that the investigator threatened to "tear … apart" appellant's mother's home, where appellant claimed to be living. She further claimed that appellant "raised [his hands] up and said all right, whatever you find belongs to me."

The Court noted that a statement by police that makes the defendant aware of potential legal consequences is in the nature of a mere truism that does not constitute a threat of injury or promise of benefit within the meaning of former O.C.G.A. § 24-3-50. Here, appellant was advised of his *Miranda* rights, waived his right to counsel, and agreed to speak with the investigator. During the conversation, the investigator told appellant about the legal consequences of his arrest and the police investigation, and appellant conceded that he knew about the active methamphetamine lab in the house. The trial court therefore did not err in finding that appellant freely and voluntarily made this statement to police.

Jury Instructions; Judicial Commentary

Graham v. State, A16A0297 (5/24/16)

Appellant was convicted of hijacking a motor vehicle and aggravated assault. He first contended that the trial court erred by instructing the jury that the State did not have to prove all of the acts listed in each count of the indictment. The record showed that the hijacking charge accused appellant of obtaining a vehicle "while in possession of a firearm and a replica of a firearm," and the aggravated assault charge alleged that he "did brandish a firearm and a replica of a firearm." The court charged as follows: "I charge you that to find the defendant guilty of the crime charged, the State need only prove that the defendant committed at least one act which satisfies each and every element of the crime charged. Merely because two or more separate acts are listed in the charge does not require the State to prove all of the listed acts to find the defendant guilty of the crime charged. In addition the presence of the word, and, in the description of actions taken by the accused is not required for the State to prove each act listed."

The Court found that although the instruction was not perfectly clear, the essence of the instruction was a correct statement of the law: If a crime may be committed in more than one way, it is sufficient for the State to show that it was committed in any one of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than disjunctive form. Thus, it did not shift the burden of proof to the defense to instruct the jury that the prosecution need prove only the use of a firearm or a replica.

Appellant next argued that he was entitled to a new trial because the trial court violated former O.C.G.A. § 17-8-57 when it told jurors, "you now have a pretty good idea where things happened." Specifically, he contended that the trial court's statement conveyed to jurors that the court thought that venue and a number of essential elements of the crime had been proven and that the trial court's statement "served to highlight" the State's argument that the defense was false. The Court disagreed.

The Court noted that the full quote stated, "Now I want to caution you about one other thing. You now have a pretty good idea about where things happened, all that's — you know, the distances, times that may be important in this case. This is not a freelance committee work where somebody needs to go out and do anymore evaluation or investigation. Don't get on Google, don't get on Maps, don't go check out whose address is what. Stay away from all that stuff as it relates to this case." Therefore, the comments here were made in the context of telling jurors not to do their own investigation. Thus, the Court found, they are more akin to the trial court's inartful comments in *Atkins v. State*, 253 Ga.App. 169, 170-71 (2) (2002), which included an admonishment that prospective jurors "listen carefully to the facts as contained in the indictment." And the Court found, the trial court instructed the jury that the State bore the burden to prove each essential element of the charged crimes, as well as venue, beyond a reasonable doubt. The trial court also instructed jurors that it had not intended by any of rulings or comments to express any opinion on the evidence or guilt of the accused. Accordingly, the Court concluded, the trial court did not err in making the complained-of comment here.

Prior Difficulties; Indictments

Everhart v. State, A16A0652 (5/25/16)

Appellant was convicted of first degree cruelty to children for the willful deprivation of necessary sustenance by failing to seek medical care for the victim (Count 1); second degree cruelty to children for causing cruel and excessive physical and mental pain to the victim by failing to seek medical care for him (Count 2); first degree cruelty to children for causing cruel and excessive physical and mental pain to the victim by inflicting multiple physical injuries(Count 3); and aggravated battery for causing brain and internal injury to the victim (Count 4). The victim was a three-month-old infant at the time of the crimes. The evidence showed that appellant demanded money from the victim's mother to buy marijuana and cigarettes. When she refused, appellant jerked the young victim out of a car seat and started beating him repeatedly in the ribs with a broom handle. Appellant also shook the victim. The victim was not taken to the hospital until a couple of days later, despite noticeable injuries.

Appellant argued that the trial court erred by failing to hold a hearing before admitting evidence of prior difficulties between him and the victim. The Court noted that prior to the new Evidence Code, former Uniform Superior Court Rule 31.3 required notice of an intent to introduce evidence of similar transactions and a hearing in order to decide whether the evidence was admissible But even when this Rule was still in effect, evidence of prior difficulties between a defendant and a victim — as opposed to prior transactions or occurrences — was admissible without notice or a hearing. Under the new Evidence Code, however, O.C.G.A. § 24-4-404(b) — not Rule 31.3 — governs admission of prior difficulty evidence. O.C.G.A. § 24-4-404(b)

incorporated Rule 31.3's notice requirement (but not the hearing requirement) for evidence of other crimes or wrongs, but specifically excludes from this notice requirement "evidence of prior crimes, wrongs, or acts [that is] offered to prove … prior difficulties between the accused and the alleged victim." O.C.G.A. § 24-4-404(b). Therefore, the Court stated, "[b]ecause the statute excludes from the notice requirement evidence of prior difficulties between a defendant and a victim and, unlike Rule 31.3, says nothing about a mandatory hearing, we decline to read it as implicitly mandating a hearing before admission of evidence of prior difficulties." Accordingly, the trial court did not err in failing to hold a hearing.

Appellant also argued that his trial counsel rendered ineffective assistance by failing to file a general demurrer to Count 1 of the indictment. The Court agreed. Count 1alleged that appellant committed cruelty to children in the first degree in violation of O.C.G.A. § 16-5-70 when he willfully deprived the victim "of necessary sustenance to the extent said child's health and well-being were jeopardized by failing to seek medical attention for said child after noticing injury and illness to the child which continued to worsen[.]" But, the Court found, the State's allegation that appellant failed to seek medical attention for the child "after noticing injury and illness to the child which continued to worsen" was not sufficient to charge any crime when the State alleged only that this deprivation constituted denial of "necessary sustenance." "'Necessary sustenance' has been defined by our Supreme Court as 'that which supports life; food; victuals; provisions' … Our statute, in the use of the word 'sustenance,' means that necessary food and drink which is sufficient to support life and maintain health." The denial of necessary and appropriate medical care for a child under 18 years of age can constitute cruelty to a child when it causes the child "cruel or excessive physical or mental pain", under O.C.G.A. § 16-5-70(b) but it does not constitute a denial of 'sustenance'." In order for the State to have charged appellant sufficiently with cruelty to children in the first degree for the failure to seek timely medical care following the severe beating of the victim, the State needed to allege that the failure *maliciously* caused the child "*cruel or excessive physical or mental pain*." O.C.G.A. § 16-5-70(b) (Emphasis added). The State's indictment omitted these essential elements of the crime and therefore failed to charge appellant with any crime at all. Therefore, Count 1 of the indictment was fatally defective and would have been dismissed if appellant's counsel had filed a general demurrer.

Search & Seizure

State v. Cook, A16A0432 (5/25/16)

Cook was charged with possession of marijuana with intent to distribute. The trial court granted his motion to suppress and the State appealed. The evidence showed that Cook was transported at his request by ambulance to a hospital following a traffic accident. Upon arrival, hospital security officers searched the backpack he was carrying in his lap. The officers found a mason jar of marijuana and called the police. When a police officer responded, he searched the bag and found the drugs and some clothing. The officer had no personal knowledge of what the security personnel had seen, nor did he smell the marijuana himself, and none of this information was included in his police report. The officer arrested Cook and then obtained a search warrant.

The Court affirmed. The Court noted that the only testimony presented was that of the police officer who was called to the hospital. Importantly, the officer did not testify that he personally smelled marijuana. Notably, the State did not present any testimony from the hospital security officers who allegedly smelled the marijuana, confiscated the bag, and searched it. Moreover, the State did not argue that Cook consented or that there were exigent circumstances justifying a warrantless search. Therefore, on these facts, the Court found that it must conclude, as a matter of law, that the State failed to meet its burden under § 17-5-30(b) to prove that the warrantless search of Cook's bag was lawful.

Jury Deliberations; Excusal for Cause

Bethea v. State, A16A0377 (5/26/16)

Appellant was convicted of voluntary manslaughter and concealing the death of another. He contended that the trial the trial court erred by excusing a juror for cause after deliberations began. Briefly stated, the record showed that the jury received the case at 4:17 p.m. and were excused until the next day at 6:15 p.m. The next morning, the courtroom deputy reported that when he opened the door to the jury room, a juror stated: "[S]he wants out, she can no longer be a part of this, bring an alternate in, she wants out." With the consent of the parties, the court brought in the juror to inquire as to the circumstances. Without stating her opinion or that of her fellow jurors, she stated that she believed they "would be still in that room all week." The trial court explained that they had only deliberated for two hours, and they needed to take more time to deliberate. The juror replied that she tried to complete the deliberation process, "but I just feel like I don't want to be a part of it." The trial court again explained the jury's responsibility to examine the evidence and deliberate and asked if the juror could talk to the other jurors and try and reach a verdict. The juror responded, "Yes, ma'am, I can do that. We have to have one verdict. And if they keep what they going on and on [sic], ain't nobody coming together … but I'm not going to be forced to go along with what they were saying just to put a verdict on the table. I can't do that." During the ensuing further conversation between the court and juror, the juror appeared to be upset and crying, and the trial court attempted to calm her. After the juror returned to the jury room, the trial court decided to excuse her and replace her with an alternate.

Here, the Court found, the trial court's main concern was that the juror was visibly upset and had reached a fixed and definite opinion so soon after the deliberation began without fully vetting the evidence with the other jurors. The juror had expressed that her mind was made up, she "wanted to go," and she could "no longer be a part of this." Legal cause for excusing a juror arises when the court determines, in its sound discretion, that the juror holds an opinion so fixed and definite that he or she cannot lay it aside and decide the case on the evidence presented and the court's charge. Although the juror did equivocate about her ability to deliberate, there was evidence that she had reached an unwavering opinion fewer than two hours into the deliberation. Unlike other cases where, for example, a trial court erred by excusing a lone holdout after more than two days of deliberation, there was evidence

showing that, very early on, the juror had ceased deliberating with the other members of the jury and "wanted out" of the process. The fact that the juror eventually stated that she could be impartial and deliberate did not require the trial court to ignore the numerous times she equivocated or the other evidence showing that she expressed a fixed and definite opinion and did not make the trial court's credibility decision to strike her error. Furthermore, the Court found, the record was clear that, despite excusing the juror, the trial court carefully considered avoiding excusing the juror simply because she might be in the minority or a potential holdout. The trial court voiced her concern that jurors not be removed simply because they were holdouts, saying "the [mere] fact that one juror does not agree with the other [does] not constitute cause for removal." Instead, the court's basis for excusing her was the juror's unwillingness to meaningfully participate in deliberation based on a thorough review of the evidence. Accordingly, the Court found no error.

Best Evidence Rule; O.C.G.A. § 24-10-1001 et seq.

Patch v. State, A16A0524 (5/26/16)

Appellant was convicted of three counts of computer or electronic pornography and child exploitation. The evidence, briefly stated, showed that appellant, using the username "heeeyyy_waitaminute", conversed online with Land, an adult female police officer he believed was a 14-year-old girl. During the explicitly-sexual conversations, he masturbated for her on a webcam. However, the officer was never able to see appellant's face.

At trial, the State presented evidence of a prior incident in 2008, when appellant was investigated in Cobb County for engaging in similar unlawful conduct with his heeeyyy_waitaminute account. This evidence showed that appellant conversed with Peluso, a retired officer, who created an online account in which he led appellant to believe he was a 13-year-old girl. Appellant sent her pictures of himself, and invited her to view him via a webcam. But unlike Land, Peluso was able to see appellant's face on the webcam, and during his testimony, he identified appellant as the individual who appeared in the pictures and on the webcam. However, those images and videos were unavailable to present to the jury because the hard drive used in that investigation had "crashed."

Appellant argued that Peluso's identification testimony was inadmissible because it was based on his viewing photographs and videos that were unavailable to the jury. More specifically, he contended that such opinion evidence was improper because it tended only to establish a fact that average jurors could decide for themselves.

The Court stated that because this case was tried after January 1, 2013, our new Evidence Code applied. And O.C.G.A. § 24-10-1001 et seq., Georgia's new "best evidence rule," squarely addresses the situation at hand — i.e., the admissibility of secondary evidence of the contents of a recording or photograph that has been lost or destroyed. Generally, under O.C.G.A. § 24-10-1002, "[t]o prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required." However, O.C.G.A. § 24-10-1004 outlines several exceptions to this general rule. In relevant part, O.C.G.A. § 24-10-1004 provides that "[t]he original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if … [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith."

Here, the Court found, it was undisputed that the State sought to present "other evidence" (i.e., Peluso's testimony) of the contents of video recordings and photographs that had been destroyed when a hard drive used in the 2008 investigation of appellant malfunctioned. Thus, under O.C.G.A. § 24-10-1004(1), an original recording or photograph is not required at trial and secondary evidence of its contents is admissible if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." And here, it was undisputed that the relevant videos and photographs were destroyed when the hard drive used in Peluso's 2008 investigation "crashed." Moreover, there was no evidence (and appellant did not even allege) that the State intentionally destroyed the videos and photographs in bad faith. As a result, Peluso's testimony regarding the contents of the lost or destroyed photographs and video recordings was admissible under the plain language of O.C.G.A. § 24-10-1004(1).

In so holding, the Court noted that neither party addressed (either below or on appeal) whether Peluso's testimony was admissible under O.C.G.A. § 24-10-1004. Instead, both parties relied exclusively on Georgia cases published before the enactment of the new Evidence Code and that these cases were all readily distinguishable from the issue before the Court.

DUI; Sufficiency of Evidence

Cash v. State, A16A0269 (5/27/16)

Appellant was convicted of two counts of DUI following a bench trial. The evidence showed that in the early hours of the morning, an officer activated the blue lights on his vehicle and pulled onto the shoulder of the road behind a car that was stopped on the shoulder. The officer approached to determine whether the driver needed assistance. The officer smelled the odor of alcohol on appellant's person. Further investigation led to appellant's arrest. Appellant agreed to a breath test and the results registered alcohol concentrations of 0.114 and 0.117 grams. At trial, the officer identified a copy of the breath test results, but the State never tendered the results into evidence, and they were not admitted. The court found appellant guilty, and merged the less safe count into the per se count.

Appellant contended that the evidence was insufficient to support his per se count conviction. The Court agreed. Given its failure to tender the Intoxilyzer 5000 test results into evidence, the State admitted — and the Court found — that it presented insufficient proof of this charge. Accordingly, the Court held, appellant's conviction for driving under the influence must be reversed, and appellant could not be retried on this count.

Moreover, the Court found, the State's mishandling of the breath test results also undermined the trial court's finding of guilt as to the less safe count. The Court noted that the evidence with respect to this charge was sufficient. Testimony regarding appellant's location that night, appearance, smell, unsteadiness on his feet, admitted consumption of alcohol, and performance on the horizontal gaze nystagmus test supported the trial court's determination that appellant had driven his vehicle while under the influence of alcohol to the extent he was less safe to drive. However, as the State conceded, the

test results were considered by the trial court in reaching its verdict, inappropriately and harmfully contributing to the finding of guilt. Thus, while the properly admitted evidence was sufficient to support the less safe finding, the evidence was not overwhelming, particularly since the officer did not encounter appellant until after appellant had stopped his vehicle on the side of the road. The breath test results, on the other hand, showed that appellant had an alcohol concentration well above the legal limit following his arrest. Under these circumstances, the Court found it highly probable that the test results, which were never admitted into evidence, influenced the verdict. Accordingly, the Court concluded, appellant was entitled to a new trial on the less safe count.

Forfeitures; Self-incrimination

Loveless v. State, A16A0479 (5/27/16)

Pursuant to O.C.G.A. § 16-13-49 (2014), the State filed a civil in rem complaint to forfeit two amounts of cash (and other personal property) that law enforcement officers had allegedly found in close proximity to methamphetamine and marijuana during a search of appellant, his vehicle, and a room in an extended stay hotel. Appellant answered, claiming ownership of one of the amounts of cash ($12,231) and demanding its immediate return; denying allegations that the cash was found in close proximity to the drugs and that the cash had been used for, was intended to be used for, or constituted proceeds from illegal drug activity; contending that the officers had obtained the property in violation of his Fourth Amendment rights; and, stating that he was facing drug charges in a related criminal matter, asserting his rights under the Fifth Amendment (against self-incrimination) and under O.C.G.A. § 24-5-506(a) (prohibiting a person charged in a criminal proceeding from being compelled to give evidence for or against himself). Appellant also contended that "answering the statutory requirements of O.C.G.A. § 16-13-49(o) may" provide the State with evidence to be used against him, and that he was an innocent owner of the cash.

The State moved to strike the answer as insufficient. Following a hearing, the trial court granted the motion and entered a default judgment for the State. The trial court found that the answer had failed to meet the requirements of O.C.G.A. § 16-13-49(o)(3), in that appellant had not included therein information as to the nature and extent of his interest in the cash, the date of the transfer, the identity of the transferor, and the circumstances of his acquiring an interest in the cash. The court further found that appellant "ha[d] instead chosen to assert a blanket right against self-incrimination in not meeting the requirements of [that statute]," and it noted that he had "never requested a stay of the forfeiture proceedings pending the outcome of his criminal prosecution."

The Court affirmed. The Court found "unconvincing" appellant's argument that the privilege set out in the Fifth Amendment and in O.C.G.A. § 24-5-506 overrides the clear and well-settled requirement that, to be sufficient, an answer in a civil forfeiture proceeding must include the information requested in O.C.G.A. § 16-13-49(o)(3) and noted that appellant cited no Georgia cases on point that supported his argument. The Court stated that there is no blanket Fifth Amendment right to refuse to answer questions in noncriminal proceedings. The privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim. The questions must at the very least be considered on an individual basis and answered accordingly. But here, appellant made a blanket refusal to answer and did not consider each question on an individual basis and specifically claim privilege on each question. The burden is on the individual claiming the privilege to state the general reason for his refusal to answer and to specifically establish that a real danger of incrimination existed with respect to each question. Further, the Court noted, appellant was not compelled to give evidence for or against himself in order to answer the forfeiture petition, inasmuch as he could have requested a stay of the forfeiture proceeding while the criminal case was pending, but did not do so. Accordingly, the trial court did not err in striking the answer for failing to meet the strict pleading requirements of O.C.G.A. § 16-13-49(o)(3).

Nevertheless, appellant argued, the trial court erred because he raised a sufficient defense under the Fourth Amendment. However, the Court found, in the absence of a legally sufficient answer, the trial court was without authority to consider the suppression issue.

Search & Seizure

State v. Dotdson, A16A0266 (6/3/16)

Dotson was indicted for manufacturing marijuana, other drug offenses, and two firearms offenses. The trial court granted his motion to suppress and the State appealed. The Court reversed.

The evidence, briefly stated, showed that a sergeant with police department received over a period of several weeks complaints from neighbors of Dotson's residence that Dotson was shooting guns outside his residence at all times of day, causing several senior citizens to fear for their safety. Each caller feared Dotson and wished to remain anonymous. Dotson lived at an address which had two trailers on it. Dotson lived in the back trailer. Dotson had several prior felony drug and weapons convictions, including prior felony convictions for carrying a concealed weapon and possession of marijuana. The sergeant obtained a search warrant for "weapons including but not limited [to], handguns, long guns, weapons parts, ammunition and any other items related to firearms." The search of the back trailer resulted in the seizure of two mason jars of marijuana and several spent shotgun shells from the yard behind the back trailer.

When the officers finished the search of the back trailer, they drove past the front trailer. As they drove by, one of the investigators saw what appeared to be several marijuana plants in the yard around the front trailer's back porch. When no one answered the door at the front trailer, the sergeant telephoned the sheriff's office and gave them the information needed to apply for a second warrant to search the front trailer. During the warrant search of the front trailer, the officers seized more jars of marijuana, a shotgun, and scales. The officers also seized Dotson's driver's license and other personal effects.

The State argued that the trial court erred in determining that the searches were not supported by probable cause. The Court agreed. The Court noted that the affidavit in support of the first search warrant described the back trailer, its location, and the area to be searched. In relevant part, the affidavit also conveyed the following information to the issuing magistrate: Dotson's neighbors had complained to police that Dotson was shooting guns outside his residence at all times of the day; several senior citizens feared for

their safety; and Dotson had a felony record, including convictions for concealed weapons charges and marijuana possession. These facts — namely, the multiple calls from concerned citizens and Dotson's prior convictions for felony drug and firearms offenses — were sufficient to allow the magistrate to make an independent determination of probable cause that a crime was being or had been committed and supported the magistrate's decision to issue the first search warrant.

The State also contended that the search of the front trailer was supported by probable cause. Again, the Court agreed. The Court found that the officers saw the marijuana plants in plain view in the yard around the front trailer's back porch, immediately after they finished the lawful search of the back trailer, and the officers then obtained a warrant to search the front trailer. Accordingly, the officers lawfully seized the marijuana and other items found in and around the front trailer. Thus, the Court concluded, both the warrant search of the back trailer and the subsequent warrant search of the front trailer were lawful and were supported by probable cause. Accordingly, the trial court erred in granting the Dotson's motion to suppress.

DUI; Williams

State v. Bowman, A16A0555 (6/7/16)

Bowman was charged with DUI (per se) and DUI (less safe). The evidence, briefly stated, showed that an officer arrived on the scene of a one-car accident. The car was nearly totaled, but Bowman, the driver, appeared to only have a small cut on his forehead. The officer notice signs of intoxication and called a DUI task force officer. Bowman stated that he was 20 years old and admitted to having consumed several beers. In response to a request that he perform field sobriety tests, Bowman repeatedly muttered that he was "going to jail anyway." Bowman failed the HGN and refused to take an alco-sensor test, again stating he was "going to jail anyway." The officer read him his implied consent rights, and to a request to take a breath test, Bowman responded, "F*** it, man, why not?" On the way to the jail, Bowman vomited in the police car. The nurse at the jail refused to admit him and directed the officer to take Bowman to the hospital. Once there, the officer once again read the applicable implied-consent warning, and this time, asked if Bowman would submit to a blood test. Bowman, lying in a hospital bed, replied saying, "yeah, whatever you got to do." And subsequently, with the officer present, hospital personnel drew Bowman's blood for testing.

The trial court granted Bowman's motion to suppress, finding that Bowman did not make a valid Fourth Amendment consent to the search of his blood, citing *Williams v. State*, 296 Ga. 817 (2015). The State appealed.

The Court stated that in reviewing the record, including the video-recording of the DUI task-force officer's interaction with Bowman at the scene of the accident, there was no evidence that either officer threatened Bowman or prolonged his detention unnecessarily in an effort to obtain his consent to the blood test. However, the evidence did show that Bowman had been in a significant accident, suffered a cut to his head, and was so unsteady on his feet at the scene that the task-force officer directed him to sit on the bumper of the patrol vehicle while he questioned him. And although Bowman was 20 years old at the time, the task-force officer made no specific inquiries as to his level of education. In addition, following Bowman's arrest, the task-force officer read him Georgia's implied consent notice for drivers under the age of 21, but did not inform Bowman of his constitutional rights under *Miranda v. Arizona*. Furthermore, the Court found, while the task-force officer testified that Bowman appeared to understand the implied-consent notice, his response to most of the officer's questions—which Bowman repeated numerous times during the encounter—was that nothing mattered and he "was going to jail anyway." Moreover, both officers agreed that Bowman was significantly intoxicated during the encounter, and in fact, the evidence showed that he made nonsensical comments about playing basketball with his brother and vomited in the back of the patrol vehicle to the extent that he seemed to be choking. Indeed, upon arriving at the jail, Bowman's condition was such that the on-site nursing staff would not admit him and directed the task-force officer to take him to a nearby hospital. Thus, the Court stated, the evidence supports the trial court's findings and certainly does not *demand* a conclusion contrary to the court's ruling.

Nevertheless, noting its legitimate interest in combating the deleterious effects of drunk-driving, the State argued that the trial court's mere consideration of whether Bowman's intoxication affected his ability to voluntarily consent allows DUI suspects to employ the very behavior the State is attempting to thwart as a shield to any prosecution of such behavior. But, the Court stated, a trial court may consider a suspect's lucidity and ability to comprehend questions in determining whether that suspect's statements were rendered involuntary as a result of intoxication. Thus, there is no logic to any argument that intoxication should not also be a factor in determining whether a suspect's consent to a search is truly voluntary. Moreover, in its haste to condemn the trial court's ruling as an across-the-board preclusion of DUI per se prosecutions, the State neglected to mention that nothing in the court's ruling prevents the State from obtaining a warrant to draw a suspect's blood in situations, such as this, in which the voluntariness of a suspect's consent is difficult to determine. And while obtaining a warrant no doubt imposes more of a burden on police officers than simply reading the implied-consent notice, in those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

Jurors; Right to Fair Trial

Wilhite v. State, A16A0216 (6/8/16)

Appellant was convicted of aggravated sodomy, burglary, and terroristic threats. He argued that his conviction was invalid because one of the jurors at his trial allegedly had a hearing difficulty, and the trial court should have allowed an evidentiary hearing to determine whether the juror could follow the evidence at trial. He further contended that his trial counsel rendered ineffective assistance by failing to litigate the issue of the juror's hearing.

The record showed that following a question by the trial court clerk during voir dire, Juror No. 2 stated, "I can't hear too well" and then instructed the prosecutor to "[s]peak a little louder." Appellant's attorney followed up on the juror's statement about her hearing by asking, "Speaking in this tone of voice, are you able to hear everything fine?" The juror replied, "So far." Appellant's counsel raised no objection to Juror No. 2, and she was empaneled as a juror. At the end of trial, after

the jury returned its verdict, appellant asked that the jury be polled. During this process, Juror No. 2 stated in response to several questions from the trial court clerk that she could not hear what the clerk was asking her.

Three years after trial, appellant's post-conviction counsel filed a written motion to question Juror No. 2 about her hearing difficulties, and the parties argued the matter at the hearing on appellant's motion for new trial. The trial court subsequently denied the motion to question the juror in its order denying appellant's motion for a new trial. The trial court stated that after reviewing the transcript, especially the voir dire of Juror No. 2, it was satisfied that "the juror in question was qualified and competent to serve."

The Court found that the record supported the trial court's determination. During voir dire, Juror No. 2 was able to answer numerous questions posed by counsel and the trial court with no difficulty. Although she appeared to have some trouble hearing when the trial court clerk spoke to her, first during voir dire and later when the jury was polled, these difficulties were not sufficient to prompt appellant's attorney to address the matter further.

Nevertheless, appellant contended, he should have been allowed to question Juror No. 2 because the issue of the juror's hearing potentially affected his constitutional right to a fair trial. The Court disagreed. The Court found that appellant failed to establish a basis for allowing the questioning of Juror No. 2 on constitutional grounds. Juror No. 2 informed the Court and counsel during voir dire that she could not "hear well," and appellant's attorney followed up at that time by testing the juror's hearing and he had the opportunity to object to her service as a juror if he was concerned about her ability to hear the evidence. Accordingly, appellant had both notice of the juror's hearing issues and the opportunity to address the issue before trial, which provided the requisite due process.

Moreover, the Court found, appellant failed to establish that his trial counsel rendered ineffective assistance. Juror No. 2 demonstrated an ability to hear and respond not only to appellant's counsel's direct question about her hearing, but also to his other questions and the questions posed by the prosecutor. Therefore he failed to show that his attorney rendered deficient performance in failing to challenge Juror No. 2 or in failing to follow up on the juror's hearing issues after the jury was polled.

Statutory Right to Speedy Trial; Waiver

State v. Marshall, A16A0744, A16A0748 (6/8/16)

The State appealed after the trial court entered orders of discharge and acquittal in the separate criminal cases of Cloyd Marshall and Jessica Lucas on the ground that their statutory rights to a speedy trial had been violated. The record showed that following their respective indictments, Marshall and Lucas, through the same appointed counsel, filed statutory demands for speedy trial. Both criminal cases were assigned to the same trial court judge, who distributed a case management order at Marshall's preliminary hearing and at Lucas's preliminary hearing. The case management orders set deadlines for discovery, for the filing of motions, and a date upon which the trial court would hear motions. The orders also placed the defendants' cases on a trial calendar which was after the deadline for them to be tried in accordance with their speedy trial demands. After the statutory speedy trial deadline had passed, the defendants filed pleas in bar seeking the dismissal of their cases. The court granted the defendants' motions and entered orders of discharge and acquittal.

The State argued that both Marshall and Lucas waived their demands for a speedy trial "by failing to voice any objection" to the case management order, which was distributed to the parties at their respective preliminary hearings and which set a trial date outside the two-term deadline imposed by O.C.G.A. § 17-7-170(b). The Court disagreed. Citing *Thornton v. State*, 7 Ga.App. 752, 753-754 (1910), the Court held that mere silence and failure to object to the case management order was not an affirmative act constituting waiver of the statutory demand for a speedy trial. And nothing in the record reflected that the defendants' or their attorney's silence was accompanied by any other conduct that would indicate consent to the trial date in the case management order. Accordingly, the trial court did not err in concluding that Marshall and Lucas had not waived their statutory demands for a speedy trial and that they therefore were entitled to an automatic discharge and acquittal on statutory speedy trial grounds.