

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 31, 2015

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THIS WEEK:

- **DUI; Probable Cause to Arrest**
- **Statute of Limitations; Tolling**
- **Juveniles; Legal Custodians**
- **O.C.G.A. § 24-8-801; Ineffective Assistance of Counsel**
- **Identifications; Show-ups**
- **Rule 404(b) Evidence**

DUI; Probable Cause to Arrest

Bostic v. State, A15A0600 (6/25/15)

Appellant was arrested for DUI. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed.

The Court found that the evidence showed the officer did not have probable cause to believe that appellant's driving ability was impaired due to alcohol consumption. The officer testified that he initiated the traffic stop not because of appellant's driving, but because of an obstructed license plate. The video of the stop showed that appellant answered all of the officer's questions promptly and that his speech was clear. Appellant could be seen on the video exiting his vehicle and walking to the patrol car, and his gait was steady and otherwise normal. Although the officer testified that appellant's eyes were bloodshot and watery, there was no evidence that appellant's eyes were glassy or unfocused. Instead, the Court found, the only evidence of a potential impairment available to the officer was appellant's admission that he had consumed a beer earlier that evening, the appearance of his eyes, and the alco-sensor test showing the presence of alcohol. While

this evidence could give rise to the suspicion or possibility that appellant was an impaired driver, it was insufficient as a matter of law to constitute probable cause to arrest appellant for driving under the influence. Therefore, the Court concluded, given that the officer lacked probable cause to arrest appellant for DUI, the order of the trial court denying appellant's motion to suppress any evidence obtained as a result of that arrest was reversed.

Statute of Limitations; Tolling

State v. Bragg, A15A0035 (6/26/15)

Bragg was indicted for violating Georgia's Employment Security Law (O.C.G.A. § 34-8-256(a)). She filed a plea in bar asserting that the applicable four-year statute of limitations under O.C.G.A. § 17-3-1(c) had run prior to her indictment. The trial court agreed and the State appealed.

The evidence showed that the on or before January 21, 2010, Bragg was identified in the Georgia Department of Labor's (DOL) system and the DOL sent Bragg's employer a quarterly wage audit inquiry letter because the system showed that she had been working while receiving unemployment benefits. Bragg may have been identified in the DOL's system as early as January 1, 2010. On February 2, 2010, the DOL received a response from Bragg's employer stating that Bragg was employed from December 29, 2008 to September 23, 2009, and that she earned more than \$7,000 during this time period. Consequently, Bragg received unemployment benefits while she was employed. The State, however, waited until January 7, 2014 to charge Bragg with violating the Georgia Employment Security Law for knowingly failing to disclose that she

was gainfully employed between January 3, 2009 and September 5, 2009, while she was receiving unemployment benefits in excess of \$4,000.

The State argued that pursuant to O.C.G.A. § 17-3-2(2), the trial court erred in granting Bragg's plea in bar because the statute of limitation was tolled until February 2, 2010, when the DOL received a response from Bragg's employer confirming her wages. The Court disagreed. O.C.G.A. § 17-3-2(2) provides that "[t]he period within which a prosecution must be commenced ... does not include any period in which ... the crime is unknown[.]" The crime victim's actual knowledge of the crime, however, is imputed to the State for purposes of determining whether the tolling provision applies. Moreover, the victim's lack of knowledge of the illegality of the act is not sufficient to toll the limitation period, but rather there must be lack of knowledge of the act itself. Accordingly, in analyzing the statute of limitation, the correct date to apply is the date that the defendant's act or actions became known to the victim.

The State alleged in Bragg's indictment that the crime was unknown to it until February 2, 2010, when the DOL received a response from Bragg's employer confirming her wages. However, the Court found, the evidence showed that the victim, in this instance, the DOL, had actual knowledge of Bragg's actions — collecting unemployment benefits while she was employed — when Bragg was identified by the DOL's system, which occurred as early as January 1, 2010. In so holding, the Court rejected the State's argument that neither the DOL, nor the State, could confirm that a crime had been committed until the DOL received the response from Bragg's employer. The DOL's lack of knowledge that Bragg was illegally collecting unemployment benefits while employed is not sufficient to toll the limitation period. Moreover, the tolling exception to the statute of limitation cannot be based upon the subjective opinion of the DOL or the State as to whether there is enough evidence to file charges because the statute of limitation is not tolled for the routine investigation of crimes.

Thus, the Court held, the statute of limitation began to run on January 1, 2010. The State failed to prove that the limitation period was tolled since the evidence established that the State had knowledge of the illegality

and failed to bring charges timely. Accordingly, the trial court did not err in granting Bragg's plea in bar.

Juveniles; Legal Custodians

In the Interest of A. H., A15A0239 (6/25/15)

Appellant appealed from an order of the juvenile court, which granted the State's request for a 48-hour continuance of his adjudicatory hearing. The record showed that appellant was taken into custody on May 2, 2014. On May 7, the juvenile court held the detention hearing required by O.C.G.A. § 15-11-472. A probation officer with an out-of-county Department of Juvenile Justice ("DJJ") and a case manager with the out-of-county Department of Family and Children Services ("DFACS") were present at that hearing, and they informed the court that appellant had been placed in the legal custody of DFACS at some time prior to the incident in question and that he was currently in the restrictive custody of DJJ. At the outset of the hearing, the prosecutor asked that appellant's detention be continued. Both the case manager and the probation officer concurred in this request. The probation officer explained that even in the absence of the current charges, continued detention would be required because appellant had been reported as a runaway from the DJJ group home where he had been placed. The court stated that in light of the evidence presented, including the hold on appellant as a result of his current committal to DJJ, probable cause existed for appellant's continued detention.

On May 9, the State filed a delinquency petition as to appellant charging him with theft by receiving, theft by taking, fleeing a police officer, and possession of a firearm during the commission of a felony. The trial court scheduled an adjudicatory hearing for May 19, 2014, and it provided both the DJJ probation officer and the DFACS case manager with notice of this fact. At the hearing, the prosecutor moved for a 48-hour continuance of the adjudicatory hearing to decide whether to file a motion to transfer the case to superior court. Appellant objected, stating that he was willing to admit to the charges. The juvenile court refused to accept his admission, noting that while the representative of the DJJ was present, the DFACS representative was not and therefore, the court could not "take an

admission from a child without their legal custodian being here." The court granted the continuance and appellant subsequently was granted an appeal.

The Court stated that continuances in delinquency proceedings are governed by O.C.G.A. § 15-11-478, which provides that a "continuance shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the moving party at the hearing on the motion. Whenever any continuance is granted, the facts which require the continuance shall be entered into the court record." The question of whether good cause exists for a continuance is therefore a factual one, which must be judged according to the particular circumstances of the case.

The Court found that under the current Juvenile Code, the parent, guardian, or legal custodian of an allegedly delinquent child is not a party to a delinquency proceeding; the only parties are the State and the allegedly delinquent child. Although not a party, the parent, guardian, or legal custodian of any child who is the subject of a delinquency petition has the right to notice, the right to be present in the courtroom, and the opportunity to be heard at all stages of the delinquency proceedings. Nothing in the law, however, provides that an adjudicatory hearing may not go forward if the child's parent, guardian, or legal custodian declines to attend the hearing. Thus, so long as a child's legal custodian is afforded his right to notice of all delinquency proceedings, he may waive his right to be present and to be heard at those proceedings. Therefore, the Court found, given that DFACS waived its right to be present and to be heard at the adjudicatory hearing, the trial court erred when it found that it could not take appellant's admission without his legal guardian being present.

Moreover, the Court found, trial court also erred when it found that DJJ did not have legal custody of appellant. The Juvenile Code defines "legal custodian" as including "[a] public or private agency or other private organization licensed or otherwise authorized by law to receive and provide care for a child to which legal custody of such child has been given by order of a court." O.C.G.A. § 15-11-2 (42)(B). Here, the record showed that prior to his arrest on the current charges, appellant had been adjudicated delinquent, committed

to DJJ, and placed in restrictive custody. Thus, the Court found, at that time, DJJ became a legal custodian of appellant.

Finally, the Court stated, given that the legal conclusions on which the juvenile court based its finding of good cause were erroneous, it must vacate the order granting the requested continuance. In doing so, however, the Court noted that the juvenile court did not consider whether the State's proffered reason for a continuance constituted good cause. Accordingly, the Court remanded the case so that the juvenile court could consider whether, under the circumstances of this case (including appellant's objection to the continuance and his expressed desire to admit to the charged crimes), the State's request for additional time to determine whether to file a removal petition constituted the good cause necessary for a continuance.

O.C.G.A. § 24-8-801; Ineffective Assistance of Counsel

Brown v. State, A15A0328 (6/29/15)

Appellant was convicted of aggravated assault and related charges. The evidence showed that appellant and his brother attacked the victim. Sometime thereafter, another brother of appellant's called the victim and told him that appellant's mother would pay him to tell the police that his brothers were not involved in the assault. A recording of that conversation was admitted in evidence and played for the jury. The State also presented testimony of Phillips, who was an inmate in custody with appellant. A trustee handed Phillips a letter address to Phillips by his nickname and pointed toward appellant, who was standing a short distance away. The letter was intercepted by a guard. The letter urged Phillips to fabricate testimony in favor of appellant.

Appellant first contended that the evidence of the telephone call from his brother to the victim was inadmissible hearsay under O.C.G.A. § 24-8-801. The Court disagreed. Here, the Court found, the statements were not hearsay because the State offered them for a purpose that did not require the jury to assume that the substance of the statements was true. The evidentiary "facts" that the State offered the statement to prove were that appellant's brother had conveyed to the victim an offer to buy his testimony and that the victim had rejected it. Those facts did not depend on whether the

brother was telling the truth about whether he or his mother would actually pay the victim to give testimony favorable to appellant. Rather, the statements were significant because they had been made and because they were likely to have had an effect on the hearer, the victim. The jury could infer from the conversation that the victim was a more credible witness for having rejected the offer. Because the evidentiary value of the statements did not rest upon whether the declarant was being truthful or honest, the trial court did not err in overruling appellant's general objection to the statements on hearsay grounds.

Appellant also argued that his trial counsel was ineffective for failing to object on hearsay grounds to Phillips' testimony that, when the prison trustee handed him the letter, the trustee pointed to appellant and said that the letter was from appellant. He argued that the trustee's gesture and statement were the only evidence establishing that the letter was from appellant and that, had counsel interposed a hearsay objection, the letter would not have been authenticated and admitted in evidence. But, the Court found, even absent Phillips' testimony as to the trustee's statements and gestures indicating that the letter was from appellant, the State presented sufficient evidence establishing a prima facie case from which the jury could infer that the letter was from him. It was apparent from the contents of the letter — which included names, places, dates, times, and other details of the incident — that only someone with great familiarity with the incident could have written it. The letter was written in the first person and implored Phillips to help "us," "the triplets," which was the nickname for appellant and his brothers. That the author was appellant could be inferred from those details, as well as the statements in the letter: "[The prosecution is] talking [a]bout a 30 do 18 [sentence.] ... I'll see if my lawyer will come see you soon[.]" Appellant had spoken to Phillips concerning his upcoming trial and told him that his lawyer would be contacting him soon, and those prior conversations were consistent with the statements in the letter. Also, when Phillips received the letter from the trustee, appellant was standing a short distance away, looking at Phillips. Appellant was the only one of the three brothers incarcerated in Phillips' cell block.

Thus, the Court found, given this evidence, appellant failed to establish that a hearsay objection would have resulted in the letter being excluded on the ground of insufficient authentication. Under the circumstances, even if Phillips' testimony concerning the trustee's statement and gesture indicating that appellant had written the letter constituted inadmissible hearsay, the erroneous admission of those statements was harmless when the jury would have been able to infer that appellant had written it from the sufficiently authenticated and admissible letter itself. Because the alleged hearsay was cumulative of other evidence of the letter's authorship, it was without material effect on the verdict. Consequently appellant failed to show prejudice under *Strickland v. Washington*.

Identifications; Show-ups

Lee v. State, A15A0312 (6/29/15)

Appellant was convicted of two counts of armed robbery, one count of aggravated assault with intent to rob, and one count of possession of a firearm during commission of a felony. The evidence showed that appellant and a co-defendant knocked on the victims' door and then committed armed robbery when the victims answered the door. Appellant and his co-defendant fled when the police arrived pursuant to a 911 call placed from the residence by another resident who was hiding. After a chase through the neighborhood, appellant was captured and brought back to the residence where both victims identified him. Prior to trial, appellant moved to suppress the pretrial identifications of him by the two victims. The court denied the motion as to the first victim, but granted it as to the second victim because the second victim was not present to offer testimony.

As to the first victim, appellant contended that the trial court erred in admitting his pre-trial and in-court identifications because the pre-trial identification procedure, in which appellant was presented to the victims while in the back seat of a squad car, was impermissibly suggestive and thereby created a substantial likelihood of irreparable But, the Court stated, even if it were to assume that the circumstances surrounding appellant's identification rendered the showup impermissibly suggestive, the evidence would be inadmissible only if under the totality of the circumstances, there was

a substantial likelihood of irreparable misidentification. And here, the Court found, the evidence showed that the first victim had the opportunity to view appellant in close proximity and in good light. His attention was focused on appellant as one of the two robbers. His identification of appellant, which occurred within fifteen minutes after appellant fled the scene, was immediate and certain. While the first victim's description of appellant to the police, which was that he had a short haircut and was wearing all black, including black gloves and a short haircut, was somewhat general, appellant was spotted by officers fleeing through the backyard of the victims' house. The police pursued him until he was captured. Therefore, he was not brought to the show-up on the sole basis that he matched a generalized description of a man wearing black clothes. Therefore, the Court found, considering the totality of circumstances, the evidence supported the trial court's finding that the first victim's identification testimony was admissible notwithstanding that the show-up was suggestive.

As to the second victim, appellant argued that the showup led to a substantial likelihood of irreparable misidentification and that the trial court erred in allowing this victim's identification testimony after ruling that the testimony would not be allowed. The Court stated that although the trial court granted appellant's motion to suppress as to the second victim, it did so only with respect to pre-trial identification evidence and only because the State had failed to produce him to offer testimony at the hearing. To the extent that appellant sought to suppress this victim's in-court identification, the trial court made no ruling, nor was it required to do so. Moreover, the trial court did not find, and appellant did not show, that the evidence of this victim's pre-trial identification infringed on appellant's constitutional right to due process. The circumstances leading to his identification of appellant were substantially the same as that of the first victim. Thus, the evidence at trial showed that the second victim had an ample opportunity to view appellant, his level of attentiveness to the persons who invaded his home was high, he identified appellant "instantly" at the show-up, he gave a description of appellant to the police that was consistent with the first victim's, and the length of time between the crime and the confrontation was minimal.

Further, the Court stated, even if it were to assume without deciding that, as in the case of a previously granted motion in limine, appellant was not required to object when the State elicited evidence of this victim's pre-trial identification, appellant did not simply fail to object. Rather, appellant argued to the jury that the show-up identifications were suggestive in opening argument and then cross-examined the victim at length about the pre-trial identification, establishing details such as that appellant had been in a cage within the police car and handcuffed. A defendant who brings out the same evidence to which he objects cannot be heard to complain. Finally, even if appellant could complain that the State failed to comply with the order granting the motion to suppress, he could not show prejudice because the other evidence of his identity was overwhelming.

Rule 404(b) Evidence

State v. Brown, A15A0457 (7/30/15)

The Court of Appeals amended its decision regarding Rule 404(b) evidence following the State's Motion for Reconsideration. The State indicted Brown, Rouse and King on charges of trafficking in cocaine, possession of marijuana with intent to distribute, and other drug violations. The State contended that the trial court erred in ruling that the State's intended evidence of other crimes was not relevant for a proper purpose and abused its discretion in granting the defendants' motion to exclude the evidence on that basis. The record showed that the State filed its notice of intent to introduce evidence of other acts pursuant to O.C.G.A. § 24-4-404(b) as proof of intent, motive, plan, and absence of mistake or accident. Specifically, the State identified the following acts: a 2005 charge against Brown and Rouse for trafficking in cocaine and a 2009 charge against Brown for possession of marijuana with intent to distribute. The trial court found that this was merely propensity evidence.

In its initial opinion, the Court found that the trial court did not abuse its discretion in excluding this evidence. In its substitute opinion, the Court, citing *Bradshaw v. State*, 296 Ga. 650, 655 (3) (2015) and *State v. Jones*, Case No. S14G1061 (June 1, 2015), stated that a defendant who enters a not guilty plea makes intent a material issue which imposes

a substantial burden on the government to prove intent, which it may prove by qualifying O.C.G.A. § 24-4-404(b) evidence absent affirmative steps by the defendant to remove intent as an issue. Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses. Thus, where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the O.C.G.A. § 24-4-404(b) test is satisfied.

Here, the Court found, it could not discern from the existing record whether the trial court considered whether Brown and Rouse, having entered pleas of not guilty to the charged offenses, had taken affirmative steps to withdraw intent as an element to be proved by the State. Further, it was not clear from the record whether the trial court compared the state of mind involved in the extrinsic offenses with that involved in the charged offenses before finding that the other-acts evidence constituted nothing more than inadmissible propensity evidence. Thus, the Court stated, to the extent the trial court discounted the propriety of the evidence for the State's stated purpose of proving intent without considering these issues, the trial court failed to exercise its discretion. Because this uncertainty thwarted the Court's review of the trial court's analysis of the first prong of the three-part test (that is, relevance of the evidence to an issue other than the defendants' character), it could not meaningfully review the trial court's analysis of the second prong (that is, weighing the probative value of the evidence, which flows from that relevance determination, against any undue prejudice). Accordingly, the Court remanded the case to the trial court to reconsider the issue under the proper standard.