Volume 8, Issue 1, February 2011

GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

···> our mission

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

···> contents

Often, officers arrest for impaired driving persons whom they neither observed drinking nor driving so these cases must be proved by circumstantial evidence. The feature article examines court decisions in cases based on circumstantial evidence. Also addressed is a recent appellate court decision that seemingly limits the prosecution of Driving Under the Influence of Drugs. Finally, see responses to questions relating to foreign drivers' licenses in the Traffic Law Corner Question & Answer.

contents

Circumstantial Evidence in DUI Cases

By Fay I. McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia

O.C.G.A. § 24-4-6. To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

What is circumstantial evidence? Some of the many definitions include:

1. Evidence in a trial that is not directly from an eyewitness or participant and requires some reasoning to prove a fact.

2. Evidence based on inference and not on personal knowledge or observation that does not directly prove a fact but gives rise to a presumption that a fact does exist.

3. Statements or information obtained indirectly or not based on first-hand experience by a person. Circumstantial evidence can include, in part, inferences about an event that was not seen.

4. Information and testimony presented by a party in a civil or criminal action that permit conclusions that indirectly establish the existence or nonexistence of a fact or event that the party seeks to prove.

5. As distinguished from direct evidence. Evidence which does not prove a fact in issue directly, but rather indirectly by inference from subsidiary facts such as when a witness says "I heard a shot and I saw the accused with a gun in his hand standing over a body lying on the ground.

6. "The distinction between direct and circumstantial evidence has best been explained this way: Direct evidence is that which is consistent with *either* the proposed conclusion *or* its opposite; circumstantial evidence is that which is consistent with *both* the proposed conclusion *and* its opposite." ***Stubbs v. State, 265 Ga. 883 (1995).***

The law in Georgia is that a conviction for driving while under the influence of drugs or intoxicants may rest upon circumstantial evidence where it is sufficient to exclude every reasonable hypothesis save that of guilt. ***Townsend v. State, 127 Ga. App. 797 (1972), Stephens v. State, 127 Ga. App. 416 (1972).*** The Court of Appeals insists that in cases involving life or liberty, this rule must not be relaxed. ***Parks v. State, 202 Ga. 84, (1947).*** If the state relies upon circumstantial evidence, it has the burden under O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis save that of guilt. ***Cornish v. State, 187 Ga. App. 140 (1988).***

It is essential that proper jury instructions are given any time circumstantial evidence is offered either by the state or the defendant. "When is a trial court required to give a jury charge on circumstantial evidence in a criminal trial and what should the charge say? We reiterate our holding in previous cases: If the State's case includes both direct and circumstantial evidence, the trial court must charge on the law of circumstantial evidence upon request; if the State's case is composed solely of circumstantial evidence, the trial court must charge on the law of circumstantial evidence even without a request. In either case, the trial court's charge on the law of circumstantial evidence should follow O.C.G.A. § 24-4-6. Yarn v. State, 265 Ga. 787, 462 S.E.2d 359 (1995); Mims v. State, 264 Ga. 271 (443 S.E.2d 845) (1994); Robinson v. State, 261 Ga. 698 (410 S.E.2d 116) (1991)." ***Stubbs v. State, 265 Ga. 883 (1995).***

In ***Cato v. State, 212 Ga. App. 417 (1994),*** defendant testified, as did his mother, that his severe allergies were bothering him at the time and he was taking Benadryl, an over-the-counter allergy medication. As a result, his eyes became red, watery, and swollen, and he became drowsy and sometimes dizzy. He had taken a heavy dose of Benadryl during the noon hour. He did not deny that he drank one or two beers just after he finished his job, before driving. When the officer complained that he was not blowing hard enough, he explained that he had bad respiratory problems and was on medication. The Court of Appeals ruled that defendant was entitled to his requested instruction on circumstantial evidence based on a reasonable hypothesis from defendant's use of Benadryl that he may not have been guilty of the crime charged. The court reversed defendant's conviction for DUI-Less Safe. The Court also reversed defendant's

continued >

This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The "Georgia Traffic Prosecutor" encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fmccormack@pacga.org.

DUI conviction in ***Tomko v. State, 233 Ga. App. 20 (1998),*** finding that the State's evidence of defendant's guilt included some circumstantial evidence (officer's opinion that defendant was impaired and a less safe driver) and that the trial court should have given the requested charge on O.C.G.A. § 24-4-6.

Prosecutors and law enforcement officers are regularly compelled to base their case on circumstantial evidence when the charge is a violation of O.C.G.A. § 40-6-270 (Hit and Run/Leaving Scene of Accident). In ***Reynolds v. State, 306 Ga. App. 1 (2010),*** the defendant appealed a judgment from a Georgia trial court, which convicted her of hit-and-run and DUI-Less Safe, in violation of O.C.G.A. §§ 40-6-270 and 40-6-391(a) (1). Through the testimony of three police officers and one tow truck driver, the State presented evidence that, as two officers were completing their work at an accident scene, they were informed that a driver's car had been sideswiped by a car that did not stop. The officers went to the reported hit-and-run scene, and a description of the alleged fleeing vehicle was broadcast over the police radio. The tow truck driver observed defendant by a silver car on the side of the interstate. The driver did not stop but observed defendant later in a store parking lot on a pay phone. When the tow truck driver was called to remove the silver car, he informed police that he observed defendant in the parking lot. Defendant had called 911 and stated that her car was stolen, and when police responded, she appeared intoxicated. Defendant was arrested and convicted. On appeal, the court found that the evidence was not sufficient to support the guilty verdicts. The State failed to establish that the silver car was involved in any hit-and-run incident, or that defendant owned the car or drove it. Accordingly, the elements of each offense were not sufficiently established and the court reversed the judgment of the trial court.

Based on the testimony of a civilian, a hit-and-run driver was convicted of DUI-Less Safe based on circumstantial evidence. To prove the DUI, the State offered a combination of direct and circumstantial evidence in the Chatham County case of ***McKay v. State, 264 Ga. App. 726 (2003)***. Ms. Baronet described McKay's failed effort to move his truck uneventfully from its parking space. In addition, she testified without dispute that McKay smelled of alcohol, his speech was slurred, he was slumped over the steering wheel, and he seemed "incoherent." Baronet claimed to have had life experience in observing people under the influence of alcohol. McKay plainly knew that his truck had hit a pedestrian. Then, after bystanders blocked his truck in, instead of awaiting the arrival of police to discuss the situation and sort things out, McKay abandoned his vehicle, fled from the scene on foot, and did not attempt to retrieve his truck until the following Monday. McKay contends that the evidence was insufficient as a matter of law to sustain his conviction for DUI. He claims that Baronet lacked specialized training in the detection of intoxicated individuals and that her opinion of his level of intoxication was not enough to prove the charge. The Court of Appeals found that a lay witness may testify as to the intoxication of the defendant and the extent thereof where the witness states the reasons for her opinion and shows that she did observe the defendant. The court said that whether to accept or reject all or part of this witness's opinion testimony was a matter for the trial court as the trier of fact. The court held that from this evidence, a rational trier of fact could have found beyond a reasonable doubt that McKay was operating or in actual physical control of a motor vehicle while under the influence of alcohol to the extent that it was less safe for him to drive.

The Court decided in favor of the state in ***Hendrix v. State, 273 Ga. App. 792 (2005)***. The defendant appeared to be asleep in the driver's seat of his vehicle with the engine running, in drive, with the lights on, and with his foot on the brake. There was no one else present. Although the officers did not see the car moving, they observed circumstances from which a jury could infer that Hendrix was in actual physical control of the car when it was moved to the location where the officers found it, and that Hendrix was intoxicated while moving it there. The court pointed out that DUI may be proven by circumstantial evidence, and that it is well settled that being found slumped over the steering wheel with the engine running constitutes such evidence. There was sufficient evidence for the jury to conclude beyond a reasonable doubt that Hendrix was in control of a moving vehicle while intoxicated. The Court of Appeals affirmed the trial court's denial of Hendrix's motion for directed verdict.

In ***Jenkins v. State, 223 Ga. App. 446 (1996),*** the defendant appealed from the judgment of the DeKalb State Court that convicted him of driving under the influence of alcohol to an extent that it was less safe for him to drive. Jenkins was discovered slumped over the wheel of his car while parked in a stranger's driveway with his engine running. A police officer determined that defendant was heavily intoxicated based upon his inability to stand and the strong smell of alcohol coming from the car. In affirming his conviction, the court held that even though no one actually saw defendant driving his car, circumstantial evidence, including the running engine and the location of the car, was sufficient to authorize the trial court's finding that defendant was guilty beyond a reasonable doubt. The court affirmed defendant's conviction.

In ***Deering v. State, 244 Ga. App. 30 (2000)***, police responded to a call of the discharge of a gun outside of a home and found Deering sitting in the driver's seat of a parked car with the engine running. Police smelled alcohol on his breath and found an open can of beer and a loaded pistol wedged between the front seats upon inspection of the car. The defendant was charged and convicted of possession of a firearm by a convicted felon, driving under the influence, driving without a valid license, driving with an open container of alcohol, and carrying a concealed weapon. He challenged his convictions, arguing that there was insufficient evidence to prove that he actually drove the car in which he was found and that he was in actual possession of the firearm. The court held that circumstantial evidence, such as the location of appellant in the driver's seat of a car with its engine running, the absence of other people in the vicinity, and the smell of alcohol on appellant's breath, was sufficient to convict appellant of driving while intoxicated.

The Court of Appeals also ruled in favor of the state in ***Patterson v. State, 302 Ga. App. 27 (2010).*** A police officer found defendant slumped over the wheel of a wrecked car, which was resting up against a curb and blocking the road. The key was in the ignition. There was no evidence of anyone else in the area that could have driven the vehicle. Defendant was passed out in the car, drooling on himself, and smelling of alcohol. When defendant awoke his speech was slurred, his eyes were glassy, and he was unable to balance. Defendant challenged a judgment of the trial court, which convicted him of driving under the influence of alcohol to the extent he was a less safe driver in violation of O.C.G.A. § 40-6-391(a). He argued that his mere presence in a stopped vehicle was insufficient to prove that he was driving under the influence of alcohol and that no direct evidence existed that he was driving the car. The Court of Appeals held that the trial court could have found from the evidence that no other reasonable hypothesis existed for defendant's presence at the scene other than that he wrecked a car while driving under the influence. Although the car was not running when the officer arrived, and he did not see the car moving, he observed circumstances from which a fact-finder could infer that defendant was in actual physical control of the car when it was moved to the location where the officer found it and that defendant was intoxicated while moving it there. The Court of Appeals affirmed the judgment. GTP

Intox 5000 not affected by interference from electronic devices

An officer, who observed defendant driving erratically, including stopping at a green light, turned on his camera, and began to follow defendant. The camera recorded defendant crossing the center line almost to the opposite curb. The officer stopped defendant, smelled alcohol, and administered field sobriety tests. Additionally, defendant admitted he had been drinking. He took defendant to a mobile command center. An Intoxilyzer 5000 test, taken within 30 minutes of the stop, gave defendant's blood alcohol level as exceeding .08 grams. Defendant argued that the evidence was insufficient to convict him. A Cherokee County jury convicted him of DUI, failure to maintain lane, speeding, and improper left turn. Defendant appealed.

The Court of Appeals held that the test results, combined with the deputy's testimony, provided ample evidence to support defendant's conviction of DUI — Per Se. Defendant's argument that the test results from the Intoxilyzer 5000 may have been affected by potential interference from other electronic devices was speculative, not supported by any evidence, and went to the weight rather than the admissibility of the test result. Also, the deputy testified that the machine would have displayed an error message if the test had been affected by radio interference. ***Miller v. State, A10A2269, Decided February 2, 2011*** GTP

DUI Drugs Code Section Ruled Unconstitutional

By Fay I. McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia

SANDLIN v. THE STATE, *A10A2197, Decided January 19, 2011*

After a jury trial in Carroll County, Jason Sandlin was acquitted of DUI-Less Safe but was convicted of Driving Under the Influence of a Controlled Substance (alprazolam). Sandlin argued on appeal that this case was governed by ***Love. v. State, 271 Ga. 398(1999)***, and thus O.C.G.A. § 40-6-391 (a) (6) was unconstitutional on equal protection grounds. The Court of Appeals agreed and reversed his conviction on this charge.

At trial, the forensic toxicologist from the Georgia Bureau of Investigation testified that Sandlin's blood contained metabolites of marijuana and alprazolam, which is commonly referred to as Xanax®. He testified that alprazolam, a Schedule IV drug, is a controlled substance that acts as a central nervous system depressant, and is only available through prescription.

O.C.G.A. § 40-6-391 (a) (6) provides that a person with any amount of marijuana or a controlled substance in his or her urine or blood can be convicted of driving under the influence. Under O.C.G.A. § 40-6-391 (b), however, a person who legally uses a controlled substance can only be convicted of DUI if that person "is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use." Therefore, Sandlin maintained that the statute denied him equal protection under the law because it disparately treated legal and illegal users of alprazolam.

The Court of Appeals pointed out that this was the same argument made in ***Love v. State, 271 Ga. App 398 (1999),*** in which the Georgia Supreme Court held that O.C.G.A. § 40-6-391 (a) (6) was unconstitutional as it pertained to persons with detectable levels of marijuana in their systems. The Court explained that the legislative distinction between users of legal and illegal marijuana was not directly related to the public safety purpose of the legislation. Therefore, it concluded that the statute was arbitrarily drawn and was an unconstitutional denial of equal protection. The Court reversed the defendant's conviction.

Relying on the holding in ***Love***, the Court of Appeals decided that the same result was warranted in this case because alprazolam is also a controlled substance that can be legally prescribed. The state argued that Sandlin was required to show that he was legally authorized to use the alprazolam, but the Court said that ***Love*** does not require such a showing to assert an equal protection challenge to the statute. Thus, Sandlin's conviction of violating OCGA § 40-6-391 (a) (6) could not stand and his conviction was reversed.

Suggestion from P. Lamb, SFST/DRE Instructor (retired)

In light of this ruling, let me suggest that you limit the applicability of this O.C.G.A. § 40-6-391 (a) to drugs that are not legal to use ANYWHERE, such as Ecstasy, LSD, Heroin, Salvia, Spice, PCP, Cocaine, Methamphetamines, etc. Rule of thumb: if the driver is under the influence of a drug that a doctor in the United Sates cannot write a prescription for, O.C.G.A. § 40-6-391 (a) (6) is appropriate. Also remember that subsection (a) (6) only applies where you have positive toxicology results. Your underlying charge for DUI/ Drugs should be O.C.G.A. § 40-6-391(a) (2) and requires proof that the driver was less safe. GTP

····> Traffic Law Corner: Q & A

Q: Could you please give me clarification on how long a person visiting from a foreign country is allowed to operate a motor vehicle in the United States on a driver's license from their home country.

A: A foreign national who is a non-immigrant visitor to the United States may operate a motor vehicle on the roads of this State for up to one year or until his or her visa expires, whichever occurs first, if they are 18 years of age or older. He or she must also have in their possession a valid driver's license issued by the driver's licensing authority in his or her country. 1949 Convention on Road Traffic, TIAS 2487, 3 U.S.T. 3008 (hereafter "1949 CRT"); Convention on the Regulation of Inter-American Automotive Traffic, TIAS 1567, 3 Bevans 865 (hereafter CRIAAT); O.C.G.A. § 40-5-21(a)(2); Schofield v. Hertz Corp., 201 Ga. App. 830, 832 (1991). Illegal aliens may not drive in Georgia even if they have an otherwise valid foreign driver's license because they have not been "admitted" to the United States, which is a requirement of the treaties. *Diaz v. State,* 245 Ga. App. 380, 383 (2000)

If the foreign license is not in English, the foreign driver must also have in his or her possession an International Drivers Permit (IDP). O.C.G.A. § 40-5-21(a)(2).The form of the IDP is prescribed by the treaties cited above and must be obtained by the foreign driver from the appropriate authority in his or her country, prior to arrival in the US. It cannot be obtained over the Internet. If the license is in English (which would include the United Kingdom and most countries that were at one time a British colony), the foreign driver does not need an IDP. Countries that are part of the European Union have standardized the design of their driver's licenses so that the critical information (name, date of issue and expiration date) is the same regardless of the official language of the country. An officer may consider EU licenses to be readable in English in which case an IDP is not required.

A foreign national who is admitted to the US as an immigrant must obtain a valid state driver's license within the time limit prescribed by the state in which they reside. In Georgia, that is 30 days (the same as if they were a US citizen who moved here from Tennessee). O.C.G.A. § 40-5-21(a). Some longer term non-immigrant visitors may qualify as residents under Georgia law, but that must be determined on a case by case basis. These foreign drivers may obtain a temporary Georgia driver's license and keep their foreign driver's license. O.C.G.A. §§ 40-5-20(b)(2); 40-5-21.1.

Foreign diplomatic and consular officers who work in the United States are required by federal law to have a driver's license issued by the U.S. Department of State rather than a state issued driver's license.

Q: Driver was stopped for a traffic offense. When the officer asked for his license, the defendant presented the officer with an ID card and booklet both of which were titled as a "International Driving Document."

Based on a review of the video, the defendant, who speaks limited English, indicated that he got the document from "Fulton." According to the booking information, the defendant is a Mexican citizen. He did not give the deputy a Mexican driver's license at the time. The ID card that was in the booklet also indicates that it is "Non Government Issued."

Based on my review of the file, I question the document being a legitimate foreign license issued by his country of citizenship. Therefore, I think the defendant can be charged with driving without a license. Is this correct?

A: You are correct in your assessment of these documents. It is one of several of these types of documents that are available over the internet. It is totally bogus so the charge of driving without a license is appropriate. I advise officers that if they are presented an "International Driving Document," that they can charge the defendant with false statement under O.C.G.A. 16-10-20. I also suggest the officer tell the driver that the document is a fake and if he or she insists on using it, they will be charged with a felony.

To be valid, the foreign driver must have a valid driver's license issued by the appropriate driver's licensing authority in his country (in this case his Mexican state of residence), and, because his license would have been in Spanish, an International Driving Permit (IDP). The IDP must be issued by a government designated agency in his country and is valid for 12 months. The form of the permit must conform to the specifications of the 1949 Convention on Road Traffic (not the United Nations Convention on Road Traffic). In most situations, the foreign driver will also be a non-immigrant visitor to the United States.

GEORGIA traffic PROSECUTOR

Prosecuting Attorneys' Council of Georgia
Traffic Safety Program
104 Marietta Street, NW
Suite 400
Atlanta, Georgia 30303

····> traffic safety program staff

Fay McCormack
Traffic Safety Coordinator
404-969-4001 (Atlanta)
fmccormack@pacga.org

····> fact:

Every day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes. The annual cost of alcohol-related crashes totals more than $51 billion.

-Statistics courtesy NHTSA (www.nhtsa.gov)

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Fay McCormack at PAC.