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FYI: STATE v. ROSENBAUM

The Georgia Supreme Court holds as unconstitutional under the Fourth Amendment the State's 539 day delay in obtaining search warrants for data contained in electronic devices even though those devices were originally seized in a warrantless, but lawful, manner by police.

In *State v. Rosenbaum*, Case No. S18A1090 (Mar. 11, 2019), Court considered, for the first time in Georgia, the effect of the State's delay in obtaining search warrants for data contained in electronic devices when those devices were originally seized in a warrantless, but lawful, manner by police. The facts, briefly stated, show that the defendants were arrested on December 4, 2015 after a foster child in their care died. At the time, police seized their iPhones, iPad, and MacBook laptop computer without a warrant. Police eventually obtained seven search warrants for the electronic devices, but the first warrants were not issued until May 26, 2017, 539 days after the devices were seized, and the last such warrants were issued on November 6, 2017, 702 days after the seizure. For various reasons, the seizure of these devices were not brought to the attention of the lead investigator or the prosecuting attorneys until May 23, 2017.

On June 23, 2017, the defendants filed a motion seeking forensic examination of the contents of the devices within a time certain and return of the devices themselves. Defense counsel stated in the motion that she had repeatedly requested since the arrests that the devices be returned. The trial court instructed the State to complete its examination and return the devices within 45 to 60 days. On January 28, 2018, the defendants filed a motion in limine and to suppress the evidence recovered from the devices. At the hearing on the motion, defense counsel again stated that she had "repeatedly sought the return of their electronic devices" at every court appearance since the defendants' arrest in 2015. Following an evidentiary hearing, the court granted the motion and the State appealed.

The Court noted that a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on unreasonable searches. Thus, even a seizure based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant. The reasonableness of the delay is determined in light of all the facts and circumstances, and on a case-by-case basis. The reasonableness determination must reflect a careful balancing of governmental and private interests.

Although the Court found this issue to be one of first impression in Georgia, it noted that the Eleventh Circuit has established a substantial body of law on this issue. In *United States v. Laist*, 702 F3d 608, 613-614 (II) (11th Cir. 2012), the Eleventh Circuit developed a four-factor test for balancing governmental and private interests under the totality of circumstances. Court must balance the following: 1) the significance



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of the interference with the person's possessory interest; 2) the duration of the delay; 3) whether or not the person consented to the seizure; and 4) the government's legitimate interest in holding the property as evidence. The Court noted that the trial court followed this analytical framework established by the Eleventh Circuit and because the framework is reasonable, comprehensive, and thorough, the Court adopted the *Laist* test for its analysis of this issue.

The Court first addressed the significance of the interference with the person's possessory interest. The Court noted that this factor has three sub-factors to consider: 1) the degree of possessory interest in the subject property; 2) the duration of the delay as it affects that interest; and 3) the efforts of defendants to secure the return of the items. The State conceded the first two sub-factors, but argued that the trial court erred in finding the demands for the return of the property "sufficiently robust" to prevent any diminishment of their interest in the property. Specifically, the State argued that there was no evidence in the record supporting the trial court's finding. The Court disagreed.

In the absence of an objection, counsel's evidentiary proffers to the trial court during a hearing will be treated on appeal as the equivalent of evidence. And here, the State neither objected nor offered opposing evidence at the hearing on June 23, 2017, when defense counsel stated in her place that she had been seeking the return of the devices for a year and a half. And other evidence presented by the State showed more of a lack of recollection, rather than a positive denial that a demand was made. Moreover, even if a possessory interest was diminished, the Fourth Amendment still obligates the State to *diligently* obtain a warrant.

As to the duration of the delay, the trial court found that this factor weighed strongly in favor of the defendants. The Court noted that the Eleventh Circuit has considered the diligence of the police in the context of possible factors contributing and possibly mitigating the delay in obtaining a warrant — including the scope of the investigation and complexity of the warrant, the personnel available, and conflicting demands on the investigators' time. But, here, the Court found, the State made no showing of particular complexity, difficulty in drafting the warrant, or competing demands on a limited number of officers. Instead, the trial court found multiple errors, failures, and oversights on the part of the State with respect to investigating or even accounting for the devices. Thus, the Court found, the trial court's conclusion that the State did not diligently pursue its investigation as it relates to the content of these devices was amply supported by the record.

As to the last two factors of the *Laist* test, the State conceded that the consent factor was irrelevant because the defendants did not consent to the seizure and agreed with the trial court that the State's legitimate interest in holding the property as evidence weighs strongly in the State's favor.

In weighing the four *Laist* factors, the trial court found that there was a significant interference over the course of the 539 day delay and that the delay did not result from the complexities of the case nor any



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overriding circumstances, but rather, from oversights that caused the State not to pursue their investigation into the contents of the devices with sufficient diligence. Thus, the Court found, while the State's interest in holding the property as evidence was very high, the Court agreed with the trial court that there was an unreasonable delay between the seizure of the property and the issuance of search warrants and that this delay violated the defendants' Fourth Amendment rights.

In so holding, the Court rejected the State's argument that the trial court should have denied the motion to suppress, even if the search warrants were invalid, because the officers sought the warrants in good faith. Specifically, the State argued that the Court should recognize the good-faith exception established by federal case law in *United States v. Leon*, 468 U.S. 897 (104 S.Ct. 3405, 82 L.Ed.2d 677) (1984) and its progeny and overrule *Gary v. State*, 262 Ga. 573 (1992) which held that OCGA § 17-5-30 precludes application of the *Leon* good-faith exception in Georgia. The Court stated that given the facts of this case, "even if we decide to revisit *Gary* at some point, this is not the case in which to undertake that analysis." Nevertheless, the Court noted that it "has recently granted a petition for certiorari in which we have asked the parties to address whether the Court should continue to follow *Gary*. See *Mobley v. State*, S18C1546 (cert. granted Mar. 4, 2019.)