Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 8, 2016

THIS WEEK:

Ineffective Assistance of Counsel; Mallory

Dumas v. State, A16A0053 (5/18/16)

Appellant was convicted of rape and child molestation. The evidence showed that the crimes occurred between 1999 and 2000 when the victim was seven years old. In 2007, when the victim was 17 years old and in therapy, she made an outcry to family members and the police were called. Appellant was not arrested until 2011. Appellant contended that his trial counsel rendered ineffective assistance by failing to request a curative instruction or a mistrial in response to the State's improper questioning and argument regarding his post-arrest silence. The Court agreed.

The record showed that appellant testified in his own defense and denied that he had ever inappropriately touched the victim. The prosecutor asked him six times, each over objection, whether he had ever before related the version of events to which he testified at trial. For example, the prosecutor asked appellant whether he had ever made a statement "to any authorities" regarding his version of the facts; asked, "And Mr. Dumas, you're saying that you never took it upon yourself being charged with rape … and child molestation, to ever attempt to provide the police with a statement of your version of the facts?"; and asked, "Despite [the fact that he had a chance to review the evidence against him prior to trial], today is the very first time that you have opened your mouth to say anything about what happened?" Subsequently, in closing argument, after noting that the defense had emphasized that the police never asked appellant for his version of events when he was arrested, the prosecutor stated, "You're getting picked up on a rape warrant. Scream it from the mountaintops, I didn't do it. But nothing." Defense counsel did not raise any objection to this argument, and at the hearing on the motion for new trial, he could not recall why he did not object.

The Court stated that defense counsel consistently objected to the State's cross-examination questions regarding appellant's failure to tell the police his version of events, and the trial court sustained some of these objections but overruled others. The trial court sustained counsel's final objection, explaining that appellant had the right to remain silent. Thus, trial counsel's performance cannot be deemed deficient in failing to ask for a curative instruction after the trial court sustained his last objection. However, when the prosecutor again raised the issue in closing argument, appellant's counsel failed to object, ask for a curative instruction, or move for a mistrial based on prosecutorial misconduct. Counsel offered no reason for these omissions at the hearing on the motion for new trial. Because no reasonable, strategic reason for trial counsel's failure to object appeared in the record, the Court found that trial counsel's performance was deficient, and the first prong of the *Strickland* test was met.

Nevertheless, the State argued that the trial court found that defense counsel opened the door to the prosecutor's comment by stating in closing argument that the police did not even bother asking appellant for his side of the story when he was arrested. The Court disagreed. Here, the Court found, the State first injected the issue of appellant's silence into the case by repeatedly asking him, over defense objections, why he did not volunteer his denial to police or anyone else. After two of the defense objections were overruled, appellant on cross-examination testified that he had not told his story to anyone or to any authority. It was only on re-direct that appellant testified that the police had never asked for his side of the story. Therefore, the Court stated, appellant was entitled to rebut the State's evidence regarding his silence, and thus, his attorney's comment upon this rebuttal evidence in his closing argument was within the range of proper argument. On the other hand, the Court found, the State's comment was not based on evidence properly before the jury; rather, it was an impermissible comment in violation of appellant's right to silence after the trial court's final ruling on the issue — that the State could not ask whether appellant had failed to tell his story to the police upon being charged with the crimes. "Although we consider this issue to be a close question, under these circumstances, where the State first injected the issue of [appellant's] silence into the case and repeatedly raised the issue over defense objections, we find that defense counsel's comment addressing properly admitted rebuttal evidence should not be construed as opening the door to the prosecutor's improper argument."

Finally, the Court addressed the prejudice prong of the *Strickland* test. The Court found that the prosecutor's clear intent was to persuade the jury to weigh appellant's post-arrest silence against him. She repeatedly questioned appellant on this issue in cross-examination, even returning to the issue to ask again whether he told his story to police after the trial court had sustained his counsel's objection to a similar question. Then in her closing argument, the prosecutor underscored appellant's failure to proclaim his innocence to police as proof of his guilt. Thus, under these circumstances, the State's violation of appellant' constitutional right to remain silent was neither incidental nor inadvertent. Moreover, the State's evidence at trial, although sufficient to support his convictions, was not overwhelming. The victim waited approximately ten years to report the incidents involving appellant, and there was no physical evidence of the crimes. The primary evidence was the victim's description of events, supported by her family's testimony as to changes in her behavior. Thus, the jury's determination necessitated weighing the credibility of the victim's testimony against appellant' credibility. Although jurors ultimately chose to believe the victim's testimony, there was a reasonable probability that an improper inference of guilt, raised by appellant's failure to tell police his side of the story, influenced this decision. Accordingly, the Court reversed his convictions on grounds of ineffective assistance of counsel.

DUI; Probable Cause to Arrest

State v. Blanchard, A16A0086 (5/18/16)

Blanchard was charged with DUI (less safe), driving with a suspended license, and an open-container violation. She moved to suppress her statements. The trial court granted the motion and found that the arresting officer lacked probable cause to arrest her for DUI. The State appealed.

The evidence, briefly stated, showed that at approximately 3:00 p.m., an officer noticed Blanchard's vehicle merge into the "gore area" of the highway. The officer then pulled up behind her because it appeared that she was having car trouble, and he wanted to ask if she needed assistance. Blanchard told him that she had run out of gas, and he offered to drive her to a nearby gas station. Once Blanchard was in his patrol car, the officer asked to see her license, but Blanchard stated that she did not have it with her. Initially, Blanchard gave the officer a false name and DOB. When the officer stated that the name was not in the system, she gave the officer her correct name and DOB. The officer then ran a check on Blanchard and discovered that she had a suspended license. As a result, he exited the vehicle, went around the car to Blanchard's door, and arrested her for driving with a suspended license. During transport to the detention center, the officer asked Blanchard if she had any contraband in her purse. Blanchard said no at first, but then admitted that she had a large plastic cup in her purse with a mixture of vodka and Kool-Aid. When the officer asked Blanchard how much alcohol she had consumed that day, she responded that "she had a few before she left her house and then she was mixing [a drink] while she was going down the road to drink when she got home." After they arrived at the detention center, the officer read Blanchard her *Miranda* rights. And it was at this point that the officer first noticed Blanchard's "eyes were bloodshot and watery and that there was a slight odor of an alcoholic beverage coming from her person. …" The officer continued questioning Blanchard about her alcohol consumption that day, and she indicated that she had "one and a half" drinks before she left her house that morning. Blanchard also took a preliminary breath test, which was positive for alcohol.

Relying on *Bostic v. State*, 332 Ga. App. 604, 606 (2015), the Court stated that to arrest a suspect for DUI (less safe), an officer must have knowledge or reasonably trustworthy information that a suspect was actually in physical control of a moving vehicle, while under the influence of alcohol to a degree which renders her incapable of driving safely. Mere presence of alcohol is not the issue. Further, the mere fact that a suspect admits to having consumed alcohol before driving does not provide the probable cause necessary to support an arrest for DUI. Indeed, impaired driving ability depends solely upon an individual's response to alcohol, and because individual responses to alcohol vary, the presence of alcohol, in a defendant's body, by itself, does not support an inference that the defendant was an impaired driver.

The State argued that the officer's testimony that Blanchard's eyes were bloodshot and watery, that he smelled the odor of alcohol, and that Blanchard admitted to drinking alcohol before driving, was sufficient to provide probable cause for her arrest. But, the Court stated, the argument ignored the crucial role that the trial court plays as factfinder, as well as the Court's obligation as an appellate court to uphold a trial court's findings if there is any evidence to support them. And while the State was indeed correct that "[w]e have previously found that bloodshot and watery eyes, as opposed to the mere presence of alcohol, can support a finding of impairment," such evidence does not *require* a finding of impairment. And here, although there was evidence that Blanchard had bloodshot and watery eyes, there was no evidence that her eyes were

glassy or unfocused. Moreover, the trial court, as the factfinder, attributed the bloodshot appearance of Blanchard's eyes to the fact that she had been crying and did not consider it as evidence of impairment.

Thus, the Court concluded, discounting the testimony regarding Blanchard's bloodshot and watery eyes as the trial court did, the remaining evidence presented to establish probable cause for Blanchard's DUI arrest was that she admitted to having one and a half alcoholic beverages the morning before her 3:00 p.m. arrest, she smelled slightly of an alcoholic beverage, her preliminary breath test was positive for alcohol, and she had an open container of alcohol in her purse. However, Blanchard exhibited no physical signs of impairment such as erratic driving, slurred speech, or stumbling. The foregoing evidence, then, supported the trial court's finding that, while there was evidence that Blanchard consumed alcohol before driving, there was no evidence that her driving ability was impaired due to such consumption. And because the mere presence of alcohol is insufficient probable cause for a DUI arrest, the trial court was authorized to find that there was no probable cause to support Blanchard's arrest for that charge.

Judicial Misconduct; Plea Bargaining

Hayes v. State, A16A0588 (5/18/16)

Appellant appealed from his convictions after entering an *Alford* plea to charges of burglary (count 1), possession of tools for the commission of a crime (count 3), and misdemeanor obstruction of a law-enforcement officer (count 4). He was sentenced to 20 years to serve 7 years with the balance on probation on count 1; five years on count 3, to run concurrent with count 1; and 12 months on count 4, also to run concurrent with count 1. He contended that his guilty plea was rendered involuntarily because the trial court improperly participated in the guilty-plea proceedings in violation of Superior Court Rule 33.5 (A), which provides that "[t]he trial judge should not participate in plea discussions." The Court agreed.

The record showed that the trial court, while explaining that the State had filed notice of its intent to seek general recidivist punishment under O.C.G.A. § 17-10-7(a) and O.C.G.A. § 17-10-7(c), stated the following to appellant: "I believe you've been recidivised by the State, which means if you're sentenced—you are found guilty and you are sentenced, you could be facing up to 20 years. And by recidivised, because you have I think three priors, if you were sentenced to 20 years you will serve every day of that in prison." The court then informed appellant that he still had the opportunity to pursue a non-negotiated guilty plea, but that if he did not do so, "we are going to have a trial and you are facing 20 years and you would serve every day of it if you are found guilty. And that was the sentence imposed by the court. So I want to be sure you understand. … I want to be sure you understand what you are looking at."

The Court stated that subsections (a) and (c) of O.C.G.A. § 17-10-7 (2011) must be "read together" and, if both are applicable, the trial court must apply them both. Nevertheless, it is well established that although subsection (c) prohibits parole, it does not dispense with the trial court's discretion to probate or suspend part of a sentence under O.C.G.A. § 17-10-7(a). In other words, if the judge sentences a fourth-time recidivist to ten years, five to serve and five on probation, he must serve five years without parole. But here, contrary to the State's assertions that the trial court only informed appellant that he would not be eligible for parole, the court effectively advised appellant that it had no intention of probating or suspending any portion of his sentence if he went to trial, stating that he would spend "every day of [the 20-year sentence] in prison." And this impermissible participation by the trial court in the plea-negotiation process rendered the resulting guilty plea involuntary. Accordingly, the Court reversed appellant's convictions and sentence, and remanded the case to the trial court. Upon remand, appellant and the State may enter into new plea negotiations or, alternatively, appellant may proceed to trial.

DUI; Rule 417

Kim v. State, A16A0430 (5/18/16)

Appellant was convicted of DUI (less safe) and failure to maintain lane. He contended that the trial court erred in admitting his prior 2010 conviction for DUI pursuant to Rule 417. The Court disagreed. The evidence showed that in the prior DUI, appellant agreed to take a breath test. However, in the DUI which was the subject of this conviction, appellant refused to take the state-administered test.

The trial court admitted appellant's prior DUI conviction because it was relevant to the issue of appellant's knowledge of the consequences of both consenting to and refusing the tests, and its probative value outweighed any prejudice. The Court agreed. The facts of the prior DUI stop and the field sobriety tests were relevant to assist the jury in evaluating whether appellant understood the implied consent testing and the potential outcome of taking or refusing these tests. Because the two incidents were factually similar, the jury was able to consider appellant's knowledge of the testing procedure and the consequences of his decisions.

In so concluding, the Court stated that Rule 403 is an extraordinary remedy which the courts should invoke sparingly. Even in close cases, courts should strike the balance in favor of admissibility. Accordingly, the Court found, the trial court properly admitted the prior conviction even if it was subject to Rule 403's balancing test. Moreover, the trial court gave the jury a limiting instruction during the trial when the first officer testified and again in the jury charge. Accordingly, based on these facts, appellant's convictions were affirmed.

Search & Seizure

Creamer v. State, A16A0614 (5/18/16)

Appellant was indicted for VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a CI went to a residence to buy marijuana. Upon her arrival, the CI walked up to the door of the residence and asked the man who answered the door (later identified as "Dred") for $40 worth of marijuana. Dred advised the CI that he had left the marijuana in his car, and he then walked across the street to a silver vehicle that was parked directly in front of the residence to retrieve it. When he returned from the car, the man sold the CI approximately 2.72 grams of marijuana for $40. The following week, the CI went to the residence a second time to purchase marijuana. Upon arriving at the residence, the CI was again greeted by Dred, who agreed to sell her the drugs. As with the first transaction, Dred "stepped off the porch" of

the residence, walked across the street, and retrieved the marijuana from the same silver car. Dred then returned to the front porch of the residence and sold the CI 1.9 grams of marijuana for $20. Based on the two sales, a search warrant for the residence was issued. During the execution of the warrant, the officers encountered appellant, who indicated that he lived in the basement of the home. During the ensuing search of the basement, the officers discovered approximately 40.2 grams of marijuana; a digital scale; multiple packs of small bags, which are commonly used to package and sell narcotics; and mail addressed to appellant.

Appellant contended that there was an insufficient nexus between his residence and the illegal activity to establish probable cause because the drugs were sold out of a vehicle, not the residence. The Court disagreed. Here, the Court found, a reliable CI purchased marijuana twice from an individual who greeted her at the front door of the residence. And while the seller did retrieve the drugs (which were prepackaged for sale) from his car, both sales took place at the *entryway* of the residence. Moreover, while the prepackaged drugs were retrieved from a vehicle, the original anonymous tip—which was later corroborated by the CI—was that drugs were being sold from the residence. Under these particular circumstances, the investigator could have made a "fair presumption" that evidence of drug dealing, such as larger quantities of marijuana along with packaging materials or scales could be found inside the residence where the drug-dealer appeared to live.

BUI; Miranda

Pedersen v. State, A16A0478 (5/18/16)

Appellant was convicted of BUI and three counts of endangering a child by operating a moving vessel under the influence of alcohol. He contended that the trial court erred in denying his motion to suppress the results of the field-sobriety tests, specifically arguing that he was in custody when the tests were conducted for purposes of *Miranda v. Arizona* and was not advised of his right against self-incrimination. The Court disagreed.

The evidence showed that a DNR officer was patrolling a lake one night when he observed a pontoon boat operating with its docking lights improperly illuminated such that its navigation lights were not clearly visible to other vessels. Consequently, the officer maneuvered his boat toward the pontoon boat and ordered its operator, appellant, to stop so that he could discuss the violation with him and conduct a brief safety inspection. Upon boarding appellant's boat, the officer observed that, in addition to appellant, there were several other passengers, including three children. And in speaking with appellant, the officer noticed that his eyes were red, his speech was somewhat slurred, and his balance was poor. The officer also smelled the odor of an alcoholic beverage emanating from appellant. As a result, the officer asked if he had been drinking, and appellant admitted to having two alcoholic beverages earlier that day. At that point, the officer asked appellant to don a life-vest and step onto the officer's vessel, so that the officer could conduct field-sobriety tests. Appellant complied, and thereafter, the officer administered several field-sobriety tests. Appellant exhibited signs of impairment after each test, and when the portable alco-sensor test returned a positive result, the officer informed appellant that he was placing him under arrest for operating a vessel under the influence of alcohol. The officer then read Georgia's Implied Consent law, but appellant refused to take the state-administered breath test.

The Court stated that it is well established that during the course of an investigation, a law enforcement officer may temporarily detain an individual and that this type of detention does not normally trigger the protections of *Miranda*. But once a DUI suspect is in custody, *Miranda* warnings must precede further field sobriety tests in order for evidence of the results to be admissible.

Here, the Court concluded, the trial court did not err in finding that appellant was not in custody for purposes of *Miranda* at the time the field-sobriety tests were conducted. The DNR officer stopped the pontoon boat because he believed appellant was operating the boat at night with its docking lights improperly illuminated such that its navigation lights were not clearly visible to other vessels. And during his brief safety inspection, the officer observed that appellant was possibly under the influence of alcohol. Although appellant was not permitted to leave the DNR officer's vessel during the course of the field-sobriety tests, there was nothing in the officer's words, all of which were heard in the recording of the encounter, which would cause a reasonable person to conclude that appellant was more than temporarily detained pending the outcome of the investigation. In fact, the Court found, at no time prior to the conclusion of the tests did the officer tell appellant that he was under arrest, and he never placed him in handcuffs. Given these particular circumstances, a reasonable person would conclude that the DNR officer was conducting field-sobriety testing for the very purpose of determining whether to take appellant into custody. And treatment of this nature cannot be fairly characterized as the functional equivalent of a formal arrest. Accordingly, the trial court did not err in denying appellant's motion to suppress the results of the field-sobriety tests on the basis of a *Miranda* violation.