

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 6, 2013

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Lalaine Briones
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

THIS WEEK:

- **Search & Seizure**
- **Fifth Amendment; Modified Protective Order**
- **Search & Seizure**
- **Search & Seizure; Expectation of Privacy**
- **Judicial Comment; Witness Credibility**

Search & Seizure

Dryer v. State, A13A0875 (8/21/13)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress and in ruling that his interaction with a police officer who ultimately arrested him began as a first-tier encounter that did not require reasonable, articulable suspicion of criminal activity. The Court agreed and reversed.

The evidence showed that an officer was patrolling a golf and country club during the late evening hours. The club had already closed and the officer noticed a sole vehicle backed into a parking space. As the officer approached to investigate, the vehicle pulled out of the spot and began driving toward the exit. The officer activated his lights and stopped the vehicle. When the officer began talking to appellant, he noticed the smell of burnt marijuana. Appellant ultimately admitted to having marijuana in the vehicle. Following a K-9 free-air search, officers searched the vehicle and found marijuana.

The Supreme Court of the United States set forth in *Terry v. Ohio* three tiers of police-citizen encounters: (1) communication between police and citizens involving no

coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief seizures supported by reasonable suspicion, and (3) full-scale arrests supported by probable cause. In order to analyze a defendant's claim that he was the victim of an illegal police detention, a court must first categorize the police-citizen encounter at issue. Police officers may approach citizens, ask for identification, and freely question the citizen without any basis or belief that the citizen is involved in criminal activity, as long as the officers do not detain the citizen or create the impression that the citizen may not leave. In any event, as long as a reasonable person would feel free to disregard the police and go on about his business, the encounter is consensual and no reasonable suspicion is required.

The Court initially rejected the State's contention that the officer's initial interaction with appellant was a first-tier encounter. Rather, the Court found, when appellant began to drive away from the parking lot and the officer activated his lights, the encounter elevated to a second-tier stop because the officer created the reality and the impression that appellant could not leave. Further, the Court distinguished the fact pattern in *Collier v. State*, 282 Ga.App. 605 (2006), where a patrol vehicle's blue lights and subsequent questioning of a defendant did not elevate the encounter beyond the first-tier because the defendant voluntarily approached the scene of investigation where the officer's lights were already illuminated. Besides, the *Collier* Court noted that the defendant's act of backing up his car in the wrong lane of traffic was already evidence of a traffic violation that provided the officer with reasonable, articulable suspicion to justify a stop of the vehicle.

By contrast, appellant did not come to the scene where an officer was already parked with his vehicle's lights illuminated. Instead, after the officer first observed appellant's vehicle parked in the lot, he decided to approach and investigate. Appellant attempted to leave but immediately stopped when the officer activated his blue lights. Further, there was no other evidence presented which showed that appellant was in a high crime area, that crimes had been committed at the golf club, or that the officer had knowledge that appellant was trespassing. Thus, the Court held, the trial court erred in ruling that the police officer's initial contact with appellant was a first-tier encounter not requiring reasonable, articulable suspicion of criminal activity. Therefore, the Court reversed appellant's conviction.

Fifth Amendment; Modified Protective Order

Bell v. State, A13A1655 (8/23/13)

Appellant argued that the trial court's order modifying a condition of his probation increased his punishment and was therefore void. The record showed that after a domestic dispute between appellant and his wife, the victim, she obtained an ex-parte TPO from the superior court on December 12, 2011, which contained a "no contact" provision. Appellant was served with a copy of this order on the same day it was issued. Two weeks later, the superior court converted the order to a twelve-month, "no contact" protective order. On January 15, 2012, appellant was arrested on misdemeanor charges arising out of an incident in which appellant bit the victim. He pled guilty to the offenses of family violence battery and disorderly conduct in state court on January 27. As a condition of probation, appellant was to have "no violent contact" with the victim. On February 10, appellant was arrested for aggravated stalking based upon a finding of probable cause that he had violated the terms of the protective order. After a hearing in superior court, appellant was taken to state court for a hearing on a motion to modify the terms of his probation. The solicitor asked the state court to change the "no violent contact" provision to "no contact" in uniformity with the protective order. The court agreed to change the terms of appellant's probation, agreed to apply the change prospectively, and, on the same

day, issued an order amending the terms of probation to provide for "no contact" with the victim.

On February 18, while in custody, appellant was served with an arrest warrant for violating the no contact term of his probation based upon the February 10 aggravated stalking charges. However, when appellant's probation was revoked on May 24, the revocation was not based upon the new aggravated stalking charges but upon other grounds, including that, between February 10 and 13, appellant made 382 telephone calls to the victim. On September 6, appellant moved the state court to vacate his modified probated sentence for the offenses of family violence battery and disorderly conduct on the ground that the sentence imposed increased his punishment and was, therefore, void. The state court held a hearing on the motion and denied it on November 15.

The Court noted that under O.C.G.A. § 17-10-1(a)(5)(A), the sentencing court "shall retain jurisdiction throughout the period of the probated sentence," and O.C.G.A. § 42-8-34(g) authorizes the court to "modify or change the probated sentence . . . at any time during the period of time prescribed for the probated sentence to run" and "in any manner deemed advisable by the judge." The Court also rejected appellant's contention that the change in condition of his probation from "no violent contact" to "no contact" increased his punishment under the Fifth Amendment's double jeopardy clause. Double jeopardy does not prohibit the imposition of any additional sanction that could, in common parlance, be described as punishment and appellant failed to show that prohibiting a criminal defendant from having contact with a victim qualified as legal punishment. Further, the "no contact" condition as statutorily characterized under O.C.G.A. § 19-13-30(b) does not provide punishment, but rather protection to individuals from violence. Therefore, the probation modification did not constitute punishment and the trial court did no error in denying appellant's motion to vacate his sentence.

Search & Seizure

Valentine v. State, A13A1267 (8/27/13)

Appellant was convicted of trafficking in marijuana. He contended that the trial

court erred in denying his motions to suppress because 1) the traffic stop leading to his arrest was not supported by reasonable articulable suspicion; and 2) the traffic stop was impermissibly expanded, thus rendering his consent to the search of his vehicle invalid. The evidence showed that an officer initiated a traffic stop of a tractor trailer driven by appellant because the decal displaying the vehicle's DOT numbers were too small and the trailer's mud flap was partially ripped. Upon approaching the vehicle, the officer confirmed that the mud flap was torn and asked to see appellant's required truck documents. Appellant offered suspicious reasons as to why he was missing some of the trucks operating documents and the officer testified that appellant was nervous during his interactions. The inspection of appellant's log book showed excessive downtime and that it was not properly maintained. Further, the officer's suspicions were heightened because appellant was in the process of making a long and cargo-less trip without the prospect of making any money. After issuing warnings, the officer asked if there were any drugs or illegal items in the tractor trailer, to which appellant said no. The officer then requested consent to search the tractor trailer, and appellant agreed. Marijuana was found inside the truck's cab. In total, thirty-three minutes had elapsed between the time the traffic stop was initiated and when appellant signed the consent to search form.

The Court initially rejected appellant's contention that the officer lacked a sufficient legal basis to effectuate the traffic stop and that the stop was pretextual. All that is required to initiate a traffic stop is specific and articulable facts providing reasonable suspicion that an individual being stopped is engaged in criminal activity. Further, a suppression motion arguing that a traffic stop was pretextual fails when an officer observes the motorist committing a minor traffic violation. Here, the officer's testimony indicated that he based appellant's stop on the mud flap and DOT lettering violations. Although 49 CFR §390.21(c)(3) regulates that a DOT decal must be legible "while [the vehicle] is stationary," the Court noted that the officer acted in good faith in believing that the unlawful act had been committed, thus his actions could not be rendered improper by a subsequent determination that the

defendant's actions were not a crime according to the technical legal definition in the statute. Further, the officer's action in stopping appellant's vehicle was shown to be reasonable and not harassing under all the circumstances.

Next, the Court rejected appellant's contention that the officer impermissibly prolonged the traffic stop. If an officer prolongs the traffic stop beyond the time reasonably required to fulfill the initial purpose of the stop, then the continued detention of the vehicle and its occupants amounts to a second detention. A reasonable time to conduct a traffic stop includes the time necessary for the officer to check the status of pertinent documents, such as the driver's license, insurance, and vehicle registration. The law further allows the officer to ask the driver questions unrelated to the purpose of the valid traffic stop, as long as the questioning does not unreasonably prolong the detention. Although the officer continued to question appellant after he wrote him a citation, the Court held the second detention justifiable because the officer learned information during the initial questioning that provided him with specific, articulable facts giving him reasonable suspicion to prolong the length of the stop. Appellant's inconsistent descriptions of his route, the inconsistent and noncompliant log books, his statement that he had taken a "personal" multi-state trip, and the fact that he would have wasted a large amount of money by driving his truck from North Carolina to Texas with no cargo amounted to more than a mere hunch. Thus, the trial court did not err in denying appellant's motion to suppress.

Search & Seizure; Expectation of Privacy

Mitchell v. State, A13A1393; A13A1394 (8/22/13)

Appellants were convicted of manufacturing marijuana and other controlled substance violations. Appellants contended that the trial court erred in denying their motions to suppress because the search warrant was based on illegally obtained information in violation of the Fourth Amendment. The Court agreed and reversed their convictions.

The evidence showed that officers were attempting to locate an individual who had fled from a traffic stop. A dual purpose K-9—one that could detect humans and the

presence of drugs—was dispatched to the scene to help the search. After unsuccessfully searching for the driver, the officer handling the K-9 heard a "crashing in the woods" behind appellant's home. To investigate, officers ran across appellant's driveway, which acted as a bridge between a stream and the woods. The path to the woods required officers to pass through appellant's front and side yard to yet another bridge which led into the wooded area. While taking this route, the drug dog alerted the officer to the presence of drugs near the basement door located on the side of appellant's residence. Officers then continued the search for the driver who had fled, but did not find him. When returning to the scene, officers knocked on appellant's door, notified them of the drug dog's alert to the presence of drugs, and sought consent to search the home. Appellants declined consent and the officers used the information gained from the incident as probable cause to obtain a search warrant. The subsequent search yielded growing marijuana and oxycodone.

The Court held that the officers violated the Fourth Amendment rights of appellants in obtaining the information to support the affidavit in support of the warrant. Specifically, the record showed that the officers and the police dog initially smelled the odor of raw marijuana coming from the residence after they left the driveway and intruded into the yard of the residence. The yard in which the officers and dog were walking when they smelled the marijuana was immediately surrounding the residence, an area within the curtilage of the residence, and was therefore an area in which appellants had a reasonable expectation of privacy protected by the Fourth Amendment's prohibition against unreasonable searches and seizures. For the purposes of the Fourth Amendment, curtilage is considered part of the home itself. Moreover, the intrusion into appellants' protected area of the home occurred without consent, a warrant, or exigent circumstances. Because the officers and the dog were unlawfully intruding on the curtilage of the residence, the odor of marijuana they smelled during the intrusion was evidence illegally obtained by search or seizure in violation of the Fourth Amendment. Thus, the Court held, the evidence found during the search should have been suppressed because the finding of probable cause to issue the search

warrant was based wholly on information illegally obtained by the officers.

Judicial Comment; Witness Credibility

Haymer v. State, A13A1552 (8/27/13)

Appellant was convicted of voluntary manslaughter and aggravated assault. He contended that the trial court made several impermissible comments during the trial, including a statement during the defense's cross-examination of a police detective indicating that it was "quite all right" for police officers to provide false information to a suspect during a custodial interview to "test" the suspect. Specifically, appellant argued that the trial court's comment violated O.C.G.A. § 17-8-57 and required a new trial. The Court agreed and reversed appellant's conviction.

The record showed that defense counsel cross-examined the detective regarding appellant's interview with detectives. During the cross-examination of the lead detective who participated in the custodial interrogation of appellant, defense counsel highlighted the fact that the detectives told appellant that his fingerprints were on the cell phone found in the victim's apartment, even though the phone had never been dusted for fingerprints. Defense counsel's questioning of the detective proceeded as follows: [DEFENSE COUNSEL]: There were never any fingerprints on the phone. [LEAD DETECTIVE]: And if there was we didn't dust for any, no. It was just a tactic to see if he would be honest with us about where his phone was and who had his phone. And it worked. [DEFENSE COUNSEL]: A dishonest tactic for honesty? THE COURT: Argumentative. *And it's quite all right for the police officers to do that in order to test a person.* So move on. (Emphasis supplied.)

The Court stated that one of the trial judge's most critical duties is to maintain complete impartiality in fact and in appearance throughout the proceedings and, most importantly, in front of the jury. Encompassing the judiciary's duty to maintain impartiality, O.C.G.A. § 17-8-57 provides, "[i]t is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate

this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error and the decision in the case reversed, and a new trial granted in the court below with such directions as the Supreme Court or Court of Appeals may lawfully give.” Moreover, even if defense counsel fails to raise an objection, an improper comment requires a new trial and no harmless error can be found. The purpose of the statute is to prevent the jury from being influenced by any disclosure of the judge’s opinion regarding a witness’s credibility because the credibility of a witness is a material fact in every case, and any questions of credibility are for the jury to decide. Thus, any statement which tends to uphold, to support, to disparage, or to lower the character and the resulting credibility of the witness is vitally connected with the facts of the case. Further, a trial court violates the statute by offering an opinion in front of the jury on any disputed material fact involved in the case.

The Court held that the trial court’s comment in the case violated O.C.G.A. § 17-8-57. Through its comment, the trial court gave its imprimatur to the interrogation techniques used by the detectives while interviewing appellant. Hence, the trial court’s comment could have been construed by the jury as a favorable opinion of the lead detective’s abilities, thus bolstering his credibility, which was a disputed material fact in appellant’s case. In so holding, the Court rejected the State’s assertion that the judge was merely explaining the ruling of the objection. Although generally speaking, a trial judge’s explanation for a ruling on an objection neither constitutes an expression of opinion nor amounts to a comment on the evidence, there nevertheless is a line that the trial court cannot cross when explaining the basis for its ruling. And here, the Court characterized the comment as gratuitous beyond an explanation; it provided to the jury a degree of credibility as to the detectives’ interrogation techniques. Therefore, the trial court committed reversible error in commenting to the jury that it was “quite all right” for detectives to provide false information to a suspect during a custodial interview to “test” the suspect. Accordingly, appellant’s conviction was reversed and remanded for a new trial.