Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 7, 2012

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## THIS WEEK:



## *Search & Seizure*

*Watt v. State A12A1386 (08/31/12)*

Appellant was convicted for trafficking in marijuana and asserted the trial court erred by denying his motion to suppress. The evidence showed that DEA agents in Arizona were contacted by the local manager of Old Dominion Freight Lines about a suspicious crate being shipped to Douglas County, Georgia. A DEA agent determined that the package contained marijuana and contacted law enforcement officials in Douglas County to arrange for a controlled delivery of the crate to Old Dominion loading docks there. When the crate arrived, an officer of the Sheriff's Office secured the package. A K-9 unit was deployed to perform a free-air sniff, and the dog signaled the presence of narcotics in the crate, the police obtained a search warrant. The day the crate arrived, Old Dominion received a call inquiring about it. Acting as an employee, an officer told the caller the crate would not be delivered until the next day but that the caller could retrieve the crate from the warehouse instead if he wanted to do so. Law enforcement agents stationed at the Old Dominion warehouse observed a silver Toyota Camry and a gold Ford pickup truck parked in the road just outside the gated entrance to the property. The occupants of the vehicles were observed engaging in conversation before driving up the driveway to the loading docks and parking outside the warehouse office. There, two individuals talked outside of the vehicles while one remained inside; law enforcement was unable to identify them at a distance. The driver of the truck entered the office and claimed the crate, while the Camry left the premises. Officers present at the scene recorded the license plate number of the Camry. As soon as the driver of the truck took possession of the crate, law enforcement approached and took him into custody. The crate contained 5 large bales of marijuana, totaling approximately 150 pounds. Officers then issued a BOLO for the silver Toyota Camry with the last four digits of the recorded license plate number pulling out onto Riverside Parkway where the Old Dominion property was located. A deputy immediately spotted a silver Camry leaving a nearby neighborhood recreation center. The driver turned in the opposite direction upon seeing the police car, and the deputy followed the Camry for two miles, confirmed the license plate number and vehicle description on the BOLO, and initiated a traffic stop. Only five to ten minutes had elapsed from the issuance of the BOLO to the time the deputy stopped the Camry. Appellant, who was driving the Camry, and the passenger were placed in handcuffs and taken into custody.

Appellant argued that the trial court erred by denying his motion to suppress because the deputy's stop of the vehicle was not predicated on a reasonable, articulable suspicion of crimi-

nal activity. However, the Court noted that a BOLO had been issued for the Toyota Camry, which police observed at the Old Dominion warehouse; the BOLO included a description of the vehicle, the last known road the driver had turned onto, and the last four digits of the vehicle's license plate. Further, the deputy observed a car matching the BOLO description within five to ten minutes after the BOLO was issued in the area of the warehouse. According to the deputy, the Camry was just "sitting there," until he passed them in his patrol car, at which time the driver pulled out and drove away. Thus, the Court found that under these circumstances, the deputy "had an objective, reasonable suspicion of criminal activity that would justify the stop."

## Hindering Emergency Call; Hearsay

*Feagin v. State A12A1193 (08/30/12)*

Appellant was convicted of aggravated battery, criminal trespass, and hindering an emergency telephone call. Appellant challenged the sufficiency of the evidence supporting his convictions. The Court affirmed appellant's convictions for aggravated battery and criminal trespass but reversed his conviction for hindering an emergency telephone call for lack of evidence.

The record showed that appellant's sister, the victim, allowed appellant to move into her home, where their mother and the victim's two young children also resided. One morning, the victim gave appellant an ultimatum, telling appellant that he would have to leave if he did not comply with the rules. The victim testified that as the heated exchange continued, she grabbed her cell phone because she was "looking for something to . . . throw at that point in time" and "just in case [she] did need to call someone." The victim stated that she did not think about calling 9-1-1 and that "9[-]1[-]1 wasn't on [her] mind." After initially grabbing her cell phone, the victim subsequently placed it on the kitchen counter. Thereafter, appellant grabbed the victim's cell phone and "snapped it in half," rendering it inoperable. The victim retreated to the upstairs area of the residence, but appellant followed her as they continued to argue. The victim testified that appellant hit her in the face, then fled from the residence. The mother called 9-1-1 to report the incident.

Regarding appellant's contention that the evidence was insufficient to support his conviction for hindering an emergency telephone call, the Court agreed. In reaching its decision, the Court stated that a person commits the misdemeanor offense of hindering an emergency telephone call when he "physically obstructs, prevents, or hinders another person with intent to cause or allow physical harm or injury to another person from making or completing a 9-1-1 telephone call or a call to any law enforcement agency to request police protection or to report the commission of a crime[.]" The Court noted that the victim testified that when she grabbed her cell phone, she was not thinking of or attempting to call 9-1-1. Rather, the victim claimed that she picked up the cell phone during the argument because she was looking for something to throw. Since the victim's testimony did not support a finding that appellant had hindered a telephone call to 9-1-1 or to police, the Court found appellant's conviction of this offense was unauthorized. Further, the Court found that the State's argument on this issue unavailing. The State asserted that appellant's conviction was proper based upon the responding officer's testimony regarding the victim's prior report that she had grabbed the cell phone to call 9-1-1 when appellant took the cell phone out of her hand and broke it in half. The State asserted that evidence of the victim's prior inconsistent statement to the responding officer was substantive evidence pursuant to *Gibbons v. State*, 248 Ga. 858, 862 (1982), ruling that "a prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes." However, the Court found that the victim testified before the issue of her alleged statement to the responding officer had been raised, and she was never questioned with the specificity necessary to establish the foundation for admission of any such statement. Thus, the trial court erred in admitting the testimony at issue as a prior inconsistent statement. Hence, the Court held that the victim's prior statement to the responding officer was inadmissible hearsay, which was wholly without probative value and could not be considered in determining the sufficiency of the evidence, even if introduced without objection. Therefore, the Court held, the conviction for hindering an emergency call must be reversed.

## Search & Seizure

*Hines v. State A12A1058 (08/30/12)*

Appellant was found guilty of five counts of sexual exploitation of children in violation of OCGA § 16-12-100 (b) (8). Evidence showed that appellant possessed five video files located on a computer at his residence depicting minors engaging in sexually explicit conduct. Police found the video files during a search of appellant's residence pursuant to a warrant. Appellant contended that the trial court erred by denying his motion to suppress. The Court found no error and therefore affirmed.

The record established that an investigator conducted an investigation over the internet which revealed that a computer attached to a Comcast-owned internet protocol (IP) address was using a specific software program to share known and suspected child pornography files. After being served with a search warrant, Comcast informed the investigator that the IP address was assigned to a customer located at 547 Toonigh Road in Woodstock, Georgia. Based on a finding that there was probable cause to believe that a crime in violation of OCGA § 16-12-100 was being committed at that location, the investigator obtained a warrant to search the property. The property was described in the warrant as a house located at 547 Toonigh Road with attached garages and a single mailbox, and the warrant authorized the investigator to search the house and any vehicles and buildings located on the property for computer hardware or software containing images of children depicting sexually explicit conduct as defined in OCGA § 16-12-100, together with indicia of use, ownership, possession, or control of those items.

When the investigator executed the search warrant at the property, the wife of the Comcast customer appeared at the door of the house. The investigator told her that an investigation led him to believe that a computer connected to the internet at her address contained child pornography, and that he had a search warrant. She told the investigator that she and her husband and their daughter lived in the house, and that appellant, her husband's nephew, lived in a recreational vehicle owned by them and parked on the property behind the house. She also told the investigator that she and her husband had computers in the

house connected to the internet by a wireless router, and that appellant had a computer in the recreational vehicle and had their permission to use the signal from their wireless router to connect to the internet. The investigator searched the recreational vehicle pursuant to the warrant and found appellant's computer. Evidence showed that appellant's computer was the same computer which the investigator's internet investigation showed was sharing child pornography files, and the computer contained the five video files used as evidence to convict appellant.

Appellant contended that, when the investigator learned for the first time prior to the search of the recreational vehicle that the vehicle was his separate residence, the investigator was required to obtain a separate warrant to search that vehicle. The Court disagreed. The warrant to search the property provided that there was probable cause to search the house and any other buildings and vehicles located on the property. The Court noted that appellant did not dispute that there was probable cause for issuance of the warrant to search the property located at 547 Toonigh Road, including the house, other buildings, and vehicles on the property, nor did he dispute that the recreational vehicle in which he was living was located on the described property. Thus, the Court found that the search warrant sufficiently identified the recreational vehicle located at the street address as property to be searched such that "it enable[d] a prudent officer executing the warrant to locate the . . . place definitively and with reasonable certainty," and sufficiently limited the searching officer's discretion.

## DUI; Search & Seizure

*Harkleroad v. State A12A1079 (08/29/12)*

Appellant was convicted of DUI and speeding. She challenged the denial of her motions to suppress the results of her horizontal gaze nystagmus (HGN) field sobriety test and her Intoxilyzer breath test. The Court found no error and affirmed. The record showed an officer's stationary radar detected appellant's vehicle traveling 43 miles per hour in a 30-mile-an-hour zone. He activated his blue lights and followed appellant until she stopped a few blocks down the well-lit city street. When the officer approached the vehicle, he noticed a strong smell of alcohol and that appellant's eyes were bloodshot and her face flushed. The front-seat passenger in the vehicle admitted that he had been drinking and that he was not fit to drive. The officer asked appellant to step to the rear of her vehicle and submit to a preliminary breath test. Appellant refused, offering to walk a line instead. The officer, who had worked over 2,000 DUI cases and was an instructor in the performance of field sobriety tests, first administered the HGN test, which appellant failed when she exhibited four of six indicators. After some argument, and an assurance from the officer that any results of a preliminary Alcosensor breath test would not be admissible against her, appellant agreed to take the test, which showed a positive result. At this point, the officer placed her under arrest, read her the implied consent warning, and transported her to police headquarters. At headquarters, appellant's first Intoxilyzer breath sample showed a blood alcohol level of .094. When the officer asked her to provide a second sample, appellant began coughing and said that she was asthmatic. Shortly afterward, she provided a second sample. The officer informed appellant that she had the right to an independent test and gave her a telephone book for the purpose of arranging such a test. More than an hour later, however, she had not succeeded in making arrangements. Appellant moved to exclude the results of the HGN test on the ground that the officer's strobe lights had interfered with his administration of the test. Appellant also moved to suppress the results of the Intoxilyzer test on the grounds that there was no probable cause to arrest her and that her asthma attack had rendered the test unreliable. After a hearing, the trial court denied both motions.

Appellant first argued that the trial court erred in denying her motions to suppress the HGN and Intoxilyzer tests because the officer lacked probable cause to arrest her. The Court disagreed and further noted that appellant abandoned her arguments made that the HGN test was inadmissible because it was not performed properly. Specifically, and as part of her argument that probable cause for her arrest was lacking, she summarily suggested that the HGN test was improperly performed. Appellant did not contest the trial court's finding that the test was properly administered, however, and the Court stated that it has consistently held that a motion to suppress is not the proper vehicle for challenging the admissibility of a blood-alcohol test "based merely on non-compliance with agency regulations governing the administration of such tests." As the trial court pointed out in its order denying appellant's motion for new trial, however, none of appellant's numerous pre-trial filings moved to exclude the results of the preliminary breath test itself. Further, the Court stated, even if she had objected to the introduction of these results on constitutional grounds at trial, which she did not, such an objection would have been untimely. Thus, the Court found that appellant waived any argument concerning the admissibility of the preliminary breath test.

The Court then stated that to the extent that appellant was asserting that the Intoxilyzer result should be suppressed because the officer obtained that result by misrepresenting whether the results of the preliminary breath test were admissible, the only grounds asserted in her written motion to suppress the Intoxilyzer result was that the officer lacked probable cause to arrest her and that the result was unreliable because of her asthmatic condition. But, the trial court was entitled to conclude not only that appellant's speeding, her bloodshot eyes, and the odor of alcohol coming from the car gave the officer reasonable and articulable suspicion to detain her for the purpose of administering the HGN test, but also that when appellant failed that test, the officer had probable cause to arrest her for DUI. For all these reasons, the trial court did not err when it denied appellant's motions to suppress.

## Weight of the Evidence; Double Jeopardy

*Nelson v. State A12A0812 (08/30/12)*

Appellant was charged, in pertinent part, with homicide by vehicle in the second degree under OCGA § 40-6-393 (c) and a pedestrian crossing violation under OCGA § 40-6-92 (a). Following the presentation of the evidence at trial, the jury found appellant guilty of the charged offenses. After sentencing appellant to 12 months of probation and 40 hours of community service, the trial court offered appellant the choice to have a new trial or to proceed serving the sentence that had been imposed. The trial court subsequently entered an order granting a new trial. Thereafter, appellant filed

a double jeopardy plea in bar, contending that her retrial was barred since the evidence was insufficient to sustain her conviction.

The Court disagreed. Specifically, the Court noted that, "[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." Significantly, however, the trial court's exercise of its discretion in granting a new trial based upon its finding that the verdict is against the weight of the evidence differs from a judgment of acquittal holding that the evidence is legally insufficient. "[T]he grant of a new trial by the trial court on the discretionary ground that the verdict is against the weight of the evidence is not a finding by the trial court that the evidence is legally insufficient so as to bar a second trial under the Double Jeopardy Clause of the Federal Constitution." The Court stated that the trial court did not specify its ground for granting a new trial. Notably, however, the trial court subsequently denied appellant's plea in bar and rejected her claim that the evidence was insufficient. In the Court's review, it likewise concluded that the evidence presented at trial was sufficient to support the jury's guilty verdict. Consequently, the Court found that the trial court did not err in denying appellant's double jeopardy plea in bar.

## North Carolina v. Pearce; Sentencing

*Callaham v. State A12A1082 (08/29/12)*

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a felony in connection with his shooting Kenneth Threats. He was sentenced to fifteen years to serve for aggravated assault and five years of probation on the firearm charge. The Court reversed the conviction and remanded for new trial because the trial court expressed an opinion as to the credibility of a witness in violation of OCGA § 17-8-57. On retrial, appellant was again convicted of aggravated assault, but the jury deadlocked on the firearm charge. The same judge again sentenced appellant to 15 years to serve, but this time he ordered appellant to pay the victim restitution. On appeal from the second conviction, appellant contended that the trial court erred by ordering restitution in favor of the victim when none had been ordered following the first trial. The Court affirmed but noted that since appellant was convicted of both aggravated assault and possession of a firearm during the commission of a felony at the first trial, but on retrial was only convicted of aggravated assault yet he received a greater sentence as a result of the restitution order, the Pearce presumption applied. *North Carolina v. Pearce*, 395 U. S. 711(1969) (Where a judge imposes a more severe sentence upon a defendant after a new trial, there is a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence). The Court therefore looked to see if there was objective information in the record justifying the increased sentence.

The Court noted that although restitution might have been discussed following the first trial, none was ordered. The defense attorney admitted, "The first sentence only addressed time. There's no restitution order." After the verdict was announced following the second trial, the prosecutor stated that she had evidence of "the total bill of medical expenses and lost wages for [the victim]," and evidence of "how much he's been paid out through the State, how much he can accept, how much more money he has access to, which will leave a difference of a certain amount of money." That evidence was then presented and the court then ordered restitution in "any amount [of the victim's damages] that's not covered by the State." Further discussion clarified that because the victim had total damages greater than that paid or available through the victim's assistance fund, the court was going to order restitution to the victim of the amount of his damages not covered by the State's victim assistance fund. The court eventually entered an award of $13,378.69. Upon examining these facts, the Court noted that it was apparent from the evidence presented that some of the information about the victim's damages came from a time after the sentencing following the first trial. Given that, together with the evidence presented regarding the victim's damages and compensation from the State, the Court concluded that there was objective information in the record justifying the restitution order thereby rebutting the *Pearce* presumption. Accordingly, the Court found no error.

## Search & Seizure, Videotape

*Womack v. State A12A0961 (08/29/12)*

Appellant was convicted of rape, false imprisonment, criminal attempt to commit aggravated sodomy, aggravated sodomy, and aggravated assault. Appellant asserted that the trial court erred by allowing the State to show the jury two clips of pornography depicting rape because the evidence was not linked to the crimes indicted and was seized using an insufficient warrant. The Court disagreed as the record reflected that when appellant was interviewed by law enforcement, he disclosed that he "had rape related pornography stored on DVD-Rs in his bedroom," and this information was included in the officer affidavit attached to the application for a search warrant. Thereafter, law enforcement obtained a search warrant to collect this pornography. And pursuant to this search warrant, officers recovered hundreds of DVDs containing more than 5,500 pornographic videos, over 1,500 of which depicted rape and/or bondage. At trial, the State admitted into evidence a hard drive containing 773 of the rape/bondage videos and played for the jury two representative videos depicting violent rape. Appellant argued that the evidence was not linked to the crime charged in the indictment, but the Court found this contention without merit. The Court stated that in prosecutions for sexual offenses, "evidence of sexual paraphernalia found in [the] defendant's possession is inadmissible unless it shows defendant's lustful disposition toward the sexual activity with which he is charged or his bent of mind to engage in that activity." Pursuant to this rule, "sexually explicit material cannot be introduced merely to show a defendant's interest in sexual activity" but instead can only be admitted "if it can be linked to the crime charged." Thus, the Court stated the evidence was admissible in appellant's case since the relevant pornography depicted scenes of rape and/or bondage, and appellant was indicted for committing the offense of forcible rape, which at points involved binding the victims' hands. Thus, this evidence did not merely show appellant's lustful disposition in general but instead depicted a "lustful disposition toward a particular sexual activity and his bent of mind to engage in that activity."

As to the second argument, that the

pornography was seized using an insufficient warrant, the Court also found this contention without merit. Although a warrant cannot leave the determination of what articles fall within its description and are to be seized entirely to the judgment and opinion of the officer executing the warrant, the degree of specificity in the description is flexible and will vary with the circumstances involved. Here, the relevant search warrant was issued for the collection of, inter alia, "DVDs of Pornography" and specifically "[a]ny records and information related to violations of [OCGA §§]16-5-21, 16-5-41, 16-6-1, 16-6-2, [and] 16-6-22.1." The Court stated that the warrant specified that the terms "records" and "information" encompassed "all the foregoing items of evidence in whatever form and by whatever means they may have been created, duplicated, transferred, or stored, including any electrical, electronic, or magnetic form" to include "floppy diskettes, hard disks, CD, CD-ROM, DVD, DVD-Rom," other methods of documentation, and "[a] ny records or information related to Internet based pornography . . . ." The Court further noted that although a warrant permitting a search for "DVDs of pornography," without more, would most likely be insufficient, the warrant further specified that officers were to seize records and information related to the sexual and other offenses appellant was alleged to have committed, i.e., aggravated assault, false imprisonment, rape, sodomy/aggravated sodomy, and sexual battery. Accordingly, the Court held that the trial court did not err by denying appellant's motion to suppress because the search warrant described the property to be seized with reasonable certainty.