Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MARCH 1, 2019
Issue 9-19

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Involuntary Intoxication; Rule 31.5

McKelvin v. State, S18A1031 (2/4/19)

Appellant was convicted of malice murder, three counts of aggravated assault and other offenses. Prior to trial, the court granted the State's motion under Uniform Superior Court Rule 31.5, requiring the defense to give notice of its intent to pursue involuntary intoxication and to turn over a psychiatric report which the court had previously ordered to evaluate appellant's fitness to stand trial. Following the trial court's ruling, the defense retained an expert witness, who testified at trial in support of appellant's theory of involuntary intoxication.

Appellant first contended that the trial court erred in concluding that, under Rule 31.5, the defense was required to provide written, pre-trial notice of its intent to pursue a theory of involuntary intoxication. The Court disagreed. Rule 31.5 requires written, pre-trial notice to the State where an accused intends to raise the issue that he was insane, mentally ill or mentally retarded at the time of the act or acts charged against the accused. Though involuntary intoxication is not specifically referenced in the rule, the Court stated that the defense is one involving issues of mental competence, in effect, temporary insanity. In fact, the involuntary intoxication statute, OCGA § 16-3-4 (a), tracks the language of the insanity statute, providing that involuntary intoxication is only a defense where an accused can demonstrate that he "did not have sufficient mental capacity to distinguish between right and wrong in relation to such act." Accordingly, though involuntary intoxication is not specifically referenced in Rule 31.5, the trial court correctly concluded that pre-trial notice of that defense is required since it is a subset of an insanity defense.

Appellant next argued that he was not required to give pre-trial notice of his intent to pursue involuntary intoxication because he sought to present the defense solely through lay witnesses. The Court noted that under the version of Rule 31.5 in effect at the time of trial, there was no pre-trial notice requirement where an insanity-type defense was to be pursued exclusively through lay witnesses. But, the trial court clearly concluded — and the record supported — that appellant's defense depended on more than lay-witness testimony. As his witness list indicated, appellant intended to call emergency medical technicians and an emergency-department physician who treated appellant on the night of his arrest. At the hearing

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on the State's motion to compel, the defense acknowledged that it would seek to elicit testimony from those medical personnel regarding their observations and treatments of the defendant on the night in question. That, alone, could constitute lay-witness testimony.

However, the defense also sought to explore other avenues of testimony, namely the results and implications of appellant's drug and alcohol tests on the night in question, both of which were negative.
Trial counsel explained that he planned to ask "the doctor about the drug test, what it did test for and what it did not test for to show there are certainly other types of drugs that are out there that were not tested for. Certainly, there could have been one that he was under the influence of." Thus, the Court found, the anticipated purpose of the physician's testimony was not in simply reporting that the drug and alcohol screen was negative — indeed, that would have been of no benefit to the defense — but in exploring what testing the physician ordered, what substances he did not test for, and whether appellant could have been on those substances. Such testimony and inferences by the physician require scientific or specialized knowledge, see OCGA § 24-7-701 (a) (3), and veer into the realm of expert-witness testimony. As such, appellant was not supporting his defense solely with lay-witness testimony. Accordingly, the trial court did not err when it decided that, under Rule 31.5, appellant was required to provide written, pre-trial notice of his intention to pursue the defense of involuntary intoxication.

Finally, relying on *Neuman v. State*, 297 Ga. 501 (2015), appellant argued that the trial court erroneously required him to turn over the psychologist's report to the State. But, the Court found, in contrast to *Neuman*, the psychologist who evaluated appellant was neither an expert retained by trial counsel nor acting to aid trial counsel in his representation of appellant. Instead, the psychologist was working at the direction of the trial court. In fact, the report clearly reflected that the evaluation was being conducted to develop recommendations for the court, and the resulting report was addressed and transmitted to the trial court, with a copy provided to defense counsel. Thus, *Neuman* was not controlling and the trial court did not err.

Guilty Pleas; Rule of Lenity

State v. Hanna, S18A1559 (2/4/19)

Hanna was charged with two counts of felony murder, OCGA § 16-5-1, and two counts of cruelty to children in the first degree, OCGA § 16-5-70. The felony-murder counts were predicated on first-degree cruelty to children by depriving the child of necessary sustenance to the extent that his health and well-being were jeopardized and by failing to seek necessary and adequate medical attention for the child. Hanna entered a non-negotiated plea of guilty to all four counts, but at the pretrial motions hearing and the plea hearing, defense counsel argued that the rule of lenity required that Hanna be sentenced as for contributing to the deprivation of a minor leading to death, pursuant to former OCGA § 16-12-1 (b) (3) and (d.1) (1) (2011), instead of for felony murder.

The trial court chose to sentence Hanna on the first count of felony murder, based upon her causing the child's death by depriving him of necessary sustenance to the extent that his health and well-being were jeopardized. And over the State's strenuous objection, the court further stated that it would apply the rule of lenity to that conviction and sentence Hanna as for contributing to the deprivation of a minor leading to death. The court sentenced Hanna to ten years in prison for

felony murder, with the first four years to be served in confinement and the balance on probation. The State appealed the void order pursuant to OCGA § 5-7-1 (a) (6).

The Court, without addressing the rule of lenity, agreed with the State. Here, Hanna pled guilty to, and was convicted of, felony murder, for which death and imprisonment for life, with or without the possibility of parole, are the only sentences prescribed by law. The trial court expressly sentenced Hanna on the first felony murder count, but it applied the penalty prescribed for violation of former OCGA § 16-12-1 (b) (3), with which Hanna was not charged and to which she did not plead guilty. The Court held that this sentence amounted to punishment that the law does not allow, is void, and must be vacated.

The Court then addressed the rule of lenity. The Court noted that in some cases, the rule of lenity has been applied to decide what sentence should be imposed because the statute determining the sentence is ambiguous. But, that application of the rule of lenity was not at issue in this case, because there is no ambiguity about the proper sentence for felony murder: the sentence must be death, imprisonment for life without parole, or imprisonment for life.

In other cases, the rule of lenity has been applied when the court concludes that one offense has been criminalized by two different statutory provisions, one of which provides a lesser punishment than the other. In that situation, the statutory provision imposing the greater punishment is effectively abrogated by the provision imposing the lesser punishment, and the defendant cannot be properly prosecuted or convicted under the more stringent provision. The Court noted that Hanna's rule of lenity argument follows this course. She argued that the offense of felony murder based on depriving a child of necessary sustenance, see OCGA § 16-5-1, and the offense of contributing to the deprivation of a minor leading to death, see former OCGA § 16-12-1 (b) (3) and (d.1), criminalize the same conduct. She contended that she therefore can only be convicted of and sentenced for contributing to the deprivation of a minor, because it carries a lesser penalty.

The Court stated that if those two statutes in fact cover the same offense so that an ambiguity is created as to which one should apply, then Hanna would be partly right: she could not properly be convicted of and sentenced for felony murder. But the method that Hanna proposed, and the trial court adopted, to address her rule of lenity argument was incorrect. Although the rule of lenity may require a court to reverse a *conviction* based upon the violation of a statutory provision that has been effectively abrogated by a duplicative provision imposing a lesser penalty, the rule does not allow the court to impose a *sentence* for an offense different than the one unambiguously provided for in the statute to which the defendant pled or was found guilty.

Thus, the Court stated, Hanna could have filed a general demurrer to the charge of felony murder based upon depriving a minor of necessary sustenance, on the ground that the felony murder statute cannot be applied to her offense because of the more lenient deprivation statute and rule of lenity. Or she could have pled guilty or gone to trial and then raised a rule of lenity argument challenging a conviction for felony murder. If the trial court was persuaded by such an argument, it could dismiss the felony murder count or set aside the felony murder conviction. The court could not, however, do what it did here: leave Hanna's felony murder conviction in place but impose a sentence for the crime of contributing to the deprivation of a minor, because Hanna was not convicted of that offense. Accordingly, the Court concluded that the sentence for felony murder is illegal and void, and vacated it.

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Judicial Misconduct; *Franks* Hearings

Young v. State, S18A1468 (2/4/19)

Appellant was convicted of murder and aggravated assault in connection with the death of his estranged wife. The transcript showed that after the jury had reached an impasse on the second day of deliberations, the judge polled the jury and concluded that further deliberations might allow the jury to reach a unanimous verdict. However, prior to sending the jury back to deliberate, the judge made the following statement: "I want to caution you that at no point in the deliberations should your conversation become abusive to any member of the jury and you have indicated that as to two of the counts the vote is 11 to 1. What I don't want to happen is for the one to be abused in the jury deliberations. Each of you has an independent and individual duty to decide this case for yourself, and each of you have to do that based on your opinion of the evidence and *your own conscience*, and you have to reach that decision for yourself. I don't want anybody to surrender an honestly held opinion of the evidence simply to terminate these proceedings. I don't want the jury discussions to become abusive toward one person or to the smaller group, the minority in the vote." (Emphasis supplied).

Appellant argued that the trial court was wrong to tell the jurors to vote their conscience because it allowed the jurors to consider their own biases and prejudices (rather than the evidence) in making a decision. The Court found no error in the instruction given. Taken as a whole, it was unlikely the jury would have understood that its verdict could be based on something other than the evidence. After polling the jury, the trial court attempted to convey that each juror had to assess the evidence for herself, and no juror should surrender her honest appraisal of the evidence merely for the sake of compromise. It was in this attempt that the trial court made reference to "conscience," and that is how a reasonable juror would have understood it. A trial court may advise the jury of the importance of reaching a unanimous verdict that is consistent with the consciences of the jury members. In addition, at the beginning of the trial, the trial court instructed the jury that it was to make its decision based solely on the evidence and testimony presented and the instructions given by the court. Therefore, the jury charge was not error.

Appellant also argued that because his arrest was based on a misleading affidavit, the trial court should have granted his request for a hearing pursuant to *Franks v. Delaware*, 438 U. S. 154 (98 SCt 2674, 57 LE2d 667) (1978) The Court noted that a *Franks* hearing allows the defendant an opportunity to challenge the validity of a search warrant if he can show it was supported with a false affidavit. In this case, however, the record showed that prior to trial, Young filed a motion pro se requesting a *Franks* hearing, which alleged that the police lied in their affidavit used to support his arrest warrant. The trial court denied appellant's request for a *Franks* hearing, observing that appellant had failed to show "what consequences would flow from the 'nullification' of the arrest warrant." In addition, the trial court stated that appellant was given a preliminary hearing where a magistrate judge found that probable cause existed, and then indicted by a grand jury, which offered additional independent proof that probable cause existed. Appellant then submitted, through counsel, a motion to quash the indictment, which argued that the police materially misrepresented facts to the grand jury to secure an indictment. The trial court denied the motion, stating that it had no way of knowing what statements were made to the grand jury due to privilege.

The Court found no error. First, regardless of whether appellant's request for a *Franks* hearing was properly denied by the trial court, his argument failed because he was both indicted and convicted, which supersedes his arrest warrant. Where

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the defendant has been indicted and convicted, an illegal arrest based on a defective warrant is not alone a ground for reversal.

Second, the Court found no error in the trial court's denial of appellant's motion to quash the indictment. Although it was unable to verify appellant's assertions, as secrecy is maintained with regard to grand jury proceedings where a competent witness is sworn properly and testifies before the grand jury, and where the defendant is thereafter found guilty beyond a reasonable doubt by a trial jury, the sufficiency of the evidence to support the indictment is not open to question. Appellant failed to show that any grand jury witness was incompetent or not sworn properly. Accordingly, the trial court committed no error in refusing to grant a *Franks* hearing or quash the indictment.

Tardiness of Lead Counsel; Voir Dire

Wainwright v. State, S18A1221 (2/4/19)

Appellant was convicted of murder and related offenses. The transcript showed that on the first morning that evidence was presented at trial, appellant's lead counsel, Morris, had not arrived in court. The judge asked if anyone knew when Morris would arrive, and then asked Fortas, appellant's second-chair counsel, if he had heard from Morris. Fortas asked for some time to contact Morris, especially since the upcoming witnesses were "Morris's". The judge gave Fortas some time and Fortas left the courtroom. The jury was then seated and shortly thereafter, Fortas reentered the courtroom. At the court's request, the State then called its first witness and the presentation of evidence began without Fortas making any additional request or comment about Morris. Nor did Fortas ask for a continuance. Morris arrived in court approximately an hour later, roughly three-quarters of the way through the State's direct examination of Aimes, its second witness. After hearing the remainder of Aimes's direct examination, Morris cross-examined her.

Appellant conceded that the first witness was unimportant, but argued that the trial court abused its discretion in not waiting for Morris regarding Aimes and for not granting Fortas's motion for a continuance. The State argued that Fortas never actually requested a continuance. However, the Court stated, it did not need to determine what exactly Fortas did during that delay, or settle the parties' dispute about whether Fortas's request merely was for time to contact Morris to determine his whereabouts, or whether Fortas was requesting a continuance to ensure that Morris was present when the State's first witness began testifying, because in either instance, appellant failed to meet his burden of showing that he was harmed. A review of the record showed that Fortas was in court and representing appellant when the State presented its first and second witnesses, and appellant did not allege any specific errors in Fortas's representation of appellant in Morris's stead. In fact, the Court stated, there is no inherent violation of a defendant's constitutional right to counsel when an associate of lead counsel represents the defendant. Similarly, appellant did not point to any specific errors that Morris committed in his cross-examination of Aimes, arguing instead that he necessarily must have been harmed by Morris cross-examining Aimes since Morris was not present for much of Aimes's direct examination. But mere speculation and conjecture that harm occurred is not enough to show harmful error.

Appellant also argued that the trial court erred by refusing his request to voir dire individual jurors in panels of 12 at a time. Pursuant to OCGA § 15-12-13, "[i]n the examination of individual jurors . . . it shall be the duty of the court, upon a request of either party, to place the jurors in the jury box in panels of 12 at a time, so as to facilitate their examination by counsel." In accordance with that rule, the Court held that upon a party's request, the trial court is required to put the

jurors in the jury box in groups of 12 for examination of individual jurors because the statute does not provide for the exercise of judicial discretion in this matter. Error in this respect, however, will not warrant reversal if the defendant is not harmed by it. And a trial court's error in denying a defendant's request to place the jury in panels of 12 for individual questioning has been held harmless when the evidence of guilt in the case was overwhelming.

Here, the Court found, at the outset of voir dire, appellant did request "that there be 12 in each panel that we voir dire." The trial court denied that request, indicating that jurors would be placed in the jury box in panels of 14 at a time. The court then proceeded by posing general voir dire questions to the 48 jurors en masse; allowing the parties to then ask additional, general voir dire questions en masse (with jurors raising their hands to indicate affirmative responses, so that the parties could follow up with them during individual voir dire); and then permitting the parties to examine individual jurors, one by one, while seated in the jury box in panels. And as it said it would, the court placed jurors in the jury box for individual examination in panels of 14, even after appellant requested that 12 be in each panel.

Nevertheless, the Court noted, it was not entirely clear whether appellant's request, which he made before general voir dire began, was that both general and individual voir dire questions be propounded to the jurors while they were seated in the jury box in panels of 12. But even assuming that the request included individual voir dire—a request that the court should have granted under OCGA § 15-12-131— the Court concluded that under the circumstances, the inclusion of two additional jurors in the panels during individual voir dire did not harm appellant. Though appellant asserted generalized harm by contending that Morris had "unusual difficulty . . . managing voir dire," Appellant did not show how those alleged difficulties were attributable to the two additional jurors in each panel. Moreover, the evidence of appellant's guilt was strong. Therefore, the Court held, given the lack of record evidence showing that appellant suffered harm, and the strength of the evidence against him, any error in the court's decision to place the jury in panels of 14 during voir dire was harmless, and appellant's claim failed.

Due Process; Adequate Hearing Assistance

Birdlow v. State, S18A1154 (2/4/19)

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred by not providing him with adequate hearing assistance during the trial. He also argued that his trial counsel was ineffective for failing to arrange adequate hearing assistance during the trial.

The Court noted that OCGA § 24-6-650 provides: "It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts … of this state and its political subdivisions unless qualified interpreters are available to assist such persons." To give effect to this policy, the General Assembly has mandated that, upon timely request, courts must provide hearing impaired persons represented by appointed counsel with the assistance of court-qualified sign language interpreters at all court proceedings to which they are a witness or party. OCGA §§ 24-6-651; 24-6-654.

Here, the Court found, although appellant is hearing-impaired, the record reflected that he did not request the assistance of a sign-language interpreter during pre-trial proceedings or at trial. Instead, the trial court provided him with headphones

that amplified the words spoken into microphones in the courtroom. Appellant was asked a number of times throughout the proceedings whether he was able to hear what was being said in the courtroom. In instances in which he did not adequately hear or understand what a witness, an attorney, or the judge had said, appellant was instructed to raise his hand and request that the statement be repeated. The record reflected that appellant utilized this procedure a number of times and that, in each instance, the speaker repeated the prior statement. The record also reflected that the trial court suspended the pre-trial proceedings at one point due to a failure of the technological assistance provided to appellant and in several instances encouraged witnesses to take special care to speak loudly into the microphone due to appellant's hearing impairment.

The Court also noted that neither appellant nor his trial counsel objected to the form of assistance offered by the trial court or invoked appellant's right to a sign language interpreter pursuant to OCGA § 24-6-650 et seq. Nevertheless, appellant contended that the hearing assistance he was provided was inadequate. The Court disagreed.

Appellant's trial counsel testified that, prior to trial, she discussed appellant's rights to hearing assistance with him. She also stated that appellant wore the court-provided headphones throughout the proceedings and that "[appellant] would always seem to say he could hear everything and understood what was going on." Trial counsel stated that, when the audio equipment suffered a malfunction, the trial court delayed the start of the trial so that functioning equipment could be used. Thus, the Court found, appellant failed to carry his burden of establishing that he was unable to hear any portion of the proceedings even when using the technological assistance and the procedure implemented by the trial court. Accordingly, the Court found no error on the part of the trial court with regard to the hearing assistance it provided to appellant.

Moreover, the Court found nothing in the record that suggested trial counsel was deficient in regard to obtaining adequate hearing assistance for appellant. The record established that appellant utilized the procedure suggested by the trial court to indicate that he was unable to hear something that had been said in the courtroom and that the trial court made laudable efforts to encourage everyone speaking on the record to do so in a manner that appellant could hear and to repeat a statement any time appellant made a request to do so. Appellant also failed to point to any specific instance in which, by utilizing that procedure, he was unable to hear the proceedings, nor did the record establish that a specific alternate form of hearing assistance was necessary to enable him to understand what was being said in the courtroom. Thus, the Court concluded, his enumerations regarding the adequacy of the hearing assistance he was provided failed.

Breath Tests; Self-Incrimination

State v. Council, A17A1218 (2/1/19)

In 2017, the Court of Appeals reversed the trial court's grant of the motion in limine filed by Council to suppress the results of a breath test. *State v. Council*, 343 Ga. App. 583 (2017). The Supreme Court vacated and remanded for reconsideration in light of *Caffee v. State*, 303 Ga. 557 (2018). Thus, the Court stated, its review was limited to only whether Council voluntarily consented to the state-administered breath test.

The State argued that the trial court erred in ruling that Council had been compelled to perform the breath test, so that administration of the test results violated Council's right against self-incrimination provided by the Georgia Constitution. Specifically, the State argued that it did not compel Council to submit to the breath test. The Court agreed.

Here, the Court found, the DUI officer's dashcam recordings showed that while the DUI officer was escorting Council to his patrol car in order to conduct the field sobriety tests, Council's phone rang and she stopped walking to search for it in her purse. Once she found her phone, she handed her purse to the DUI officer while she answered her phone. Then, when she was finished with the call, Council handed the phone to the DUI officer, who put the phone in Council's purse before putting the purse on the hood of his patrol car while he performed the field sobriety tests. Thus, the evidence did not support the trial court's finding that Council consented to the breath tests after Council's phone was "taken away from her" and "confiscated."

The trial court also found that, "[t]hroughout her encounter with [the DUI officer, Council] indicated [that] she wanted to make phone calls before she made decisions, including whether to take the field sobriety tests and the [state-administered breath test at issue in this case]. Mixed in with requests to call a lawyer were requests to call someone to pick up her daughter from soccer practice." According to the trial court, the DUI officer "refused to let [Council] call anyone, but told her that after she took his test he would let her get someone to pick up her daughter. She was not given the option of making that telephone call without taking the test." However, again after reviewing the DUI officer's dashcam recording, the Court found that it did not support the trial court's findings. Instead, it showed that, while Council was deciding whether to complete the field sobriety tests, she asked the DUI officer if she could call "somebody and ask someone to come get [her]."

Similarly, the trial court found that the DUI officer told Council "that he was also concerned about her daughter and that, even though it was not the usual practice and procedure, once she took his breath test he would allow her to make a telephone call." According to the trial court, right after that exchange, Council "finally agreed to take the breath test[.]" But, the Court found, the DUI officer's dashcam recording clearly showed that the exchange at issue occurred while the DUI officer was transporting Council to the police station, several minutes after she had consented to taking the breath test. Moreover, the DUI officer did not tell her that he would let her make a phone call "once she took [the] breath test," but, instead, told her that she could call her boyfriend "once we finish there[ ] at the precinct." And, significantly, there was no evidence that, once she agreed to take the breath test, Council ever withdrew her consent before taking the test.

In other words, the Court found, Council was not going to be allowed to make the calls until she either took the breath tests or refused to do so. Thus, refusing to allow her to make the calls did not constitute coercion. Consequently, the Court concluded, there was no evidence to support the trial court's finding that Council's consent to the breath test was obtained after the DUI officer told her she could not call about her daughter unless she took the breath test, so that finding was clearly erroneous.

Having applied the standard of review set forth in *Caffee* and given the totality of the circumstances presented, the Court found that the indisputable evidence shown by the officers' dashcam recordings did not show that the State coerced or compelled Council to undergo the breath test. Therefore, because Council voluntarily consented to the breath test, her constitutional right against self-incrimination would not be violated by the admission of the results of her breath test, and the trial court erred in granting Council's motion in limine to suppress those results.

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Ineffective Assistance of Counsel; Special Demurrers

Thompkins v. State, A18A1859 (2/5/19)

Following a negotiated plea, appellant pled guilty to aggravated stalking and the remaining charges, burglary in the first degree and arson in the first degree, were nolle prossed. Thereafter, he filed a motion to withdraw his plea. After a hearing, the motion was denied.

Appellant argued that his counsel was ineffective in failing to file a special demurrer challenging the date range within his indictment. Specifically, the indictment charged appellant with committing aggravated stalking "between the 29th day of August, 2015, and the 27th day of September, 2015, the exact date of the offense being unknown to the Grand Jury[.]" Appellant contended that because the State provided a date at the plea hearing, August 29, 2015, on which he allegedly contacted the victim at her workplace, the State could have narrowed the range of dates and thereby his trial counsel should have filed a special demurrer. The Court disagreed.

Generally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer. However, where the State can show that the evidence does not permit it to allege a specific date on which the offense occurred, the State is permitted to allege that the crime occurred between two particular dates. And here, the aggravated stalking count on the indictment also stated that appellant contacted the victim "by electronic means." Thus, if, as alleged by the State, appellant had sent text messages to the victim over the indicted time period, the State would likely have been permitted to allege that the crime occurred between the two dates.

But, the Court added, even assuming it was error for appellant's counsel to have failed to file a special demurrer, he could not demonstrate the prejudice necessary to support his ineffective assistance claim. If a timely special demurrer is granted, the trial court quashes the indictment. However, the quashing of an indictment merely bars trial on the flawed indictment; it does not bar the State from re-indicting the defendant. Thus, even if appellant's attorney had filed a demurrer, it would not have prevented the State from re-indicting and trying appellant. Also, appellant did not claim that the allegedly imperfect indictment prejudiced him in any way, just that the special demurrer "more likely than not . . . would have been successful[.]" Accordingly, the Court concluded, under these circumstances, appellant failed to show that he was prejudiced by his attorney's failure to file a special demurrer.

Implied Consent; Coercion

State v. Baddeley, A18A1623 (2/6/19)

Baddeley, who was 63 year old, was charged with DUI in connection with a two car accident. The trial court granted his motion to suppress the results of a chemical blood test, finding that the officer coerced him into agreeing to the test. The State appealed.

The evidence, briefly stated, showed that the officer found Baddeley at the hospital emergency room. After determining he was under the influence, the officer, placed Baddeley under arrest without taking him into custody, read him the Georgia Implied Consent Notice, and asked Baddeley to agree to a blood test. Baddeley refused by shaking his head. Thereafter,

the officer prepared a driver's license suspension form, presented it to Baddeley, and explained that by refusing to submit to the blood test, his license would be suspended but that the form functioned as a temporary permit. In so doing, the officer told Baddeley that if he did not submit, the officer wound "yank" Baddeley's license "as of then." Baddeley then changed his mind and consented to the test, and the test ensued. Baddeley testified that he changed his mind in part because the trooper said that he was going to "yank" Baddeley's license. He also testified that he changed his mind because he felt "very intimidated" by the officer's "body language and the way he was looking at me."

In a 2-1 decision, the Court reversed. The Court stated that there were no objective facts in the transcript upon which the trial court was authorized to conclude that a reasonable 63-year-old person would not feel free to decline the officer's request for a blood test. Indeed, Baddeley initially refused to take the test, which reflected that he knew he had a right to do so. The only purported evidence to the contrary was that Baddeley felt intimidated by the officer's "body language and the way he was looking at [him]." But Baddeley did not describe the relevant body language or demeanor in any way. And the trial court's finding that "the Officer's demeanor changed when [Baddeley] refused [to take the test]" was wholly unsupported by the record and therefore clearly erroneous. There was no testimony about the officer's demeanor nor a change in it. Although the officer testified that Baddeley became argumentative at one point, there was no evidence regarding the topic of that argument or whether it contributed to Baddeley's feeling of intimidation. In fact, the Court stated, all it had was "Baddeley's subjective feeling of intimidation."

Moreover, the Court found, the use of the word "yank," without more, is insufficient to show coercion. Used in this manner, "yank" has been defined as "[to] remove abruptly" or "to remove abruptly and unceremoniously," and under the applicable statute, the law enforcement officer takes possession of the driver's license "at the time of the person's refusal." OCGA § 40-5-67.1 (f) (1). Thus, the officer accurately told Baddeley that he would take his license abruptly if he refused to comply, as the law provides, which is insufficient to show coercion.

The Court concluded that both the officer and Baddeley testified that after initially refusing the test, Baddeley "changed his mind," and there was no evidence that he did so as a result of any threats or other coercive techniques. Rather, the State showed that Baddeley voluntarily consented to taking the State-administered blood test after being told that he would lose his license if he failed to comply. Accordingly, the trial court's grant of the motion to suppress was reversed.