Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MARCH 8, 2019
Issue 10-19

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Search & Seizure

Cromartie v. State, A18A2041 (2/8/19)

Appellant was convicted of trafficking in cocaine, possession of marijuana with the intent to distribute, driving without a license, improper lane change, and failure to maintain lane. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence showed that officers saw a rental car with a Florida tag that was being driven erratically, changing lanes without signaling, veering outside of its lane, and speeding. Appellant was driving the rental car. A second vehicle, also with a Florida tag, was being driven very closely behind the first car and mimicking that car's actions, changing lanes whenever the first car changed lanes. Appellant's brother was driving the second vehicle. The manner in which the two vehicles were being driven and the fact that one was a rental car suggested to the law enforcement officers that the vehicles might be transporting drugs or otherwise engaged in illegal activity. Law enforcement officers stopped both vehicles. Appellant's brother was released with a warning after a consensual search of his vehicle yielded no contraband. However, appellant was arrested for giving false information to the officer. A drug dog was brought to the scene. It alerted on the vehicle and a search thereafter yielded the cocaine and marijuana.

Appellant argued that the law enforcement officers unreasonably prolonged the traffic stop to await the arrival of the drug dog, which the evidence showed occurred as much as 50 minutes after the stop began. The Court noted that in order to comply with the Fourth Amendment, an investigative detention cannot be prolonged beyond the time reasonably required to fulfill the purpose of the stop. But, the Court found, by the time the drug dog arrived, appellant was no longer in a temporary, second-tier encounter, investigative detention. Instead, the evidence showed that shortly after he was stopped, he was in a third-tier encounter, under arrest for giving false information to a law enforcement officer. And, the Court noted, appellant did not cite, and it was not aware of any authority imposing the prohibition against unreasonably prolonged detentions to a lawful, third-tier custodial arrest.

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Nevertheless, appellant contended, the search of the car following the drug dog's alert was unlawful because it did not comply with the requirements of a lawful warrantless search incident to arrest. However, the Court held, the search did not have to meet the requirements of that exception because it instead fell within the "automobile exception" to the search-warrant requirement, which permits officers to search a vehicle that is being used on the highways if they have probable cause to believe that it contains contraband. The drug dog's indication of the presence of drugs gave the officers probable cause to search the car. And the dog's open-air sniff, which preceded its alert, was not a "search" implicating Fourth Amendment rights. Accordingly, the trial court did not err in denying appellant's motion to suppress.

Right to Counsel; Right of Self-Representation

Renfro v. State, A18A2088 (2/11/19)

Appellant was convicted of rape, incest, aggravated child molestation and child molestation. He contended that his right to counsel was violated when the trial court allowed him to represent himself at trial. The Court disagreed.

The Court found that the record showed that after learning that appellant intended to represent himself, the trial court devoted substantial time and effort to ensuring that he understood the dangers of proceeding pro se. Specifically, the trial court warned appellant from the outset that self-representation was "always a bad idea," that appellant should not represent himself, and that defendants with so-called "sovereign citizen" beliefs such as his had never been successful; provided appellant with a copy of the indictment, to which appellant responded that he had "familiarized [himself] with the statutory elements necessary to prove all" the charges; asked whether appellant understood the lesser-included offenses of the charged crimes, and specifically suggested that he should examine the lesser-included offenses to rape and aggravated child molestation; and confirmed that appellant did not suffer from any mental disabilities or impairments and had some experience representing himself. The record also showed that the trial court authorized appellant to keep his previously appointed counsel as stand-by counsel, and that appellant availed himself of this resource throughout the trial. Under these circumstances, the Court concluded, the trial court did not abuse its discretion when it determined that appellant had knowingly and intelligently waived his right to trial counsel.

Nevertheless, appellant contended, his pretrial and stand-by counsel was ineffective during the case evaluation and investigation phase. The Court again disagreed. The record showed that counsel moved for a continuance at the outset of trial on the ground that appellant was incompetent. Appellant "objected" to the motion, which the trial court denied after determining that appellant had not received any diagnosis or treatment for mental illness. And, when a criminal defendant elects to represent himself, either solely or in conjunction with representation or assistance by an attorney, he will not thereafter be heard to assert a claim of ineffective assistance of counsel with respect to any stage of the proceedings wherein he was counsel. Therefore, the Court concluded, under the circumstances, which included appellant's rejection of stand-by counsel's advice to delay the trial and the trial court's repeated warnings that he should not represent himself, appellant was barred from asserting his own ineffectiveness on appeal.

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Best Evidence Rule; Transcript of Plea Hearing

Almeda v. State, A18A1710 (2/11/19)

The Court granted appellant's application for discretionary review after the trial court revoked his probation for violating a special condition. The record showed that appellant and Breazeale were indicted for robbery by force and theft by taking in connection with a December 2015 robbery. On September 6, 2016, appellant and the State agreed at a plea hearing that appellant would cooperate in finding a third person involved in the crimes in exchange for a sentence of 12 years with 3 to serve in prison. After appellant pled guilty, the trial court sentenced appellant to the negotiated sentence and imposed special conditions of probation including "truthful testimony" and "cooperat[ion] with the investigation of the case." The special conditions of appellant's probation included that he "shall testify fully and truthfully as to all circumstances of this case and any related matters" and "shall cooperate with police in the investigation of this case." After that pronouncement, appellant testified that Breazeale and he argued because Brezeale was seeing the victim. Appellant and a person named Grady arranged to jump the victim and knew where the victim would be because the victim had an appointment to see Breazeale that evening. Appellant did not implicate Breazeale.

Thereafter, a law enforcement officer went to speak to appellant in jail. Based on this interview and other evidence, the officer determined that appellant was not truthful in his testimony and fabricated a motive for attacking the victim in order to exonerate Breazeale. At the revocation hearing, and over an objection on the basis of the best evidence rule, Breazeale testified that, contrary to appellant's earlier testimony at the plea hearing, which she had attended, she was involved in the plan to confront and rob the victim and that parts of appellant's testimony had been false. The court thereafter revoked his probation.

Appellant argued that the trial court violated the best evidence rule when it admitted Breazeale's account of appellant's testimony at the plea hearing rather than the transcript of that hearing. The Court noted that
OCGA § 24-10-1002 provides that "[t]o prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required." "Given the similarity between Georgia's new evidence code and the Federal Rules of Evidence, it is proper that to give consideration and great weight to constructions placed on the Federal Rules by the federal courts. As the Eleventh Circuit and other federal courts have noted, Federal Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. It does not, however, require production of a document simply because the document contains facts that are also testified to by a witness. Therefore, the Court held, the trial court did not abuse its discretion when it overruled appellant's best-evidence objection to Breazeale's testimony concerning appellant's plea hearing.

Search & Seizure; Patdowns

State v. Robusto, A18A1802 (2/11/19)

Robusto was accused of one count of possession of heroin and one count of failure to wear a seat belt. The Court granted his motion to suppress, finding that the officer did not have a reasonable suspicion to pat-down Robusto, a passenger in the vehicle, based on officer safety. The State appealed. The Court, however, affirmed,

The Court found that an officer on routine patrol noticed a vehicle oddly parked in a gas station lot. As he slowly drove his patrol vehicle past the vehicle, with the intention of checking the vehicle's license tag, the officer noticed that the passenger was not wearing his seat belt. But before the officer could get a visual on the tag, the vehicle started accelerating, exiting the parking lot and entering a four-lane road. The officer followed and, given that the passenger was not wearing his seat belt, initiated a traffic stop. Consequently, because the police officer observed that Robusto was not wearing a seatbelt, as the vehicle in which he was an occupant left the gas station parking lot, he was authorized to initiate the traffic stop. And following this traffic stop, the police officer was certainly authorized to make a reasonable inquiry and investigation.

However, the Court stated, that did not end its inquiry. Here, the arresting officer testified that, upon approaching the vehicle in which Robusto was a passenger, he noticed a spoon with a white residue on it in the vehicle's center console and a newly opened box of Q-tips on the backseat, both of which were indicators of illegal intravenous drug use. The officer then testified that the driver would not stop moving, which made him nervous, and, therefore, he ordered the driver to exit the vehicle. But despite his alleged trepidation, instead of frisking the driver, the officer merely questioned him, and upon being informed by the driver that Robusto was in possession of illegal drugs, he ordered Robusto to exit the vehicle. At this point, the officer candidly acknowledged that the traffic stop had now become a drug investigation.

Nevertheless, even a particularized and objective basis for suspecting that a person is engaged in criminal activity is not sufficient to authorize a pat-down of the suspect for weapons. Rather, a *Terry* pat-down is authorized when the officer reasonably believes that it is necessary to protect the officer from attack. And here, the officer subsequently testified that after asking Robusto if he was in possession of any drugs, he performed a pat-down of Robusto for his safety, which resulted in the discovery of two syringes. But the officer further testified that such pat-downs were standard operating procedure for his police department and that he performs patdowns on everyone he suspects of using intravenous drugs. And notably, although the officer testified generally that syringes can pose a danger, at no point did he testify that he believed Robusto might be dangerous. In fact, when Robusto's counsel pointedly asked the officer: "There was no reason to believe that Mr. Robusto was armed; correct?", the officer explicitly responded, "Correct." Given these particular circumstances, the Court held that the State failed to present evidence that the officer had a reasonable, articulable, particularized basis for believing Robusto was armed or dangerous prior to performing his standard pat-down, and thus, it failed to meet its burden of establishing that the pat-down was lawful. Accordingly, the trial court did not err in granting Robusto's motion to suppress the evidence seized as a result of the pat-down.

Implied Consent; Out-of-state Licenses

Hernandez v. State, A18A1638 (2/11/19)

Appellant was charged with DUI. The evidence showed that after she was arrested and read her implied consent rights, she vacillated as to whether to take the test and eventually agreed to avert a drivers' license suspension. She moved to suppress the results of her blood test because the officer misinformed her about whether her Washington State driver's license would be suspended if she refused to take the state-administered test. The trial denied the motion.

The Court stated that in considering whether the officer's misstatement of the implied consent was so material as to invalidate her consent, the determinative issue is whether the notice given was substantively accurate so as to permit the

driver to make an informed decision about whether to consent to testing. Even when the officer properly gives the implied consent notice, if the officer gives additional, deceptively misleading information that impairs a defendant's ability to make an informed decision about whether to submit to testing, the defendant's test results or evidence of his refusal to submit to testing must be suppressed. The suppression of evidence, however, is an extreme sanction and one not favored in the law.

An implied consent notice that misinforms the holder of an out-of-state driver's license that refusal to submit to state testing will result in revocation of the out-of-state license is the type of misleading information that impedes a suspect's ability to make an informed choice under the implied consent statute and thereby renders the ensuing test results inadmissible.

Here, the Court found, although the officer twice told appellant — accurately — that a refusal to submit to a blood test would result in the suspension of her driving privileges in Georgia, the dashcam video showed that the last two exchanges indicated that appellant believed that her Washington driver's license would be suspended if she refused a blood test. The officer told appellant that, "it's a state test, and if you refuse it, then your driving privileges can be suspended for a year." And when appellant asked, "Is that just like a Georgia thing?" the officer responded that it is "pretty much an everybody thing." After having granted and then denied consent, appellant then consented, saying, "So — I guess, whatever."

The State nevertheless contended that appellant had consented to the blood tests after twice being informed correctly about the impact of refusal, and thus, had already made her decision before the misleading statement. However, the Court found, the evidence also demonstrated that appellant rescinded her consent more than once after being so informed. And, most importantly, her final consent was given only after she appeared to believe that her Washington license would be revoked if she refused. Accordingly, the Court concluded, it could not say that the statement did not coerce appellant to consent to the state-administered test, and thus, the trial court erred in denying her motion to suppress.

Right to Self-Representation; *Faretta* Hearings

Allen v. State, A18A1892 (2/11/19)

Appellant was convicted of possession of marijuana with intent to distribute. He contended that trial court erred in failing to hold a hearing under *Faretta v. California*, 422 U.S. 806 (95 SC 2525, 45 LE2d 562) (1975), when appellant requested to represent himself. The Court disagreed.

The Court noted that a *Faretta* hearing is required if appellant made an unequivocal assertion of his right to represent himself prior to trial. Here, the record showed that prior to trial, the trial court inquired as to whether there were any pretrial issues to address and the State responded that "I think [appellant] wants to fire the Public Defender's Office." The trial court asked if there were any motions from the defense, and appellant's trial counsel responded that there was "[n]othing, other than [appellant] wants to make a statement." In a lengthy statement, appellant requested a continuance, acknowledged that he "had four Public Defenders since the case has been open," complained that he was unhappy with his present representation and that a previously agreed-upon plea deal had been withdrawn, and expressed that he was in the process of retaining his own attorney. At the conclusion of appellant's statement, the State responded that, for the record, it would like the trial court to know the details of the last plea offer "if, in fact, you were going to allow him to not

have a lawyer and proceed without a lawyer." The trial court stated that there had been no discussion about proceeding without a lawyer.

Thereafter, the court asked appellant if there was anything else he wanted to say. Appellant responded that he did not feel that his current attorney had his best interest in mind, that he did not think the attorney wanted to represent him, and that he did not feel "comfortable with him representing me." Appellant then concluded with a lengthy statement about his work history, praise for the public defender who had preceded current counsel, and additional complaints about his current representation. The trial court then called the case for trial and when appellant inquired whether he would be able to present certain documents toward his defense, the trial court answered, "Through your attorney please. Thank you very much." Appellant then asked, "Am I able to proceed by myself, Your honor? I don't mind doing that by myself. I think I have a better chance representing myself because I know the truth and I want to make sure about all the things that I heard. And I'm not sure if my attorney is going to allow me to speak up and do that for myself." The trial court responded, "Okay. Thank you very much. Let's start." Thereafter, there was no other discussion from appellant about representing himself during trial.

The Court found that appellant had not made an unequivocal assertion of the right to represent himself. Rather than making an unequivocal statement regarding self-representation, appellant's statements equivocated between dismissing his current public defender, retaining new counsel, or representing himself. If the request to represent oneself is equivocal, there is no reversible error in requiring the defendant to proceed with counsel. Furthermore, statements that amount to nothing more than expressions of dissatisfaction with current counsel do not trigger any requirement that the court hold a hearing under *Faretta* or that the defendant be allowed to proceed pro se. Thus, absent an unequivocal request to represent himself, the trial court did not err in failing to conduct *a Faretta* hearing.

Sufficiency of Answers in Forfeitures; Service of Process

State v. Crowder, A18A2113, A18A2114, A18A2115 (2/11/19)

The Court consolidated three appeals relating to the forfeiture of $46,820 in U.S. currency that law-enforcement officers seized from the daughter of the claimant, Crowder. The facts and procedural history, very briefly stated, showed that the seizure occurred at Hartsfield-Jackson International Airport. The State filed a complaint on the currency and served the daughter who lived in California. She timely answered and asserted that Crowder was the owner of the funds. The State attempted personal service on Crowder, who lived in Alabama, but was unsuccessful. The State sent a copy of the summons and complaint to the same address via certified mail, but despite two attempts, the postal service returned the mailed documents as unclaimed. The State then served him by publication.

At a hearing, the State moved to dismiss the daughter for lack of standing. Crowder appeared, claimed he had never been served, and moved for a continuance. The court granted the continuance. The daughter eventually dismissed her answer. The State moved for judgment on the pleadings because despite service by publication, Crowder had not filed an answer. Crowder then filed an insufficient answer. The State moved for a more definite statement. Crowder responded by filing a motion to dismiss the complaint for insufficiency of service.

An evidentiary hearing was held. Thereafter, without explicitly ruling on either the State's motion for judgment on the pleadings or Crowder's motion to dismiss, the court found that the State failed to provide evidence that the $46,820 in U.S. currency was being used for an illegal purpose and, thus, awarded the money to Crowder. The State filed a notice of appeal on April 10, 2018, but on April 13, 2018, Crowder filed a motion to release the currency. Then, on April 23, 2018, Crowder filed a notice of cross appeal, arguing that the trial court erred in failing to dismiss the State's complaint for insufficient service of process. The State filed a response to Crowder's motion to release the currency, citing its pending appeal, but the trial court, nonetheless, granted Crowder's motion. Subsequently, the State filed a notice of appeal of that decision, as well as an emergency motion with the Court to stay the release of the funds, which the Court of Appeals granted. These consolidated appeals followed.

In the first appeal, the State contended that the trial court erred in effectively denying its motion for judgment on the pleadings or to dismiss Crowder's answer for failure to comply with the statutory pleading requirements for an in rem forfeiture answer. The Court agreed. It was undisputed that Crowder never verified his answer. Additionally, Crowder's answer failed to include the address where he resided; a description of the circumstances of his obtaining the property; the date or even a time frame in which he obtained the property; the nature of his relationship with his daughter, who possessed the property at the time of the seizure; or any documentation supporting his answer. Furthermore, after the State filed a motion for a more definite statement (in which it cataloged the deficiencies in his answer), Crowder—rather than amend his answer —moved to dismiss the State's complaint. Given these particular circumstances, Crowder's answer failed to comply with the special pleading requirements of OCGA § 9-16-12 (c) (1). Accordingly, the Court held, the trial court erred in denying the State's motion for judgment on the pleadings or, alternatively, in failing to dismiss Crowder's answer.

In the cross-appeal, Crowder contended that the trial court erred in failing to grant his motion to dismiss the State's complaint for insufficient service of process. Specifically, he argued that the service by publication was not an option under the Uniform Civil Forfeiture Procedure Act and that, even if it was, the State failed to show that it exercised due diligence in its attempts to serve Crowder personally. The Court disagreed.

The Court found that his arguments were belied by the very statutory scheme he claimed supports his position. OCGA § 9-16-12 (b) (3) specifically provides that service by publication is allowed if the owner of the subject property "resides out of this state." And although there was conflicting evidence as to Crowder's exact street address, nothing in the record disputed the State's assertion that Crowder resided somewhere in Opelika, Alabama, i.e., out of state. Moreover, the Court stated, setting aside the issue of whether the State exercised due diligence in initially attempting to personally serve Crowder, under the plain terms of OCGA § 9-16-12 (b) (3), such attempts were not required. The State's ability to serve a claimant who resides out of state via publication is not contingent upon whether it first exercised due diligence to serve such a claimant personally.

Finally, in the last appeal, the State contended that the trial court erred in denying its motion to stay the release of the currency given the State's pending appeal in Case No. A18A2113. Once again, the Court agreed with the State. Georgia law makes clear that the filing of the notice of appeal operates as a supersedeas and deprives the trial court of the power to affect the judgment appealed, so that subsequent proceedings purporting to supplement, amend, alter or modify the judgment, whether pursuant to statutory or inherent power, are without effect. Here, given the State's timely notice of appeal in Case No. A18A2113, as provided in OCGA §§ 5-6-37 and 5-6-38, the State was not required to release the

seized currency until the disposition of that appeal. Accordingly, the Court held, the trial court erred in considering Crowder's motion to release the currency, much less granting it.

Discovery Violations; Requests for Remand

Rowland v. State, A18A1562 (2/12/19)

Appellant was convicted of aggravated sexual battery, cruelty to children in the first degree, and three counts of incest. He contended that pursuant to OCGA § 17-16-6, the trial court erred in failing to grant a continuance based on an alleged discovery violation by the State. The record showed that the day before trial, defense counsel objected to the trial going forward based on the state's alleged failure to give him a copy of the recorded forensic interview of the victim. The prosecution responded that they believed they had given defense counsel a copy of the approximate hour-and-a-half recording during discovery. The trial judge, noting that the State believed it had in fact provided the recording and that it had an open-file discovery policy, nevertheless ordered the State to give defense counsel a copy of the recording that day so he could review it before the start of trial the next day. The State subsequently did not introduce the recorded interview into evidence at trial.

The Court stated that if it comes to the attention of the trial court that either the State or the defendant has failed to comply with the requirements of the Discovery Act, the court has wide latitude in fashioning a remedy for such violation. And here, the Court found, even assuming that there was a discovery violation, the trial court's remedy gave appellant the opportunity to receive and review the recording before trial, Appellant made no showing that such remedy was inadequate or that he was harmed by it, and the recording in question was not even introduced into evidence at trial. Thus, the Court concluded, appellant failed to show that the trial court abused its broad discretion in denying a continuance.

Appellant also argued this appeal presented the first opportunity for him to raise an ineffectiveness of counsel claim, and requested a remand to the trial court for an evidentiary hearing on that claim. However, relying on *Tepanca v. State*, 297 Ga. 47, 51 (6) (2015) the Court found that appellant made no specific claims as to how his counsel was ineffective. Instead, he only claimed generally that there were failures to object to prejudicial evidence, to object to actions taken by the trial court, and to file motions before and during trial. Thus, the Court found, he failed to show even a possibility of ineffective assistance, and there was no need for a hearing on remand.

Nevertheless, appellant cited *Mallon v. State*, 253 Ga. App. 51, 54 (5) (2001), for the proposition that the Court should remand the case for an evidentiary hearing even though he failed to identify any specific errors by counsel. Thus, the Court disapproved of the language in *Mallon* to the extent it conflicts with the Supreme Court's holding in *Tepanca* by suggesting that an appellate brief which fails to specify any deficiencies by counsel is sufficient to authorize remand for an evidentiary hearing on an ineffectiveness claim raised for the first time on appeal.